



**The Secretary
Economic Legislation Committee
The Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600**

16 April 2010

Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010.

This submission is made on behalf of Queensland Newsagents Federation (QNF) and NSW and ACT Newsagents Association (NANA)

The ACL is a major piece of legislation, essentially rewriting the consumer protection provisions of the current TPA and adding new provisions to ensure a nationally consistent consumer law regime.

The two Associations welcome the Bill in principle but have some serious concerns about impact on small business, in fact in some cases current small business protections are lost, in other cases small business lose out in relation to new initiatives and in other instances an opportunity to remedy anomalies is missed.

This submission is on behalf of two newsagency association and hence newsagents but it is expected that most of the issues raised will apply to small businesses generally.

The issues

- A Guarantees- definition of "consumer"
- B Guarantees- exclusion of resale
- C Guarantees- indemnification by suppliers
- D Unfair contracts- exclusion of business to business dealing.

Issue A- Guarantees- definition of consumer.

The current provisions in the TPA re warranties/guarantees – small business coverage.

The TPA contains Division 2, that relates to retailers and Division 2A, which relates to manufacturers/importers.

Division 2 (and parts of Division 2A) apply only in relation to the supply of goods or services by a corporation in the course of business to a ‘consumer’.

A consumer is defined in section 4B of the TPA by reference to the type or value of goods or services purchased. Specifically, a person is taken to have acquired particular goods or services as a consumer if either:

- the price of the goods or services is not greater than \$40,000; or
- the price of the goods or services is greater than \$40,000 but the goods or services are of a kind ordinarily acquired for personal, domestic or household use or consumption (or, in the case of vehicles, the vehicle (or trailer) is acquired for use principally in the transport of goods on public roads);

There are some variations to the above in the States and Territories. This note will not discuss those differences.

Consequently, small business purchases are covered if,

- Under \$40,000, no matter their intended use.
- Over \$40,000 if the purchase is of goods of a kind ordinarily acquired for personal, domestic or household use or consumption.
- Over \$40,000 in the case of vehicles is acquired for use principally in the transport of goods on public roads.

However the law does not apply if goods are purchased either for re-supply or for the purpose of using them up or transforming them in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land.

The proposed Australian Consumer Law (ACL) provisions re guarantees.

Definition of “consumer”.

(1) A person is taken to have acquired particular goods as a *consumer* if, and only if:

- The goods are of a kind ordinarily acquired for personal, domestic or household use or consumption, or

- The goods consisted of a vehicle acquired for use principally in the transport of goods on public roads.
- The services are of a kind goods are of a kind ordinarily acquired for personal, domestic or household use or consumption
- Goods are not purchased for re supply or to be transformed or used up.

The difference between current and proposed.

The only real test in the ACL is the'' ordinarily acquired' use test, the previous \$40,000 threshold, no matter its intended use, is gone.

This will substantially impact on small business.Small businesses loose out and we see no reason why the current monetary threshold cannot be retained.

In fact the CCAAC Report on Statutory Implied Conditions and Warranties left this issue open but the Government appears to have decided to take some protections away from small business without any real consultation.

Implications for small business are obvious, for instance purchasing IT equipment that is clearly for business use only and is below \$40.000 is no longer covered. A household type fridge is still covered but a cooling display cabinet under \$40,000 is not. There can be many more examples, shop fittings under \$40.000 are currently covered but will not be in future.

Issue B- Guarantees- exclusion of goods obtained for resale, etc

Currently the law does not apply if goods are purchased either for re-supply or for the purpose of using them up or transforming them in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land.

This is continued in the Bill.

This exclusion comes from an assumption that any business, big or small, is able to assess any problems when the goods are for resale, or to be used up or transformed.

That is simply not the case today. How does a newsagent know if a magazine is not printed properly or pens are faulty .Yet the newsagent is likely to bear the cost if goods are faulty?

Of course with the change in the definition of consumer this issue is less of an issue than now but nevertheless is an issue and one that is an anomaly in this day and age.

It may be that protections of small business in issues such as mentioned above is not one for national consumer law but serious consideration needs to be given to giving business some basic protections in relation to goods and services that it acquires.

Issue C- Guarantees- indemnification by suppliers.

Section 274 provides a statutory indemnity by the manufacturer /importer to a supplier /retailer.

However there are a few issues in the provision,

- The manufacturer is not liable if there is some intervening acting after the goods have left the manufacturer. However that exception is not available to the retailer, it will always be liable to the consumer yet may in some cases not be able to seek indemnification from the manufacturer.
- In cases where a retailer sells a product at higher than the recommended retail price it will be possible for the manufacturer to avoid liability to the retailer. This is quite unfair to retailers and selling above recommended retail might go to the issue of the amount of moneys to be indemnified but not a total loss of indemnification.

Issues D. Unfair consumer contracts – business to business dealings.

The new ACL adds provisions to the TPA in relation to unfair contracts but the “consumer contract” threshold is as follows,

- an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption

Consequently most small business contracts with other businesses are NOT covered but dealings between consumers and small business are.

D. Summary

Small business loses out in relation to warranty/ guarantees and unfair contracts in its dealings with other businesses.

The Bill provides increased obligations on small business when it comes to its dealings with consumers.

It is suggested that urgent consideration be given to giving small business some basic protections or at least maintain the current law when it comes to implied warranties.

Yours truly,

**Hank Spier
Principal**