



## Trade Practices Amendment (Australian Consumer Law) Bill 2009

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Law and Bills Digest Section

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## Trade Practices Amendment (Australian Consumer Law) Bill 2009

**Date introduced:** 24 June 2009

**House:** House of Representatives

**Portfolio:** Treasury

**Commencement:** There are various commencing dates as set out in the table in clause 2.

**Links:** The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

### Purpose

The purpose of the Bill is to:

- amend the *Trade Practices Act 1974* (TPA) to establish the Australian Consumer Law (ACL)<sup>1</sup> as a schedule to that Act, including provisions to address unfair contract terms
- introduce into the TPA new penalties, enforcement powers and consumer redress options, and
- amend the *Australian Securities and Investments Commission Act 2001* (ASIC Act) to introduce corresponding provisions that will apply in respect of financial services, in relation to unfair contract terms, penalties, enforcement powers and consumer redress options.

### Background

#### Productivity Commission report

On 11 December 2006, the then Treasurer, the Hon. Peter Costello requested that the Productivity Commission undertake an inquiry into Australia's consumer policy framework. The principal legislative provisions which regulate Australia's consumer policy framework are contained in the TPA and equivalent provisions in state and territory Fair Trading Acts.

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1. The Australian Consumer Law is discussed on pages 10–11 of this Digest.

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According to the ‘terms of reference’, the Productivity Commission was to consider, amongst other things:

- the need to ensure that consumers and businesses, including small businesses, are not burdened by unnecessary regulation or complexity
- the shared responsibility of the Australian Government and the State and Territory governments for consumer policy, and
- the importance of promoting certainty and consistency for businesses and consumers in the operation of Australia’s consumer protection laws.<sup>2</sup>

### **Business Council of Australia**

In March 2008 the Business Council of Australia published its paper ‘*Towards a Seamless Economy: modernising the regulation of Australian business*’, in which it declared:

Despite the unified image we present to the world, doing business across Australia is made unnecessarily confusing, complex and costly by the inability of governments to make adequate progress in harmonising and rationalising existing regulation. ...<sup>3</sup>

Anyone can think of companies that operate in every state and territory. Our largest retailers, banks, airlines and telecommunications companies operate around the nation... But the exposure to multi-jurisdictional regulation is much broader than just Australia’s largest companies. It goes to a small family business in a regional town alongside a state border, or a single-person operation selling services over the internet to customers in other states.

All of which begs the question: is Australia’s regulatory environment keeping up with the changing face of Australian business?<sup>4</sup>

In practice, a seamless economy is one where the regulatory requirements placed on a business are not determined by geographical location but are consistent across the country.<sup>5</sup>

The Business Council of Australia called on government leaders, via the Council of Australian Governments (COAG), to speed up reform to harmonise regulations across the

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2. Productivity Commission, ‘Review of Australia’s Consumer Policy Framework’, *Productivity Commission Inquiry Report No. 45*, (two volumes), 30 April 2008, p. vii, viewed on 23 July 2009, <http://www.pc.gov.au/projects/inquiry/consumer/docs/finalreport>
  3. Business Council of Australia, *Towards a seamless economy: modernising the regulation of Australian business*, Melbourne, March 2008, p. 3, viewed on 16 July 2009, <http://www.bca.com.au/Content/101371.aspx>
  4. Business Council of Australia, op. cit., p. 7.
  5. Business Council of Australia, op. cit., p. 11.

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country, so that by the end of 2010 businesses would face a consistent environment wherever they operated.<sup>6</sup>

### COAG response

The final report of the Productivity Commission, published on 30 April 2008 recommended the introduction of a single national generic consumer law.<sup>7</sup> In addition, the Productivity Commission stated that ‘the new law should include a provision voiding ‘unfair’ contract terms that have caused consumer detriment’.<sup>8</sup> COAG gave its broad agreement to those recommendations on 2 October 2008.<sup>9</sup>

### The consultative process

On 17 February 2009, the Treasury issued a consultation paper entitled, ‘*An Australian Consumer Law: Fair Markets—Confident Consumers*’, which was intended to explain the nature and scope of the proposed reforms and seek views on some aspects of those reforms.<sup>10</sup> The Treasury received 101 submissions, of which 87 were public submissions.<sup>11</sup>

In addition to the consultative process about the broad issues surrounding the introduction of an Australian Consumer Law, the Treasury also launched a more specific consultation

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6. S Burrell, ‘One seamless economy—pronto’, *Sydney Morning Herald*, 18 March 2008, p. 22, viewed on 16 July 2009, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FYKXP6%22>

7. Productivity Commission, op. cit., volume 1, p. 18.

8. Productivity Commission, op. cit., volume 1, p. 2.

9. Council of Australian Government’s meeting, 2 October 2008, viewed 23 July 2009, [http://www.coag.gov.au/coag\\_meeting\\_outcomes/2008-10-02/index.cfm#regulat](http://www.coag.gov.au/coag_meeting_outcomes/2008-10-02/index.cfm#regulat)

10. The Treasury, ‘*An Australian Consumer Law: Fair Markets—Confident Consumers*’, Commonwealth of Australia, 17 February 2009, viewed 23 July 2009, [http://www.treasury.gov.au/documents/1484/PDF/An\\_Australian\\_Consumer\\_Law.pdf](http://www.treasury.gov.au/documents/1484/PDF/An_Australian_Consumer_Law.pdf)

11. Submissions—An Australian Consumer Law: Fair Markets—Confident Consumers, viewed 23 July 2009, <http://www.treasury.gov.au/contentitem.asp?ContentID=1501&NavID=>

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about unfair contract laws on 11 May 2009.<sup>12</sup> The Treasury received 96 submissions, of which 88 were public submissions.<sup>13</sup>

The primary concerns expressed in submissions to Treasury related to the unfair contracts provisions—particularly the potential effects of the application of those provisions to business-to-business transactions.

## Unfair contract terms

‘Unfair contract terms are those that disadvantage one party but that are not reasonably necessary to protect the legitimate interests of the other.’<sup>14</sup>

### The extent of the problem

In 2006 the Standing Committee on Law and Justice of the Legislative Council of the New South Wales Parliament (the NSW Standing Committee) conducted an inquiry into unfair terms in consumer contracts. The NSW Standing Committee was informed that accurate data collection in relation to unfair contractual terms as a particular consumer issue was not available. Nevertheless

the anecdotal evidence presented by witnesses and submission makers working in the area of consumer complaints, the law and various industries clearly indicates that this is a very real and significant ongoing problem for a large number of consumers in NSW as it is elsewhere.<sup>15</sup>

The Productivity Commission stated:

There is persuasive evidence that notionally unfair terms are commonplace in Australian contracts...However, the rationale for action principally rests on the unreasonable *use* of unfair terms, not their *existence*. This is because, perceptions of their inherent unfairness aside, dormant unfair terms often do not cause detriment to consumers.

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12. The Treasury, ‘*The Australian Consumer Law: Consultation on draft provisions on unfair contract terms*’, 11 May 2009, viewed 23 July 2009, <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1537>
  13. Submissions—the Australia Consumer Law: Consultation on draft provision on unfair contract terms, viewed on 23 July 2009, <http://www.treasury.gov.au/contentitem.asp?ContentID=1547&NavID=037>
  14. Productivity Commission, op. cit., volume 2, p. 149.
  15. Standing Committee on Law and Justice, ‘*Unfair terms in consumer contracts*’, New South Wales Parliament, 23 November 2006, p. 24, viewed on 24 July 2009, [http://www.parliament.nsw.gov.au/Prod/parliament/committee.nsf/0/3ecd89db93b4314eca25722f000b8bc9/\\$FILE/Unfair%20terms%20in%20consumer%20contracts%20Report%2032.pdf](http://www.parliament.nsw.gov.au/Prod/parliament/committee.nsf/0/3ecd89db93b4314eca25722f000b8bc9/$FILE/Unfair%20terms%20in%20consumer%20contracts%20Report%2032.pdf)

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The evidence about the detrimental use of unfair terms is of variable quality. Much of the cited evidence is anecdotal... Nevertheless, there is quantitative evidence from Victoria<sup>16</sup> and from various other countries that suggests that somewhere between about 5 and 15 per cent of consumers might be detrimentally affected by unfair terms.<sup>17</sup>

Based on that evidence, the Law Council of Australia did not support the inclusion of unfair contracts provisions at all, stating that the existing laws on unconscionable conduct in both the TPA<sup>18</sup> and ASIC Act<sup>19</sup> were sufficient.<sup>20</sup>

In addition other submissions, for example from Master Builders Australia, argued that the unfair contracts provisions should not apply to specific industries which are already more than adequately covered by state legislation, such as that which exists in respect of domestic building contracts.<sup>21</sup>

In comparison, Choice supported the introduction of the proposed provisions, particularly in respect of 'essential or near essential services' such as energy and telecommunications.<sup>22</sup>

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16. Consumer Affairs Victoria, 'Unfair contract terms in Victoria: research into their extent, nature, cost and implications', *Research paper no. 12*, Melbourne, October 2007, viewed on 24 July 2009, [http://www.liquor.vic.gov.au/CA256902000FE154/Lookup/CAV\\_Publications\\_Shopping\\_and\\_Services/\\$file/Research\\_paper\\_UCT.pdf](http://www.liquor.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Shopping_and_Services/$file/Research_paper_UCT.pdf)
  17. Productivity Commission, op. cit., volume 2, p. 152.
  18. Sections 51AA–51AC of the TPA prohibit 'unconscionable conduct' but the TPA does not contain a formal definition of the term.
  19. Sections 12CA–12CC of the ASIC Act prohibit 'unconscionable conduct' in relation to financial services but the ASIC Act does not contain a formal definition of the term.
  20. Law Council of Australia, 'Submission—An Australia Consumer Law Discussion Paper', 24 March 2009, p. 4, viewed on 29 July 2009, [http://www.treasury.gov.au/documents/1501/PDF/LCA-Trade\\_Practices\\_Committee.pdf](http://www.treasury.gov.au/documents/1501/PDF/LCA-Trade_Practices_Committee.pdf)
  21. Master Builders Australia, *Submission to Senate Economics Legislation Committee: Trade Practices Amendment (Australian Consumer Law) Bill 2009*, 24 July 2009, p. 4, viewed 5 August 2009, <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=99fe9ec5-efd8-4d63-9a2e-b370bf6584ed>
  22. Choice, 'Submission—An Australia Consumer Law Discussion Paper' 24 March 2009, p. 4, viewed on 5 August 2009, <http://www.treasury.gov.au/documents/1501/PDF/CHOICE.pdf>

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### To whom do the provisions apply?

The exposure draft of the unfair contract terms proposed that these provisions would apply to business-to-business contracts as well as consumer contracts. This was in line with comments by the Productivity Commission that:

Small businesses have a dual role in consumer policy: as well as being suppliers of goods and services, they are consumers in their own right. Indeed, in their dealings with larger businesses, small businesses can face many of the same issues as individual consumers, particularly relating to unequal bargaining power and the lack of resources to effectively negotiate contracts.<sup>23</sup>

That has not happened in this Bill, which applies the provisions only to business-to-consumer contracts. The removal of business-to-business contracts from the Bill was largely in response to the submissions from business to the Treasury consultation paper. Many of those submissions indicated that applying the proposed unfair contract provisions to business-to-business contracts would create widespread commercial uncertainty and would undermine the efficiencies to big business brought about by the use of standard form contracts.<sup>24</sup>

The biggest loser in terms of that decision is small business.<sup>25</sup> However, it may be that the proposed pecuniary penalties also contained in the Bill and which will apply to, amongst other things, the prohibition against unconscionable conduct, will provide some consolation.

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23. Productivity Commission, *op. cit.*, volume 2, p. 318.

24. Legal Aid Queensland, 'Submission—An Australian Consumer Law Discussion Paper', 1 April 2009, p. 4, viewed on 4 August 2009, [http://www.treasury.gov.au/documents/1501/PDF/Legal\\_Aid\\_Queensland.pdf](http://www.treasury.gov.au/documents/1501/PDF/Legal_Aid_Queensland.pdf) and Shopping Centre Council of Australia, *Submission to Senate Economics Legislation Committee: Trade Practices Amendment (Australian Consumer Law) Bill 2009*, 29 July 2009, p. 3, viewed on 5 August 2009, <https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=fd1ed523-bb24-41c8-ba25-7cb60cef4658>

25. A Midalia, 'We've lost contract protection, say small business', *Australian Financial Review*, 30 June 2009, p. 3, viewed on 29 July 2009, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FFOZT6%22> and Queensland Newsagents Federation, *Submission to the Senate Economics Legislation Committee: Trade Practices Amendment (Australian Consumer Law) Bill 2009*, 22 July 2009, viewed on 5 August 2009, <https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=7c72d3a0-1ff1-4fc4-8304-1620118b536f>

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### Proposed unfair contract provisions

The Productivity Commission recommended that the unfair contract provisions should be in the following terms:

- a term is established as ‘unfair’ when, contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract
- there would need to be material detriment to consumers (individually or as a class)
- it would relate only to standard-form, non-negotiated contracts
- it would exclude the upfront price of the good or service, and
- it would require all of the circumstances of the contract to be considered, taking into account the broader interests of consumers, as well as the particular consumers affected.<sup>26</sup>

The unfair contracts provisions in the Bill are similar but not the same as those recommended by the Productivity Commission.

### Good faith

Contrary to the Productivity Commission’s recommendation, the reference to ‘good faith’ was removed from the Bill on the grounds that there is, as yet, no universally accepted meaning in Australia of this term.<sup>27</sup> It has been said that

In Australia, some courts have accepted, to some degree, the implication of obligations of good faith in contractual dealings. For instance, it has been suggested that good faith embraces three notions: an obligation on the parties to cooperate in achieving their contractual objects, compliance with honest standards of conduct and compliance with standards of conduct which are reasonable having regard to the interests of the parties. However, uniform acceptance and understanding of concepts, content and implications of good faith obligations has not emerged in the Australian jurisdictions.<sup>28</sup>

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26. Productivity Commission, op. cit., volume 2, recommendation 7.1, p. 168.

27. The Australian Consumer Law: Consultation on draft provision on unfair contract terms, p. 3.

28. Independent Committee, ‘Review of the Disclosure Provisions of the Franchising Code of Conduct’, Office of Small Business, Canberra, October 2006, p. 46.

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### Substantial likelihood of detriment whether financial or otherwise

The Productivity Commission recommended the unfair contract provisions contain a reference to **material detriment** to consumers ‘to allow regulators or consumers to take action where detriment has been suffered as a result of the use of an unfair term’.<sup>29</sup>

However, the Bill contains a much broader provision which allows that a term in a consumer contract will be unfair if there is a substantial **likelihood** that it would cause detriment, whether **financial or otherwise**, if it was applied or relied on. According to the relevant consultation paper ‘this is designed to allow the court to consider situations where there may be other forms of detriment, such as inconvenience, delay or emotional distress’.<sup>30</sup>

In relation to the requirement that the detriment be ‘material’ George Raitt of Piper Alderman suggested that:

... this ought to be retained... if a term in a standard form contracts [sic] operates unfairly for vulnerable or disadvantaged consumers, and that class accordingly receive a benefit, the impact on all the other business transactions of the supplier needs to be considered and adverse implications of compensating a minority of consumers needs to [be] managed to avoid opening the floodgates.<sup>31</sup>

GE Capital submitted that:

without suffering actual detriment, a mere change in personal circumstance or change of heart could lead to claims of likelihood of detriment, and in long term contracts, the risk of those claims is significantly greater.<sup>32</sup>

Master Builders Australia posed the question:

... will it include the potential for damages for emotional distress, a matter normally excluded at common law?<sup>33</sup>

### Broader interests of consumers

The requirement that the contract be considered, ‘taking into account the broader interests of consumers’ has been removed. This means that a Court, in determining whether a

29. Productivity Commission, op. cit., volume 2, p. xi.

30. Unfair Contracts consultation paper p. 11.

31. G Raitt, ‘Submission—An Australia Consumer Law Discussion Paper’, 12 March 2009, p. 2, viewed on 4 August 2009, [http://www.treasury.gov.au/documents/1501/PDF/George\\_D\\_Raitt.pdf](http://www.treasury.gov.au/documents/1501/PDF/George_D_Raitt.pdf)

32. GE Capital, Submission on unfair contracts, 22 May 2009 p. 3, viewed on 29 July 2009,

33. Master Builders Australia, op. cit., p. 31.

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contract term is ‘unfair’ **may** take into account broader public policy considerations, but will not be **required** to do so.

## The nature of the Australian Consumer Law

In accordance with the COAG agreement,<sup>34</sup> the Australian Consumer Law will be enacted both nationally and in each of the States and Territories by means of an application law scheme. In this case the law will be legislated by the Australian Parliament, and each State and Territory will apply the nationally agreed law. Amendments to the national law would then require agreement by jurisdictions according to an Inter-Governmental Agreement.<sup>35</sup>

However it has been reported that:

Cracks are emerging in the move towards a national consumer law after West Australian Treasurer Troy Buswell accused the federal government of ignoring the states and making unilateral changes that disadvantage small business.<sup>36</sup>

**Importantly it should be noted that the Australian Consumer Law is to be introduced by two separate Bills.**

This Bill is the first one and sets the ground work. Amongst other things, it amends the TPA to establish the Australian Consumer Law as a schedule to the TPA, sets out the rules for applying and amending the Australian Consumer Law and inserts the provisions about unfair contract terms. This means that when this Bill is passed the Australian Consumer Law will only contain the provisions about unfair contract terms. The States and Territories will then be able to implement the Australian Consumer Law by way of mirror legislation.

The second Bill, which has not yet been introduced, will implement the bulk of COAG’s agreed reforms as part of the Australian Consumer Law. This will entail:

- transferring the existing consumer protection and related provisions of the TPA into the Australian Consumer Law

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34. Council of Australian Governments, *Intergovernmental Agreement for the Australian Consumer Law*, July, 2009, viewed 11 August 2009, [http://www.coag.gov.au/coag\\_meeting\\_outcomes/2009-07-02/docs/IGA\\_australian\\_consumer\\_law.pdf](http://www.coag.gov.au/coag_meeting_outcomes/2009-07-02/docs/IGA_australian_consumer_law.pdf)

35. The Treasury, ‘An Australian Consumer Law: Fair Markets—Confident Consumers’, p. 9.

36. S Morris, ‘Buswell breaks ranks on consumer law’, *Australian Financial Review*, 20 July 2009, p. 9, viewed on 5 August 2009, <https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=fd1ed523-bb24-41c8-ba25-7cb60cef4658>

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- amending those provisions to reflect best practice in existing State and Territory consumer laws
- introducing a new national product safety regulatory framework, and
- amending the ASIC Act to ensure its consistency with the Australian Consumer Law.<sup>37</sup>

### Committee consideration

On 25 June 2009 the Senate referred the Trade Practices Amendment (Australian Consumer Law) Bill 2009 to the Economics Committee for report by 7 September 2009. The closing date for submissions was 31 July 2009.<sup>38</sup> The Economics Committee received 47 submissions.

### Financial implications

According to the Explanatory Memorandum, the Bill has no significant financial impact on Commonwealth expenditure or revenue.<sup>39</sup>

However, it is noted that the Bill requires both the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC) to play a greater regulatory role without, apparently, either having received an increase in funding in the 2009–10 budget.<sup>40</sup>

It would appear that the main cost arising from the Bill will be the transitional cost to business which may have to review and alter its existing standard form contracts for business-to-consumer transactions.

### The roles of the regulators

The ACCC administers the TPA. In broad terms, the TPA covers unfair market practices, industry codes, mergers and acquisitions of companies, product safety, product labelling,

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37. Explanatory Memorandum, p. 9.

38. The details of the enquiry are available at the Senate Economics Committee website, viewed 16 July 2009,  
[http://www.aph.gov.au/Senate/committee/economics\\_ctte/tpa\\_consumer\\_law\\_09/index.htm](http://www.aph.gov.au/Senate/committee/economics_ctte/tpa_consumer_law_09/index.htm)

39. Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill 2009, p. 4.

40. For information about the ACCC 2009–10 budget, see p. 93. For information about the ASIC 2009–10 budget, see p. 150.  
[http://www.treasury.gov.au/documents/1539/PDF/Treasury\\_portfolio\\_budget\\_statements\\_2009\\_10.pdf](http://www.treasury.gov.au/documents/1539/PDF/Treasury_portfolio_budget_statements_2009_10.pdf)

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price monitoring, and the regulation of industries such as telecommunications, gas, electricity and airports<sup>41</sup> but does **not** apply to financial services.

The ASIC is established by section 8 of the ASIC Act as Australia's corporate, markets and financial services regulator. In the context of this Bill, the role of ASIC as a financial services regulator is primarily one of consumer protection.

The Bill gives the ACCC and the ASIC a broader range of enforcement options, than those which currently exist by empowering them to send substantiation notices and infringement notices as well as imposing pecuniary penalties and issuing public warning notices in relation to particularly recalcitrant conduct.

### Substantiation notices

The Bill proposes to empower the ACCC and the ASIC to issue notices to seek information relevant to the substantiation of claims or representations, or in relation to the ability of a person to supply goods and services. There has been widespread publicity about the application of substantiation notices to, for example, the real estate industry. It was reported that 'real estate agencies involved in under-quoting and dummy bidding will be hit with fines of up to \$1.1 million from January 1'<sup>42</sup> and that the changes will allow unsuccessful bidders who feel they have been duped by artificially low reserve prices to recoup pre-purchase costs from vendors and real-estate agents.<sup>43</sup>

The Australian Bankers Association (ABA) opined that such a broad power could lead to 'fishing' exercises by the relevant regulators and therefore significantly increase the administrative burden of businesses without corresponding benefits. In any event, the ABA took the view that the power should be qualified so that a substantiation notice should not be given except where the relevant regulator had objectively verifiable and reasonable grounds.<sup>44</sup>

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41. Australian Competition and Consumer Commission website, viewed 11 August 2009, <http://www.accc.gov.au/content/index.phtml/itemId/54137>

42. M Russell, 'Agents to fact \$1m fines for fake bids', *Sunday Age*, 19 July 2009, p. 2, viewed 11 August 2009, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FZL5U6%22>

43. C James, 'Crackdown on auction scams', *Sunday Telegraph*, 19 July 2009, p. 3, viewed 11 August 2009, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FAP5U6%22>

44. Australian Banking Association, 'Submission to Senate Standing Committee on Economics: Trade Practices Amendment (Australian Consumer Law) Bill 2009', 31 July 2009, p. 4 of annexure 1, viewed 11 August 2009,

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In the same vein, Brambles considered that ‘the new power given to regulators to issue substantiation notices is one of the most potentially damaging for businesses’ in the Bill.<sup>45</sup> Of particular concern to Brambles was the fact that businesses which have been issued with substantiation notices may have their reputations damaged when there are no reasonable grounds for believing that they have engaged in unlawful conduct.

However, it should be noted that the Bill is silent about whether the ACCC will publish any information about the recipients of those notices.

### Orders to redress loss or damage to non-party consumers

The Bill contains amendments to the TPA and the ASIC Act to allow the ACCC and the ASIC to seek certain orders for the benefit of persons that are not parties to proceedings. The need for such amendments arises from the *Cassidy* case<sup>46</sup> by the Full Court of the Federal Court. In that case the ACCC alleged that Medibank Private had made a number of representations, including about the length of the waiting period before benefits could be claimed, and the cost of private health insurance, which were false and misleading.

In bringing the case to the Court, the regulator requested orders be made that:

- Medibank Private identify and write to each of the persons who, in reliance on the false and misleading claims, had entered into a contract of private health insurance with Medibank Private during the relevant period, and
- Medibank Private offer those persons appropriate compensation.

The issues for the Court were whether it was empowered under the relevant legislation to make orders in favour of persons who were not actually formal parties to the proceedings and whether it could require Medibank Private to offer compensation to those third parties. It decided that it could not. This limited the power of the regulator to represent those persons who had suffered damage due to a false or misleading statement by a business. Part 4 of Schedule 2 and Part 5 of Schedule 3 will address this situation.<sup>47</sup>

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<https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=922731ad-4ecf-4a84-ba21-fd8ce29a1e60>

45. Brambles, ‘Submission to Senate Standing Committee on Economics: Trade Practices Amendment (Australian Consumer Law) Bill 2009’, 31 July 2009, paragraph 4.2, p. 4, viewed 11 August 2009, <https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=d67ae098-2e12-48e6-a87c-803212621e1e>
46. *Medibank Private Limited v Brian Cassidy* [2002] FCAFC 290 (13 September 2002).
47. C Zappone, ‘Consumers get their day in court’, *The Age*, 29 July 2009, viewed 11 August 2009, <http://business.theage.com.au/business/consumers-to-get-their-day-in-court-20090729-e017.html>

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The Law Council of Australia acknowledged that this is a significant amendment to the existing law and expressed the view that it is vital that the provisions set out clearly how the process, particularly with reference to determining who falls within the affected class, will operate.<sup>48</sup>

### Infringement notices

At present the TPA does not give the ACCC the power to issue infringement notices. However the *Corporations Act 2001* does empower the ASIC to issue infringement notices for breaches of the continuous disclosure provisions. The power was inserted by the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004*.<sup>49</sup>

Prior to [this amendment], the only method of enforcement available to the ASIC in respect of a breach of the continuous disclosure obligations was taking action against an entity through the courts or negotiating enforceable undertakings. The ASIC contended that the available remedies were time consuming and placed excessive demands on limited resources [so that] many minor breaches were not prosecuted. The ASIC claimed that it needed a quicker and more immediate response for less serious violations.<sup>50</sup>

Those amendments were very contentious. The key criticisms related to the absence of sufficient checks and balances on the ASIC's power.<sup>51</sup> There is also an argument that the exercise of the power by the ASIC is unconstitutional.<sup>52</sup>

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48. Law Council of Australia, 'Submission to Senate Standing Committee on Economics: Trade Practices Amendment (Australian Consumer Law) Bill 2009', 6 August, 2009, p. 8, viewed 11 August 2009,

<http://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=8d7bbcac-c56b-4849-a6ed-3b028f5f045b>

49. See S Dudley, 'Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2004', *Bills digest no 166*, 2003–04, Parliamentary Library Canberra, 21 June 2004, viewed on 5 August 2009, <http://www.aph.gov.au/library/pubs/bd/2003-04/04bd166.pdf>

50. R Langley, 'Over three years on: Time for reconsideration of the corporate cop's power to issue infringement notices for breaches of continuous disclosure', *Companies and Securities Law Journal*, Vol. 25, 2007, pp. 439–466 at p. 444.

51. R Langley, p. 445.

52. M Hyland, 'Infringement notices under the Corporations Act 2001 (Cth): Has the Commonwealth Parliament gone too far?', *University of Notre Dame Australia Law Review*, Vol. 10, 2008, pp. 115–137, viewed on 5 August 2009, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fjmart%2FRCLT6%22> and J McConvill, 'Australian Securities and Investments Commission proposed power to issue infringement notices: another slap in the face to s.1324 of the

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Although the Explanatory Memorandum indicates that infringement notices will facilitate the payment of relatively small financial penalties ‘in relation to relatively minor contraventions that may not otherwise be pursued through the Courts’<sup>53</sup> there is no provision in the Bill stating that infringement notices are to be issued exclusively in respect of minor contraventions, nor is there a definition of what constitutes a ‘minor contravention’.

### Public warning notices

The Bill also contains amendments which will allow the ACCC or the ASIC to issue a warning notice in respect of a suspected breach of certain provisions within the TPA or the ASIC Act or a failure to respond to a substantiation notice, provided certain conditions are satisfied.

The Motor Trades Association of Australia recognised that the power to ‘name and shame’ can be quite effective in securing behaviour change. However, it stressed that reputation is extremely important to business. On that basis, it suggested that if the regulator is ultimately shown to be incorrect, then it should be liable for damages to that business.<sup>54</sup>

### Main provisions

#### Unfair contract terms

**Item 1 of Schedule 1** of the Bill inserts the Australian Consumer Law into the TPA as Schedule 2 to that Act. The Schedule will contain eight new sections which relate to unfair and prohibited contract terms.

**Part 1 of Schedule 3** of the Bill inserts **new subdivision BA** into Division 2 of Part 2 of the ASIC Act. The new subdivision contains eight new sections which relate to unfair and prohibited contract terms. Those provisions are in essentially the same terms as those which are proposed for the TPA except that they are directed at financial products or contracts for the supply, or possible supply of services that are financial services.<sup>55</sup> The

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Corporations Act or an undermining of corporate civil liberties’, *Australian Business Law Review*, Vol. 31, 2003, pp. 36–47, viewed on 5 August 2009, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fjrnart%2FUCL86%22>

53. Explanatory Memorandum, paragraph 8.2, p. 85.

54. Motor Trades Association of Australia, ‘*Submission to Senate Standing Committee on Economics: Trade Practices Amendment (Australian Consumer Law) Bill 2009*’, 31 July 2009, p. 4, viewed 11 August 2009, <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=bf97cfad-8f42-4426-a65a-db50c6a569dc>

55. Proposed paragraph 12BF(1)(c).

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comments below, although couched in terms of the proposed amendments to the TPA are also relevant to the ASIC Act. The equivalent amendment to the ASIC Act is noted in the footnotes.

**Proposed subsection 2(1)** provides that a term of a '*consumer contract*' is void if the term is '*unfair*' and the contract is a '*standard form contract*'. If a term is 'void', it is 'legally non-existent' and 'cannot be enforced or relied on'.<sup>56</sup> The contract itself will continue to bind the parties in respect of all its other terms if it is capable of operating without the unfair term: **proposed subsection 2(2)**.<sup>57</sup>

The term '*consumer contract*' is defined in **proposed subsection 2(3)**<sup>58</sup> as a contract for either the supply of goods or services or a sale or grant of an interest in land to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.<sup>59</sup> Under the terms of this definition, the unfair contract provisions will only apply to contracts between individual consumers, or contracts between a business and a consumer. Interestingly, there has been no attempt to base the new definition of '*consumer contract*' on the existing definition of '*consumer*' in section 4B of the TPA or section 12C of the ASIC Act.

**Proposed section 3** provides that a term of a consumer contract is '*unfair*' if it would cause a significant imbalance in the parties' rights and obligations arising under the contract, and the term is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term. There is an automatic presumption that a term of a consumer contract is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term. The onus is on the advantaged party to prove otherwise: **proposed subsection 3(4)**.<sup>60</sup>

In cases where a court is to decide about whether a term is unfair, **proposed subsection 3(2)**<sup>61</sup> provides that the court:

- **may** take into account such matters as it thinks relevant
- **must** take into account the following:

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56. *Butterworths Concise Australian Legal Dictionary*, third edition, LexisNexis Butterworths, Australia, 2004, p. 451.

57. See **item 7** of Schedule 3 of the Bill. **Proposed section 12BF** of the ASIC Act is the equivalent provision.

58. **Proposed subsection 12BF(3)** is the equivalent provision in the ASIC Act.

59. According to **proposed section 1** an '*interest*' in land is a legal or equitable estate or interest in the land; a right of occupancy of the land, or of a building or part of a building erected on the land; or a right, power or privilege over, or in connection with the land.

60. **Proposed section 12BG** is the equivalent provision in the ASIC Act.

61. **Proposed subsection 12BG(2)** is the equivalent provision in the ASIC Act.

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- the extent to which the term would cause, or there is a substantial likelihood that it would cause, detriment (whether financial or otherwise) to a party if it were to be applied or relied on
- the extent to which the term is transparent<sup>62</sup>
- the contract as a whole.

**Proposed section 4** lists the kinds of terms of a consumer contract that may be ‘*unfair*’.<sup>63</sup> The kinds of terms can be broadly grouped as follows:

- **proposed paragraphs 4(a), (b), (d), (e), (f), (g) and (h)** are examples of types of terms that allow a party to make changes to key elements of a contract, including terminating it, on a unilateral basis
- **proposed paragraphs 4(i), (k), (l) and (m)** are examples of types of terms that have the effect of limiting the rights of the party to whom the standard-form contract is presented
- **proposed paragraph 4(c)** refers to terms that penalise, or have the effect of penalising, one party but not the other, for a breach or termination of the contract
- **proposed paragraph 4(j)** refers to terms that allow for a party to assign the contract to the detriment of the other party, without the other party’s consent, and
- **proposed paragraph 4(n)** provides that additional terms may be added to this list of examples by way of regulations. This is to permit the expansion of the list in response to changes in markets and the way in which standard-form contracts are constructed and used.

According to **proposed subsection 5(1)**,<sup>64</sup> a term of a contract cannot be voided under proposed subsection 2(1) if the relevant term:

- defines the main subject matter of the contract
- sets the ‘*upfront price*’ payable under the contract, or
- is a term required, or expressly permitted, by a law of the Commonwealth or a State or Territory.

The ‘*upfront price*’ payable under a consumer contract is the consideration that is provided, or is to be provided, for the supply, sale or grant under the contract; and is

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62. A term is *transparent* if it is expressed in reasonably plain language, is legible, is presented clearly and is readily available to the party affected by it: **proposed subsection 3(3)** of the TPA or **proposed subsection 12BG(3)** of the ASIC Act.

63. **Proposed section 12BH** is the equivalent provision in the ASIC Act.

64. **Proposed section 12BI** is the equivalent provision in the ASIC Act.

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disclosed at or before the time the contract is entered into. It does not include any other consideration that is contingent on the happening (or otherwise) of a particular event.

The Treasury consultation paper about unfair contract terms sets out the rationale for ensuring that the term in a contract which relates to the upfront price of the goods or services will not be an '*unfair*' term as follows:

The exclusion of 'upfront price' is intended to exclude from consideration the basic price paid for the goods, services or land supplied under the contract. This exclusion is based on the premise that it would not be desirable to permit a consumer to challenge the basic price paid for the goods, services or land at a later time, when this is an issue about which the consumer has a choice (that is, if the price is too high, the consumer can decide not to enter into the contract).<sup>65</sup>

The equivalent amendments to the ASIC Act contain an additional clarification. **Proposed subsection 12BI(3)** provides that in the context of credit agreements, the upfront price includes the total amount of principal that is owed under the credit agreement provided that amount is disclosed at or before the time the contract is entered into by the parties. According to the Explanatory Memorandum 'this means that consideration in the context of a credit contract includes both the principal repayable and the interest payable under that contract'.<sup>66</sup>

In addition to the unfair contract term provisions, the Bill contains provisions in similar terms in relation to prohibited contract terms: **proposed section 6**.<sup>67</sup> Those terms are to be prescribed by regulation: **proposed subsection 6(4)**. The Explanatory Memorandum states that 'no regulations are proposed to be made at the present time and so there are no prohibited terms'.<sup>68</sup> Essentially, a term of a consumer contract which is a standard form contract will be void if the contract contains a prohibited term. In addition, a pecuniary penalty may be imposed where a person contravenes **proposed subsection 6(2)** which states that a person must not include a prohibited term in a consumer contract.<sup>69</sup>

The issue of whether a contract is a '*standard form contract*' will not arise unless there is a dispute about the contract. Where a party to a proceeding alleges that a contract is a

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65. The Treasury, *The Australian Consumer Law: Consultation on draft provisions on unfair contract terms*, op. cit., p. 15.

66. Explanatory Memorandum, paragraph 2.69, p. 26.

67. **Proposed section 12BJ** is the equivalent provision in the ASIC Act. The section requires that the standard form contract must also be a contract which is a financial product, or a contract for the supply, or possible supply, of services that are financial services.

68. Explanatory Memorandum, paragraph 2.79, p. 27.

69. **Proposed subsection 12BJ(2)** is the equivalent provision in the ASIC Act.

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**'standard form contract'**, **proposed subsection 7(1)**<sup>70</sup> contains a presumption that it is. The onus is on the other party to the proceeding to prove otherwise.

In cases where a court is to decide about whether a contract is a standard form contract **proposed subsection 7(2)**<sup>71</sup> provides that the court:

- **may** take into account such matters as it thinks relevant
- **must** take into account the following:
  - whether one of the parties has all or most of the bargaining power relating to the transaction
  - whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties
  - whether another party was, in effect, required either to accept or reject the terms of the contract in the form in which they were presented
  - whether another party was given an effective opportunity to negotiate the terms of the contract
  - whether the terms of the contract take into account the specific characteristics of another party or the particular transaction and
  - any other matter prescribed by the regulations.

### Application of the Australian Consumer Law in the Commonwealth, States and Territories

The purpose of **items 9** and **10** is to amend the TPA to specify the constitutional basis and reach of the Australian Consumer Law.

**Item 9** inserts **proposed paragraph 6(2)(ca)** into the TPA so that the Australian Consumer Law will apply to a contract in relation to trade or commerce which is made:

- between Australia and places outside Australia
- among the States
- within a Territory, between a State and a Territory or between two Territories.

**Item 10** inserts **proposed subsection 6(3A)** which will extend the operation of the Australian Consumer Law, including the unfair contract provisions to conduct involving the use of postal, telegraphic or telephonic services based on the power in section 51(v) of

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70. **Proposed section 12BK** is the equivalent provision in the ASIC Act.

71. **Proposed subsection 12BK(2)** is the equivalent provision in the ASIC Act.

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the Constitution. This means that, for example, the Australian Consumer Law will apply to contracts between mobile telephone service providers and their customers.

**Item 11** inserts new Part XI, the Australian Consumer Law into the TPA. **Proposed section 130** confirms that the unfair and prohibited contract term provisions apply to consumer contracts to which a corporation is a party. This means that the provisions extend to business-to-consumer transactions. Provisions which apply to contracts for the supply of financial services are not contained in the TPA. They are located in the ASIC Act.

**Proposed sections 133–143** facilitate the application of the Australian Consumer Law by the participating jurisdictions, that is, the States and Territories which are parties to the Intergovernmental Agreement for the Australian Consumer Law.<sup>72</sup>

## Pecuniary penalties

### Trade Practices Act—pages 20 to 24 of the Bill

**Item 1** of **Schedule 2** of the Bill proposes to insert **new section 76E** into the TPA. **Proposed subsection 76E(1)** introduces pecuniary penalties in respect of contraventions of the following:

- a provision of Part IVA which relates to unconscionable conduct
- a provision of Division 1 of Part V which contains a prohibition against misleading or deceptive conduct (other than section 52)<sup>73</sup>, or Division 1AAA of Part V which prohibits participation in a pyramid selling scheme
- subsection 65C(1) or (3), 65D(1) or 65F(8), section 65G or subsection 65Q(9), (9C) or (10) or 65R(1) which relate to product safety and product information, and
- proposed sections 87ZN or 87ZO which are inserted by item 12 of this Bill in relation to compliance with substantiation notices.

In addition **proposed subsection 76E(1)** is directed at those persons who have attempted to contravene the provisions, have aided or abetted another to do so, have induced another person to contravene the provisions, have been directly or indirectly a party to the contravention or have conspired with another person in the contravention. If a Court is

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72. Council of Australian Governments, Intergovernmental Agreement for the Australian Consumer Law, viewed 11 August 2009, [http://www.coag.gov.au/coag\\_meeting\\_outcomes/2009-07-02/docs/IGA\\_australian\\_consumer\\_law.pdf](http://www.coag.gov.au/coag_meeting_outcomes/2009-07-02/docs/IGA_australian_consumer_law.pdf)

73. The reason that section 52 is excluded is that section 75AZC of the TPA creates an offence of strict liability for a breach of the prohibition on false and misleading representations. That offence carries a penalty of 10 000 penalty units, being equivalent to \$1.1 million.

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satisfied on the balance of probabilities that any of the above has occurred,<sup>74</sup> then the Court may order the person to pay the Commonwealth a penalty.

In deciding the appropriate penalty, **proposed subsection 76E(2)** requires the Court to consider **all** of the following:

- the nature and extent of the act or omission and of any loss or damage suffered as a result
- the circumstances in which it took place, and
- whether the person has previously been found by the Court to have engaged in similar conduct.

**Proposed subsection 76E(3)** sets out the maximum number of penalty units to apply in each case.<sup>75</sup> The maximum penalty prescribed is \$1.1 million for a corporation and for a person who is not a body corporate the maximum penalty prescribed is \$220 000.

Proceedings for an order that a person pay the Commonwealth a penalty under section 76E (referred to as a '**consumer protection breach**') will be stayed where criminal proceedings are started against a person for an offence, and the offence is constituted by conduct which is substantially the same as the conduct giving rise to the consumer protection breach: **proposed subsection 76F(2)**. However the proceedings may be resumed if the person is not convicted of the offence.

**Item 5** inserts **proposed subsection 85(7)**. The effect of this is that a person other than a body corporate who has been ordered to pay a pecuniary penalty for a '**consumer protection breach**' will have a defence. Where the court finds that the person has acted honestly and reasonably, it may relieve the person of the liability to pay the pecuniary penalty wholly or partially. The terms of the proposed defence are consistent with the other defences detailed in section 85 of the TPA.

### ASIC Act—pages 58 to 62 of the Bill

**Part 2 of Schedule 3** of the Bill similarly empowers the Court to impose pecuniary penalties for certain breaches of the ASIC Act. **Proposed subsection 12GB(1)** provides that there is a '**consumer protection breach**' if a person who has contravened, attempted to contravene, aided or abetted the contravention, induced or attempted to induce a person to contravene or who has been directly or indirectly knowingly concerned in or a party to a contravention of the following:

- Subdivision C—about unconscionable conduct

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74. The standard of proof 'on the balance of probabilities' applies to all of the civil penalty provisions covered in this Bills Digest.

75. Section 4AA of the *Crimes Act 1914* provides that a **penalty unit** means \$110.

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- Subdivision D (other than section 12DA)—about consumer protection
- Subdivision GC (inserted by this Bill)—about substantiation notices.

The maximum penalties are listed in **proposed subsection 12GBA(3)** with the highest penalty being 10 000 units (\$1.1 million) payable by a person who is a body corporate in respect of a contravention of a provision of Subdivision C or D.

A Court must not order that a pecuniary penalty be paid by a person in respect of certain conduct if the person has already been convicted of an offence constituted by conduct which is substantially the same: **proposed subsection 12GBB(1)**. Conversely, criminal proceedings may be started against a person for conduct that is substantially the same as a *'consumer protection breach'* even if a pecuniary penalty order has been made in respect of that conduct: **proposed subsection 12GBB(3)**.<sup>76</sup>

The evidence provided by a person in respect of proceedings for a pecuniary penalty order based on conduct which is a *'consumer protection breach'* is not admissible in criminal proceedings against the person if the conduct is substantially the same: **proposed subsection 12GBB(4)**.

**Proposed section 12GBD** provides that a body corporate must not indemnify a person against either a liability to pay a pecuniary penalty or legal costs incurred in defending or resisting proceedings in which the person is found to have that liability. This provision mirrors existing provisions in sections 77A, 77B and 77C of the TPA which were inserted in response to the recommendations of the Dawson Review<sup>77</sup> that corporations be prohibited from indemnifying, directly or indirectly, officers, employees or agents against the imposition of a pecuniary penalty upon an officer, employee or agent.<sup>78</sup>

**Item 12** inserts **proposed subsection 12GI(5)**. The effect of this is that a person other than a body corporate who has been ordered to pay a pecuniary penalty for a *'consumer protection breach'* will have a defence. Where the court finds that the person has acted honestly and reasonably, it may relieve the person of the liability to pay the pecuniary penalty wholly or partially.

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76. This provision is similar in its terms to existing subsection 76C(4) of the TPA.

77. D Dawson, *Review of Competition Provisions of the Trade Practices Act 1974*, Commonwealth of Australia, Canberra, January 2003, viewed 11 August 2009, <http://tpareview.treasury.gov.au/content/report.asp>

78. T John and J Davidson, 'Trade Practices Legislation Amendment Bill (No. 1) 2005', *Bills digest no. 130*, 2004–05, Parliamentary Library, Canberra, 30 March 2005, p. 16, viewed 11 August 2009, [http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/OYGF6/upload\\_binary/Oygf67.pdf;fileType=application%2Fpdf#search=%22r2282%22](http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/OYGF6/upload_binary/Oygf67.pdf;fileType=application%2Fpdf#search=%22r2282%22)

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## Disqualification orders

### Trade Practices Act—page 25 of the Bill

**Item 7 of Schedule 2** of the Bill inserts **proposed subsection 86E(1B)** into existing section 86E of the TPA. The effect of the proposed amendment is that the ACCC may apply to the Court for an order disqualifying a person from managing a corporation where the Court is satisfied that the person has committed a ‘*consumer protection breach*’ or has breached a provision of Part VC of the TPA. The Court may make the order where it considers that disqualification is appropriate and justified. In that case, the ACCC must provide a copy of the order to ASIC. Whilst the ACCC already has this power in relation to contraventions of the restrictive trade practices provisions in Part IV of the TPA, the proposed provision significantly extends the power.

### ASIC Act—pages 63 to 64 of the Bill

**Item 14 of Schedule 3** of the Bill inserts **proposed section 12GLD** into the ASIC Act so that ASIC can apply to the Court for an order disqualifying a person from managing corporations where the person has committed a ‘*consumer protection breach*’ and the Court is satisfied that disqualification is appropriate and justified.

**Item 15** inserts **proposed section 206EB** into the *Corporations Act 2001* (Corporations Act) which confirms that a person is disqualified from managing corporations if a court order to that effect is in force under proposed section 12GLD.

## Substantiation notices

### Trade Practices Act—pages 26 to 29 of the Bill

**Item 12 of Schedule 2** of the Bill inserts Part VID containing **proposed sections 87ZL–87ZO** into the TPA. **Proposed section 87ZL** provides that where a person has made a claim or representation promoting, or intending to promote:

- a supply of goods or services by a corporation
- a sale or grant of an interest in land by a corporation
- employment that is to be, or may be, offered by a corporation

then the ACCC may give the person a written notice that requires the person to give information and/or produce documents that could be capable of substantiating the claim or representation.

The notice must be in the form set out in **proposed subsection 87ZL(4)**. The person must provide the requested information or documents within 21 days after the notice is given: **proposed subsection 87ZL(2)**. The ACCC may extend the period for complying with the

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notice if the person applies in writing for the extension of time within the 21 day period: **proposed section 87ZM**.<sup>79</sup>

A failure to comply with a substantiation notice within the approved time limit will be a contravention of proposed section 76E and will therefore be subject to a pecuniary penalty.<sup>80</sup> However, an individual may refuse to give the information or produce the documents specified in a substantiation notice on the ground that the information or documents might tend to incriminate them or expose them to a penalty: **proposed subsection 87ZN(3)**.

A person must not provide false or misleading information in response to a substantiation notice: **proposed section 87ZO**. The maximum penalty if a person is a body corporate is 250 units (\$27 500). The maximum penalty if a person is not a body corporate is 50 units (\$5 500): **proposed subsection 76E(3)**.

### **ASIC Act—pages 65 to 67 of the Bill**

**Item 20 of Schedule 3** of the Bill inserts **proposed sections 12GY–12GYC** empowering ASIC to give a person who has made a claim or representation, a written notice requiring the person to provide information or produce documents which are capable of substantiating the claim or representation. The proposed sections are in similar terms as **proposed sections 87ZL–87ZO** which are to be inserted into the TPA by this Bill so that a failure to comply with a substantiation notice will give rise to pecuniary penalties under proposed subsection 12GBA(3).<sup>81</sup> The major differences are that it is ASIC (rather than the ACCC) which is authorised to issue the substantiation notice and the subject of the claim or representation is about the supply of financial services by the person.

### **Orders to redress loss or damage to non-party consumers**

#### **Trade Practices Act—pages 30 to 34 of the Bill**

**Item 18 of Schedule 2** of the Bill inserts **proposed sections 87AAA and 87AAB** into the TPA. Essentially this is about ‘class actions’—where there are legal proceedings allowing the claims of many individuals against the same defendant, arising from the same or similar circumstances, to be conducted by a single representative, namely the ACCC. The proposed amendments operate as follows:

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79. The original 21 day period and any approved extension of time are referred to as the ‘*substantiation notice compliance period*’: **proposed subsection 87ZN(2)**.

80. The maximum penalty if a person is a body corporate is 150 units (\$16 500) and the maximum penalty if a person is not a body corporate is 30 units (\$3 300): **proposed subsection 76E(3)**.

81. The maximum penalties are the same as those under the TPA which are set out in the footnote above.

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- the ACCC may apply to the Court for an order against a person engaged in **‘contravening conduct’**: **proposed subsection 87AAA(1)**
- **‘contravening conduct’** is a contravention of any of the following:
  - a provision of Part IVA which relates to unconscionable conduct
  - a provision of Division 1 of Part V which contains a general prohibition against misleading or deceptive conduct
  - Division 1AAA of Part V which prohibits participation in a pyramid selling scheme
  - Part VC which contains the offences relating to unfair practices and the offences relating to product safety and product information or
  - the Australian Consumer Law (which, on the passing of this Bill, will contain the unfair contract provisions)<sup>82</sup>
- the Court must only make an order if it will redress loss or damage, or prevent likely loss or damage, suffered by non-party consumers: **proposed subsection 87AAA(3)**.

Under **proposed section 87AAB** the Court has wide ranging power about the nature of the orders it may make:

- declaring the whole or part of a contract made between the person responsible for, or involved in, the contravening conduct (referred to as **‘the respondent’**) and the non-party consumer void, void *ab initio*<sup>83</sup> or void at all times: proposed paragraph 87AAB(a)
- varying a contract
- refusing to enforce any or all of the provisions of such a contract or arrangement
- directing the respondent
  - to refund money or return property to a non-party consumer referred to in that subsection
  - to repair, or provide parts for, goods that have been supplied under the contract or arrangement to a non-party consumer referred to in that subsection or to supply specified services to a non-party consumer referred to in that subsection at their own expense
- in relation to an instrument creating or transferring an interest in land, directing the respondent to execute an instrument that varies or terminates the instrument.

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82. See **item 60**.

83. Means—of no effect from the beginning. *Butterworths Concise Australian Legal Dictionary*, third edition, LexisNexis Butterworths, Australia, 2004, p. 451.

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### ASIC Act—pages 68 to 71 of the Bill

**Item 26 of Schedule 3** of the Bill inserts **proposed sections 12GNB and 12GNC** into the ASIC Act which are in the same terms as proposed sections 87AAA and 87AAB.<sup>84</sup>

**Proposed section 12GNB** will allow the ASIC to apply to the Court for an order against a person engaged in *'contravening conduct'* being a contravention of any of the following:

- Part 2, Division 2, Subdivision C which is about unconscionable conduct in the supply of financial services, and
- Part 2, Division 2, Subdivision D which is about misleading and deceptive conduct in the supply of financial services.

### Infringement notices

#### Trade Practices Act—pages 35 to 41 of the Bill

**Part 5 of Schedule 2** of the Bill introduces a new concept to the TPA – infringement notices. In particular **item 23** inserts a definition of the term *'infringement notice provision'* into existing section 4(1) which means:

- a provision of Part IVA which relates to unconscionable conduct
- a provision of Division 1 of Part V which contains a general prohibition against misleading or deceptive conduct and a provision of Division 1AAA of Part V which prohibits participation in a pyramid selling scheme—with some exceptions
- subsection 65C(1) or (3) which relate to product safety standards
- section 65D(1) which relates to product information standards, or
- section 65G which relates compliance with product recall orders, and
- section 87ZN or 87ZO which are inserted by this Bill and relate to compliance with substantiation notices.

**Item 24 of Schedule 2** of the Bill inserts new part VIC containing **proposed sections 87ZD–87ZK** into the TPA. According to **proposed subsection 87ZD(1)** the purpose of new Part VIC is to provide for an infringement notice to be sent to a person where there has been an alleged contravention of an *infringement notice provision*. This will provide an alternative to proceedings that may result in the imposition of a pecuniary penalty under proposed section 76E. Importantly there is no requirement to issue an infringement notice under this Part: **proposed paragraph 87ZD(2)(a)**. This means that it is up to the ACCC to decide whether the use of this power is warranted in the circumstances.

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84. It is noted that there is no subsection (7) in either proposed section 87AAA or proposed section 12GNB. However it is not clear whether this is intentional or a minor drafting error.

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The ACCC is empowered to issue infringement notices under the following conditions:

- the ACCC has reasonable grounds to believe that a person has contravened an infringement notice provision: **proposed subsection 87ZE(1)**
- no more than one may be issued in respect of the same contravention: **proposed subsection 87ZE(2)**
- the infringement notice must be issued within 12 months of the actual contravention in order for it to have effect: **proposed subsection 87ZE(3)**
- the notice must be in the prescribed form including a statement about the penalty payable in respect of the notice and the period within which it must be paid (called the *'infringement notice compliance period'*):<sup>85</sup> **proposed section 87ZF**
- must state the amount of the penalty in accordance with the penalties set out in **proposed section 87ZG** compared to the penalty which could otherwise be payable under section 76E.

The maximum penalty payable under **proposed section 87ZG** is \$6 600 if the person is a body corporate and \$1 320 if the person is not a body corporate.

Where a person receives an infringement notice and pays the stated penalty within the required time, it acts as a bar to further proceedings, whether criminal or civil, in respect of the conduct which led to the alleged contravention: **proposed section 87ZH**. Conversely, where a person does not pay the penalty specified in an infringement notice within the required time, proceedings may be taken against the person under Parts VC or VI of the TPA: **proposed section 87ZI**.

**Proposed section 87ZK** empowers the ACCC to withdraw an infringement notice. In that case a formal withdrawal notice will be issued which must be in the prescribed form. Where the person has already paid the relevant infringement penalty, the amount will be refunded.

### **ASIC Act—pages 72 to 77 of the Bill**

Unlike the ACCC, the ASIC is already empowered to issue infringement notices under the *Corporations Act 2001*. The proposed amendments will extend that power to certain matters covered by the ASIC Act.

**Item 30 of Schedule 3** of the Bill inserts the definition of *'infringement notice provision'* as being a provision of:

- [Part 2, Division 2] subdivision C—about unconscionable conduct

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85. **Proposed section 87ZJ** provides that the *'infringement notice compliance period'* is 28 days beginning on the day after the day that the infringement notice was issued.

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- [Part 2, Division 2] subdivision D—about consumer protection—but **excluding** section 12DA (misleading or deceptive conduct), subsection 12DC(2) (false representations in relation to financial products that involve interests in land), section 12DE (offering gifts and prizes), subsection 12DG(1) (bait advertising), section 12DI (accepting payment without intending to supply) or 12DM (asserting a right of payment for unsolicited financial services)
- [Part 2, Division 2] subdivision GC—inserted by this Bill, about substantiation notices.

**Item 31** inserts **proposed sections 12GX–12GXG** into the ASIC Act to provide for the issue of an infringement notice by ASIC where there has been a contravention of an infringement notice provision, as an alternative to proceedings for a pecuniary penalty order. The provisions in relation to infringement notices are set out in the same terms as **proposed sections 87ZD–87ZK** which are to be inserted into the TPA.

The ASIC is empowered to issue infringement notices under the following conditions:

- the ASIC has reasonable grounds to believe that a person has contravened an infringement notice provision: **proposed subsection 12GXA(1)**
- no more than one may be issued in respect of the same contravention: **proposed subsection 12GXA(2)**
- the infringement notice must be issued within 12 months of the actual contravention in order for it to have effect: **proposed subsection 12GXA(3)**
- the notice must be in the prescribed form including a statement about the penalty payable in respect of the notice and the period within which it must be paid (called the *'infringement notice compliance period'*):<sup>86</sup> **proposed section 12GXG**
- must state the amount of the penalty in accordance with the penalties set out in **proposed section 12GXC** compared to the penalty which could otherwise be payable under section 12GBA.

Notably **proposed section 12GXC** contains the relevant pecuniary penalties which range from 30–60 penalty units (\$3 300–\$6 600) for a body corporate and 6–12 penalty units (\$660–\$1 320) for a person who is not a body corporate.

## Public warning notices

### Trade Practices Act—pages 42 to 43 of the Bill

**Item 26** of **Schedule 2** of the Bill provides for the insertion of **proposed section 86DA** which provides that the ACCC may issue to the public, a written notice containing a

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86. **Proposed section 87ZJ** provides that the *'infringement notice compliance period'* is 28 days beginning on the day after the day that the infringement notice was issued.

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warning about the conduct of a corporation. Under **proposed subsection 86DA(1)** such a public notice can be issued **only if** the ACCC:

- has reasonable grounds to suspect a contravention of a provision of Part IVA (about unconscionable conduct), Part V (about consumer protection, specifically from unfair practices) or Part VC (offences provisions) of the TPA
- is satisfied that a person has suffered, or is likely to suffer a detriment because of the conduct, and
- is satisfied that doing so is in the public interest.

Importantly the ACCC can issue a public warning that a person has refused or failed to respond to a substantiation notice where it considers that this is in the public interest: **proposed subsection 86DA(3)**.

### **ASIC Act—page 78 of the Bill**

**Item 32** of **Schedule 3** of the Bill inserts **proposed section 12GLC** into the ASIC Act to empower the ASIC to issue to the public a written notice containing a warning about the conduct of a corporation in similar terms as those in the TPA which are outlined above. The relevant grounds for such a notice are a contravention of a provision of Subdivision C (about unconscionable conduct) or Subdivision D (about consumer protection) of the ASIC Act.

As with the proposed amendments to the TPA, the ASIC is empowered to issue a public warning in relation to a refusal or failure to respond to a substantiation notice where it considers that this is in the public interest: **proposed subsection 12GLC(2)**.

### **Enforcement and remedies relating to the Australian Consumer Law**

The commencement date for the provisions which are located in **Part 7** of **Schedule 2** of the Bill is later than the commencement date for the provisions in Parts 1–6 which are outlined above. This is the reason that some of the items in Part 7 seem to ‘double up’ on matters already included in the Bill. For example item 14 inserts the definition of ‘*non-party consumer*’ into existing subsection 4(1) of the TPA. **Item 29** repeals that definition and inserts a replacement definition. The reason is that the latter definition will support the terms of the Australian Consumer Law when it commences. Similarly **items 35–37, 53–55, 60–69** and **75** are amendments to provisions inserted by Parts 1–6 of the Bill which will update those provisions to include a reference to the Australian Consumer Law.

Importantly **item 37** inserts a new item into the table in **proposed subsection 76E(3)** which sets out the amount of pecuniary penalties so that the penalty for a breach of a provision of the Australian Consumer Law (which includes the unfair contract terms) is 250 units (\$27 500) for a body corporate and 50 units (\$5 500) for a person who is not a body corporate.

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## Enforcement and remedies relating to unfair and prohibited contract terms in the ASIC Act

As with the amendments to the TPA, the amendments to the ASIC Act have different commencement dates. The commencement date for the provisions which are located in Part 8 of Schedule 3 of the Bill is later than the commencement date for the provisions in Parts 2–7. This is the reason that some of the items in Part 8 seem to ‘double up’ on matters already included in the Bill. For example **item 22** of Schedule 3 inserts the definition of ‘*non-party consumer*’ into existing subsection 12BA(1) of the ASIC Act. **Item 34** repeals that definition and inserts a replacement definition. Similarly **items 35–37, 53–55, 60–69** and **75** are amendments to provisions inserted by Parts 2–7 of Schedule 3 of the Bill which will come into effect when the unfair contract provisions commence.

Importantly **item 36** inserts a new item into the table in **proposed subsection 12GBA(3)** which sets out the amount of pecuniary penalties, so that the penalty for a breach of the unfair and prohibited contract terms will be the same as the penalty in the TPA.

## Concluding comments

There is no doubt that the insertion of unfair contract provisions in the TPA and the ASIC Act is the most contentious part of this Bill. According to the Productivity Commission:

Whatever their immediate benefits, barring unfair contract terms is likely to have some adverse knock-on impacts for consumers through higher prices (or lower quality goods and services). These impacts arise through three pathways.

First, an unfair contracts provision would entail enforcement costs for regulators and impose compliance burdens on businesses through re-writing contracts and dealing with the regulator. Businesses will usually pass these on to consumers. However, these costs appear unlikely to be large, especially given the learning that has taken place in the UK and Victoria, and the fact that compliance costs would be avoided on those national contracts already changed due to the Victorian legislation.

Second, barring specific terms alters the ‘complex balance of the contractual bargain’, thus affecting profits and placing upward pressure on prices. For instance, a reduced capacity for businesses to impose some contingent charges on consumers, such as certain termination fees, would lead to recovery through higher upfront charges.

Third, ... a prohibition could sometimes have unintended impacts by reducing (reputable) suppliers’ discretion to act against consumers behaving in bad faith. As well as adding to the above cost and price effects, this might affect the availability or nature of products and services.<sup>87</sup>

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87. Productivity Commission, op. cit., volume 2, p. 155.

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Nevertheless, the widespread reach of the proposed amendments, providing as they do the right for consumers to challenge terms about exit, default and penalty fees charged by banks<sup>88</sup> gyms, telcos and car rental companies,<sup>89</sup> for example, in commonly used consumer contracts will no doubt find strong support in the community.

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88. General news, 'Unfair contract proposal boon for bank customers', Canberra Times, 20 April 2009, p. 1, viewed 11 August 2009,  
<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FN5BT6%22>
89. General news, 'Companies tackled on unfair contracts', Australian, 17 February 2009, p. 4, viewed 11 August 2009,  
<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F1SSS6%22>

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