

nation of the Tribunal".<sup>9</sup> Nevertheless, the new sub-section does have the effect of reducing the independent decision-making power of the Tribunal and this raises the issue of whether or not the government will legislate again to whittle away further powers of the Tribunal.

The effect of the amendments is that in a small percentage of cases there is a reversion to the pre-1968 system of the hearing of planning appeals, where the Minister appointed delegates to hear the appeal and he could accept or reject their recommendations. Similarly, under the new amendment the Minister hears recommendations from the Tribunal and presumably he can accept or reject the recommendations made. The amendments to s. 21 of the *Town and Country Planning Act* 1961 mean that the Tribunal is no longer the final arbiter of all planning disputes. In certain instances the government of the day has power to make final determinations on cases involving future planning policy for an area or region, as the Governor in Council is empowered to step into the shoes of the Tribunal.

## LEGISLATIVE COMMENT

### THE MARKET COURT ACT

T. PAGONE\* AND T. CUNNINGHAM\*\*

In 1978 the Victorian Parliament enacted legislation establishing a Market Court.<sup>1</sup> This comment examines and evaluates the functions and procedures of this legislation which is aimed at protecting consumers and regulating traders.

In announcing the legislation, the then Minister for Consumer Affairs, Mr Ramsay, stated that it represented an attempt to regulate or eliminate those traders who have thus far been able to avoid the impact of Victoria's existing consumer-orientated legislation, those traders "whose main concern seems to be to take from the consumer without giving value in return".<sup>2</sup> The new Act adds to the existing consumer legislation a power vested in the Director of Consumer Affairs to take action against a trader who in the opinion of the Director has "repeatedly engaged in conduct that is unfair to consumers".<sup>3</sup> The potential magnitude of this addition is vast, as the Act has created the machinery whereby trading practices which are deemed unfair can be prevented without the need for further ad hoc

<sup>9</sup> S. 21(4J) *Town & Country Planning Act* 1961.

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<sup>1</sup> *Market Court Act* 1978 (Vic.) commenced on 1 June 1979 (hereinafter referred to as "the Act").

<sup>2</sup> *Victorian Parliamentary Debates* (Hansard) 19 October 1978, 4936.

<sup>3</sup> S. 15.

legislation as was required with practices such as door-to-door selling and mock auctions.

Until now the Victorian consumer protection legislation has been contained largely in the *Consumer Affairs Act 1972* (Vic.), the *Small Claims Tribunals Act 1973* (Vic.) and the *Motor Car Traders Act 1973* (Vic.).

The *Consumer Affairs Act 1972* has three functions: first, it establishes the Consumer Affairs Bureau<sup>4</sup> as a market "watchdog"; secondly, it prescribes a series of prohibited or regulated practices;<sup>5</sup> and thirdly it gives the Director the power to initiate proceedings on behalf of consumers in certain circumstances.<sup>6</sup> The powers of the Director to take action against a trader are narrowly defined and controlled, whereas under the *Market Court Act 1978* (Vic.) the Director's powers *vis-a-vis* the trader are greatly expanded and a special court is established to hear the matter.<sup>7</sup>

The *Small Claims Tribunals Act 1973* establishes a quasi-judicial body<sup>8</sup> in which a consumer may bring an action against a trader in a relatively inexpensive and informal setting, providing it is a "small claim" as defined by that Act,<sup>9</sup> that is, that the claim does not exceed \$1,000 in either the amount of money claimed or the monetary value of work required to be performed. The Tribunal first seeks a settlement by conciliation and only if that fails does it actually adjudicate.<sup>10</sup>

The *Motor Car Traders Act 1973* establishes a licensing scheme for car dealers<sup>11</sup> and a committee with a dispute-solving function.<sup>12</sup> In addition certain compulsory practices are prescribed.<sup>13</sup>

The machinery of these last two Acts is unaffected by the new legislation; the consumer is given no new form of redress against the trader and is largely denied access to the new Market Court.

### Personnel

When sitting, the Market Court will comprise three members: the President, who is to be a County Court judge, one person to represent the interests of traders and another, the interests of consumers.<sup>14</sup> The latter two will be chosen from a panel to be selected by the government.<sup>15</sup>

<sup>4</sup> S. 8.

<sup>5</sup> Trading stamps or coupons (s. 11); false or misleading advertising (s. 13); misleading marking of prices (s. 13A); mock auctions (s. 13B); door to door sales (s. 14); unordered goods and services (s. 21); pyramid (s. 32A) and referral selling (s. 32F), and bait advertising (s. 13(2A)).

<sup>6</sup> The Director may do so when a consumer has made a complaint under that Act and he is satisfied that the consumer has a cause of action or a good defence; he must also consider it to be in the public interest to do so. The amount in question must not exceed \$10,000 (s. 9B(1) and (2)).

<sup>7</sup> *Market Court Act 1978* Part 1, Division 2.

<sup>8</sup> S. 3.

<sup>9</sup> S. 2(1).

<sup>10</sup> S. 9(1).

<sup>11</sup> S. 14.

<sup>12</sup> S. 7.

<sup>13</sup> Form of agreement of sale (s. 30); keeping of a purchases book (s. 26); guarantees for certain secondhand cars (s. 41).

<sup>14</sup> S. 4.

<sup>15</sup> S. 5.

Advertisements appeared in the press calling for consumer groups and business and trade associations to nominate people for the consumers' and traders' panels respectively.<sup>16</sup>

As a result eight people were appointed to the traders' panel and six to the consumers' panel.<sup>17</sup> Since only the names of these people were published, nothing can be said as to the expertise they may bring to bear in actions before the Market Court.

The President will decide all issues of fact and law and make the actual decision of the Court. The Act does not define in any detail the functions of the other two members; rather, they will assist the President in any way required, including advising him on any matter other than a question of law,<sup>18</sup> but they are precluded from participating in the making of decisions or determinations. The possible functions likely to be awarded to the other two members will have to come from a narrow range. Their most likely task will be to present information and opinions e.g. evidence or specialised data with which, by their background, they are made competent to deal. Any such function would have to stop short of giving recommended decisions, lest the President, in adopting such decisions, should be seen as having delegated his judicial function, contrary to the scheme of the Act, and contrary to the general principle that where exclusion from earning one's livelihood is concerned there can be no implied delegation of judicial-type functions.<sup>19</sup>

The presence of these advisers may allow the consumer's interests to be placed before the Court where he would otherwise have no access. Also, where the consumer may have access the function of the member from the Consumer Panel may well help to balance any advantage a trader may have by virtue of more expensive legal representation (at least on factual issues if not on law).

### Consumers

The Act affords protection to "consumers", who are defined in section 2: "Consumer" means a person (not being a corporation) —

- (a) who buys or hires goods otherwise than for re-sale or letting on hire or than in the course of or for the purposes of a business carried on by him or by a partnership of which he is a member; or
- (b) for whom services are supplied for fee or reward otherwise than in the course of or for the purposes of a business carried on by him or by a partnership of which he is a member."

In excluding corporations from "consumers" the Act conforms with Victoria's other consumer legislation.<sup>20</sup> Since the *Market Court Act 1978*

<sup>16</sup> The Melbourne *Sun*, 17 January 1979, 5.

<sup>17</sup> "Traders' panel": Kenneth Fraser Cassin, John Michael Fulton, Paul Alexander Jones, Donald Alexander Sandy, John Edmund Collins, William Hugh Callister, Peter Frankel and John Wesley Poulton.

"Consumer's panel": Francis Barry Napthine, Derek Lionel Pay, Suzanne Margaret Russell, Robert William Gibson, John Bruce Paul and Janet Grace Galley.

<sup>18</sup> S. 8.

<sup>19</sup> *Vine v. National Dock Labour Board* [1957] A.C. 488.

<sup>20</sup> S. 9 *Consumer Affairs Act 1972* (Vic.); s. 2(1) *Small Claims Tribunals Act 1973* (Vic.).

is designed to fill a gap in consumer legislation it ought not to follow the existing provisions with this formula. One must question the premise upon which "consumers" are defined because one of the most glaring gaps in our legislation, the narrow definition of consumer, remains unfilled.

In its ordinary sense the word "consumer" means one who uses an article.<sup>21</sup> Why then are "corporate consumers" excluded? The legislature may have assumed that corporations do not need protection and that by virtue of their incorporation they acquire immunity to the vices of the market place. Such an assumption ignores commercial reality—there is just as much scope for inequality of bargaining power between corporations as there is between natural persons and corporations. Alternatively, the legislature may be using consumer protection as a basis to discourage the use of the corporate veil by small business people. Apparently not, since the further restriction that goods bought or hired and services supplied "for the purposes of a business" carried on by the consumer are not within the definition. There appears to be no logical basis for excluding corporate consumers.

A different approach is taken by the *Trade Practices Act 1974* (Cth.) which defines consumers as follows:<sup>22</sup>

- "For the purposes of this Act, unless the contrary intention appears—
- (a) a person who acquires goods shall be taken to be a consumer of the goods if the goods are of a kind ordinarily acquired for private use or consumption and the person does not acquire the goods or hold himself out as acquiring the goods for the purposes of re-supply; and
  - (b) a person who acquires services shall be taken to be a consumer of the services if the services are of a kind ordinarily acquired for private use or consumption and the person does not acquire the services for the purposes of, or in the course of, a profession, business or for a public purpose."

Within this definition a corporation may well be a consumer, subject only to the limitation that the goods acquired are of the sort ordinarily acquired for private use or consumption as opposed to commercial use. The Commonwealth Act recognises that not everything a corporation acquires is for the purposes of production—even a corporation has "private" needs and, for example, a company buying a car for the use of one of its travelling salesmen would be a consumer. In respect of services, even the *Trade Practices Act 1974* is rather restrictive and effectively excludes corporate consumers by the "course of business" requirement.

We submit that the definition of consumer in the *Trade Practices Act 1974* in respect of goods, is the more realistic appraisal of "users" who require legislative protection. The *Market Court Act 1978* should have adopted this approach and applied it not only to goods but also to services. We can see no logical reason for a different approach to goods vis-a-vis services, such as the *Trade Practices Act 1974* employs. In respect

<sup>21</sup> *Oxford English Dictionary* definition paraphrased.

<sup>22</sup> S. 4(3).

of both categories of consumables a corporation has uses not directed to the purposes or resupply or production—the corporation which purchased a vehicle for its travelling salesman will consume mechanical services in maintaining the vehicle.

The *Market Court Act* 1978 may also exclude an increasingly numerous class of “consumers”, the bodies corporate of strata title sub-divisions.<sup>23</sup> Section 14 of the *Strata Titles Act* 1967 (Vic.) constitutes the registered proprietors of strata units to be a body corporate. Although such a body corporate is not subject to the provisions of the *Companies Act* 1961 (Vic.)<sup>24</sup> it would nevertheless appear to be beyond the definition of “consumer” in the *Market Court Act* 1978.<sup>25</sup> Since the *Strata Titles Act* 1967 imposes duties on bodies corporate to provide certain services<sup>26</sup> (for example, in maintaining the common property), duties which may require employing the services of tradesmen, the gap in persons subject to consumer protection is even more worthy of being remedied—the legislature forces people living in units into the fiction of a corporation and then deprives them of consumer rights.

Trustee companies, which may be established primarily for taxation purposes, are also excluded. Although these companies may not be in a stronger bargaining position than a natural person, the legislature excludes them by its restrictive definition of “consumers”.

### Traders

Section 2 of the Act defines “trader” to mean:

“. . . a person who carries on a business of supplying goods to or providing services for any person.”

Corporate and non-corporate traders are treated alike. Service-providing traders subject to statutory licensing or similar schemes are excluded from the ambit of the Act.<sup>27</sup> This exclusion is a curious limitation upon the jurisdiction of the Court in view of the criticisms levelled at licensing as a regulatory tool by the Minister in his second reading speech.

Mr Ramsay alluded, *inter alia*, to the fact that consumers may be lulled into a false sense of security when dealing with licensed traders whom they may regard, simply by virtue of their being licensed by a government agency, as being virtually government guaranteed.<sup>28</sup> He further claimed that such schemes expose reputable traders to the same bureaucratic intervention as the unscrupulous, an undesirable result for the business community.<sup>29</sup> In spite of this, the Act reinforces such schemes. Rather than attempting to solve the problems inherent in licensing as a regulatory mechanism, the Act leaves such schemes fully intact and prohibits the Market Court from dealing with such traders.

<sup>23</sup> *Strata Titles Act* 1967 (Vic.).

<sup>24</sup> S. 14(2).

<sup>25</sup> And also beyond the definition of “consumer” in Victoria’s other consumer legislation.

<sup>26</sup> S. 15(1).

<sup>27</sup> S. 3.

<sup>28</sup> Hansard, *op. cit.*, fn. 2, 4936.

<sup>29</sup> *Ibid.*

Section 3 excludes not only such professionals as doctors and lawyers who have quite rigorous ethical standards. If only such professions were excluded, where expertise may be a critical factor in an ethical dispute, then a strong argument exists for leaving those professions to regulate themselves. However, the actual number and diversity of traders excluded by this provision is staggering.<sup>30</sup>

We submit that the Act ought to have established a single jurisdiction in the Market Court which could enforce the standard of "unfair conduct" prescribed in the Act itself and the standards prescribed by the licensing statutes. Perhaps the administering of justice by a single body could achieve uniformity of approach to the multifarious standards prescribed by Parliament.

### *Straw Companies*

Since the definition of trader includes both natural and corporate persons, a trader may be able to evade the thrust of the Act by using a "straw" company as his trading vehicle. The Act does not specifically provide a means to counter this avoidance technique. Section 17 goes part of the way in providing that where the Director of Consumer Affairs applies for an order against a trader being a company the Court may also make an order prohibiting persons concerned or taking part in the management of that company from

"consenting to or conniving at the engaging of such conduct by that company or any other company in whose management he is concerned."

We submit that such a provision is insufficient to reach behind the "corporate veil" since two conditions precedent must be satisfied: first, an application by the Director of Consumer Affairs must be made against a company; and secondly, the Court must find that *the* company "has repeatedly engaged in unfair conduct", that is, that particular company. Conceivably, if an unscrupulous trader operated three companies, each of which dealt unfairly only once, then although for practical purposes there has been repetition, section 17 could not be invoked as no *one* of those companies could have an order made against it. The provision does prevent a person using "new" straw companies set up after an order is made against him, but it does not stop the shrewd operator using several companies which were all set up at a much earlier stage. An unscrupulous trader, by employing a modicum of forethought and expending the cost of incorporation of several companies, can avoid the thrust of the Act. Perhaps the very traders against whom the Act is directed, those whose main concern is to take from the consumer without giving value in return, are the ones most likely to avoid it.<sup>31</sup>

<sup>30</sup> Included amongst these would seem to be auctioneers, gun dealers, estate agents, finance brokers, money lenders, hawkers and pedlars, liquor vendors, second-hand dealers, motor car traders, milk vendors, architects, nurses, optometrists, hair-dressers, chiropodists, dentists, pharmacists, veterinary surgeons, psychologists, physiotherapists, chiropractors, osteopaths and tax agents.

<sup>31</sup> It is no answer that the principles of company law may allow for the lifting of the corporate veil and thereby allow action to be taken directly against the individual—the Act ought to prescribe the method for so doing.

### Access

The Act is not designed to provide consumers with a direct means of redress against traders; rather, it provides the executive arm of government with a judicial framework within which to prevent individual traders who abuse accepted standards of market morality from trading or continuing to engage in a particular practice.

It is the Director of Consumer Affairs who has the standing to commence an action against a trader.<sup>32</sup> Even when the requisite conditions for an action exist, the Director is not obliged to proceed—he is given a wide discretion:

“Where it appears to the Director that a trader has engaged in conduct that is unfair to consumers the Director *may* make application. . . .”<sup>33</sup>

The Act is silent as to the factors upon which the Director ought to exercise his discretion.<sup>34</sup>

Although it is theoretically possible that a disgruntled consumer “may” be able to have the action (or inaction) of the Director reviewed by the Supreme Court<sup>35</sup> the problems of standing and the nature of the available remedies<sup>36</sup> render the opportunities and likelihood of successful review negligible. Even the recent “modernisation” of public law proceedings effected by the *Administrative Law Act 1978* (Vic.) would not cover decisions such as those the Director has to make in deciding whether to seek an order against a trader.<sup>37</sup>

We submit that the *Market Court Act 1978* ought to be more explicit as to when the Director must act and that there ought to be some process of accountability. In the absence of a procedure for consumer class actions, the discretion vested in the Director is most unlikely to achieve much in the cause of consumer protection. Consumers need direct access to a specialised tribunal and they need to have that access on a “class” or “representative” basis so that even those who cannot in their own right afford to have the Court determine their individual rights are nonetheless covered by tribunal decisions. The Australian Law Reform Commission has said in relation to class actions:

“Nor are small claims tribunals an alternative. They are simply not designed to deal with complaints of systematic or repetitive misconduct.”<sup>38</sup>

The Commission, in proposing a class action system tailored to Australian conditions, did cite public interest actions commenced by an appropriate governmental agency as an alternative. The *Market Court Act*

<sup>32</sup> S. 15(1).

<sup>33</sup> *Ibid.*; emphasis added.

<sup>34</sup> See *infra*.

<sup>35</sup> For example by a Writ of Mandamus, which could lie against a Crown servant as a “*persona designata*”.

<sup>36</sup> For example, a Writ of Mandamus may force the Director to exercise his discretion, but will not lie to force the exercise of that discretion in any particular manner.

<sup>37</sup> S. 2.

<sup>38</sup> Australian Law Reform Commission, *Access to the Courts—II: Class Actions*, Summary of Discussion Paper No. 11, June 1979, 3.

1978 tends more to the latter approach, but by giving the Director such a wide discretion it effectively negates any possible advantage to consumers. We favour the use of a set of legislated criteria determining when the Director must commence an action against a trader since the onus is then on the appropriate bureaucrat. Only if the Director failed in his "duty" would a consumer need to look to the Courts, whereas, in a class action the initiative would rest with a member of the public. If the Government is genuine about consumer protection, then it is reasonable that its appointed functionary should be the one who must take the lead and that the legislature tell him when he must do so.

In coming to this conclusion, one must question whether a separate court is required to effect this task or whether actions commenced in one of the existing courts would have sufficed. Since it seems fair to say that the new concept of "unfair conduct", which is discussed later in this comment, is not such as to be beyond those who preside over our existing courts, would it not also be fair to conclude that the creation of a new body is wasteful, that the powers vested in this new court could have been vested in an existing court and that the right of the Director to commence actions could simply have been incorporated into an expanded s. 9 of the *Consumer Affairs Act 1972*? The answer appears to us to depend on whether the Market Court will possess a degree of expertise setting it apart from any existing forum.

#### *Director's Discretion*

The Court is empowered by s. 15(1) to make orders in respect of a trader where five conditions are satisfied: (1) Where it appears to the Director (2) that in the course of a business (3) a trader has repeatedly engaged in conduct (4) that is unfair and (5) the Director has applied to the court for an order.

The most striking feature emerging from this cluster of conditions is that the court can only function at the discretion of the Director, and moreover, that the discretion is exceptionally wide. The conduct must first "appear" to the Director to warrant invoking the sanction of the Court, but there is no obligation on him to take notice of any complaint (or series of complaints) nor is there specific machinery or provision through which aggrieved consumers either singly or collectively may request that the Director take proceedings.<sup>39</sup>

The second aspect of the Director's discretion links in with the central concept of "unfairness" pervading the legislation. Section 15(2) provides that certain conduct shall be deemed to be unfair to consumers. Thus conduct is deemed to be unfair to the consumer if it is "misleading" or "by means of which" the consumer is taken "advantage of" or which induces a consumer to enter into an agreement the terms of which are such "that no reasonable person would regard them as just".

The breadth of the discretion of the Director becomes apparent when

<sup>39</sup> Note that it is not sufficient that the conduct be deemed unfair, for it must specifically appear to the Director to be so.

it is remembered that it is he who must at first instance decide whether any given conduct fits the description of "unfair"; it is to him then that in the first instance the consumer must present his case. Indeed, it is important to note that it is a central feature of this Act to give new powers and rights to the Director (and not the consumer) vis-a-vis the trader, and in this sense s. 15(2) is more a defining of the circumstances when the Director may take action rather than creating new law regulating the conduct of traders.<sup>40</sup> The Act creates the machinery by which the Director has power to prosecute; it is a machinery vis-a-vis the Director and trader, not a general law which anyone may rely upon in a court action.

### *Repetition*

The opportunity for the Director to exercise his discretion only arises where the unfair conduct is "repeated" and "occurs in the course of a business". However, even where the Director exercises his discretion and takes action against a trader the court does not have power to prohibit or regulate unless it is also satisfied of the matters.<sup>41</sup> Thus the court is powerless against a trader who on one occasion engages in unfair conduct (however grossly unfair) but must wait until at least a second similar act is committed (or reported).

This limitation attains quite considerable importance when it is remembered that prosecutions must necessarily depend on transactions and activities coming to the notice of the Director (presumably through complaints to him) and it is probably safe to assume that not all unfair conduct will be reported.<sup>42</sup> Ironically, by insisting on a "repetition" of unfair dealings, the Act effectively prohibits the Court from preventing unfair practices whilst "in the bud"; only blossoms may be pruned.

The Victorian legislature's reluctance in this respect is to be contrasted with s. 56A of the *Consumer Protection Act* 1969 (N.S.W.) which provides that where a person "threatens to contravene or fail to comply with" the provisions of the Act, the Commissioner for Consumer Affairs<sup>43</sup> may apply for an injunction "restraining the threatened contravention". Whilst it is clear that the provisions of s. 15(2) of the *Market Court Act* 1978 are broader in their terms than the *Consumer Affairs Act* 1969, the ability of the Commissioner to take action against the mere threat of a breach gives substantial force to his powers and functions of protecting the consumer. We submit that whilst it would not be appropriate to give the Director power to take action against a trader who merely "threatens to be unfair",

<sup>40</sup> It might be said that unfair conduct as deemed by s. 15(2) is not prohibited but that if it is unfair under that section then the Director may take steps to prevent its continuation. The particular trader is then regulated, but traders as a class are not regulated.

<sup>41</sup> S. 16(1).

<sup>42</sup> There is a curious presumption implicit in such a provision that only if misconduct is reported often can it have occurred often; we suggest that there should be a presumption that if the misconduct is once reported it may have occurred more than once.

<sup>43</sup> The New South Wales counterpart of Victoria's Director of Consumer Affairs.

the Director should not be restricted to action in cases of repetition.<sup>44</sup>

### *Strict Liability*

The definition of "unfair conduct" contains none of the adverbs normally used to denote that some consciously deliberate mental state is required in order to engage in such conduct. Where an offence is prescribed in a formula lacking reference to mens rea there is a presumption that mens rea is an element of that offence.<sup>45</sup> It is submitted that mens rea would be required on the part of a trader before it could be said he had engaged in unfair conduct. This provides a further means of avoiding regulation for traders. We submit that strict liability would be appropriate here, for, although this is not always a popular concept,<sup>46</sup> any harshness in relation to the earning of one's livelihood could be mitigated by the fact that even in situations of strict liability offences the defence of "honest and reasonable mistake" is probably available<sup>47</sup> and could also be made available here by analogy to the criminal law. Wider scope for arguments by traders as to their mental state, particularly in relation to the concept of negligence, with its imprecise standards, only seems to reinforce the bias in the trader's favor contained in the Act.

### *Deeds of Assurance*

An integral part of the power of the Director to bargain with traders is the provision of the system of "deeds of assurance". Section 30 of the Act provides that when the Director feels that a trader has repeatedly engaged in unfair conduct he may attempt to obtain from the trader an agreement by which the trader undertakes to operate in a more scrupulous manner.

The provisions relating to these deeds require careful attention for they can be of great tactical advantage: once the Director obtains a deed he is then precluded from seeking an order against the trader, unless the trader fails to comply with the deed.<sup>48</sup> The failure to comply with the deed constitutes an offence<sup>49</sup> and gives the Director power to seek both an order against the trader<sup>50</sup> and the consent of the court to prosecute the trader in respect of the offence of not having complied with the deed.<sup>51</sup>

The trader who enters into a deed of assurance is thus placed in a strategically advantageous position by having two opportunities of avoiding control: first, the court may hold that the deed of assurance is not enforceable;<sup>52</sup> and secondly, the trader may thereafter prove that there has

<sup>44</sup> We do not feel that the Director should be given powers which would give him an effective right to dictate the ethics of market morality: his task is that of administration; but he ought not to have to wait until two or three unsuspecting consumers are "duped" before he can move.

<sup>45</sup> *Sweet v. Parsley* [1970] A.C. 132.

<sup>46</sup> C. Howard, *Criminal Law* (3rd edition, Sydney, Law Book Co., 1977) 388.

<sup>47</sup> *Proudman v. Dayman* (1941) 67 C.L.R. 536.

<sup>48</sup> S. 30.

<sup>49</sup> S. 32(1).

<sup>50</sup> That is, under s. 15(1), which he could have done anyway had he not first sought a deed of assurance.

<sup>51</sup> S. 33: but note that even if the trader fails to comply with the deed and is thus guilty of an offence, the Court must refuse its consent to a prosecution for such offence if it refuses to make an order pursuant to s. 15(1): s. 35(2).

<sup>52</sup> That is, by declining to make an order pursuant to s. 16(1).

been no breach of the deed.<sup>53</sup> The second aspect is undeniably fair, but why should the deed first have to be "approved" by the court.<sup>54</sup> The implicit assumption ought to be that both parties to the deed have consented to its terms and consented to what the court would not be unlikely to have ordered. Therefore the deed ought to be enforceable in the same manner as any other contract between willing parties. The reasons advanced by the Minister that only deeds which reflect possible judgments of the courts should be enforceable<sup>55</sup> implies a distrust of the Director and exhibits a curious ambivalence inherent in the Act: on the one hand the Director cannot be trusted to enter into fair deeds of assurance, whilst on the other hand he is the sole repository of the power to enforce the Act.

The tactical advantage to an unscrupulous trader is that by giving the assurance the Director may not rely on past misconduct alone to seek an order: no order is possible until there is a breach, and further misconduct.

### Orders

Once the Director applies to the court, and if the court is satisfied that the trader "has repeatedly engaged in certain conduct within the meaning of s. 15", it may make an order "prohibiting the trader from engaging in such conduct",<sup>56</sup> and if the court thinks it desirable (with or without application by the Director) it may "in addition" make an order

"prohibiting the trader from entering in the course of a business into contracts with consumers unless the contracts are in such form or comply with such terms and conditions as the Court may specify."<sup>57</sup>

Despite the language of these provisions it seems the consumer may be deprived of any benefit of such an order, for s. 18(1) provides that a contract entered into by a trader shall not be

"illegal or void or unenforceable . . . by reason only that it contravenes or does not comply with an order made by the court."

To avail himself of the potential benefit of an order, the consumer must apply to the court to have the contract declared void, and such application must be made "within three months" after the date on which the contract was entered into.<sup>58</sup> But even then the court is given the discretion of declaring the contract void only where "it appears to the court desirable to do so".<sup>59</sup> Thus, as between the consumer and trader, the order of the Court may be of no effect because (a) the consumer's application was not brought within three months of the contract, (b) the Court's order pursuant to s. 16 was made more than three months after the contract was entered

<sup>53</sup> In which case the court would have no power to make an order.

<sup>54</sup> S. 33 requires the Director to seek the consent of the Court to prosecute pursuant to s. 32 or to seek an order pursuant to s. 16, if the deed is breached.

<sup>55</sup> Hansard, op. cit., fn. 2, 4936.

<sup>56</sup> S. 16(1).

<sup>57</sup> S. 16(2). By subsections (3) and (4) the Court is given power to make interim orders of the same nature pending its final determination.

<sup>58</sup> S. 18(2).

<sup>59</sup> S. 18(3).

into or (c) because the court may not consider it desirable to declare the contract void.<sup>60</sup>

Even the consumer who wins his case and has a contract declared void is still denied immediate redress: he must pursue his claim in a court of "competent jurisdiction".<sup>61</sup> Where the claim is small enough and can otherwise be brought within the jurisdiction of the Small Claims Tribunal<sup>62</sup> the consumer may be put to relatively little expense (if not little effort). Otherwise even the relatively inexpensive Magistrates' Court<sup>63</sup> with its \$600 limit<sup>64</sup> will be of benefit in few cases unless the consumer wishes to abandon the excess of his claim over the \$600 limit.<sup>65</sup>

It seems quite anomalous that the consumer should be put to the added delay and expense of pursuing his claim outside the Market Court, especially when it is remembered that the President of the Court must "be a judge of the County Court"<sup>66</sup> and further that he

"alone shall decide all questions of law and of fact and shall make all decisions and determinations required to be made or given by the Court."<sup>67</sup>

We submit that to avoid unnecessary delay, cost and the duplication of workload, jurisdiction over these matters should be vested in the Market Court.

The disincentive to the consumer is reinforced by the prohibition on the awarding of costs.<sup>68</sup> As a matter of policy it seems curious that although it is the trader's misconduct which forces the consumer to take this remedial action (and even then only after a seemingly tortuous process during which first the Director must take action and then the Court must take action) the consumer must do so at his own expense.<sup>69</sup> Either the consumer ought to be able to recover his costs or the contract ought to be automatically void when a court order is breached. It is strange that the latter course has not been adopted, for the legislature has seen fit to declare a public policy on what is unfair conduct, yet it is unwilling to

<sup>60</sup> Not only is there no guidance to the Court by setting out the criteria on the basis of which to adjudicate "desirability", but there is the possibility of a curious policy which would allow the Court to make orders and then rob those orders of efficacy. Of course the foregoing assumes that the consumers are aware of orders that have been made, but we submit that most consumers are likely to be totally unaware of the orders made, despite the provisions requiring publication: s. 28.

<sup>61</sup> S. 18(3).

<sup>62</sup> See s. 15(1) and the definition of "small claims" in s. 2(1) *Small Claims Tribunals Act 1973*.

<sup>63</sup> Relative to the County and Supreme Courts.

<sup>64</sup> Assuming of course that the claim can be brought under the special jurisdiction of the Magistrates' Court, which is at present still at this limit: s. 50(1)(d) *Magistrates' Courts Act 1971* (Vic.).

<sup>65</sup> S. 64 *Magistrates' Courts Act 1971*.

<sup>66</sup> S. 4(4)(a).

<sup>67</sup> S. 7(1).

<sup>68</sup> S. 12. The only exception appears to be in respect of costs of appeals to and questions reserved for the Supreme Court: see *Market Court (Special Cases and Appeals) Rules 1979*, No. 187, inserting Order 16 Chapter II, *Rules of the Supreme Court*.

<sup>69</sup> Compare with s. 9B *Consumer Affairs Act 1972* where the Director is liable for costs awarded.

declare that contracts in breach of such policy are to be void.

We view it as a defect in the legislation that the orders lack efficacy. In principle the nature of the orders is precisely what would be required since they have the characteristic of injunctions prohibiting conduct or contracts, but these injunctions ought to be supported by strong enforcement measures and should create consequences which make the breach of an order a serious occurrence not to be lightly treated. Instead the legislature creates a "procedural jungle" which operates to dissuade the consumer though he has not committed any misconduct.

Moreover, the scope of orders possible should be increased to allow recovery of moneys paid under contracts to be refunded or damages awarded in appropriate cases. We can see no reason in principle why the functions of the Small Claims Tribunal and the Market Court should not be administered by the one body. At present the former body has limited powers in respect of "small claims" as defined in the Act<sup>70</sup> which to some extent overlaps the concerns of the Market Court. The legislature in creating this new body has denied itself the opportunity to make use of the already existent expert body and has failed to make efficient use of the available resources; rather, it has split what can conceptually and practically amount to a homogeneous area of concern. Schematically we now have a confused structure which overlaps to a small extent, but is uncoordinated.

### *Penalties*

The Act provides for a penalty of \$5,000 for the failure to comply with an order of the court<sup>71</sup> or deed of assurance,<sup>72</sup> this being more realistic than the penalties of Victoria's other consumer-orientated legislation.<sup>73</sup> On the other hand, there is no sanction of increased penalties for further offences. Whilst small traders may well be warned off after one \$5,000 fine, it is not unthinkable that larger corporations will merely treat this as a trading expense; although the threat of damaged reputation by publication of the orders of the Court<sup>74</sup> may prove otherwise. Only time will tell whether the penalties will be effective.

### *Conclusion*

In announcing the legislation, the Minister cited the case of a woman who, upon request by a contractor effecting renovations to her house, made progress payments after which the contractor disappeared. Since the contractor had no assets in his own name, the woman had no remedy—the work remained incomplete and her money was lost.<sup>75</sup> It is important

<sup>70</sup> S. 2(1) *Small Claims Tribunals Act 1973*.

<sup>71</sup> S. 29.

<sup>72</sup> S. 32.

<sup>73</sup> For example: *Consumer Affairs Act 1972* s. 23, \$500 penalty for unsolicited goods; s. 20, up to \$400 penalty for attempting to exclude door-to-door sales provisions; *Motor Car Traders Act 1972* (Vic.) s. 54, \$500 for failure to disclose that vendor is a motor car trader; s. 30(2), \$250 for failure to use prescribed agreement for sale.

<sup>74</sup> S. 28.

<sup>75</sup> *The Ballarat Courier*, 21 October 1978.

to emphasise to those who believe that the Act is somehow meant to aid the plight of people in similar positions, that the new Act would be of absolutely no use, and if the legislature believed that the Act would be of use in that situation it is labouring under a great misapprehension. The major obstacles making the Act ineffective are:

- (a) the Act excludes from its definition of "consumers" many that should be included,
- (b) the Act does not apply where the trader is licensed or registered,<sup>76</sup>
- (c) the consumer is deprived of direct access to the new Court<sup>77</sup> and even if the Director is persuaded to make application and the tortuous road leading to the Court making an order is surmounted, the consumer must resort to pursuing the claim in a court of competent jurisdiction,<sup>78</sup>
- (d) an isolated act of misconduct (however gross) is not "unfair" within the meaning of s. 15(1), which demands repetition.

In fact the actual operation of the Act is far more modest than the announcement of the Minister would suggest and it is important to be precisely aware of its potential to avoid misunderstanding and disappointment. Previous consumer legislation has been directed at prohibiting particular practices, regulating certain industries or altering the court structure to provide easier access for consumers. The *Market Court Act* 1978 is quite different in that it offers a means of isolating traders and their activities and preventing those activities without the need for further legislation. Its most effective implementation would be against a nascent industry; for example the Act could have prevented the practice of mock auctions without the need for specific legislation. As such, the Act operates as a Damoclean sword against future "swindlers". We have no doubt that this limited function can be of great value and, moreover, that in view of this potential, albeit narrow, the Act is an important piece of legislation which regrettably is not receiving sufficient prominence. With the suggested amendments, the potential could be converted to a kinetic consumer force.

<sup>76</sup> S. 3.

<sup>77</sup> S. 15.

<sup>78</sup> S. 18(3); provided, of course, that the action is brought within three months of the making of the contract.

