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THE AUSTRALIAN FEDERATION OF
CONSUMER ORGANISATIONS INC.

THE ROLE OF PROSECUTION IN CONSUMER PROTECTION

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by

John Braithwaite, Susan Vale and Brent Fisse

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Trade Practices Commission

Department of Consumer Affairs - New South Wales

Department of Consumer Affairs - Western Australia

Ministry of Consumer Affairs - Victoria

Weights and Measures Office - Victoria

Department of Territories and Local Government - ACT

Consumer Affairs Bureau - ACT

Consumer Affairs Bureau - Queensland

Department of Community Development - Northern Territory

Consumer Affairs Bureau - Western Australia

Consumer Affairs Council - Tasmania

Department of Public and Consumer Affairs - South Australia

CONTENTS

FIGURES

TABLES

EXECUTIVE SUMMARY

SUMMARY OF RESULTS

1. For every consumer affairs conviction in Australia, there are more than 200 written complaints which do not lead to a conviction and conservatively over 2,000 unwritten complaints. In 1982-83 South Australia was the leading state or territory jurisdiction in both per capita and absolute numbers of consumer affairs convictions. The reason for this is a very high number of residential tenancies prosecutions.

2. New South Wales showed a consistent and steady drop in consumer affairs convictions from 1976-77 to 1982-83. New South Wales is the only jurisdiction with a dramatic downward trend.

3. South Australia and Victoria both showed substantial increases in convictions until 1975-76 followed by much lower rates for the late 1970's.

4. In Queensland, Tasmania, the Northern Territory and the Australian Capital Territory, prosecutions for substantive consumer affairs offences are virtually non-existent. However, in Queensland and Tasmania there are significant numbers of prosecutions for the "technical" offence of failure to provide information to consumer affairs officers.

5. South Australia, Western Australia and Tasmania are the jurisdictions with the highest conviction rates. The

Tasmanian rate is almost totally explained by relatively large numbers of prosecutions for failure to provide information, the Western Australian rate is partly explained by many prosecutions of unlicenced motor dealers, and the South Australian rate by a very high incidence of residential tenancies enforcement.

6. The cash fine, generally directed against a company rather than an individual, is the almost universal consumer affairs sentence. Imprisonment is never used as a sanction.

7. Fines imposed federally under the Trade Practices Act are by far the heaviest. Trade Practices fines in aggregate exceed by a factor of four all consumer affairs fines by states and territories combined. New South Wales is the jurisdiction with the second highest average fines followed by Victoria. Fines in all jurisdictions are paltry in comparison to the assets of the companies being fined.

8. The Australian Capital Territory and Tasmania are notable for their neglect of weights and measures enforcement.

9. Even though 17 percent of complaints to consumer affairs agencies in Australia concern the major expenditure item of motor vehicles, the Northern Territory, Tasmania and the Australian Capital Territory never prosecute in this area. New South Wales and Western Australia have the most aggressive prosecution programs for offences related to motor vehicle dealers.

10. Price control convictions are a significant area of enforcement in New South Wales only.

11. Federal enforcement under the Trade Practices Act leads in the area of false advertising, trade descriptions and misrepresentation. This was also a major area of enforcement in Victoria and South Australia in the mid-70's. In recent years, the states have neglected prosecution in this area.

12. New South Wales, and to a lesser extent South Australia and Western Australia, are the only jurisdictions with any sort of record of prosecuting hire purchase, door-to-door sales and pyramid selling offences.

13. Western Australia is the only jurisdiction with a significant prosecution program for product safety offences.

SUMMARY OF POLICY RECOMMENDATIONS

The prosecutorial capacity of all Australian consumer affairs agencies is a joke, but only unscrupulous white-collar criminals are enjoying the laugh. AFCO's recommendations are:

1. All governments should significantly increase investment in personnel dedicated to consumer affairs enforcement and investigation work. If necessary, this should be funded by taking resources from some of the lower-priority law enforcement tasks undertaken by relatively very well funded police forces.

2. Selected consumer affairs officers should undertake criminal investigation training with police forces.

3. The populous jurisdictions of New South Wales, Victoria and Queensland could improve their prosecutorial (and other) performance by greater regionalisation of their operations.

4. The tiny consumer affairs jurisdictions of the Australian Capital Territory, the Northern Territory and Tasmania need to be plugged into an enforcement unit of viable proportions by either:

   (a) relying on the Trade Practices Commission for most investigations, or

   (b) making consumer affairs a subunit of a larger business regulation inspectorate (e.g. combination with health inspectors), or

   (c) handing over the consumer affairs function to a federal agency.

5. The Trade Practices Commission should have a specialised investigative capability which is made available to all states and territories for difficult cases within their borders.

6. Product safety enforcement will only become a reality in Australia when we have a national Consumer Product Safety

Commision with specialised staff, sophisticated testing capabilities and rigorous hazard and accident statistics information systems.

7. Consumer affairs agencies should continue with the philosophy that on receipt of a complaint, redress for the consumer should take precedence over punishment of the trader.

8. Nevertheless, not only should more complaints lead to prosecution, but also less reliance should be placed on complaints in prosecution programs. Consumer affairs agencies should become proactive as well as reactive. Proactive enforcement should include random or focused surveys of compliance with key laws, targeting of known white-collar criminals and even "sting" operations.

9. State and territory agencies should follow the Trade Practices Commission and Victorian leads in issuing prosecution guidelines. The Trade Practices Commission guidelines should assert that general deterrence is the major goal of prosecution.

10. The requirement that consumer protection prosecutions by the Trade Practices Commission must be approved by the Minister for Home Affairs and Environment should be scrapped.

11. Needless to say, a fundamental reason why prosecutions are non-existent in many domains in many jurisdictions is that relevant consumer protection laws simply do not exist in the

jurisdictions. Some of the key law reforms needed are documented in the AFCO paper CONSUMER PROTECTION REFORM (1984 edition).

12. Prosecutors should be instructed to explore fully the option of individual as well as corporate charges in consumer affairs cases.

13. Maximum fines of up to $1 million are needed in consumer affairs statutes to deter the worst offences of the largest companies.

14. The cash fine should not be relied upon exclusively as the sanction for corporate offenders under consumer protection statutes. Equity fines, corporate probation, adverse publicity orders and community service orders are key alternatives needed in the sentencing armory for dealing with corporate offenders.

15. Consumer affairs annual reports should plot the number of prosecutions for each year on a graph which will enable the public to discern an increase or decrease in the number of prosecutions across time.

16. The Australian Institute of Criminology should keep the inter-jurisdictional comparison data in this report up to date through regular publication in the Sourcebook of Australian Criminal and Social Statistics.

THE ROLE OF PROSECUTION IN CONSUMER PROTECTION

INTRODUCTION

The purpose of this report is to describe the situation governing prosecution by consumer affairs agencies in Australia. From this description of the empirical state of affairs we will begin to propose policies which might make for more appropriate use of prosecution in the armoury of tools for protecting consumers. As will become clear later, our selecting of prosecution as the focus of this study does not imply that we see prosecution as the only important regulatory tool available to consumer affairs agencies. This is not a global study of the effectiveness of consumer protection; it is a study of the role one important element of consumer protection programs - prosecution.

Consumer affairs enforcement is a relatively recent phenomenon in Australian history, at least insofar as it is conducted by specialised consumer affairs departments or bureaux. These specialised agencies were created in response to an organized consumer movement which itself only began to become a force to be reckoned with in the 1960s and emerged as a well-organized lobbying presence only in the 1970s. Consumer affairs bureaux or departments were established in every state and territory between 1969 and 1974, immediately followed by the Whitlam government's establishment of the Trade Practices Commission at a Commonwealth level. Prior to this, there had been for many decades rudimentary weights and measures enforcement in Australia, enforcement of purity standards for food by inspectors located in health and primary industry departments as well as a fragmented

enforcement of various other consumer rights by disparate agencies. The present study is not concerned with those types of consumer protection enforcement such as meat inspection, therapeutic goods regulation, and pure food control conducted by agencies other than consumer affairs bureaux and departments. These areas will be the subject of future studies.

COMPLAINTS

The National Consumer Complaint Statistics System reveals that in 1982-83 65,378 written complaints were made to government consumer affairs agencies in Australia. These statistics of course understate the problem because there is an unwillingness or inability of many to put their complaints in writing. In 1981-82, the Trade Practices Commission had 932 written complaints, but 22,000 consumer affairs complaints and enquiries overall. While the New South Wales Department of Consumer Affairs had 26,362 written complaints in 1981-82, there were 283,775 telephone calls from concerned consumers and 39,197 personal interviews with consumers. The data to come will show that for every consumer affairs conviction there are more than 200 written complaints which do not lead to a conviction and conservatively over 2,000 unwritten complaints. Of course, there is no way of knowing how many of these complaints involve actual violations of the law - a large number of them undoubtedly involve no illegality by the trader.

The National Consumer Complaint Statistics System reveals the breakdown of written complaints by reasons for the complaint in Table 1. A further breakdown of these statistics according to

whether they were directed to state and territory agencies or the Trade Practices Commission (TPC) reveals that 55 per cent of TPC complaints fell in the categories, 'Misleading Advertising' or 'Misleading Representations'. Most complaints to state agencies fell in the first category, 'Unsatisfactory Quality of Product or Service'.

These statistics do not include complaints to weights and measures inspectorates which are not within consumer affairs agencies. In Tasmania, for example, the Weights and Measures Inspectorate investigated 3,200 complaints or enquiries in 1982, checked and verified/adjusted some 15,000 weighing or measuring instruments, and checked or test weighed some 25,000 pre-packed articles. While about 700 of the latter were found to be underweight, there were only three convictions for all types of weights and measures offences in the 1981-82 year.

METHODOLOGY

The basic source of data for this study was consumer affairs departmental or bureau annual reports. Data on all consumer affairs convictions were sought for all states and territories and for federal prosecutions under the Trade Practices Act. The starting year for data collection in each jurisdiction was the year of the first consumer affairs department or bureau annual report. This excluded considerable conviction data which pre-dated the establishment of a specialised consumer affairs agency. In New South Wales data were only available from the 1976-77 financial year despite determined efforts by the Commissioner for Consumer Affairs to extract information on our behalf from the

TABLE 1

WRITTEN COMPLAINTS TO AUSTRALIAN CONSUMER PROTECTION AGENCIES

BY REASON, 1982-83

Reason	No.	%
Unsatisfactory quality of product or service	29,484	41.6
Unfair or unfulfilled contracts	19,344	27.3
Guarantees and warranties not honoured	4,908	6.9
Misleading advertising	2,523	3.7
Misleading representations	1,561	2.1
Excessive prices/charges	3,996	5.6
Unfair credit practices	3,387	4.8
Unfair sales methods	2,624	3.7
Offers of redress	2,447	3.5
Unsatisfactory packaging, labelling	540	0.8
TOTAL*	70,814	

* Each complaint may be given two reason categories and totals may exceed product/service totals.

Industrial Registrar of the New South Wales Industrial Commission and the Industrial Magistrate for earlier years. This is a case of a jurisdiction where significant numbers of consumer affairs prosecutions were being undertaken prior to the starting point of our statistics. We doubt in other jurisdictions whether there was much prosecutorial activity prior to the starting dates of our data.

Some annual reports for some jurisdictions did not include prosecution data and some included very incomplete data (e.g. no record of whether a prosecution led to a conviction, no record of the sentence imposed). The gaps in the data were pursued through correspondence, telephone calls, and in the case of Victoria, a research officer spent a week in Melbourne working through files.

A major complication was that weights and measures enforcement tended to be a responsibility which shifted between consumer affairs and other departments; yet this was the largest area of prosecutorial activity. Weights and measures convictions are therefore treated separately from other consumer affairs offences in this report.

The tables which follow relate to successful prosecutions (convictions) to the exclusion of unsuccessful proceedings launched.

In circumstances where there were a number of closely related charges that occurred at a similar point in time directed at the

same defendant, this was counted as one case. In the classic example, X is charged under the Motor Vehicle Dealers Act both for dealing without a licence and winding back an odometer with intent to enhance the value of the vehicle. X is also charged under the Unfair Advertising Act for advertising a vehicle with incorrect mileage. For the purpose of total figures, X was counted as one case. However, in the subclassification of the case, it will be counted in three separate categories - unlicenced motor vehicle dealer, other motor vehicle offences and false advertising. In circumstances where not only company X, but also Directors A and B and employee C were convicted, these were counted as four separate cases. The average value of fines excludes awards of costs and compensation orders for consumers.

This comparative counting principle was considered to be the most sensible because it avoids artificially inflating the level of conviction of a jurisdiction which lays charges on every technical offence possible in comparison with a jurisdiction which prosecutes only on the most serious count. However, there is some scope for dispute under the above counting procedures in deciding what constitutes "a number of closely related charges". The New South Wales Department of Consumer Affairs was critical of our counting only one conviction for 57 findings of guilt against Rena Ware Distributors for Door-to-Door Sales breaches in failing to give prescribed notices to consumers. The charges did relate to 57 different transactions involving different consumers, so there was a fair basis for their criticism. Had they been for different kinds of offences as well, instead of all being for failing to give prescribed notices, we would have

counted them as separate convictions even though they had been against the same offender on the same day. This case does illustrate the difficulty of resolving what constitutes "a number of closely related charges".

RESULTS

Convictions

Table 2 and Figures 1 - 9 plot the consumer affairs convictions (excluding weights and measures offences) for all jurisdictions. South Australia and Victoria are the only jurisdictions which exhibit patterns even remotely resembling a regulatory "life cycle" (Bernstein 1955) in which new agencies begin with an early flush of prosecutorial action followed by gradual accomodation to industry interests. South Australia and Victoria both exhibit increases in the use of prosecution up to 1975-76 followed by substantial declines in punitiveness. The high level of prosecutions in Victoria in 1975-76 in fact represented a "blitz" on petrol stations for misleading advertising of prices; the "blitz" was terminated when the practices ceased. For South Australia, the decline was dramatically reversed in 1982-83 under the new Attorney-General and Minister for Consumer Affairs, Mr Chris Sumner. South Australia has outstripped all other states in both per capita and absolute terms in consumer affairs convictions. With 103 convictions, South Australia became the first state to pass the milestone of 100 convictions in a year. The reason, we will see later, is to be found in a crackdown in one particular area in South Australia - residential tenancies.

Queensland is the only state which evidences consistent steady increase in its consumer affairs conviction rate (Figure 3). An exactly opposite trend is evident with New South Wales (Figure 1). This is the most startling finding in the trends. New South Wales is the only state which has shown (until 1982-83) a consistent downward slide in the use of prosecution, and the downward slide is dramatic. The number of convictions fell from 97 in 1976-77 to 34 in 1981-82. 1982-83 showed something of a recovery to 54 convictions. It should be noted that the New South Wales data excludes prosecutions by the NSW Council of Auctioneers and Agents and the NSW Rental Bond Board. Both of these authorities, while part of the Department of Consumer Affairs, are semi-autonomous and independently conduct their own prosecutions. In the case of the Council of Auctioneers and Agents, exclusion of their prosecutions has no distortionary effect on inter-state comparisons because the types of cases concerned are not handled by other consumer affairs agencies. However, a very serious distortion arises from exclusion of the Rental Bond Board cases. The Board ran its first prosecutions in 1979/80 when 46 charges were laid. In 1980/81 there were 12 prosecutions, 20 in 1981/82 and 72 in 1982/83. Unfortunately, we do not know how many of these prosecutions were multiple related charges against the same offender at the same point in time. Therefore, we are not in a position systematically to incorporate these extra cases into our data. It is understood, however, that the overwhelming majority of the prosecutions are for failure of landlords to lodge rental bonds with the Board.

TABLE 2

CONVICTIONS OBTAINED BY CONSUMER AFFAIRS AGENCIES

TOTAL FIGURES (EXCLUDING WEIGHTS AND MEASURES)

YEAR	FED PART IV*	FED PART V**	NSW	VIC	QLD	SA	WA	TAS	ACT	NT
1973/74			-	-	2	24	-	6	2	-
74/75	1	4	-	35	8	31	-	21	1	-
75/76	0	1	-	74	8	56	-	32	2	-
76/77	0	16	97	19	21	31	9	16	1	-
77/78	11	9	76	28	16	40	38	7	0	-
78/79	2	2	64	16	30	***	63	24	0	-
79/80	6	9	55	35	23	33	80	9	3	0
80/81	6	10	49	19	20	20	35	21	0	0
81/82	2	7	34	25	27	20	64	11	2	5
82/83	3	3	54	24	29	103	82	23	2	2
83/84	-	-	-	-	-	-	-	-	-	3

- A dash means data not available

* Refers to convictions under the restrictive trade practices provisions of Part IV of the Trade Practices Act

** Refers to convictions under the consumer protection provisions of Part V of the Trade Practices Act.

*** SA changed over from calendar year to financial year records

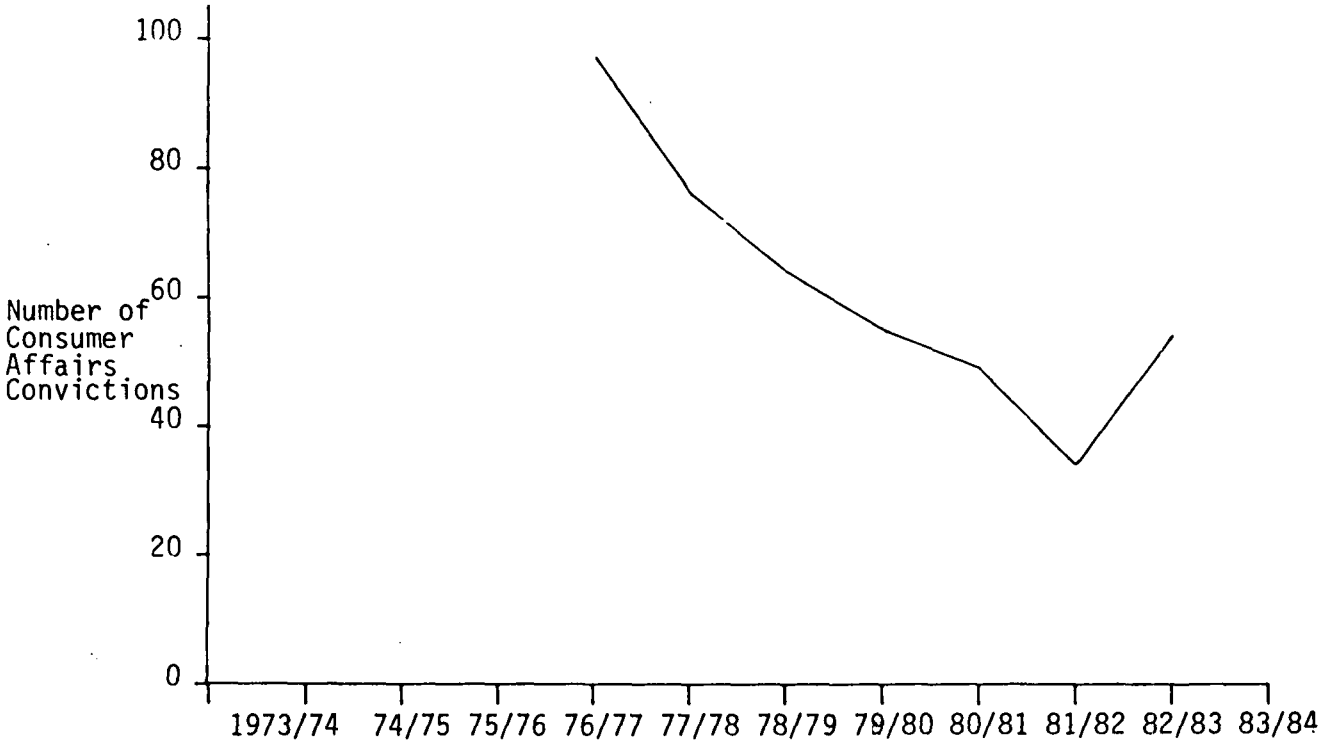

FIGURE 1 Total Convictions Obtained by NEW SOUTH WALES Department of Consumer Affairs (Excluding Weights and Measures)

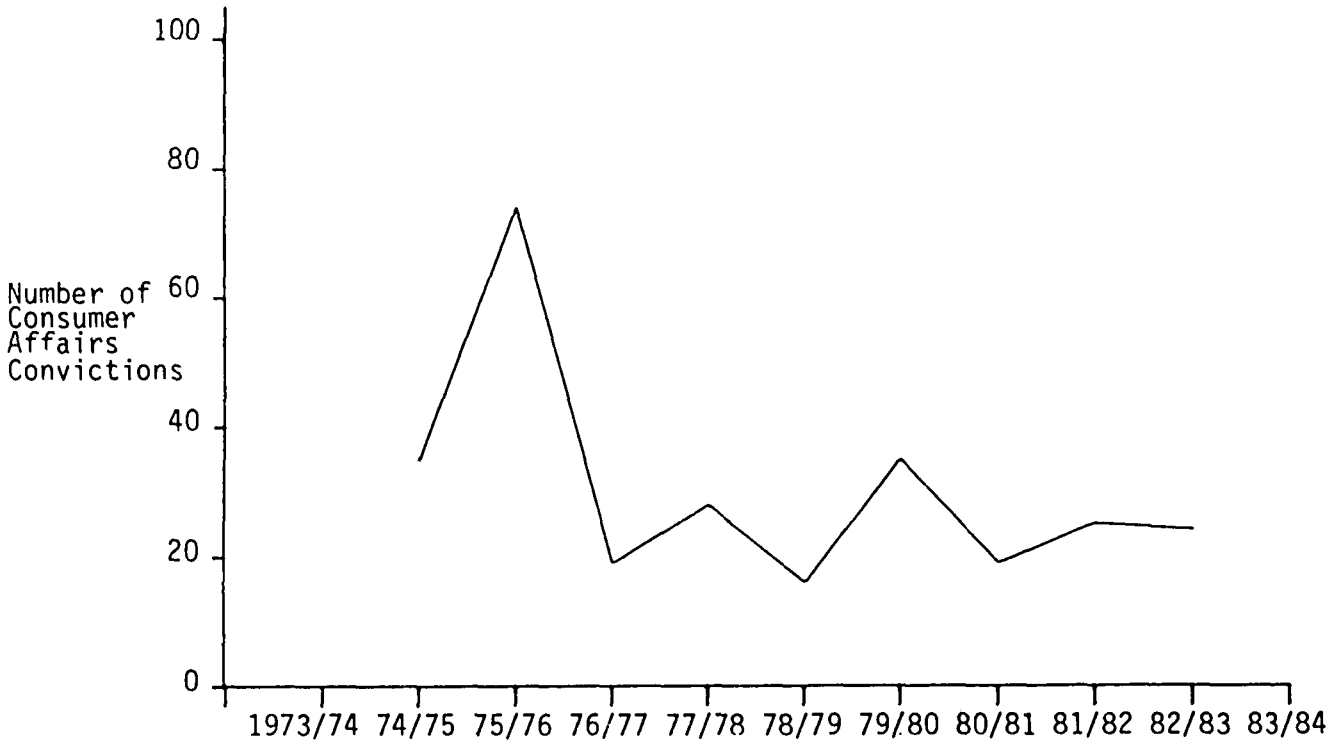

FIGURE 2 Total Convictions obtained by VICTORIAN Ministry of Consumer Affairs (Excluding Weights and Measures)

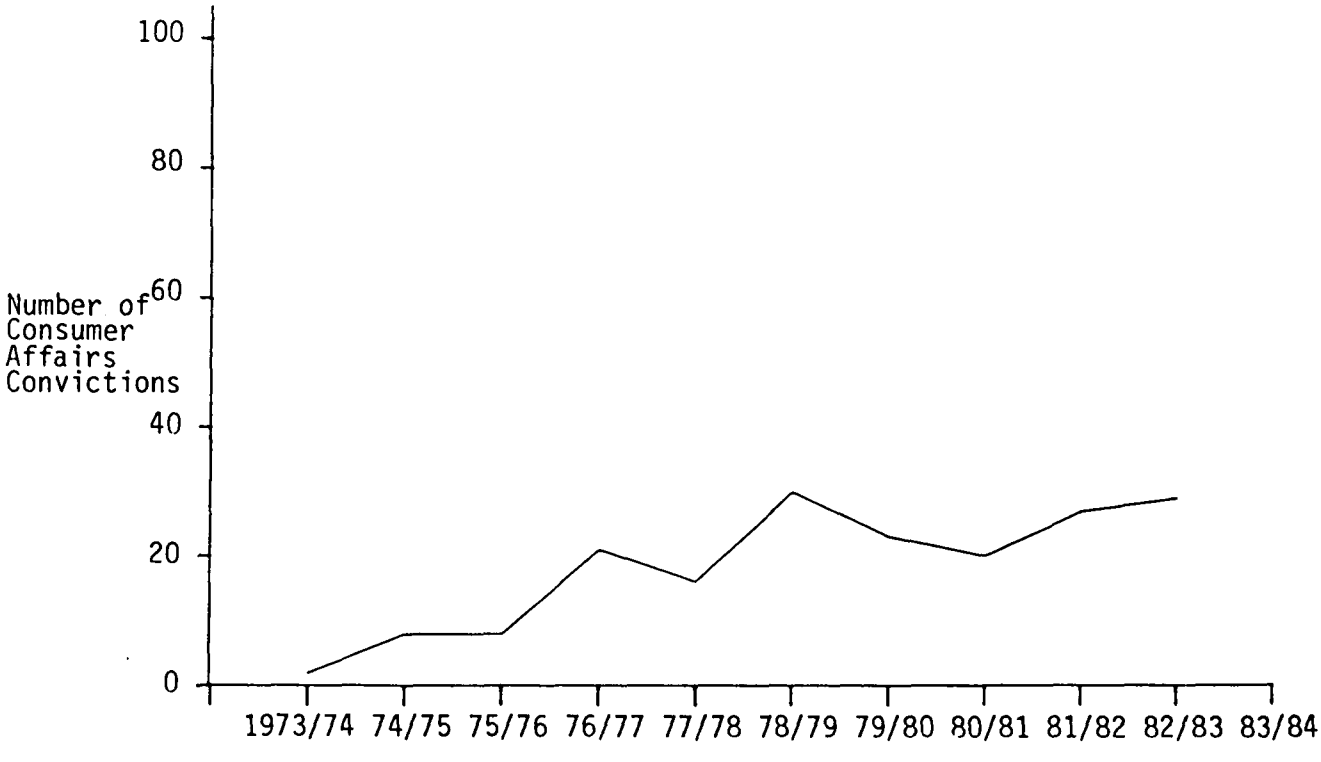

FIGURE 3 Total Convictions Obtained by QUEENSLAND Consumer Affairs Bureau (Excluding Weights and Measures)

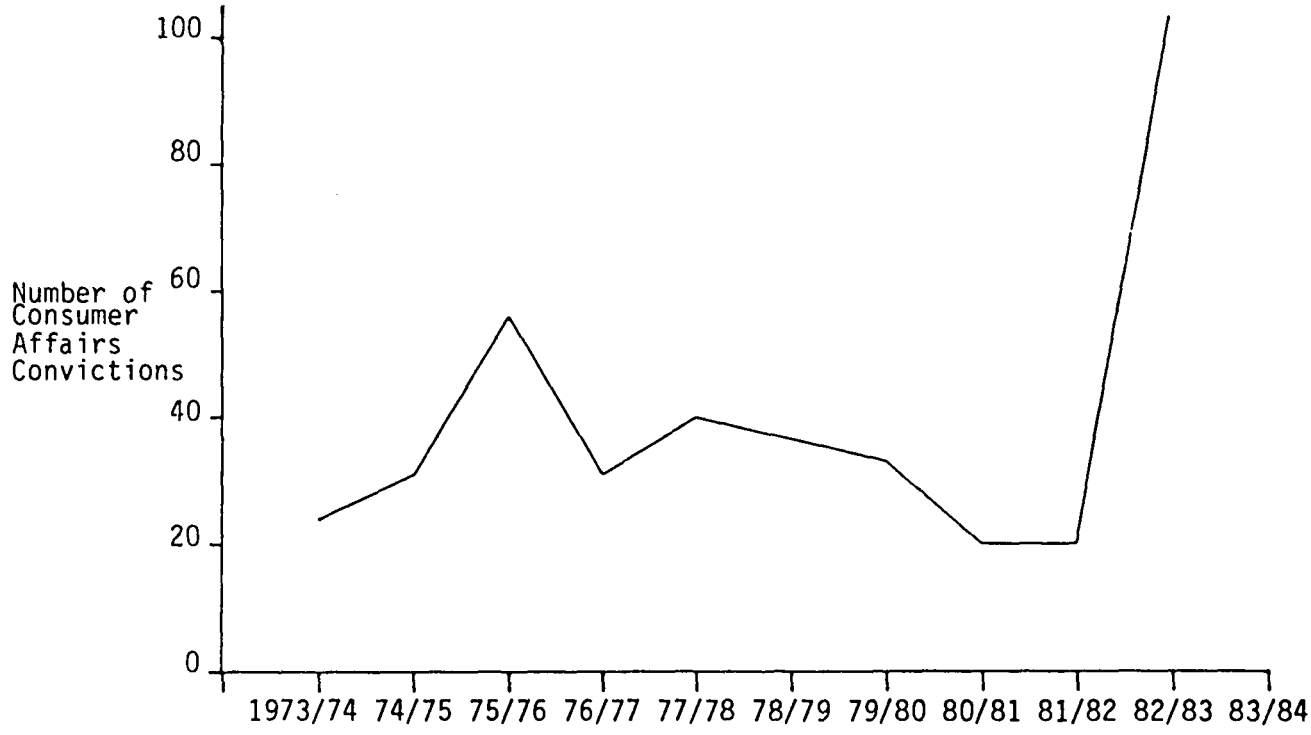

FIGURE 4 Total Convictions Obtained by SOUTH AUSTRALIAN Department of Public and Consumer Affairs (Excluding Weights and Measures)

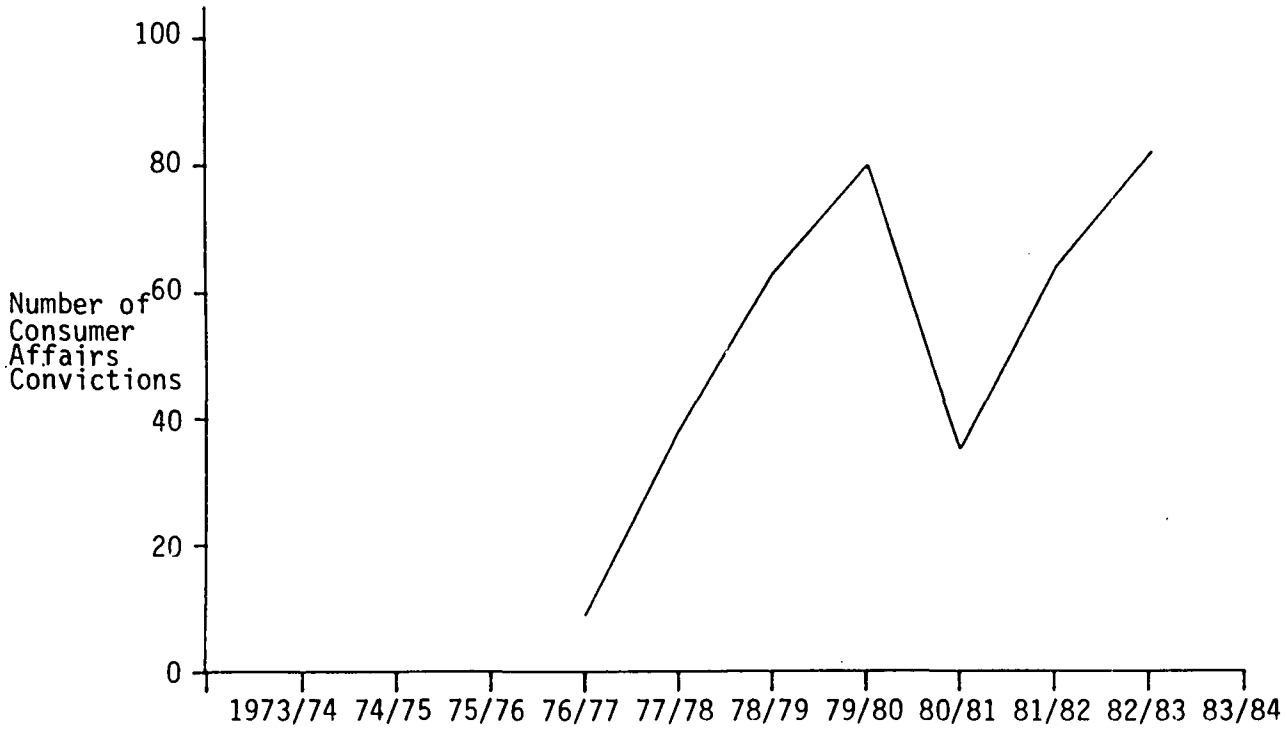

FIGURE 5 Total Convictions Obtained by WESTERN AUSTRALIAN Consumer Affairs Bureau (Excluding Weights and Measures)

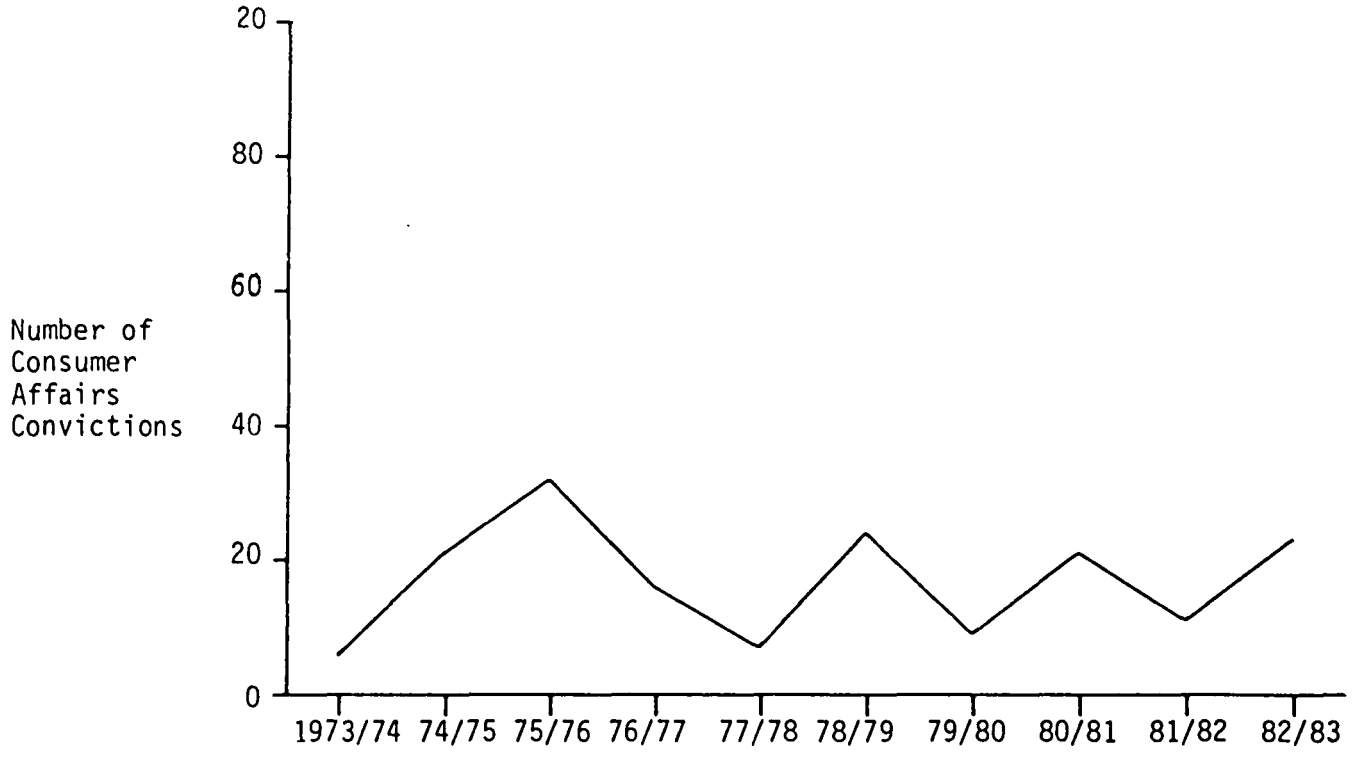

FIGURE 6 Total Convictions Obtained by TASMANIAN Consumer Affairs Council (Excluding Weights and Measures)

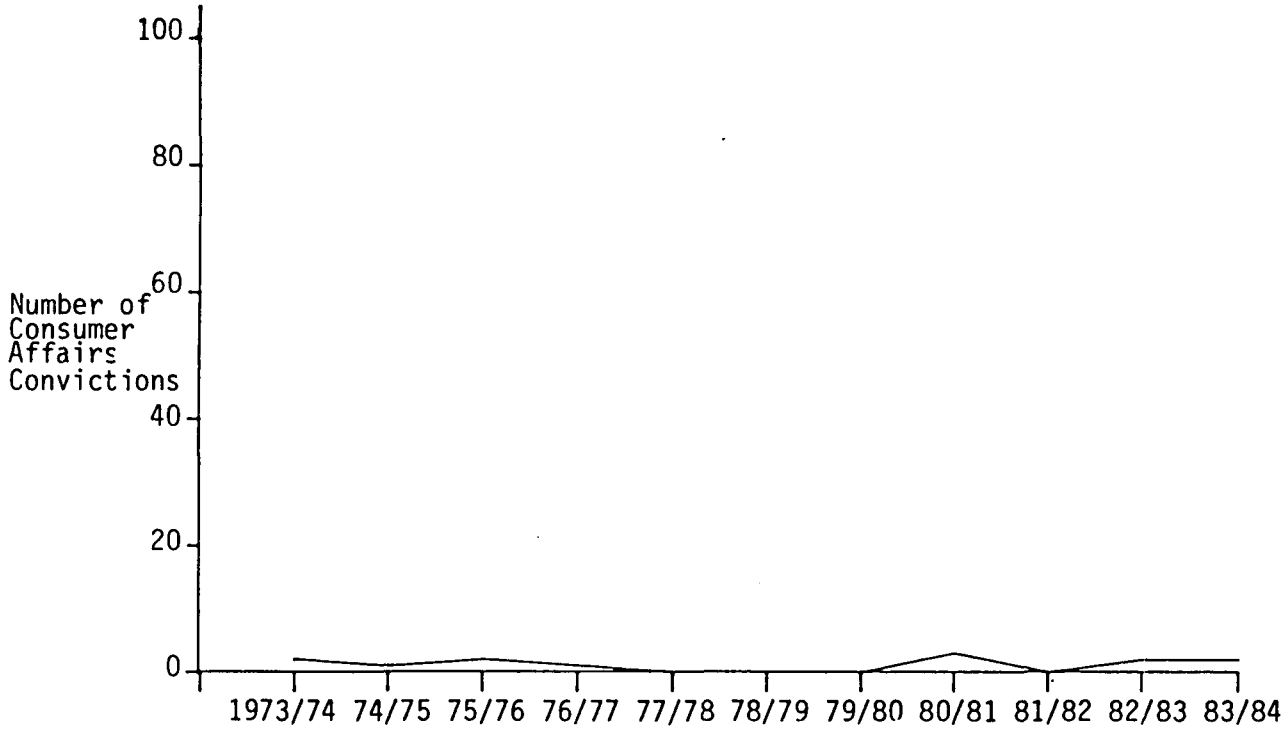

FIGURE 7 Total Convictions Obtained by AUSTRALIAN CAPITAL TERRITORY Consumer Affairs Bureau (Excluding Weights and Measures)

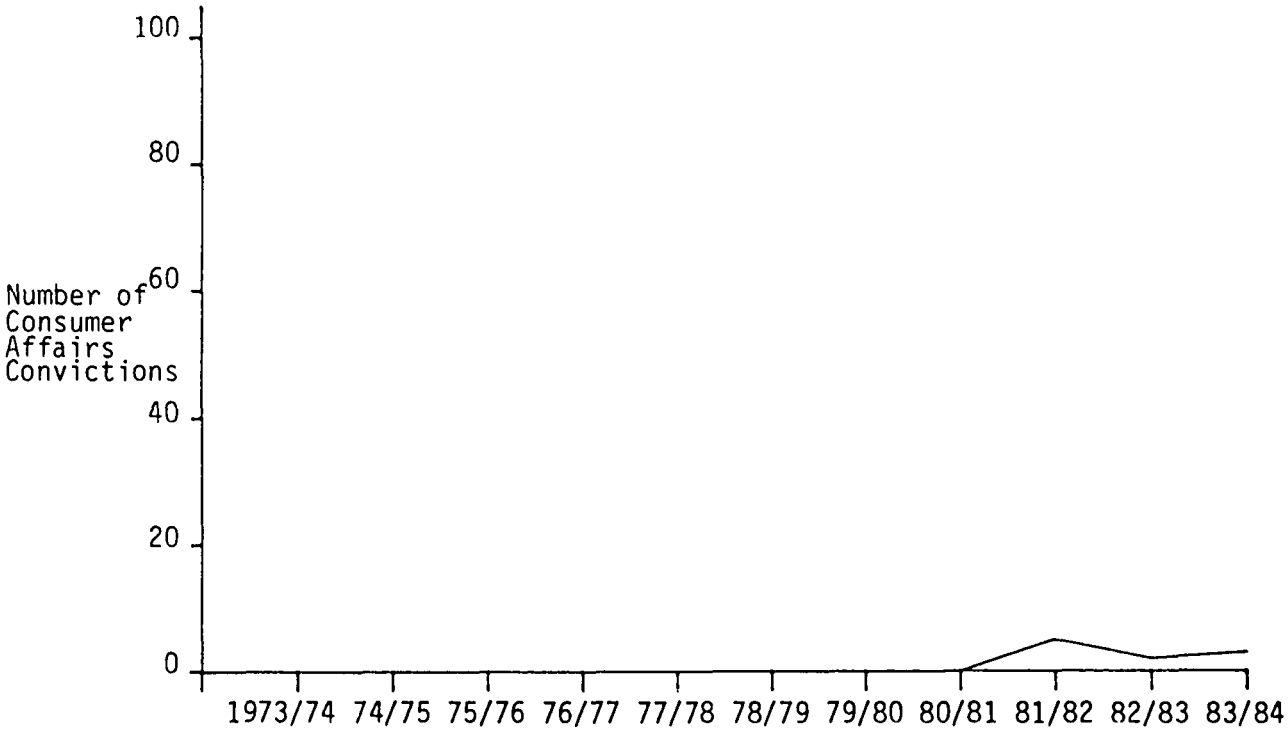

FIGURE 8 Total Convictions Obtained by NORTHERN TERRITORY Consumer Affairs (Excluding Weights and Measures)

FIGURE 9 Total Convictions Obtained by The TRADE PRACTICES COMMISSION (Excluding Weights and Measures)

Figure 10 compares the state and territories on the basis of their conviction rates per 100,000 population during the 1980's. The most recent four years, rather than just the last year, was selected as the basis of comparison to even out idiosyncratic variations from year to year in the smaller jurisdictions. The lowest rates for successful prosecutions are found in both the largest and the smallest jurisdictions. While Victoria has the lowest conviction rate (2.6 convictions from 1979-80 to 82-83 per 100,000 population), the ACT is not far behind with a rate of 3.0, followed by New South Wales (3.6). The three middle-sized jurisdictions, Western Australia (19.5), Tasmania (14.4), and South Australia (13.3) have the highest conviction rates.

The differences are considerable. All three middle-sized jurisdictions (South Australia, Western Australia and Tasmania) have conviction rates at least three times as high as the rates for all large jurisdictions (New South Wales, Victoria and Queensland) and the small jurisdiction of the ACT.

The hypothesis which suggests itself is that there is an optimum size for a jurisdiction with responsibilities for consumer protection enforcement. A jurisdiction which is too small lacks the staff resources to mount any sort of credible program of prosecution. A tiny agency with a handful of personnel cannot afford, for example, to have some of its inspectors taken off their routine duties to attend a criminal investigation course. A very large jurisdiction, on the other hand, may be at greater

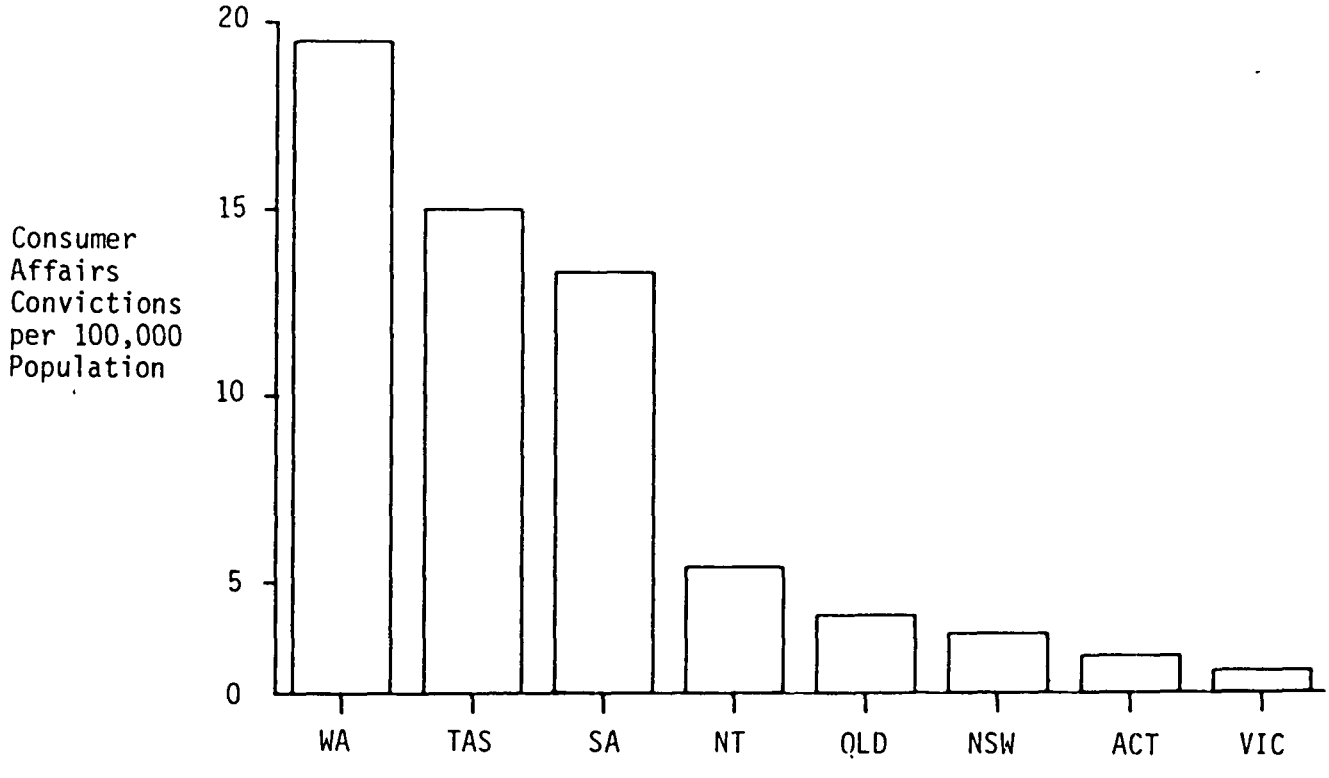

FIGURE 10 Consumer Affairs Conviction Rates per 100,000 Population for the Years 1979/80 - 1982/83 (Excluding Weights and Measures)

risk of retreating into a head office mentality which leaves consumer affairs personnel too remote from many sectors of a huge populace.

If further research supports this optimum size of jurisdiction hypothesis, the policy implication would seem to be greater regionalization of the operations of the large jurisdictions of New South Wales, Victoria and Queensland and incorporating consumer affairs inspectorates in the small jurisdictions of the Northern Territory and the A.C.T. into larger inspectorates. This could be achieved either through a federal takeover of their consumer affairs operations, using the Trade Practices Commission for prosecutions, or making consumer affairs a subunit of a larger business regulation inspectorate (e.g. combination with health inspectors). The latter solution has in a sense already been adopted with the Tasmanian Weights and Measures inspectorate, which is part of the Department of Labour and Industry with its substantial industrial safety and health inspectorate.

Jurisdictional Variations in Sanctions

The sanction used almost universally in consumer affairs sentencing in Australia is the cash fine. A daily fine for continuing the offence is provided for in Section 40 of the South Australian Second Hand Motor Vehicle Act and in perhaps some other isolated areas. Occasionally offenders are placed on a good behaviour bond. In some jurisdictions the courts can order payment of compensation to aggrieved consumers in addition to a

fine. Orders of costs against defendants are also common. In our calculation of average fines, costs and compensation orders are not included.

The only genuinely innovative sanctions are to be found in Victoria where, under the provisions of the Market Court Act, the Director of Consumer Affairs may attempt to obtain from a trader, if that trader is repeatedly engaged in conduct that is unfair to consumers, a Deed of Assurance that the trader will refrain from such conduct. Alternatively the Director may apply to the Market Court for an Order of Prohibition against a trader engaged in unfair conduct. To date there are in existence two Orders of Prohibition and two Deeds of Assurance.

In short, cash payment, largely to the state in the form of a fine, is the almost universal sanction for consumer protection offences. There is no case in the annual report of a consumer affairs department or bureau where an offender has been imprisoned.

Sanctions are generally directed against corporations or partnerships rather than against individuals, except where an individual owns the company. State prosecutions of individuals held accountable for the offending of large companies of which they are employees are very rare indeed.

Figure 11 compares the average fines for the same four years of the 1980s for all jurisdictions except Western Australia. Unfortunately, data on sanctions were not available for this

jurisdiction. Total fines imposed and year by year average fine data for each jurisdiction are provided in Tables 3 and 4. It should be remembered here that the average fine often relates to the combined fines from several closely related charges laid against the same defendant at a similar point in time.

By far the heaviest fines are with federal prosecutions under the Trade Practices Act. Average fines for consumer protection offences under Part V of the Trade Practices Act (to the exclusion of "pecuniary penalties" for restrictive trade practices violations under Part IV) were $17,852. The average pecuniary penalty for restrictive trade practices defendants was $39,294. The jurisdictions with the next highest average fines were New South Wales and Victoria with all the other jurisdictions being a long way behind the two big states in average fines. South Australia and Tasmania, states which along with Western Australia had the highest conviction rates, had the lowest average fines. Thus, we have a classic trade-off between frequency and severity of punishment. New South Wales and Victoria have low frequency of punishment, but when they do punish, they do so more severely. South Australia and Tasmania have relatively high frequency and low severity.

Most restrictive trade practices "pecuniary penalties" are for resale price maintenance (for example, a manufacturer forbids retailers from selling their product below a certain price). While these are not "criminal" offences (proof is only required on the balance of probabilities), it is reasonable to view a court ordered pecuniary penalty for a resale price maintenance

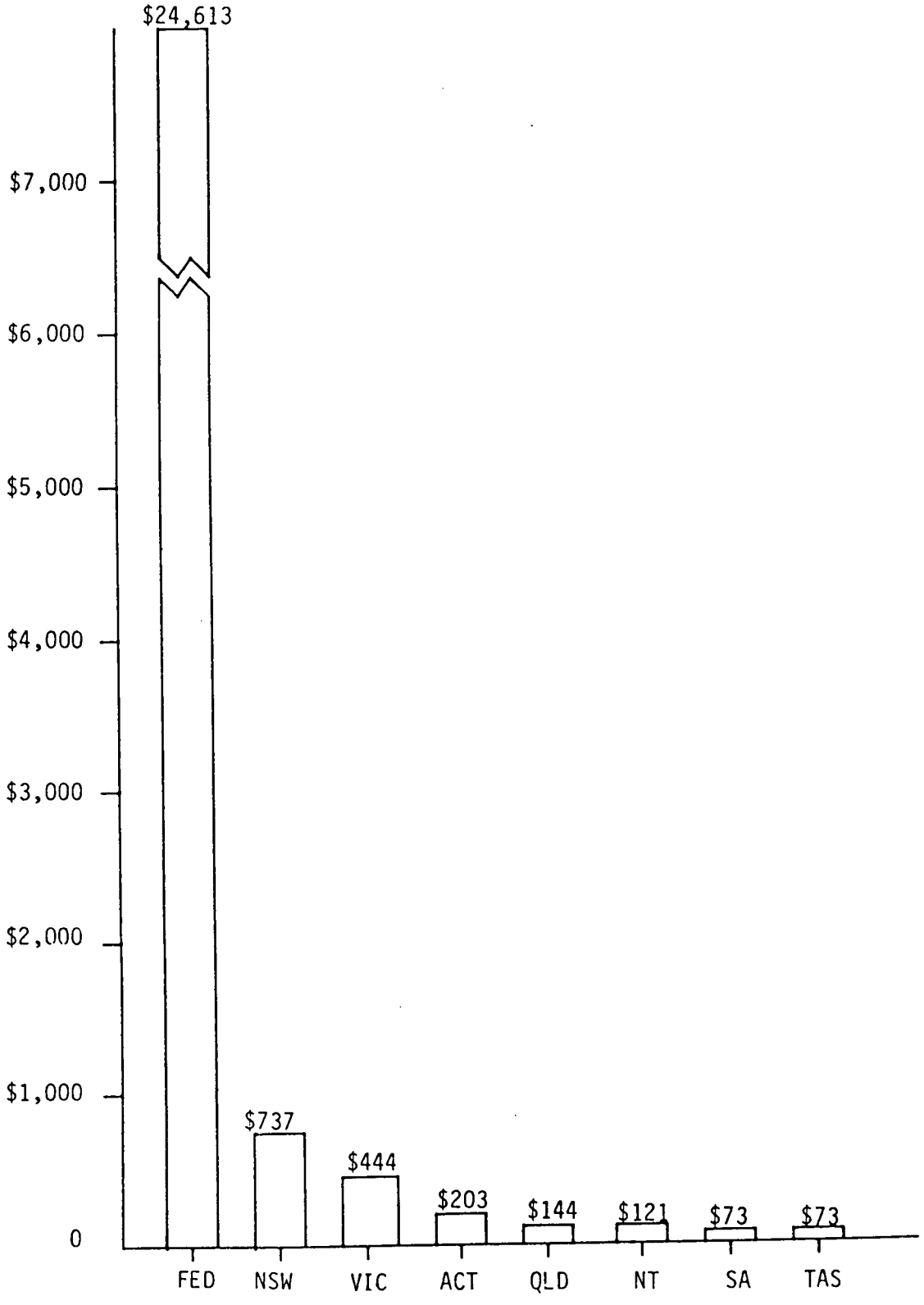

FIGURE 11 Average Fines Imposed for Consumer Affairs Convictions for the Years 1979/80 - 1982/83 (Excluding Weights and Measures)

TABLE 3

TOTAL FINES IMPOSED FOR CONSUMER AFFAIRS CONVICTIONS

(EXCLUDING WEIGHTS AND MEASURES)

YEAR	FED PART IV* $	FED PART V** $	NSW $	VIC $	QLD $	SA $	WA $	TAS $	ACT $	NT $
1973/74	-	-	-	-	70	2,895	-	90	130	-
74/75	5,000	107,500	-	1,790	530	3,380	-	375	100	-
75/76	0	500	-	5,780	462	7,310	-	675	240	-
76/77	0	85,520	15,768	2,810	1,725	4,790	-	1,020	200	-
77/78	218,000	63,390	31,669	4,515	1,445	5,555	-	640	0	-
78/79	31,000	27,000	23,069	5,740	2,630	-	-	1,870	0	-
79/80	263,000	102,100	26,135	11,340	2,695	3,810	-	575	1,000	0
80/81	320,000	289,400	39,588	10,280	3,845	1,560	-	1,275	0	0
81/82	15,000	19,200	26,315	17,810	4,435	-	-	985	160	450
82/83	70,000	53,500	49,435	6,305	3,275	7,455	-	1,690	260	400
83/84	-	-	-	-	-	-	-	-	-	200

\- A dash means data not available

* Refers to convictions under the restrictive trade practices provisions of Part IV of the Trade Practices Act

** Refers to convictions under the consumer protection provisions of Part V of the Trade Practices Act

TABLE 4

AVERAGE FINES IMPOSED FOR CONSUMER AFFAIRS CONVICTIONS

(EXCLUDING WEIGHTS AND MEASURES)

YEAR	FED PART IV* $	FED PART V** $	NSW $	VIC $	QLD $	SA $	WA $	TAS $	ACT $	NT $
1973/74	-	-	-	-	35	121	-	15	65	-
74/75	5,000	26,875	-	51	66	109	-	18	100	-
75/76	-	500	-	78	57	131	-	21	120	-
76/77	-	5,345	162	148	82	155	-	64	200	-
77/78	19,818	7,043	417	161	90	139	-	91	-	-
78/79	15,500	13,500	360	358	87	-	-	78	-	-
79/80	43,833	11,344	475	324	117	115	-	64	333	-
80/81	53,333	28,940	808	541	192	78	-	61	-	-
81/82	7,500	2,743	773	712	164	-	-	90	80	90
82/83	23,333	17,833	915	263	113	72	-	73	130	200
83/84	-	-	-	-	-	-	-	-	-	66

\- A dash means data not available

* Refers to convictions under the restrictive trade practices provisions of Part IV of the Trade Practices Act

** Refers to convictions under the consumer protection provisions of Part V of the Trade Practices Act

offence as a consumer affairs conviction for the purposes of this study (see the boxed case study, "We Are Not Interested in Supplying Anybody Who Discounts"). Cases where the Commission was seeking an injunction rather than a penalty were not counted.

The differences in penalty size are great in the sense that average fines are about ten times as high in N.S.W. as in South Australia and Tasmania and more than a hundred times as high in the federal jurisdiction compared with the average for the smaller states. Such differences must be kept in perspective, however. The fact is that all the average fines are very low in absolute terms. Even the Trade Practices fines are not high when one considers that these are normally directed against large national or international corporations. Total penalties of $100,000 or more have been imposed under the Trade Practices Act on the Sharp Corporation of Australia (Hartnell v Sharp Corp. (1975) ATPR 40-003), Menville Pty Limited (Wilde v Menville Pty Limited (1981) 50 FLR 380), Colourshot Pty Limited (Ducret v Colourshot Pty Limited (1981) ATPR 40-196), and Pye Industries Sales Pty Limited (TPC v Pye Industries (1978) ATPR 40-089). For a giant transnational like Sharp, $100,000 is to its assets less than a parking ticket to the assets of an individual citizen. On the other hand, to the Australian subsidiary viewed in isolation, $100,000 was a significant financial setback, particularly when added to legal costs for the company of "close to half a million dollars" (Hopkins 1978: Para. 6). What Figure 11 fundamentally shows is that the only consumer protection enforcement of real consequence is by the Trade Practices Commission. The fines and "pecuniary penalties" imposed by the Trade Practices Commission

"WE ARE NOT INTERESTED IN SUPPLYING ANYBODY WHO DISCOUNTS"

On 25 June 1980 the court imposed a penalty of $25,000 on Dunlop Australia Limited (17) for resale price maintenance on Adidas sporting goods. (The case was instituted on 4 January 1980). A penalty of $4,000 was imposed on Mr J.A. Steele, the National Sales Manager of Dunlop's Adidas division; both admitted the contravention to the court.

The case fits into the pattern of other RPM cases dealt with by the courts. In this case, Mr Steele said to a small retailer of sporting goods:

"Look, raise your prices on Adidas gear to suggested retail price or we will make things difficult for you ... We are not interested in supplying anybody who discounts."

The courts have been consistent in stressing that RPM is contrary to Parliament's intention that businessmen operate in competitive conditions and that the public should receive the benefits of that competition. The court, again, saw the need to impose a heavy penalty in order to deter similar contraventions.

(From Trade Practices Commission Annual Report, 1979-80, p. 81)

since 1974-75 total $1,350, 110 - four times as much as all the state fines combined for the same period.

Weights and Measures Convictions

Prosecutions for weights and measures violations have not been included in the foregoing statistics: although in New South Wales and the Australian Capital Territory weights and measures violations are administered alongside other consumer protection enforcement by the one section within the Department and Bureau respectively. In all other states, weights and measures enforcement is handled separately, either by a separate division within the Department or Bureau or, as in Victoria and Tasmania, by another department.

Prosecutions under this category relate to short quantities supplied by traders/retailers e.g. a consumer pays for one tonne of firewood but receives less than one tonne, a faulty measuring device, such as a petrol bowser that is incorrectly measuring litres dispensed, or a package containing less than the stated quantity .

Data on numbers of weights and measures convictions and average fines for those convictions are to be found in Tables 5 and 6. As with other consumer affairs convictions, the numbers of cases have declined in New South Wales since 1977-78. However, average weights and measures fines in New South Wales in recent years have become dramatically higher than in all other jurisdictions. Victoria is the second highest in average fines, but is a long way behind N.S.W.. As with other consumer affairs enforcement,

TABLE 5

WEIGHTS AND MEASURES CONVICTIONS

YEAR	FED	NSW	VIC	QLD	SA	WA	TAS	ACT	NT
1969/70	0	-	-	-	1	-	2	0	-
70/71	0	-	-	11	18	-	0	0	-
71/72	0	-	-	1	17	-	0	0	-
72/73	0	-	-	7	7	-	0	2	-
73/74	0	-	-	9	4	-	0	2	-
74/75	0	-	-	8	1	4	0	0	-
75/76	0	-	-	3	14	4	0	0	-
76/77	0	11	-	6	15	2	0	0	-
77/78	0	25	-	3	21	2	0	0	-
78/79	0	12	20	6	44	3	0	0	-
79/80	0	16	23	6	19	5	0	0	-
80/81	0	15	21	9	18	11	0	0	-
81/82	0	6	69	17	21	5	3	0	-
82/83	0	5	39	22	43	1	14	0	-
83/84	-	-	-	-	-	-	-	-	1

- A dash means data not available

TABLE 6

AVERAGE FINES IMPOSED - WEIGHTS AND MEASURES CONVICTIONS

YEAR	FED $	NSW $	VIC $	QLD $	SA $	WA $	TAS $	ACT $	NT $
1969/70	-	-	-	-	20	-	35	-	-
70/71	-	-	-	56	24	-	-	-	-
71/72	-	-	-	40	29	-	-	-	-
72/73	-	-	-	61	21	-	-	15	-
73/74	-	-	-	98	95	-	-	15	-
74/75	-	-	-	62	20	63	-	-	-
75/76	-	-	-	95	127	44	-	-	-
76/77	-	181	-	103	225	35	-	-	-
77/78	-	381	-	37	180	100	-	-	-
78/79	-	306	147	73	214	17	-	-	-
79/80	-	401	182	72	173	100	-	-	-
80/81	-	353	263	231	226	59	-	-	-
81/82	-	890	211	101	207	86	46	-	-
82/83	-	1522	186	128	285	40	21	-	-
83/84	-	-	-	-	-	-	-	-	0

- A dash means data not available

in 1982-83 South Australia became the state with the highest number of weights and measures convictions both in absolute and per capita terms.

Tables 5 and 6 show that Western Australia has a very thin record of weights and measures enforcement. There has only been one successful weights and measures prosecution in the Northern Territory and that was conditionally discharged without the imposition of a fine. In the A.C.T. there has not been a weights and measures prosecution since 1973-74 because of the incredible situation that the maximum fines provided for in the weights and measures legislation ($20 and $40) are below the minimum expected sentence before the Deputy Crown Solicitor's office are willing to proceed under their prosecution guidelines.

Offences Related to Motor Vehicle Dealers

An important subset of the consumer affairs convictions of Table 2 relate to motor vehicle dealers. Major offence types include altering the odometer (kilometer) reading and "jacking" (see the boxed case study "The Jacked" Deal). Table 7 shows that a large part of the comparatively high conviction rate in Western Australia is due to substantial numbers of convictions of backyard motor vehicle dealers for operating without a licence. This is not a major proportion of the prosecutions in any other jurisdiction. In Queensland, licencing of motor vehicle dealers is a responsibility of the Department of Justice; they have effected 19 successful prosecutions since 1975. Tasmania has no licencing requirements for motor vehicle dealers.

The "Jacked" Deal

A 24 year old nurse was referred to a car dealer by an acquaintance who was apparently a "spotter" for that dealership. She paid a deposit of $100 and signed a hire purchase agreement in respect of a 1974 Toyota Corona priced at $4,499. The agreement shows that she received a trade-in allowance of $600 for a Commer Van although she had never owned nor seen this vehicle.

She was not satisfied with the Corona and returned it to the dealership about three weeks later. She was persuaded to sign another hire purchase agreement in respect of a 1977 Ford Sedan. This agreement shows that she received a trade-in allowance of $4,950 for the Toyota Corona which suggests that the vehicle appreciated $451 in the space of three weeks. The agreement also shows a cash deposit of $400 which the consumer did not pay.

The upshot of the whole affair was that although she only paid a deposit of $100, the agreement committed her to 48 monthly instalments of $277 (a total of $13,296). She only managed to pay the first instalment and the vehicle was repossessed shortly thereafter.

(From NSW Department of Consumer Affairs Report 1979-80.)

TABLE 7

CONVICTIONS OF UNLICENCED MOTOR VEHICLE DEALERS

YEAR	FED	NSW	VIC	QLD	SA	WA	TAS	ACT	NT
1973/74	-	-	-	0	4	-	0	0	-
74/75	0	-	0	0	7	-	0	0	-
75/76	0	-	0	0	21	-	0	0	-
76/77	0	21	0	0	6	2	0	0	-
77/78	0	13	0	0	6	8	0	0	-
78/79	0	19	0	0	-	20	0	0	-
79/80	0	16	6	0	11	31	0	2	0
80/81	0	2	4	0	3	15	0	0	0
81/82	0	7	4	0	3	15	0	1	2
82/83	0	9	8	0	4	39	0	0	1

- A dash means data not available

TABLE 8

MOTOR VEHICLE DEALERS - CONVICTIONS FOR OFFENCES

OTHER THAN OPERATING WITHOUT A LICENCE

YEAR	FED	NSW	VIC	QLD	SA	WA	TAS	ACT	NT
1973/74	-	-	-	-	9	-	0	0	-
74/75	0	-	0	0	9	-	0	0	-
75/76	0	-	0	0	16	-	0	0	-
76/77	1	64	0	0	15	3	0	0	-
77/78	0	48	0	0	24	30	0	0	-
78/79	0	20	4	0	-	35	0	0	-
79/80	0	15	14	0	16	40	0	1	0
80/81	0	22	10	0	0	7	0	0	0
81/82	0	17	17	0	56	26	0	0	0
82/83	0	28	13	0	4	19	0	0	1
83/84	-	-	-	-	-	-	-	-	1

- A dash means data not available

Other prosecutions relating to motor vehicle dealers are also prominent in New South Wales, South Australia and Western Australia (Table 8). Even in these states, prosecutions principally relate to "technical" offences such as failure to display the first schedule notice. It is notable that while 17 per cent of complaints to consumer affairs agencies nationally concern new or used motor vehicles (National Consumer Complaints Statistics System), Queensland and the Australian Capital Territory ignore this problem in their prosecution programs and Tasmania has no legislation upon which it can act against this problem.

Tenancy Offences

Residential tenancies convictions relate to withholding payments of security bonds, demands for payment of rent in advance and other offences involving rent of housing. In the last three years, 77 per cent of South Australian consumer affairs convictions have related to residential tenancies matters. There were no fewer than 85 such convictions in 1982-83 (see Table 9).

Enforcement of the Residential Tenancies Act totally explains South Australia's emergence in 1982-83 as the most prosecutorial consumer affairs state. The increase from eight prosecutions in 1981-82 to 85 in South Australia in 1982-83 is indicative of a policy directive plus a consumer awareness campaign. South Australia's Residential Tenancies Act came into effect in December 1978. During the first three years, inspectors primarily issued warnings concerning non-compliance with the Act. A policy directive in 1982-83 ordered vigorous enforcement of the

Act. In addition to this, the Department had conducted a consumer awareness campaign aimed at informing the public of the rights of tenants. This was principally done by speakers at forums such as the Real Estate Institute of Australia, Senior Citizens Clubs, Schools etc. and interviews on local radio.

The South Australian legislation provides for a Residential Tenancies Tribunal for the hearing of disputes between landlords and tenants. The Tribunal has the power to impose penalties to a maximum of $2,500. Disputes involving large amounts must be heard in the Court of Summary Jurisdiction. Hearings by the Residential Tenancies Tribunal are at no cost to either party.

New South Wales is the second most active state in residential tenancies prosecutions. The greater activity in New South Wales compared with the other states apart from South Australia is understated by Table 9. This is because it excludes the not inconsiderable prosecutorial activity of the NSW Rental Bond Board discussed earlier.

In the Northern Territory, residential tenancy matters are the responsibility of Treasury. To date any prosecution proceedings have been withdrawn on the advice of the Attorney General before reaching the court. In Queensland the Residential Tenancies Act is enforced by private actions only. No Queensland Department has responsibility for the Act.

Western Australia has no tenancy prosecutions because it has no tenancy law, but a working party has been established to look at

TABLE 9

RESIDENTIAL TENANCIES CONVICTIONS

YEAR	FED	NSW	VIC	QLD	SA	WA	TAS	ACT	NT
1973/74	-	-	-	0	0	-	0	2	-
74/75	0	-	0	0	0	-	0	1	-
75/76	0	-	0	0	0	-	0	2	-
76/77	0	0	0	0	0	0	0	1	-
77/78	0	1	0	0	0	0	0	0	-
78/79	0	3	0	0	0	0	0	0	-
79/80	0	1*	0	0	0	0	0	0	0
80/81	0	1*	0	0	17	0	0	0	0
81/82	0	2*	0	0	8	0	0	1	0
82/83	0	4*	0	0	85	0	0	1	0

\- A dash means data not available

* Excludes convictions by the NSW Rental Bond Board

the need for legislation. In Tasmania the Consumer Affairs Council has recommended to government on several occasions since 1978 that legislation governing residential tenancies should be drafted but so far the government has not been moved to action. Victoria has a Residential Tenancies Tribunal. The Tribunal resolves disputes but does not have the power to impose fines. Against the trend of previous years, in 1983-84 to date, three successful prosecutions have been concluded in Victoria under the Act. A new Residential Tenancies Bill is currently being drafted.

Failue to Provide Information

Consumer affairs officers have powers under various state and Commonwealth acts to require traders to supply certain types of information concerning complaints by consumers to the officers. Table 10 is interesting in that it shows that federally, in New South Wales, Victoria, South Australia, the A.C.T. and the Northern Territory governments rarely have to prosecute companies for failing to comply with orders to provide information. In Queensland and Tasmania, however, such prosecutions are common.

What is more important about the figures in Table 10, however, is that in Queensland and Tasmania failure to provide information is almost the ONLY reason for consumer affairs offenders being prosecuted. In the last ten years, 163 of the 170 consumer affairs convictions in Tasmania have been for failure to provide information. Thus, we must now overturn our earlier finding that Tasmania is one of the states which uses prosecution frequently.

TABLE 10

CONVICTIONS FOR FAILURE TO PROVIDE INFORMATION TO CONSUMER AFFAIRS OFFICERS

YEAR	FED	NSW	VIC	QLD	SA	WA	TAS	ACT	NT
1973/74	-	-	-	1	0	-	6	0	-
74/75	0	-	0	1	0	-	21	0	-
75/76	0	-	1	4	0	-	32	0	-
76/77	0	3	0	16	0	4	16	0	-
77/78	0	0	5	14	3	0	7	0	-
78/79	0	0	0	28	0	4	20	0	-
79/80	0	0	0	22	4	4	9	0	-
80/81	0	2	0	19	0	2	20	0	-
81/82	0	0	0	25	0	5	11	0	3
82/83	0	0	1	28	0	7	21	0	0
83/84	-	-	-	-	-	-	-	-	1

- A dash means data not available

In Tasmania, prosecution is almost never used to deter substantive consumer affairs offences. It is only used for enforcement of the "technical" offence of failure to provide information. Tasmanian consumer affairs offenders apparently can rest easy in the knowledge that, so long as they do not behave obstreperously to departmental officers, they need have no fear of the law.

The same situation exists in Queensland. Of 145 convictions during the last six years, 136 were for failing to provide information. Four of the seven prosecutions that have been heard under the Northern Territory Consumer Protection Act have been for failure to provide information. In these jurisdictions, prosecutions for substantive consumer affairs offences are virtually a non-event.

Price Control Convictions

State governments in New South Wales, Victoria, South Australia and Western Australia have power to prohibit certain types of price increases. In the Northern Territory, the Prices Regulation Act only covers bread and milk. Bread and milk vendors, however, need not be alarmed as the Department of Treasury which administers the Act has a policy of issuing no more than warnings.

Prosecutions arise from failures to provide information to the price control authorities or for failure to abide by an order prohibiting a price increase. Convictions of this type have been significant area of consumer affairs enforcement only in New

South Wales. Since 1977-78, there have been 26 price control convictions in New South Wales. The only other jurisdiction with any price control convictions is South Australia with four.

False Advertising and Trade Descriptions and Misrepresentation

This area covers the publication of statements that are untrue or misleading to consumers. Examples include a shop advertising a product at a sale price when there are none of the items in current stock or an accountant advertising that he/she is a "chartered accountant" when he/she is not a member of the Institute of Chartered Accountants (see also the boxed case study, "The Sharp Case").

It can be seen from Table 11 that federal enforcement under the Trade Practices Act is concentrated on false advertising, misleading trade descriptions and misrepresentation. Table 11 also shows that this was a very major area of enforcement in Victoria and South Australia in the mid-70's. In recent years, prosecutions have been neglected by state governments in this area - an ironical result as these were years when the Trade Practices Commission was forbidden by the Fraser government from becoming involved in advertising misrepresentations which were contained within the borders of one state.

Hire Purchase, Door to Door and Pyramid Selling

The con man who goes door to door selling doubtful products on extortionate hire purchase terms, the promoter of an illegal pyramid selling scheme which requires each participant to snare a number of friends into a get-rich-quick scheme which will leave

THE SHARP CASE

The first prosecution under the Trade Practices Act was in 1975 for a case of blatantly misleading advertising. It was a case which a consumer group first drew to the attention of the Trade Practices Commission. In 1975, the Japanese transnational, Sharp, advertised its microwave ovens on a national basis. Under a general blurb, "Microwave Cooking is Here!", it claimed that "every Sharp microwave oven is fully tested and approved by the Standards Association of Australia".

This claim was misleading in at least two respects: First, the Standards Association of Australia had not tested and approved Sharp microwave ovens, and second, any such testing would not have been for every microwave oven but only one or two samples of the model. The company was fined a total of $100,000 on ten charges. Justice Joske condemned Sharp's conduct from the bench as "a gross and wicked attempt to swindle the public of Australia".

TABLE 11

CONVICTIONS FOR FALSE ADVERTISEMENTS AND TRADE DESCRIPTIONS AND MISREPRESENTATION (INCLUDING MOTOR VEHICLE DEALERS)

YEAR	FED	NSW	VIC	QLD	SA	WA	TAS	ACT	NT
1973/74	-	-	-	1	5	-	0	0	-
74/75	3	-	30	7	10	-	0	0	-
75/76	1	-	65	2	17	-	0	0	-
76/77	14	3	10	3	8	0	0	0	-
77/78	7	5	22	1	5	0	0	0	-
78/79	3	9	11	2	0	3	2	0	-
79/80	5	12	10	1	2	8	0	0	0
80/81	10	7	11	1	0	6	1	0	0
81/82	9	5	4	2	2	7	0	0	0
82/83	4	5	0	1	4	8	0	1	0

- A dash means data not available

someone at the end of the chain very poor, the enforcer of illegal interest rates - these are the targets of convictions under this category. The category relates to misconduct by sales representatives and failure to provide full details of a contract or agreement.

New South Wales, and to a lesser extent South Australia and Western Australia, are the only jurisdictions with any sort of record of pursuing these particularly nasty and parasitic kinds of offenders through the courts. There has also been some legal action in Tasmania. However, the Hire Purchase Act in that state is administered by the Law Department as opposed to the Consumer Affairs Council and it is not possible from the records to determine which actions were either successful or unsuccessful prosecutions or civil actions. Table 12 tells a shocking story of neglect by the criminal justice system of this all-too-common kind of con-man.

Product Safety Offences

No table is needed to summarise product safety prosecutions. Western Australia is the only jurisdiction with a significant record of prosecuting companies which supply goods in contravention of banning orders or mandatory safety standards. There have been 17 such cases in Western Australia, 11 of them in 1982-83. Tasmania had one conviction in 1978-79 and two in 1982-83. It is interesting to note, however, that such prosecutions, because they are the personal responsibility of the Secretary of the Consumer Affairs Council, not the Council itself, they are not recorded in any public document. New South Wales had one

product safety conviction in 1977-78 for "supply of goods not in accordance with Consumer Protection (Safer Goods) Regulations". None of the other states and territories have had any product safety convictions.

There have been only three federal cases under the Trade Practices Act in this area. In 1981, New Concept Import Services Pty. Ltd. was fined $2,000 under the Trade Practices Act for selling banned goods. The goods were balloon making kits which were dangerous to children in that they contained hazardous chemicals likely to be inhaled or swallowed during balloon blowing. In 1984, two companies were convicted for selling flammable nighwear.

The limited product safety prosecution experience seems to confirm the American contention that if you do not have a national Consumer Product Safety Commission, you do not get consumer product safety enforcement. One study has estimated that the US Consumer Product Safety Commission has saved five million disabling injuries or deaths since 1973 (Lower et. al., 1983). State governments cannot support testing capabilities, information systems on accidents and specialised personnel on a scale to do the job.

The High Pressure Sale

There was a series of complaints against Identity Kitchens Pty Limited, in relation to their high pressure sales techniques. The complaints revealed a course of conduct whereby salesmen gained entry to consumers' homes following an offer for an obligation free design and quote for a kitchen. Once there, the salesmen stayed several hours, finally quoting a price for a kitchen. If the price quoted was not accepted immediately, the salesmen would then quote a lower price - sometimes a reduction of up to 40 per cent - saying that the lower price would be available only if the conumer agreed to sign a contract and pay a part deposit immediately.

Consumers who entered into agreements with the company were not given the Statement and Notice as required under the Door-to-Door Sales Act. These documents inform consumers of their rights under the Act including their right to cancel the agreement within 10 days. The failure to deliver the documents is a breach of section 3(2) of the Act.

The company was successfully prosecuted for nine offences under section 3(2) of the Door-to-Door Sales Act. The Court ordered that it pay fines totalling $1,350, court costs of $126 and professional costs amounting to $540. It also made an order under section 3(3)(a) of the Act that the company refund a total of $4,024 to consumers.

(From NSW Department of Consumer Affairs Annual Report, 1981-82.)

TABLE 12

CONVICTIONS RELATING TO HIRE PURCHASE, DOOR TO DOOR SALES AND PYRAMID SELLING

YEAR	FED	NSW	VIC	QLD	SA	WA	TAS	ACT	NT
1973/74	-	-	-	0	7	-	0	0	-
74/75	0	-	0	0	5	-	0	0	-
75/76	0	-	0	1	6	-	0	0	-
76/77	0	3	0	1	4	0	0	0	-
77/78	0	10	0	1	5	0	0	0	-
78/79	0	6	3	0	0	0	0	0	-
79/80	0	6	4	0	0	1	0	0	0
80/81	0	7	0	0	0	5	0	0	0
81/82	0	5	0	0	1	10	0	0	0
82/83	0	6	0	0	2	3	0	0	0

\- A dash means data not available

SUMMARY OF RESULTS

1. For every consumer affairs conviction in Australia, there are more than 200 written complaints which do not lead to a conviction and conservatively over 2,000 unwritten complaints. In 1982-83 South Australia was the leading state or territory jurisdiction in both per capita and absolute numbers of consumer affairs convictions. The reason for this is a very high number of residential tenancies prosecutions.

2. New South Wales showed a consistent and steady drop in consumer affairs convictions from 1976-77 to 1982-83. New South Wales is the only jurisdiction with a dramatic downward trend.

3. South Australia and Victoria both showed substantial increases in convictions until 1975-76 followed by much lower rates for the late 1970's.

4. In Queensland, Tasmania, the Northern Territory and the Australian Capital Territory, prosecutions for substantive consumer affairs offences are virtually non-existent. However, in Queensland and Tasmania there are significant numbers of prosecutions for the "technical" offence of failure to provide information to consumer affairs officers.

5. South Australia, Western Australia and Tasmania are the jurisdictions with the highest conviction rates. The Tasmanian rate is almost totally explained by relatively large numbers of prosecutions for failure to provide

information, the Western Australian rate is partly explained by many prosecutions of unlicenced motor dealers, and the South Australian rate by a very high incidence of residential tenancies enforcement.

6. The cash fine, generally directed against a company rather than an individual, is the almost universal consumer affairs sentence. Imprisonment is never used as a sanction.

7. Fines imposed federally under the Trade Practices Act are by far the heaviest. Trade Practices fines in aggregate exceed by a factor of four all consumer affairs fines by states and territories combined. New South Wales is the jurisdiction with the second highest average fines followed by Victoria. Fines in all jurisdictions are paltry in comparison to the assets of the companies being fined.

8. The Australian Capital Territory and Tasmania are notable for their neglect of weights and measures enforcement.

9. Even though 17 percent of complaints to consumer affairs agencies in Australia concern the major expenditure item of motor vehicles, the Northern Territory, Tasmania and the Australian Capital Territory never prosecute in this area. New South Wales and Western Australia have the most aggressive prosecution programs for offences related to motor vehicle dealers.

10. Price control convictions are a significant area of enforcement in New South Wales only.

11. Federal enforcement under the Trade Practices Act leads in the area of false advertising, trade descriptions and misrepresentation. This was also a major area of enforcement in Victoria and South Australia in the mid-70's. In recent years, the states have neglected prosecution in this area.

12. New South Wales, and to a lesser extent South Australia and Western Australia, are the only jurisdictions with any sort of record of prosecuting hire purchase, door-to-door sales and pyramid selling offences.

13. Western Australia is the only jurisdiction with a significant prosecution program for product safety offences.

TOWARDS REFORM

An AFCO Philosophy of Regulation

To AFCO, the foregoing results represent a deplorable underutilisation of the criminal sanction in consumer protection enforcement. This is not to say that AFCO sees consistent punishment of consumer affairs offenders in proportion to the gravity of their wrongs as an appropriate goal for public policy. AFCO is more concerned about getting a better deal for consumers than it is with ensuring that wrongdoers get their just deserts. To this end, AFCO agrees with the philosophy of all state and territory consumer affairs departments and bureaux that in general the first priority of the agency should be to negotiate with a trader to solve the problem of an aggrieved consumer.

Prosecution, however, is a key bargaining tool in such processes of negotiation. If traders know that the agency has a reputation for securing heavy sentences on a regular basis against recalcitrant offenders, then they are much more likely to cooperate in efforts to grant redress to the consumer. At the moment, traders know that they face no prospect of a significant sentence unless the Trade Practices Commission decides to take them on as a major case. The state agencies, particularly in Queensland, Tasmania, the Northern Territory and the A.C.T., need to beef up their prosecutorial performance if irresponsible traders are to reach the conclusion that they really have something to lose by being recalcitrant.

At the same time, AFCO is critical of Australian consumer protection agencies for being short sighted in viewing the

solving of each complainant's problem, one by one, as the ultimate in consumer protection. Prosecution should be regarded as more than simply a back-stop to conciliation processes which break down. Any regulatory agency should use prosecution in a proactive way with the intention of deterring potential offenders as well as actual offenders. It is a barren policy to direct prosecution only at solving specific problems after the horse has bolted. High profile general deterrence is needed by making examples of some serious offenders in a very public way.

The best evidence for such exemplary prosecutions does not necessarily come from waiting for a complainant to walk through the door. If an agency targets the turning back of kilometer readings on used cars as a problem, evidence for showcase prosecutions will not come from complainants. Victims of the offence are most unlikely ever to come to know that they have been victimised - this is precisely what makes it a widespread form of fraud. Adequate evidence will come when inspectors randomly check the kilometer readings through the windows of a sample of used cars on commercial premises, check with government records to ascertain the previous owner and contact that owner to discover the kilometer reading at the time of sale. If the previous owner reports a substantially higher reading than is currently evident, then traditional criminal investigation techiques will usually secure a quick conviction (Braithwaite, 1978).

Weights and measures enforcement is the one area where consumer affairs inspectors consistently adopt this kind of proactive

approach. It is fair to say that in all other areas, consumer affairs is the only domain of business regulation in Australia which has such a totally reactive strategy. Mines inspectors do not wait for mines to blow up before investigating; occupational health and safety inspectors do not wait for workers or union officials to come to their office with complaints; environmental regulators do not wait for the scent of air pollution to waft in through their open office windows; meat inspectors spend most of their time at abbatoirs preventing meat from becoming unhealthy. Consumer affairs inspectors also need to move beyond investigating complaints to actively patrolling for offences out in the market place.

We do not wish to downplay the importance of the complaint resolution function of comsumer affairs agencies. Indeed, AFCO would like to see it strengthened by making complaints officers more accessible to the people through more decentralised shop-front offices such as the one recently opened in Footscray by the Victorian Minister for Consumer Affairs. But a regulatory agency needs a prosecution program to deter potential offenders as well as a complaint resolution program to solve problems after they have occurred. Somewhere between total reliance on complaint resolution and total reliance on proactive enforcement lies the most cost-effective mix which will give consumers the maximum protection for the consumer affairs dollar.

One thing is sure: Total reliance on complaint resolution will leave some of the most serious problems neglected. To illustrate, the almost complete lack of consumer product safety

prosecutions reflects the fact that many of the most serious offences of this kind will never come to the attention of victims. If a citizen is exposed to a product containing a hazardous chemical which increases his risk of cancer, he is unlikely to be aware of this. (Ask any person on the street to name just one consumer product banned under the Trade Practices Act). Citizens who do not know about banning orders are not likely to complain about being sold a banned product. The only route to effective regulation is for inspectors randomly to check stores, wholesalers and importers for banned stock. Recognising the failure of Australian governments in this area, AFCO has set up its own national network of product safety monitors in co-operation with the Country Women's Association and the Australian Consumers Association to at least check retail establishments for hazardous products.

Deficiencies in the Law

A major reason why prosecution fails to occur in many jurisdictions is that there is simply an absence of consumer protection laws in those jurisdictions. Another reason for the rarity of product safety prosecutions is that there are only 15 banning orders and mandatory standards under the Trade Practices Act, and generally much smaller numbers under state and territory laws.

Moreover, as we saw in Table 9, residential tenancies prosecutions do not occur in Queensland, Western Australia, Tasmania and the Northern Territory mainly because of a lack of legislation.

It is not the purpose of this paper to document all the deficiencies of consumer protection legislation in Australia. For this kind of analysis, see AFCO's paper, Consumer Protection Reform (1984). However, clearly some jurisdictions have a greater capability than others to bring consumer affairs prosecutions before the courts because they have more and better laws. Tasmania is a classic case of a jurisdiction hampered by inadequate legislation. As the Tasmanian Consumer Affairs Council lamented in its 1982 Annual Report:

> There is little doubt concerning the deficient state of consumer protection laws in this State. The Council, in its Annual reports for many years, has directed attention to the fact that this State does not have a Consumer Claims Tribunal; this State does not have any effective laws concerning the selling of secondhand motor vehicles; this State does not have any effective legislation to control misleading advertising; this State does not have effective legislation to protect the consumer interest in landlord and tenant relationships. The list could go on and on, as this State fares badly in comparison with the mainland States.
>
> The reasons for this lack of legislative protection are, on the surface, not difficult to explain. The Consumer Affairs Council has recommended to the Government a number of legislative proposals in the important areas mentioned above, but these have foundered on the legislative path because of inaction and vested interest opposition. There have also been delays with any legislative proposal which could be seen to be at all radical in its concepts (p. 13).

Things are improving, however. Tasmania is now establishing a Consumer Claims Tribunal. The past year has seen considerable movement towards all states having uniform credit laws. New credit legislation has been drafted in Victoria and is planned to be introduced in Parliament this year. New South Wales has also been developing similar legislation. AFCO is hopeful that other states will quickly follow Victoria this year and introduce similar legislation. A working party of state and federal officers was established last year to develop uniform legislation

in all states for the regulation of travel agents and this legislation should be introduced this year. Further state laws are being developed to mirror the provisions of the Trade Practices Act.

Individual Versus Corporate Prosecutions

One of the findings of this study is that individual employees are almost never prosecuted by state or territory consumer affairs agencies. Since the Trade Practices Commission commenced prosecution proceedings in 1975 there have only been 12 cases in which individual defendants have been convicted. In 16 other cases individuals have been prosecuted. Some of the latter are awaiting trial or appeal, but with most of them proceedings continued against the corporation while charges against individual officers of the corporation were dropped.

For corporate offences there are important advantages in imposing both corporate and individual liability. Up to a point, considerable reliance on corporate responsibility is inevitable. It is often easy to prove that a company has broken the law, but much more difficult to prove just which individuals within the company were responsible for the offence. Diffused responsibility for tasks, organizational secrecy and the willingness of senior employees to scapegoat more junior personnel are among the reasons for such difficulty. In any case, when the goal of a regulatory agency is corporate responsibility more than individual responsibility, it is appropriate that corporations be the subject of both sanction and stigmatization for criminal behaviour.

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On the other hand, a sense of responsibility by individual company executives is also an important goal of consumer protection enforcement. To this extent, deterrence should also be directed at individuals. While companies may be easier to convict than individuals for consumer protection offences, once convicted, individuals are more readily deterrable. Modest cash fines can be a much more severe sanction for an individual than for large companies, and for serious cases, there is the sanction of imprisonment, a sanction which cannot be imposed on companies. Criminal convictions which have the effect of disqualifying individuals from being company directors or which cost the individual a license to operate in a particular industry can be heavy penalties.

Fisse (1980: 183) suggests as a remedy to the slide away from individual liability for Australian consumer affairs enforcement that the law only permit the imposition of corporate liability when it can be shown to be "impossible, impractical or unjust to resort to individual criminal responsibility". This solution may be sound in principle, but AFCO is concerned that any law reform which puts further roadblocks in the way of corporate prosecution will further discourage what little consumer affairs prosecution we now have. At the very least, however, the consumer movement requests that prosecutors more fully explore the option of individual as well as corporate charges in consumer affairs cases.

Higher Maximum Penalties

Comment has already been made about the pathetically low fines imposed on consumer affairs offenders. The situation is most dramatically illustrated by weights and measures offences in the A.C.T. where the potential penalties are such a flea-bite that the Deputy Crown Solicitor's prosecution guidelines automatically rule out proceedings as not worth the effort.

In most of the states and territories maximum penalties under the various Acts administered by consumer affairs agencies tend to range between $100 and $10,000.

If deterrence is a goal of prosecution and if large companies are among the potential targets of prosecution, then much higher maximum penalties must be available. This is not to say that high maxima should be applied against small companies; but courts must have available to them the tools to sting large companies should this be required. Without considering transnational companies of massive proportions, many of Australia's largest companies have sales exceeding $1,000 million per annum. Fines of up to $1,000,000 should therefore be provided for in consumer protection legislation for the most serious offences. This would only provide for a charge of less than 0.1 per cent against the sales of a company with over $1,000 million in sales.

Multi-million dollar fines have been imposed against giant companies in the United States. AFCO does not suggest that million dollar fines are necessary for any but a small minority

of extreme cases involving very large companies. But unless consumer protection law is capable of dealing with the worst cases of unlawful conduct it has no credibility.

Alternatives to Fines

By implication, we have already seen one of the severe limitations of fines as a sanction against corporate consumer affairs offenders. Even a fine of a million dollars can be inadequate to deter a large corporation. Coffee (1981: 390) calls this "the deterrence trap":

> the *maximum meaningful fine* that can be levied against any corporate offender is necessarily bounded by its wealth. Logically, a small corporation is no more threatened by a $5 million fine than by a $500,000 fine if both are beyond its ability to pay. In the case of an individual offender, this wealth ceiling on the deterrent threat of fines causes no serious problem because we can still deter by threat of incarceration. But for the corporation, which has no body to incarcerate, this wealth boundary seems an absolute limit on the reach of deterrent threats directed at it. If the 'expected punishment cost' necessary to deter a crime crosses this threshold, adequate deterrence cannot be achieved. For example, if a corporation having $10 million of wealth were faced with an opportunity to gain $1 million through some criminal act or omission, such conduct could not logically be deterred by monetary penalties directed at the corporation IF THE RISK OF APPREHENSION WERE BELOW 10%. That is, if the likelihood of apprehension were 8%, the necessary penalty would have to be $1.25 million (i.e. $1 million times 1.25, the reciprocal of 8%). Yet such a fine exceeds the corporation's ability to pay. In short, our ability to deter the corporation may be confounded by our inability to set an adequate punishment cost which does not exceed the corporation's resources (Coffee, 1981: 390).

While the deterrence trap is the most fundamental weakness of fines directed against corporations, there are other problems - fines being passed back to consumers in higher prices, managers who are actually responsible for a violation not being affected by a cheque which is written to pay the fine in a head office

interstate, and so on. These deficiencies of fines have been more fully discussed elsewhere (Nagel, 1979; Fisse and Braithwaite, 1984).

Are there any alternatives to fines as sanctions against corporate consumer affairs offenders? Briefly we will consider four alternatives: equity fines; corporate probation; adverse publicity orders; and, community service orders. All the alternatives have their weaknesses, weaknesses which have been described in more detail elsewhere (Fisse and Braithwaite, 1984). Equally, however, each has some important advantages over cash fines, and each therefore has a place in an armory of sentences to be made available to the courts to deal with corporate crime. There is no best or ideal sanction for punishing corporate offenders, only sanctions which are better than others in some circumstances and worse in other situations. The courts are the best judge of which sentence is tailor-made for any particular offence and the courts must be given an effective array of tools from which to choose.

Equity Fines

One possible alternative to fines is equity dilution, an imaginative approach proposed by Coffee (1981: 413-24). The proposal, in essence, is this:

> [W]hen very severe fines need to be imposed on the corporation, they should be imposed not in cash, but in the equity securities of the corporation. The convicted corporation should be required to authorise and issue such number of shares to the state's crime victim compensation fund as would have an expected market value equal to the cash fine necessary to deter illegal activity. The fund should then be able to liquidate the securities in whatever manner maximises its return (Coffee, 1981: 413).

achieve deterrence are at risk of being passed onto consumers as higher prices, or to workers through lay-offs or cut-backs in employment opportunities.

Probation

Another prospective alternative to fines against corporations is probation, a sentence used increasingly in the United States but which does not appear to be open under existing probation legislation in Australian jurisdictions (but note the availability of conditional release on bond without conviction under the Crimes Act, 1914-1982 (Cth.), s. 19B). Various proposals have been advanced for more extensive reliance upon this option, probation being a convenient platform upon which to base a number of more particularised sanctions (see e.g. Coffee, 1981: 448-59; Yale Law Journal, 1979). Of these more particularised sanctions, the main possibilities are probationary orders mandating internal discipline or organisational reform.

Internal discipline orders have been tentatively proposed by the Mitchell Committee in South Australia (South Australia, 1977: 361-62), the suggestion being as follows:

> Essentially, internal discipline orders would require a corporation to investigate an offence committed on its behalf, undertake appropriate disciplinary proceedings, and return a detailed and satisfactory compliance report to the court issuing the particular order. In the event of unreasonable non-compliance corporate criminal responsibility would be necessary in some cases, but usually it would be sufficient to impose individual criminal responsibility on those personnel specified in the order as responsible for securing compliance. Unlike the system of Frankpledge, the object of internal discipline orders thus would not be to produce guilty individuals to the prosecuting authorities, but to cast part of the burden of enforcement squarely upon the enterprise on whose behalf an offence has been committed.

The main advantage of equity fines, as compared with cash fines, is that they would sidestep the deterrence trap arising where the liquid assets of a corporation place an upper limit on the fine which is collectable, and where this upper limit is less than the fine required to deter corporate crime. The beauty of the equity fine is that, by appropriating fixed as well as liquid assets, it raises the upper limit of the amount collectable. Moreover, the upper limit is raised further by the capacity of the equity fine to get at future assets in addition to current assets: the public seizes not just whatever cash the company can rake up to pay a fine, but a share in future earnings as well as ownership rights in its plant, equipment and property investments. The basic explanation for this, as Coffee has indicated, is that the market valuation of most companies vastly exceeds their cash resources:

> ... the equity fine is a response to the basic precept of the economist that the value of the firm is the discounted present value of its expected future earnings. If one recognises that this "going concern value" of the firm typically exceeds its "book" or liquidating value, then the real deficiency of cash fines is that they cannot be paid out of expected earnings, but it is precisely this source of value against which the equity fine is levied. To give an example, a young company with excellent prospects may have a very low book value, limited cash resources and little borrowing capacity with financial institutions. Yet, because of its expected future growth, its stock may trade at a high price-earnings multiple. It is essentially immune from high cash fines because it has only modest liquid assets, and thus it may be tempted to risk legal sanctions. But an equity fine permits society to reach its future earnings today by seizing a share of the firm's equity (which is, of course, equal in value to the market's perception of the discounted present value of those earnings) (Coffee, 1981: 419-20).

A related advantage of equity fines over cash fines is that they are borne by shareholders rather than by persons beyond the circle of corporate profit-sharing. Cash fines large enough to

At first blush, this proposal may seem unworkable insofar as it would require corporations to confess wrongdoing on the part of its officers or employees and then administer punishment itself, but the empirical reality is that the approach has been used with some success in the United States, most notably by the Securities and Exchange Commission in its campaign against foreign bribery. The basic strategy is that, if the corporation and nominated managerial personnel are threatened with severe enough sanctions in the event of non-compliance (e.g. equity fines or adverse publicity orders in the case of the corporation, jail or weekend detention in the case of personnel), compliance commends itself as the lesser of two evils. It might also be wondered whether this approach would involve too great a sacrifice of due process for individuals subjected to corporate internal discipline (e.g. non-availability of the privilege against self-incrimination), but it would be a piece of fanatical libertarianism to suppose that internal disciplinary systems should carry the same panoply of procedural protections as the criminal justice system: subjection to internal corporate discipline, serious as it often can be, involves neither the expression of condemnation by the state via the stigmatic clout of a criminal conviction, nor the imposition of incarceration.

Organisation reform orders have been proposed, under various labels, by a number of reform agencies and commentators (see e.g. American Bar Association, 1980: 18.162-63, 18.179-84; Fisse, 1973; Stone, 1976; Yale Law Journal, 1979). The basic gist is to require preventive policies or procedures to be modified or introduced where necessary to guard against repetition of an

offence. This approach has recently been recommended under the American Bar Association's STANDARDS FOR CRIMINAL JUSTICE (1980: 18.162-63; 18.179-84) as Standard 18.2.8(a)(v):

> Continuing judicial oversight. Although courts lack the competence or capacity to manage organisations, the preventive goals of the criminal law can in special cases justify a limited period of judicial monitoring of the activities of a convicted organisation. Such oversight is best implemented through the use of recognised reporting, record keeping, and auditing controls designed to increase internal accountability - for example, audit committees, improved staff systems for the board of directors, or the use of special counsel - but it should not extend to judicial review of the legitimate "business judgment" decisions of the organisation's management or its stockholders or delay such decisions. Use of such a special remedy should also be limited by the following principles:
>
> (a) as a precondition, the court should find either (1) that the criminal behaviour was serious, repetitive, and facilitated by inadequate internal accounting or monitoring controls or (2) that a clear and present danger exists to the public health or safety;
>
> (b) the duration of such oversight should not exceed the five and two-year limits specified in standard 18.2.3 for probation conditions generally; and
>
> (c) judicial oversight should not be misused as a means for the disguised imposition of penalties or affirmative duties in excess of those authorised by the legislature.

It should be noted that this proposal would not require the probation service to assume onerous new duties of corporate supervision: where supervision is required, reliance would be placed on "an experienced corporate attorney, a firm of auditors, or a professional director" (American Bar Association, 1980: 18.182-83). Rather, the main question surrounding the ABA model is whether it goes far enough toward providing an effective sanction: the limitations imposed under Standard 18-2.8(a)(v)(A)(2), and (C) make the sentence of continuing judicial supervision remedial in nature whereas in cases of serious wrongdoing it is difficult to understand why corporations should

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not be punished in a way which requires them to take more extensive steps than those which can be imposed in the context of injunctive remedies (e.g. why shouldn't an egregious corporate offender be punished by an organisational reform order requiring it to run a few extra miles by instituting innovative compliance controls?). One possible explanation for conservatism on this front is the traditional perception of probation as a soft sentencing option. If so, provision should be made for explicitly punitive injunctions against corporations as well as for corporate probation.

Were internal discipline and organisational reform orders available as probationary conditions or punitive injunctions, they could be used to overcome the limitations suffered by fines against corporations. First of all, internal discipline orders would enable corporate offenders to be sanctioned in a manner responsive to the problem of maintaining individual accountability for corporate offences: unlike fines, this type of sanction would be targetted directly towards those personnel who had a hand in the offence subject to sentence.

Second, the deterrence trap which confronts attempts to impose heavy cash fines would largely be skirted by recourse to internal discipline or organisational reform orders: the deterrent impact of these sanctions would lie largely in financial or non-financial internal disciplinary sanctions and in detraction from corporate or managerial power, consequences which almost invariably can be borne by corporations without sending them into financial ruin.

Third, internal discipline and organisational reform orders would be much more congruent with non-financial values in organisational decision-making: corporate and managerial power would be affected directly, corporate and managerial prestige would receive at least a glancing blow, and the micro-goals of organisational sub-units would be immediately relevant to a probationary review of suspect standard operating procedures.

Fourth, as far as catalysing organisational reform is concerned, organisational reform orders could be used to insist that corporate defendants react in a manner responsive to any structural or other institutional problems which contributed to the commission of an offence.

Given these advantages over fines, there is a strong case for introducing probation as a sanction against corporations. Numerous points of detail need to be settled and cast in suitable legislative form, but these should not distract attention from the need for a sanction capable of pressing upon the inner nerves of corporate governance.

Adverse Publicity Orders

A third possibility is to make adverse publicity available as a formal court-ordered sanction.

This approach, which goes back to the English Bread Acts of the early nineteenth century, was suggested in 1970 by the US National Commission on Reform of Federal Criminal Laws (the Brown Commission) (see generally Fisse, 1971). Section 405 of the

Brown Commission's Study Draft provided in relevant part as follows:

> When an organisation is convicted of an offence, the court may, in addition to or in lieu of imposing other authorised sanctions, ... require the organisation to give appropriate publicity to the conviction by notice to the class or classes of persons or sector of the public interested in or affected by the conviction, by advertising in designated areas or by designated media, or otherwise ... (US National Commission, 1970).

Although the proposal was never implemented, it has enjoyed considerable support, largely because of a growing realisation that most corporations are highly sensitive about their prestige as an interest over and above (although overlapping with) profits. By contrast, provision has often been made for remedial publicity orders, as under s. 80A of the Trade Practices Act. Section 80A provides that, in the case of contraventions of Part V (relating to consumer protection), a defendant can be ordered to disclose information or to publish advertisements pertinent to such contraventions, and although the wording of the section may be broad enough to cover punitive publicity orders, the object behind the provision was to enable corrective disclosure or advertising to be used as a civil remedy along the lines developed in the US by the Federal Trade Commission (Taperell, Vermeesch & Harland, 1983: 780-81).

Granted that explicitly punitive publicity orders could be made available, in what respects might they help to overcome the limitations of fines?

To begin with, adverse publicity orders against corporate defendants need not be exclusively corporate in orientation but,

with the aid of probation, could also help to promote individual accountability. As Coffee has argued (1981: 429-34), there is a valuable hint to be taken from the McCloy report documenting Gulf Oil's slush funds and bribes (McCloy, 1976). The report, prepared by an outside counsel in response to American SEC enforcement initiatives, not only triggered substantial procedural reforms but also hastened the resignation of officials named in it. Furthermore, the revelations in the report were such as to be picked up by the press, and the report itself became a paperback bestseller.

Taking this cue, Coffee has proposed that corporate offenders be required to employ outside counsel to prepare a McCloy-style report which names the key personnel involved and outlines in readable form what they did. Probationary pre-sentence reports would mandatorily be prepared "in considerable factual depth in the expectation that such studies will either find an audience in their own right or, more typically, provide the database for investigative journalism" (Coffee, 1981: 431).

Second, publicity orders would not fall into the deterrence trap created by limited corporate liquidity: adverse publicity would be used to inflict loss of corporate prestige, without any need to inflict loss of money from cash resources. Sufficient evidence of the importance of prestige to Australian corporations is provided by the growth of corporate image advertising for "quiet achievers" and "big Australians".

Third, publicity orders would be directed primarily toward the infliction of loss of prestige, and hence would achieve congruence with this important non-financial value in organisational decisionmaking. To the contrary, it is sometimes suggested that the main aim of this type of sanction would be to inflict financial loss by discouraging consumers from buying the defendant's product (e.g. Leigh, 1969: 1959-60). But if this were the only aim, cash fines would be a more efficient way of achieving it.

Fourth, although adverse publicity orders would not guarantee any organisational reform of procedures or policies likely to result in a corporation re-offending, they could be used in such a way as to put public pressure on a defendant to move in that direction. Most obviously, it would be possible when framing a publicity order to pay explicit attention to the nature of the steps, if any, taken by a corporation to set its house in order after the commission of an offence. The court imposing sentence could follow up with a bout of further adverse publicity if there was no reform, or favourable publicity if there was reform.

Despite these potential advantages, skeptics have thrown doubt on the extent to which corporate prestige is likely to matter to executives, and have raised the spectre of successful counterpublicity and other problems (see e.g. Packer, 1968: 361; Coffee, 1981: 424-29). Fisse and Braithwaite (1983) have discussed these questions in some detail elsewhere, on the basis of an empirical study of the impacts of adverse publicity in 17 cases involving major US and Australasian companies. Put in a

nutshell, the main conclusion drawn from this range of corporate experience was that senior executives were concerned about their perception that corporate prestige had been battered by the publicity even when the publicity had no adverse impacts on profits. The book argues that the objections raised in the past to the idea of using shame and stigma as a means of controlling corporate behaviour are either more fanciful than real or, if real, could be handled by the responsive design and application of formal publicity orders (Fisse & Braithwaite, 1983: ch. 21).

Community Service

Community service has been required as a condition of probation or non-prosecution in several cases in the US, but in the two best-known instances, United States v. Allied Chemical Corporation Company and United States v Olin Mathieson, payment of money for charitable purposes was involved rather than personal performance of community service by the corporate offender itself. A concrete statutory proposal, together with explanatory comments, has been put forward in another paper by Fisse (1981). In part, that proposal is as follows:

(a) Where a corporation is convicted of an offence the court may make a punitive order (here referred to as a "community service order") sentencing the offender to undertake a project of community service in accordance with the subsequent provisions of this section.

(b) (i) The amount of community service required to be performed shall be quantified in terms of the actual net cost of materials, equipment and labour to be used for the project.

(ii) Unless provided otherwise the maximum cost of community service under a community service order shall be the same as the maximum amount of the fine or monetary penalty applicable to the offence for which the order is made.

(iii) A project of community service shall be performed within two years of the date of sentence unless the court orders otherwise.

(c) (i) A project of community service may be either a project proposed by the offender and agreed to by the court or a project specified by the court.

(ii) A project of community service shall be performed by personnel employed by the offender except where the court is satisfied that the assistance of an independent contractor is necessary to make the best use of the offender's own skills and resources.

(iii) The personnel by whom a project of community service is to be performed shall include representatives from managerial, executive and subordinate ranks of the offender's organisation irrespective of non-implication in the offence for which a community service order is imposed.

(iv) An offender subject to a community service order shall specify which persons are to undertake the required project of community service and, in the case of employees, shall indicate their rank within the organisation.

A community service sanction of the kind proposed above would require corporate defendants to undertake a socially-useful programme involving a commitment of time, effort and available skills. Thus, in Hartnell v Sharp Corporation of Australia Pty Ltd, the microwave oven case in which Sharp was fined $100,000 for misleading advertising, a court armed with the option of ordering a sentence of community service could have required Sharp to undertake various measures in aid of consumer protection. Apart from the possibility of deputising the company to monitor the advertising of other firms in specified media over a given period, Sharp might have been called upon to assist the Standards Association of Australia in the research and development of safety standards for microwave ovens or other electronic products, or alternatively in the testing of competitors' microwave products. Given the

specialised talents and innovative capacity for which corporations are deservedly much-praised, little difficulty is likely to be experienced in finding suitable projects even if, as in the examples above, the projects chosen are tied to the particular context of the offence committed.

Conclusion on Sanctions

All the foregoing sanctions directed against corporations have strengths and weaknesses. Even the much maligned fine has its advantages - it is easily remissible when the defendant is found to have been wrongly convicted; involving no judicial follow-up, it is simple; and it adds to consolidated revenue rather than draining the public purse. As stated earlier, there is no best type of sanction for corporate consumer affairs offenders. To argue that equity fines are better than cash fines is like a defence minister arguing that bombers are better than fighters. An armory of sanctions should be made available so that the courts can do better at the difficult task of imposing sentences which make the corporate world sit up and take notice. Deterrence and internal corporate reform are most likely to be achieved when courts have the capacity to choose a creative sanction which is uniquely suited to the circumstances of each case.

DEFICIENCIES IN ENFORCEMENT

No consumer protection agency in Australia has sufficient resources to mount an adequate prosecution program. This is not to say that the resources required would be massive, let alone to compare the mountains of money wasted elsewhere in the criminal

justice system. Ten officers devoted to developing cases for prosecution would dramatically expand the prosecutorial capabilities of any Australian consumer protection agency. Ten officers taken from any police department would not significantly hamper enforcement performance with respect to traditional crime. What we are talking about, then, is an inconsequential redeployment of governmental resources so as significantly to help overcome structural inequality in law enforcement. Even the most heinous of white-collar predators against consumers are at little risk of prosecution in Australia, whereas police departments have the resources to prosecute children who steal milk money.

It has already been argued that consumer affairs officers need to adopt more proactive strategies if they are to achieve adequate deterrence through prosecution. Active surveys of compliance with various laws are needed. Known white-collar criminals who move from industry to industry and state to state should be targeted and even "sting" operations should be considered to put them out of circulation. For example, consumer affairs investigators could take a number of cars in perfect running order to a trader who is the target of a vehicle repair fraud investigation in order to gather evidence of fraud.

The present research has provided the first opportunity for the Australian public to evaluate the prosecutorial performance of consumer affairs agencies. AFCO believes that deterring consumer affairs offenders through the courts is an important aspect of the performance of governments. Consumer affairs annual reports

should therefore plot the number of prosecutions for each year on a graph which enables discernment of increases or decreases in the number of prosecutions across time. The Australian Institute of Criminology should also record interstate comparisons on consumer affairs convictions across time in its Sourcebook of Australian Criminal and Social Statistics. This would involve no more than keeping the data presented in this report up to date in a centrally available location.

A key question of enforcement strategy is the respective roles of the Trade Practices Commission and the state departments and bureaux. There is virtue in the Trade Practices Commission specialising in big prosecutions against major companies. For the smaller jurisdictions in particular, there will always be a resources and investigative expertise problem in mounting large and complex cases. It could therefore be rational for the smaller jurisdictions to refer their big cases to the Commission for investigation and prosecution. Now that the 1981 Review of Commonwealth Functions Ministerial directive for the Commission to stay out of purely state matters has been lifted, it is open to the Commission to step more fully into the breech.

A naive observer might comment that the states are more successful than the Trade Practices Commission because they do not lose as many cases. The Victorian Ministry of Consumer Affairs lost only two cases out of 26 in 1982-83. In South Australia, out of 359 cases since 1973-74 no more than five have been lost by the Department of Public and Consumer Affairs. However, experience with regulatory agencies across the world

indicates that agencies which impose trivial penalties on businesses will not often have those penalties vigorously resisted because the size of the sanction does not justify the cost of a contest. For an agency which imposes non-trivial sanctions, by international standards the Trade Practices Commission has a good success rate. Against its 92 successful prosecutions to 1983, the Commission has had 24 prosecutions where defendants have been acquitted, or where charges were withdrawn.

Some of the above TPC cases that were lost or withdrawn nevertheless resulted in partial victories for consumers. For example, five of the 24 instances where the TPC was "unsuccessful" relate to one case (George Weston Foods and Ors (1979) ATPR 40-114; (1980) ATPR 40-150)). In this case the TPC alleged that George Weston Foods and three other ACT bread manufacturers "fixed" or controlled the price of bread supplied by them to resellers and consumers in the ACT. The Commission also alleged that the Director of the ACT Employers' Federation had aided and abetted or had been knowingly concerned in the alleged contravention. While charges against the five defendants were withdrawn, this was part of a settlement in which the manufacturers undertook not to announce jointly any increases in bread prices and not to communicate with each other with respect to proposed alterations in bread prices. The case was therefore far from unsuccessful. Waldman (1978) and Fisse and Braithwaite (1983, 243-5) have used the IBM antitrust legislation and other American cases to illustrate the phenomenon of regulatory agencies successfully changing business behaviour even in cases

where the formal legal decision goes in favour of corporate defendants. What often happens is that business organisations change monopolistic or other socially irresponsible behaviour as part of their defence against government legal action.

The TPC is also ahead of other consumer affairs agencies in having publicly announced guidelines for enforcement. The only other agency with such publicly available guidelines is the Victorian Ministry of Consumer Affairs. Let us quote the TPC guidelines in full:

> 21. The Commission directs its consumer protection compliance resources to matters that raise issues of national importance. This requires an assessment of each matter on the basis of its impact on consumer welfare (and fair competition for business) in the national context.
>
> 22. In assessing ISSUES OF IMPORTANCE, regard will be had to whether the conduct:
>
> (a) relates to goods or services that form major items of consumer expenditure
>
> (b) adversely affects consumers e.g. -
>
> - in a significant monetary sense
> - misleads them about their rights
> - raises health or safety risks
> - affects consumers who most need protection
>
> (c) adversly affects competition
>
> (d) is engaged in widely by other firms, particularly larger firms
>
> (e) is continuing
>
> (f) is deliberate with the knowledge that it is a breach of the law
>
> (g) has been the subject of earlier attention.
>
> 23. In assessing the national significance of issues, regard will be had to matters that affect or could affect consumers in more than one State or Territory, to conduct of companies operating nationally and to conduct that is carried on nationally or in more than one State or Territory.

24. The Commission will exercise its discretion as to whether detailed investigations are to proceed. If the Commission decides to take action, it may pursue either one or a combination of the following approaches:

    - investigation and discussion of particular matters with companies which are the subject of the complaint achieving, where appropriate, administrative solutions that ensure that the interests of consumers are promoted and protected

    - court proceedings where exemplary action is appropriate or where the powers of the court are required to bring about a cessation of conduct that is inimical to the interests of consumers

    - the Commission may also issue industry wide guidelines or engage in industry consultations.

    The object is to obtain real compliance with the intention of the Act, and the Commission will take whatever is the most appropriate course of action in the circumstances to achieve that compliance.

25. Breaches by small companies usually will be dealt with by administrative rather than court action. The quantum of consumer detriment involved is often smaller where it arises from the practices of small firms other than from large and important suppliers with whom many consumers deal; there are of course exceptions to that. Apart from that there are numbers of small businesses who have less knowledge of the Act than large firms. However, in cases where the conduct has serious detrimental effects on consumers or is blatant or persistent, court action will be taken against even relatively small companies.

26. Court action will be more likely to be against medium or large sized companies, particularly those that persist in contraventions in spite of earlier warnings, or companies which show blatant disregard for the interests of consumers or are likely to be seen as standard setters for the industry.

The TPC guidelines follow principles quite similar to those which have guided the courts in deciding penalties under the Act (Freiberg, 1983; Taperell, Vermeesch and Harland, 1983: 110-16, 769-73). AFCO supports these guideline as sensible and commends the Commission for making them public to facilitate the very kind of assessment we are now making of them. Other consumer protection agencies should follow the TPC lead.

The TPC guidelines by and large strike a realistic balance which, recognising the severe resource constraints on the Commission, should maximise the compliance impact for the regulatory dollar. AFCO strongly supports the priority accorded to action against large companies. Addition of the following qualification is suggested, however:

> "When conduct by a company poses a threat of death or injury, the size of the company will be irrelevant in determining what action will be taken."

The most important criticism of the TPC enforcement guidelines is that more explicit recognition should be given to general deterrence (as opposed to specific deterrence of the actual offender) as the major goal of enforcement. Discussion of "exemplary action" certainly makes general deterrence an implicit goal, but what is implicit should be made forcefully explicit and set up as a criterion by which TPC performance is evaluated. The Victorian Ministry of Consumer Affairs Enforcement Policy is superior in this regard: It states that a decision to prosecute should be made in the light of "the value of a prosecution and conviction as a deterrent to others".

Given the dismal performance of the states and territories in imposing penalties capable of achieving effective deterrence, the TPC is the greatest hope which consumers now have for the deterrence of illegal conduct which victimises them. Recognising its superior capacity to achieve deterrence compared to weaker state agencies, the TPC should adopt general deterrence as its major goal.

As it takes over more of the punitive compliance work from the states, the Commission might compensate by asking state agencies to take over some of its negotiated compliance activities involving companies within one state.

One impediment to the TPC substantially increasing its flow of prosecutions is the requirement that all consumer affairs prosecutions be approved by the Minister for Home Affairs and Environment. There is no justification for any TPC prosecutions to be quashed politically. Surely the role of politicians is to write the law and the role of the Commission is to enforce it. The delay and duplication from having the Minister reconsider all prosecutions is inefficient and introduces a risk that the law might not be enforced without fear or favour.

SUMMARY OF POLICY RECOMMENDATIONS

The prosecutorial capacity of all Australian consumer affairs agencies is a joke, but only unscrupulous white-collar criminals are enjoying the laugh. AFCO's recommendations are:

1. All governments should significantly increase investment in personnel dedicated to consumer affairs enforcement and investigation work. If necessary, this should be funded by taking resources from some of the lower-priority law enforcement tasks undertaken by relatively very well funded police forces.

2. Selected consumer affairs officers should undertake criminal investigation training with police forces.

3. The populous jurisdictions of New South Wales, Victoria and Queensland could improve their prosecutorial (and other) performance by greater regionalisation of their operations.

4. The tiny consumer affairs jurisdictions of the Australian Capital Territory, the Northern Territory and Tasmania need to be plugged into an enforcement unit of viable proportions by either:

   (a) relying on the Trade Practices Commission for most investigations, or

   (b) making consumer affairs a subunit of a larger business regulation inspectorate (e.g. combination with health inspectors), or

   (c) handing over the consumer affairs function to a federal agency.

5. The Trade Practices commission should have a specialised investigative capability which is made available to all states and territories for difficult cases within their borders.

6. Product safety enforcement will only become a reality in Australia when we have a national Consumer Product Safety Commission with specialised staff, sophisticated testing capabilities and rigorous hazard and accident statistics information systems.

7. Consumer affairs agencies should continue with the philosophy that on receipt of a complaint, redress for the consumer should take precedence over punishment of the trader.

8. Nevertheless, not only should more complaints lead to prosecution, but also less reliance should be placed on complaints in prosecution programs. Consumer affairs agencies should become proactive as well as reactive. Proactive enforcement should include random or focused surveys of compliance with key laws, targeting of known white-collar criminals and even "sting" operations.

9. State and territory agencies should follow the Trade Practices Commission and Victorian leads in issuing prosecution guidelines. The Trade Practices Commission guidelines should assert that general deterrence is the major goal of prosecution.

10. The requirement that consumer protection prosecutions by the Trade Practices Commission must be approved by the Minister for Home Affairs and Environment should be scrapped.

11. Needless to say, a fundamental reason why prosecutions are non-existent in many domains in many jurisdictions is that relevant consumer protection laws simply do not exist in the jurisdictions. Some of the key law reforms needed are documented in the AFCO paper CONSUMER PROTECTION REFORM (1984 edition).

12. Prosecutors should be instructed to explore fully the option of individual as well as corporate charges in consumer affairs cases.

13. Maximum fines of up to $1 million are needed in consumer affairs statutes to deter the worst offences of the largest companies.

14. The cash fine should not be relied upon exclusively as the sanction for corporate offenders under consumer protection statutes. Equity fines, corporate probation, adverse publicity orders and community service orders are key alternatives needed in the sentencing armory for dealing with corporate offenders.

15. Consumer affairs annual reports should plot the number of prosecutions for each year on a graph which will enable the public to discern an increase or decrease in the number of prosecutions across time.

16. The Australian Institute of Criminology should keep the inter-jurisdictional comparison data in this report up to date through regular publication in the Sourcebook of Australian Criminal and Social Statistics.

REFERENCES

American Bar Association (1980). Standards For Criminal Justice, Vol. 3 (Boston: Little, Brown).

Bernstein, Marver H. (1955). Regulating Business by Independent Commission (N.J.: Princeton University Press).

Braithwaite, John (1978). "An Exploratory Study of Used Car Fraud", in Paul R. Wilson and John Braiuthwaite (eds), Two Faces of Deviance: Crimes of the Powerless and Powerful (Brisbane: University of Queensland Press).

Coffee, John C., Jr (1981). "No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment", Michigan Law Review 79: 386-459.

Fisse, Brent and John Braithwaite (1984, in press). "Sanctions Against Corporations: Dissolving the Monopoly of Fines", in Roman Tomasic (ed), Business Regulation in Australia (Sydney: CCH).

Fisse, Brent and John Braithwaite (1983). The Impact of Publicity on Corporate Offenders (Albany, NY: State University of New York Press).

Fisse, Brent (1981). "Community Service as a Sanction against Corporations", Wisconsin Law Review: 970-1017.

Fisse, Brent (1980). "Criminal Law and Consumer Protection", in A.J. Duggan and L.W. Darvall (eds), Consumer Protection Law and Theory (Sydney: Law Book Company).

Fisse, Brent (1973). "Responsibility, Prevention, and Corporate Crime", New Zealand Universities Law Review 5: 250.79.

Fisse, Brent (1971). "The Use of Publicity as a Criminal Sanction Against Business Corporations", Melbourne University Law Review 8: 107-150.

Freiberg, Ari (1983). "Monetary Penalties Under the Trade Practices Act 1974 (CTH)", Australian Business Law Review 11: 4-26.

Hopkins, Andrew (1978). The Impact of Prosecutions under the Trade Practices Act (Canberra: Australian Institute of Criminology).

Leigh, Leonard H. (1969). The Criminal Liability of Corporations in English Law (London: Weidenfeld and Nicholson).

Lower, Ann K., Ann Averyt and David Greenberg (1983). On the Safe Track: Deaths and Injuries Before and After the Consumer Product Safety Commission (Washington D.C.: Consumer Federation of America).

McCloy, John J. (1976). The great Oil Spill: The Inside Report (New York: Chelsea House Publishers).

Packer, Herbert L. (1968). The Limits of the Criminal Sanction (Stanford: Stanford University Press).

South Australia Criminal Law and Penal Methods Reform Committee (1977). Fourth Report, The Substantive Criminal Law (Adelaide: South Australian Government Printer).

Stone, Christopher D. (1975). Where the Law Ends: The Social Control of Corporate Behavior (New York: Harper & Row).

Tapperell, G.Q., R.B. Vermeesch, and D.J. Harland (1983). Trade Practices and Consumer Protection (Sydney: Butterworths).

Trial Magazine (1983) "Consumer Group Cites CPSC as Catalyst in Reducing Accidents and Deaths", Trial: 14.

United States National Commission on Reform of Federal Criminal Laws (1970). Study Draft (Washington, DC: United States Government Printing Office).

Yale Law Journal (1979). "Structural Crime and Institutional Rehabilitation: A New Approach to Corporate Sentencing", Yale Law Journal 89: 353-75.