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

Submission by the Treasury to
the Senate Economics Legislation Committee

11 May 2010

INTRODUCTION

The Treasury is grateful to the Committee for the opportunity to provide this additional submission to assist the Committee in its inquiry.

The Submission addresses the following matters:

- specific questions on notice asked by Senators;
- specific issues raised by Senators with the Treasury during the hearings;
- specific issues raised by Senators with other witnesses during the hearings.

In preparing this submission we have had regard to the transcript published by the Committee and to written questions provided by the Committee Secretariat on behalf of Senators.

The Treasury has previously provided the Committee with two documents designed to explain the context of the ACL and its provisions: ***The Australian Consumer Law: An introduction*** and ***The Australian Consumer Law: A guide to provisions***.[1]

1 Both guides are available at http://www.treasury.gov.au/consumerlaw/content/default.asp

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GLOSSARY OF TERMS

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
ASIC	Australian Securities and Investments Commission
ASIC Act	***Australian Securities and Investments Commission Act 2001***
BRCWG	Business Regulation and Competition Working Group
CCA	***Competition and Consumer Act 2010***
COAG	Council of Australian Governments
IGA	***Intergovernmental Agreement for the Australian Consumer Law,*** signed by members of the Council of Australian Governments on 2 July 2009.
MCCA	Ministerial Council on Consumer Affairs
MINCO	Ministerial Council for Corporations
PC	Productivity Commission
SCOCA	Standing Committee of Officials of Consumer Affairs
First ACL Act	***Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010***. This Act received the Royal Assent on 14 April 2010 and includes measures to implement: • a national unfair contract terms law; and • new enforcement powers, penalties and redress options in the TPA. The measures in this Act will be incorporated into the schedule version of the ACL. The Act also makes consequential amendments to the ASIC Act.
The Bill	Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010. The Bill also makes consequential amendments to the ASIC Act.
TPA	***Trade Practices Act 1974***

AGREEMENT WITH THE STATES AND TERRITORIES

The ACL represents a cooperative policy development and decision-making process undertaken by the Australian Government and the governments of the States and the Territories. All decisions in the development and implementation of the ACL have been taken with the States and Territories. The New Zealand Government has also been actively engaged in the process, particularly on the development of the provisions on consumer guarantees.

The initial text of the ACL

The initial text of the ACL must be agreed by all Australian governments. The law will be enacted by the Australian Parliament, and applied in that form by each state and territory parliament. Accordingly, the Australian Government would need to ensure that state and territory governments agree with any proposed amendment to the ACL by the Australian Parliament. There is otherwise a risk that state and territory parliaments will not apply the ACL in the form passed by the Australian Parliament and the key benefit of this reform — uniformity — will be lost.

Any future amendments to the ACL

The ***Inter-Governmental Agreement for the Australian Consumer Law*** (IGA)[2] was signed on 2 July 2009 by COAG and will govern the future administration of the ACL.

The process for amending the ACL, once it is passed by the Australian Parliament, applied by the States and Territories and commences, is set out in clauses 8 to 19 of the IGA:

- The Australian Government, a State or a Territory may submit a proposal to amend the ACL, and provide this to all other jurisdictions.
- The Australian Government will commence a consultation process within four weeks of receiving a proposed amendment, which involves:
  - the Commonwealth Minister writing to all States and Territories notifying them of the amendment and providing three months from the date of that notice to consider and respond to the proposal in writing;
  - after three months the Commonwealth Minister will call a vote. States and Territories will have 35 days to vote, and if they do not vote or abstain within that period, then they will be taken to have supported the proposed amendment; and
  - to be successful, the proposed amendment must be supported by the Australian Government and at least four other jurisdictions, of which three must be States.

2 http://www.coag.gov.au/coag_meeting_outcomes/2009-07-02/docs/IGA_australian_consumer_law.pdf.

- The Australian Government may make minor or inconsequential amendments to the ACL, provided it notifies the States and Territories of its intention to do so. It may not proceed with such amendments, if a State or Territory objects within 21 days of their receiving notice. In this situation, the Commonwealth Minister must call a vote.

- After an amendment has been agreed by the Australian Government and the States and Territories, the Australian Government will then introduce legislation to amend the ACL into the Australian Parliament.

Subordinate regulation under the ACL

The same approval requirements apply to regulations and legislative instruments made under the ACL as apply to changes to the ACL itself.

The National Partnership Agreement

The Implementation Plan for the ***National Partnership Agreement to Deliver a Seamless National Economy***[3] sets out milestones towards implementation of the ACL.

Under the Implementation Plan, all jurisdictions were to:

- establish a senior officials working group in November 2008 to arrange development of the ACL; and

- agree the IGA by the end of June 2009.

The Commonwealth was to:

- commence drafting the ACL by the end of December 2009;

- undertake public consultation on a final draft of the ACL and administrative arrangements in April to June 2010; and

- complete the regulation impact statement for the ACL by the end of June 2010.

The Implementation plan also sets out the following milestones that are yet to occur:

- the Commonwealth is to enact principal legislation for the ACL by December 2010;

- all jurisdictions are to enact application acts by December 2010; and

- all jurisdictions are to commence the ACL by December 2010.

The COAG Reform Council is responsible for monitoring compliance with NPA implementation requirements and provides reports annually to COAG.[4]

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3 http://www.coag.gov.au/coag_meeting_outcomes/2010-04-19/docs/nat_part_agree_seamless_nat_econ_implement_plan.pdf.

4 http://www.coag.gov.au/crc/index.cfm.

CONSULTATION

The Australian Government, together with the States and Territories, has engaged in extensive consultation on the reform proposals.[5]

In most cases, the provisions of the ACL reproduce existing provisions in the TPA and in state and territory fair trading laws (see table in Appendix A). However, there are some key areas in which the provisions (but not the policy intent) of the ACL differ from previous regulation, namely:

- the new national consumer guarantees law;
- the new rules on unsolicited selling;
- the new rules on lay-by sales; and
- the new national product safety law.

While these provisions may be expressed differently, the provisions largely reflect the same policy intent of existing provisions in the TPA and state and territory fair trading acts.

The policy proposals underpinning this reform have been the subject of extensive consultation over the past five years and in many cases, the reviews dealing with specific aspects of the legislation have made specific recommendations about the form of legislation, which have been accepted. These reviews include:

- the Standing Committee of Officials of Consumer Affairs' (SCOCA) report ***Civil penalties for Australia's consumer protection provisions*** (2005)[6];
- the Productivity Commission's ***Review of the Australian Consumer Product Safety System: Research Report*** (2006)[7];
- the Productivity Commission's ***Review of Australia's Consumer Policy Framework*** (2008) (the PC Review)[8];
- the Commonwealth Consumer Advisory Council's (CCAAC) review of statutory conditions and warranties, including an issues paper entitled ***Consumer rights: Statutory implied conditions and warranties*** (2009)[9] and a final report entitled ***Consumer rights: Reforming statutory implied conditions and warranties*** (2009)[10]; and
- the SCOCA National Education and Information Advisory Taskforce's report titled ***National Baseline Study on Warranties and Refunds*** (2009).[11]

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5 For a timeline of the steps taken in developing the ACL, see page 14 of The Australian Consumer Law, An introduction, The Treasury, April 2010.
6 http://www.consumer.gov.au/html/civil_penalties/index.html.
7 http://www.pc.gov.au/projects/study/productsafety/docs/finalreport.
8 http://www.pc.gov.au/projects/inquiry/consumer.
9 http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1586.
10 http://www.treasury.gov.au/contentitem.asp?NavId=035&ContentID=1682.
11 http://www.treasury.gov.au/contentitem.asp?NavId=014&ContentID=1666.

In preparing the provisions of the Bill, the Government, with the States and Territories, has taken account of the views expressed in response to the following public consultations:

- SCOCA's information and consultation paper titled ***An Australian Consumer Law: Fair Markets — confident consumers*** (2009)[12]; and
- SCOCA's ***Consultation on draft Regulation Impact Statements*** (RIS) on reforms based on best practice in state and territory consumer protection laws, and a new national product safety regime (2009).[13]

Issues raised before the Committee by stakeholders fall into two broad categories:

- concerns or disagreement with the policy outcome arrived at by MCCA and reflected in the provisions of the ACL; or
- concerns with the specific drafting in provisions of the ACL and the potential practical implications and costs of those.

With respect to the former category, there has been extensive consultation since 2005 on those issues and the views of stakeholders have been taken into account in MCCA's policy decisions and the preparation of the ACL.

As to the latter category, the Australian Government, along with the States and Territories, has prepared the legislation to give effect to the policy outcomes agreed by MCCA. The Government is very much aware of the views expressed by stakeholders about whether this has been achieved in the submissions provided to the Committee, including views put directly to the Government and the Treasury during the period in which the Bill was prepared. The Government will have close regard to the recommendations of the Committee concerning the drafting of provisions of the ACL.

Drafting

A question on notice from Senator Eggleston (see Appendix C) and comments from other stakeholders observe that the ACL, as drafted, is complex and poorly drafted.[14] We have reflected on this comment and continue to consider that, while aspects of the ACL are different[15], it does not follow that the ACL is more complex than the current range of laws.

The provisions of the ACL replace provisions now set out in 17 Acts of the Commonwealth, state and territory parliaments. These Acts have, over time, accumulated many differences, reflecting differing policy approaches and drafting styles over more than three decades across all jurisdictions. These laws present considerable complexity, confusion and cost for both consumers and businesses.

The ACL replaces these laws with a single set of provisions. The provisions are presented in a logical order and within a clear regulatory framework of general and specific protections, offences, remedies and enforcement powers.

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12 http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1482.
13 http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1665.
14 Committee ***Hansard***, Melbourne, 29 April 2010, E37.
15 See Appendix A for a table setting out the areas in which the ACL differs from the TPA.

The ACL has been drafted by the Office of Parliamentary Counsel in accordance with Drafting Directions issued by First Parliamentary Counsel. It has been drafted using plain language. Plain language drafting seeks to create legislation that is easy for the relevant audience to understand. Unnecessary jargon and gratuitous obscurity has been eliminated from the ACL wherever possible.

A small number of unintentional drafting errors have been identified by Treasury or by stakeholders. Appendix B lists those errors that are currently known to Treasury. We are grateful to those people who have brought these errors to our attention.

ECONOMIC DISTORTION AND EXEMPTIONS FROM REGULATION

On 30 April 2010, Senator Cameron asked the Treasury about the potential for exemptions from aspects of the ACL to cause distortions.[16]

The ACL is intended to be a generic law which applies to all sectors of the economy. The only exception to this applies with respect to financial products and services, which are regulated under the ASIC Act and the Corporations Act as a consequence of the referral of State powers to the Commonwealth in these areas. While this exception does exist, there is a policy commitment by the Australian Government to, as far as is necessary and practical, maintain consistency between the two areas.

As a general proposition, the existence of regulatory exemptions creates the potential for economic distortions and a reduction in total consumer welfare as a regulated market participant may face disadvantages when compared to an unregulated participant when competing in the market. For this reason, the ACL eliminates the exemptions which currently apply to:

- architects and engineers under section 74 of the TPA with respect to the application of the implied warranty that services will be fit for purpose (see section 61 of the ACL); and
- Telstra under section 64 of the TPA with respect to the requirements for unsolicited directory entries and advertisements (see section 43 of the ACL).

An exemption should only apply where there is a clear policy justification for it, the benefits exceed the costs and it does not serve to reduce competition in a market. The ACL provides for the following exemptions that have been carried over from the TPA:

- section 38: the application of certain misleading conduct provisions (sections 29, 30, 33, 34 and 37) to persons carrying on a business of providing information; and
- section 43: the application of the prohibition on asserting a right to payment for unauthorised directory entries or advertisements to certain publishers, the Commonwealth and state and territory governments.

16 Economics Legislation Committee, Senate, Canberra, 30 April 2010, E43.

In other areas, the ACL does not provide for exemptions on its face. Rather, it provides the Minister with a regulation making power to make exemptions in specific circumstances. The ACL provides for the possibility of exemptions in the following areas:

- section 65: the application of the consumer guarantees provisions (Part 3-2, Division 1 of the ACL) to electricity, gas and telecommunications services;

- section 94: the application of the unsolicited consumer agreements provisions (Part 3-2, Division 2 of the ACL) in all or some respects; and

- section 131(2): the requirement to comply with the mandatory reporting requirement in section 131 in specific circumstances.

These areas have been identified as there is a potential that the application of the generic ACL provisions will, in some circumstances, lead to a consequence which has a greater distortionary effect than would be the case where other, more appropriate consumer regulation applies. In each case, the potential for exemptions to be made has been provided for on the basis that either:

- there is alternative consumer protection regulation which is more appropriate to the specific market sector being considered; or

- the exemption does not reduce consumer welfare and facilitates an efficient and competitive market.

THE MEANING OF 'CONSUMER'

The meaning of 'consumer' as defined in section 3 of the ACL is relevant to the Parts of the ACL dealing with consumer guarantees, unsolicited consumer agreements, lay-by sales agreements, the provision of itemised bills, the definition of continuing credit contracts and linked credit contracts.

The meaning of consumer was the subject of inquiry by CCAAC, which suggested that the existing $40,000 threshold be removed. CCAAC indicated that '… there is no meaningful distinction to be made between a person who pays $40,000 for goods or services and a person who pays $40,001. The focus of the definition should be on the class of person who makes the purchase, or on the kind of goods or services which are purchased.'[17]

MCCA agreed to accept CCAAC's recommendation, and accordingly the ACL retains the TPA definition of consumer, but without the $40,000 threshold. A person would be taken to have acquired goods as a consumer if '… the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption.'

Submissions made to the Committee have suggested potential additional changes to the definition of consumer. The Law Council of Australia (LCA) suggested[18] that the definition of 'consumer' should be amended to take into account the nature of the person acquiring the goods or services, the nature of the goods or services acquired and the purpose of acquisition. The LCA also suggested that the definition should be limited to consumers who are individuals. Freehills submitted[19] that the definition of consumer should be based on subsection 23(3) of the ACL, which defines 'consumer contract' for the unfair contract terms provisions of the ACL.

A key consideration, in relation to defining 'consumer' in the ACL, is the avoidance of undue complexity. This is the case in relation to the consumer guarantees provisions in Parts 3-2 and 5-4 of the ACL, in particular. When a consumer returns a good to a supplier for a repair it is often not possible to conduct an inquiry into the nature of the person, the purpose of the acquisition or whether the goods are being returned on behalf of a body corporate. Any move to amend the definition of 'consumer' such that these inquiries are necessary would add to costs for business and limit the enforceability of consumer guarantees, reducing the scope of an important consumer protection. Similar considerations also apply to the other provisions of the ACL that rely on the definition of consumer, namely unsolicited consumer agreements, lay-by sales and the provision of itemised bills.

The current definition of 'consumer' within the ACL avoids complex inquiries into the nature of persons by focussing, instead on the nature of goods. For example, it is relatively easy to determine that a microwave oven purchased from a whitegoods retailer is '… of a kind ordinarily acquired for personal, domestic or household use or consumption'. By contrast, there are no special characteristics of a business person, when they are standing in a

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17 Commonwealth Consumer Affairs Advisory Council, ***Consumer rights: reforming statutory implied conditions and warranties***, Final Report, October 2009, p 121.

18 Law Council of Australia (LCA), submission no. 18, p 5.

19 Freehills, submission no. 35, p 7.

retailer's shop with a faulty microwave oven, which would readily allow the retailer to determine that the goods were used for a purpose other than for personal, domestic or household use or consumption.

The LCA and Freehills also raised concerns about consumer protection for consumers who purchase goods ordinarily used for business purposes.[20] In relation to those purchases, consumers would continue to receive the benefit of any express warranties provided by manufacturers or suppliers and conditions or warranties implied into contracts by the common law.[21]

Senator Eggleston provided the Treasury with questions on notice (see Appendix C) regarding whether the removal of the $40,000 threshold would exclude motor vehicles owned by businesses from coverage under statutory warranties. The only change to the meaning of consumer in the ACL, when compared to the TPA, is the removal of the $40,000 threshold. Vehicles purchased by businesses will continue to be covered by statutory warranties to the extent that they are either '… ordinarily acquired for personal, domestic or household use or consumption' or where they '… consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads'.[22]

In addition, statutory warranties covering vehicle purchases are typically provided for in state and territory laws that are in addition to rights provided for in the ACL.[23] New motor vehicles are almost always covered by express warranties provided by manufacturers. These warranty rights enjoyed by consumers and businesses would be unaffected by implementation of the ACL.

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20 Freehills, submission no. 35, pp 4; LCA, submission no. 18, p 5.

21 Terms implied in law include: conditions of reasonable fitness and merchantable quality, fitness for purpose on a contract for the sale of goods, an implied warranty of seaworthiness, an implied condition that, on the letting of a furnished house, it is reasonably fit for habitation, the implied duty of care in the carriage of passengers and in looking after bailed goods. See, for example, G. Williams, "Language and the Law IV" (1945) 61 ***Law Quarterly Review*** 384 at 403, quoted in ***Byrne v Australian Airlines Ltd*** (1995) 185 CLR 411 at 448 per McHugh and Gummow JJ. See also, Heffey, P, Paterson, J. and Hocker P, ***Contract: Commentary and Materials***, p 433-450.

22 See section 3 of the ACL.

23 See, for example, ***Motor Dealers Act 1974*** (NSW), section 27 and ***Property Agents and Motor Dealers Act 2000*** (QLD), Chapter 9, Part 5.

REVERSALS OF THE ONUS OF PROOF

Reversals or partial reversals of the onus of proof have been included in the ACL in situations where:

- it would be impossible or unreasonable to expect a consumer or a regulator to meet the conventional standard of proof; and
- the supplier would easily be able to meet the standard of proof.

All provisions of the ACL have been developed in accordance with the Commonwealth Attorney General's Department's ***A Guide to Framing Commonwealth Offences, Civil penalties and Enforcement Powers***[24].

Specific provisions

There are ten instances where there is a reversal of the onus of proof set out in the ACL. Of these, five replace existing reversals of the onus of proof in the TPA and five are new, reflecting the inclusion of new areas of consumer law at the Commonwealth level as part of the ACL.

Section 4(2) — Misleading representations as to future matters

Section 4(2) is based on sections 51A and 75AZB of the TPA.

This is not a reversal of the onus of proof, it is an evidentiary onus. The person accused of a breach does not have to prove representations as to future matters are not misleading (for example, to conclusively show that something would have happened , when it might not have); but they must put evidence to the contrary before the court (that is, to present evidence that it was as reasonable to expect that something might not have happened than it was to expect that it might have done).[25] Putting such evidence before the court discharges the onus on the respondent and subsequently the onus shifts back to the claimant to prove the that the representation as to a future matter was misleading.

Section 40(4) — Asserting a right to payment for unsolicited goods or services; 43(6) — Asserting a right to payment for unauthorised entries or advertisements

Sections 40(4) and 43(6) are based on section 64 of the TPA. The provisions of section 64 of the TPA have, for the purposes of the ACL and greater clarity, been divided into two sections, with one being extended to cover advertisements.

Sections 40(4) and 43(6) require that a person must have had no reasonable belief of their right to assert payment for there to be a contravention of the provisions. As such, it is for the person to prove what their belief was and that it was reasonable.

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24 http://www.ilsac.gov.au/www/agd/agd.nsf/Page/Publications_GuidetoFramingCommonwealthOffences,CivilPenaltiesandEnforcementPowers.

25 Explanatory Memorandum, p 24-25.

The onus of proving 'reasonable belief' has been placed on the respondent in these cases, as it would be extremely difficult for a regulator or private party to establish the respondent's reasonable belief, as it is a subjective matter. Only the respondent is likely to hold evidence relevant to proving whether they held a particular belief and whether it is reasonable.

A person accused of contravening either of the criminal equivalents to sections 40 and 43 of the ACL (sections 162 and 163) also has the benefit of the standard defences to an offence under the ACL — reasonable mistake of fact and the act or default of another person.[26]

Section 24(4) — Unfair contract terms — meaning of unfair (legitimate business interests)

Section 24(4) was introduced into the ACL in the ***Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010*** (first ACL Act) (it is presently section 3 of the ACL, for the purposes of that Act) and was considered by the Committee in its 2009 report[27] on that Bill.

There is a rebuttable presumption that an unfair term is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the application or reliance on that term, unless that party can prove otherwise.

Section 27(1) — Unfair contract terms — standard-form contracts

Section 27(1) was introduced into the ACL in the first ACL Act (it is presently section 7 of the ACL, for the purposes of that Act) and was considered by the Committee in its 2009 report[28] on that Bill.

Where a contract is alleged to be a standard-form contract, then the onus will be on the supplier to prove that it is not.

Sections 29(2) and 151(2) — False or misleading representations (testimonials)

Sections 29 and 151 of the ACL provides that false of misleading representations that purport to be a testimonial or concern a testimonial are specifically prohibited by the ACL. Sections 29(2) and 151(2) include an evidentiary burden on a respondent to adduce evidence in court that representations concerning testimonials are not false or misleading, as the case may be.

This is not a reversal of the onus of proof, it is an evidentiary onus. The accused person does not have to disprove the alleged breach; he or she must put evidence to the contrary of the allegation before the court.[29] Putting such evidence before the court discharges the onus on the respondent and subsequently the onus is on the plaintiff to prove the alleged breach. This provision is similar to section 14 of the Victorian ***Fair Trading Act 1999***, which also places an onus on the person making the representation.

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26 Sections 207 and 208 of the ACL.

27 Economics Legislation Committee, Senate, ***Trade Practices Amendment (Australian Consumer Law) Bill 2009*** (2009) [4.6-4.17].

28 Economics Legislation Committee, Senate, ***Trade Practices Amendment (Australian Consumer Law) Bill 2009*** (2009) [4.6-4.17].

29 Explanatory Memorandum, p 114-115.

The LCA submits[30] that the onus of proof should not be altered for the criminal contravention in 151(2) of the ACL in relation to false or misleading testimonials. The LCA does, however, support the evidentiary onus placed on a respondent in relation to that section's non-criminal equivalent, section 29(2).

The accuracy of testimonial statements is something which can be difficult to prove in the absence of evidence from the person making the representation or the person purported to have made the testimonial statement.[31] As such, the rationale for placing an evidentiary onus on a person accused of making a false or misleading testimonial representation is the same in both the civil and criminal context.

A person accused of contravening the criminal equivalent, section 151(2), also has the benefit of the standard defences to an offence under the ACL — reasonable mistake of fact and the act or default of another person in sections 207 and 208.

Section 70 — Unsolicited consumer agreements

Section 70 of the ACL provides that where a contract is alleged to be an unsolicited consumer agreement, then the onus will be on the supplier to prove that it is not.

Questions about whether an agreement falls within the scope of the unsolicited selling provisions, which are likely to focus on the issue of solicitation, may be the subject of potential dispute between the parties to a proceeding. This will place claimants at a significant disadvantage should they be required to prove that this is the case. It is also likely that the business would have a record if the person in fact solicited the transaction. The rebuttable presumption has been included to ensure that the potential for a successful action by a claimant under this provision is not impeded.[32]

Sections 106(3) and (4) — Product safety — goods that do not comply with a safety standard
Sections 118(3) and (4) — Product safety — goods the subject of a ban
Sections 136(3) and (4) — Information standards — non-compliant goods

Sections 106, 118 and 136 of the ACL are based on the following existing TPA provisions:

- section 65C (and its criminal equivalent, section 75AZS) in relation to bans and safety standards; and

- section 65D (and its criminal equivalent, section 75AZT) in relation to information standards.

While these provisions do not technically reverse the onus of proof in the contravention in subsections 106(3), 118(3) and 136(3), they create a contravention based on manufacture, possession or control of goods and provide a defence (in subsections 106(4), 118(4) and 136(4) and (5) respectively) that such manufacture, possession or control was not for the purposes of supply within Australia.

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30 LCA, submission no. 18, p 4.
31 Standing Committee of Officials of Consumer Affairs, ***Regulation Impact Statement: Reforms based on best practice in State and Territory consumer laws*** (2009) [23.492].
32 Explanatory Memorandum, p 219.

A respondent would be able to establish the defence in most or all cases under these provisions and, as such, would have a similar outcome to a reversal of the onus of proof (which would require a person to establish something to avoid a contravention).

Subsections 106(3) and (4), 118(3) and (4), and 136(3) and (4) are based on the current equivalent Victorian provisions of the ***Fair Trading Act 1999***, which prohibits supply of non-compliant or banned goods[33] and defines supply as including 'have in possession for the purpose of sale'.[34]

These provisions also exist as parallel offences in sections 194, 197 and 203 of the ACL. A person accused of contravening the criminal equivalent, section 151(2), has the benefit of the standard defences to an offence under the ACL — reasonable mistake of fact and the act or default of another person.[35] There are also additional defences available to an importer accused of a criminal contravention when they could not have known that products or product-related services acquired from outside Australia for the purposes of resupply did not comply with a safety or information standard.[36]

33 Sections 33, 44 and 46 of the ACL.
34 Section 3 of the ACL, definition of 'supply'.
35 Sections 207 and 208 of the ACL.
36 Sections 210 and 211 of the ACL.

GENERAL PROTECTIONS

UNCONSCIONABLE CONDUCT

Reforms contained in this Bill

On 5 November 2009, the Government announced[37] amendments to the TPA in response to the Senate Committee's recommendations in its 2008 review of the statutory definition of unconscionable conduct. The Government also announced increased penalties under the ACL of up to $1.1 million for corporations and $220,000 for individuals which will apply to anyone engaging in unconscionable conduct or making false or misleading representations.

Additionally, the Government announced a further inquiry process to examine whether a list of examples of unconscionable conduct or a statement of principles of what constitutes unconscionable conduct should be incorporated into the TPA. The Government also encouraged the ACCC to continue in its resolve to achieve further judicial guidance on unconscionable conduct under the TPA.

The unconscionable conduct provisions in the ACL (sections 20 to 22) are largely the same as the existing TPA provisions, with two exceptions:

- the provisions are drafted to apply to the conduct of persons rather than just corporations; and

- subsections 22(2)(j) and (3)(j) have been expanded to ensure that the terms and behaviour pursuant to a contract are relevant considerations in determining unconscionable conduct in business transactions.

Future reforms

On 3 March 2010, the Government announced[38] that it would develop, in consultation with the States and Territories, amendments to the ACL unconscionable conduct provisions.

On 30 April 2010, MCCA agreed[39] that the unconscionable conduct provisions of the ACL would contain interpretative principles to guide the interpretation of the provisions, as well as unify the currently separate provisions that apply to consumers and business.

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37 See media release 'Government to strengthen Franchising Code of Conduct and unconscionable conduct law', available at http://minister.innovation.gov.au/Emerson/Pages/GOVERNMENTTOSTRENGTHENFRANCHISINGCODEOFCONDUCTANDUNCONSCIONABLECONDUCTLAW.aspx.

38 See media release 'Rudd Government strengthens unconscionable conduct laws', available at http://minister.innovation.gov.au/Emerson/Pages/RUDDGOVERNMENTSTRENGTHENSUNCONSCIONABLE.aspx .

39 MCCA Communiqué (30 April 2010), http://www.consumer.gov.au/html/download/MCCA_Meetings/Meeting_23_30_Apr_10.pdf.

These reforms will be included in a Bill to be introduced in 2010 and will introduce the following interpretative principles into the legislation to illustrate the meaning and scope of the provisions:

- the provisions are intended to go beyond the scope of the previous judge-made law of unconscionable conduct, and are not confined by it;
- the court may consider the terms and progress of a contract; and
- the provisions may apply to systems of conduct, and are not restricted by the need to identify a specific person at a special disadvantage.

The changes will also unify the non-exhaustive types of conduct which may be unconscionable in the context of a business's dealings with consumers and a business's dealings with other businesses, either as a customer or supplier to those businesses.

UNFAIR CONTRACT TERMS

The application of the unfair contract terms provisions to small businesses was raised in submissions by the Queensland Newsagents Federation and ACT Newsagent Association[40], the National Association of Retail Grocers of Australia Pty Ltd[41], the Motor Trades Association of Australia[42] and the Council of Small Business of Australia.[43] CHOICE[44] and the Consumer Action Law Centre also raised the application of the unfair contract terms provisions to insurance contracts.[45]

Business-to-business contracts

The unfair contract terms provisions in Part 2-3 of the ACL do not apply to business-to-business contracts. While this was not the case in the exposure draft of the unfair contract terms provisions released by the Government in May 2009, the Australian Government made a decision last year to not apply the unfair contract terms provisions to business-to-business contracts to improve the clarity of the law for small businesses. The Australian Government's decision to exclude business-to-business contracts was made after reviewing the unconscionable conduct provisions of the TPA and the ***Franchising Code of Conduct***.[46]

In considering how best to deal with specific instances of unfairness in business-to-business contracts, on 5 November 2009 the Australian Government announced its response to

40 Queensland Newsagents Federation and ACT Newsagent Association, submission no. 10, p 4.
41 National Association of Retail Grocers of Australia Pty Ltd, submission no. 19, p 1.
42 Motor Trades Association of Australia, submission no. 21, p 1.
43 Council of Small Business of Australia, submission no. 27, p 1.
44 CHOICE, submission no. 20, p 4.
45 Consumer Action Law Centre, submission no. 28, p 2.
46 Commonwealth, ***Parliamentary Debates*** House of Representatives, 24 June 2009, 6983 (Dr Craig Emerson, Minister for Competition Policy and Consumer Affairs).

Parliamentary inquiries into the effectiveness of the unconscionable conduct provisions of the TPA and the ***Franchising Code of Conduct***.[47]

Insurance contracts

In its inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill 2009, the Senate Economics Legislation Committee, which reported on 7 September 2009, recommended that the Australian Government consider whether insurance contacts should be included within the scope of the unfair contract terms law; or alternatively, whether the ***Insurance Contracts Act 1984*** should be amended to provide an equivalent level of protection.[48]

The application of the unfair contract terms provisions to insurance contracts is the subject of a discussion paper entitled ***Unfair terms in insurance contracts — Options paper***[49], which was released by the Minister for Financial Services, Superannuation and Corporate Law, the Hon Chris Bowen MP, on 27 March 2010. Submissions closed for that paper on 30 April 2010.

47 See above, p 13 ('Unconscionable conduct') and http://minister.innovation.gov.au/Emerson/Pages/GOVERNMENTTOSTRENGTHENFRANCHISINGCODEOFCONDUCTANDUNCONSCIONABLECONDUCTLAW.aspx.

48 Economics Legislation Committee, Senate, ***Trade Practices Amendment (Australian Consumer Law) Bill 2009*** (2009) Chapter 8.

49 http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1756.

SPECIFIC PROTECTIONS

UNFAIR PRACTICES

False or misleading representations

Coles

Coles' submission suggests that the drafting of section 29, which prohibits false or misleading testimonials 'by any person', will potentially make advertisers liable if an actor playing a character in an advertisement states that they like a product, when the actor does not necessarily like the product.[50]

The ACL does not seek to define 'testimonial'. A testimonial may take many forms, including written comments on a website, a statement in a radio or television advertisement or comments made in a press article or television or radio program (often called 'advertorials'). The content of a particular advertisement would need to be considered in order to determine if a particular representation is both a testimonial and false or misleading.

The provision addresses two things:

- whether the content of a testimonial is false and misleading; or
- whether something purporting to be a testimonial is genuine (that is, whether the fact of the making of a testimonial is false or misleading).

If it is clear that an advertisement portrays a fictional character who uses and likes a product, then that representation would not be a testimonial by the actor portraying the character. In such a situation, the principal concern would be whether the statements made in the advertisement itself are false or misleading, the responsibility for which rests with the business concerned.

Law Council of Australia

The LCA also suggests[51] that the new prohibitions on false or misleading representations relating to consumer guarantees in section 29(m) and (n) of the ACL are functionally similar or identical and that (n) should be deleted. It also suggests that section 29(n) could lead to confusion that any attempts to sell extended warranties would be deemed to be misleading.

These additional prohibitions were recommended by the Commonwealth Consumer Affairs Advisory Committee in its report ***Consumer rights: Reforming statutory implied conditions and warranties.***[52]

While the two prohibitions apply to similar types of claims or representations, they make it explicit on the face of the legislation that both representations downplaying or denying

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48 Coles Supermarkets Australia, submission no. 3, p 1.
51 LCA, submission no. 18, p 11.
52 Finding 7.6.

consumers' statutory rights and representations that consumers need to pay to receive certain rights are prohibited.[53]

Offering rebates, gifts and prizes

The Consumer Credit Legal Service WA suggests[54] that section 32 of the ACL should address the situation where a gift or prize is offered either as a conduit to attempt to sell other items or where the person is tricked into buying something when they thought they were just claiming their prize.

The selling of items subsequent to a prize being received is not prohibited generally, providing that the person is not misled. If a person is misled, the misleading and deceptive conduct (Part 2-1) and false or misleading representations (Part 3-1, Division 1) provisions in the ACL would apply.

Unauthorised advertisements

Sensis[55] suggested a number of amendments to exempt certain entities from the unauthorised advertisements and entries provisions in section 43 the ACL, and to clarify the requirements for authorising the placing of an entry or an advertisement.

Exemptions[56]

Exemption for Telstra

Sensis is concerned that the exemption for publications published, or to be published, by or under the authority of the Australian Telecommunications Commission (ATC) has been removed in the ACL.[57] This exemption is currently provided in subsection 64(10) of the TPA, but does not appear in section 43 of the ACL.

The exemption was provided to the ATC when it was the government agency responsible for Australian domestic telecommunications services. Its functions were subsequently merged into the Australian and Overseas Telecommunications Corporation, which was privatised and became Telstra.

The exemption is no longer justified. It was originally provided to a government agency providing a monopoly telecommunications service. There is now a competitive telecommunications market and a number of private businesses provide directory services. The exemption should not continue to be provided to a private organisation, when competitors do not, and never have had, the benefit of the exemption, and therefore operate at a potential disadvantage.

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53 Explanatory Memorandum, p 115-116; Evidence to Economics Legislation Committee, Senate, Canberra, 30 April 2010, E40 (Mr Simon Writer). See, also, the discussion on page 28 of this submission about the low level of awareness of statutory consumer rights by businesses.

54 Consumer Credit Legal Service WA, submission no. 15, p 2.

55 Sensis, submission no. 2.

56 See also pages 10 and 11; and above on exemptions, p 11-12.

57 Sensis, submission no. 2, p 2-3.

Exemption for large and listed companies

Sensis is also concerned that the exemption for large or listed companies and their subsidiaries, currently available in some States[58], has not been reflected in section 43 of the ACL[59].

Section 64 of the TPA, which relates to directory entries, did not contain an exemption for large or listed companies. The authorisation requirement only stipulates that the authorisation document be signed by the authorising person. Such authorisation does not have to be in written form — this point is explained further on the next page of this submission.

Subsection 43(3) of the ACL — exemption for high circulation publications

Sensis raised concerns that, as currently drafted, publications such as the White Pages, which have a high annual circulation, may not receive the exemption for publications with a weekly circulation of 10,000 copies or more.[60]

The exemption is not expressed to only apply to publications that have a weekly circulation. A publication that has a circulation which is equivalent in weekly terms should also qualify for the exemption, subject to the auditing requirement. For example, a publication with a monthly circulation of 50,000 copies would qualify for the exemption, as drafted.

Authorising the placement of an entry or advertisement

Sensis is concerned that the requirement for a document to be signed by the person authorising the placement of an entry or advertisement, at section 43(5)(a) of the ACL, would preclude authorisations made over the phone or the internet.[61]

Section 2 of the ACL defines a 'document' as:

- a book, plan, paper, parchment or other material on which there is writing or printing, or on which there are marks, symbols or perforations having a meaning for persons qualified to interpret them; and

- a disc, tape, paper or other device from which sounds or messages are capable of being reproduced.

If a person provides authorisation over the telephone, a recording of that authorisation would be sufficient to satisfy the authorisation requirements.

Authorisations given over the internet are covered by the ***Electronic Transactions Act 1999*** (Cth). Section 10 of that Act provides that, where the signature of a person is required by a law of the Commonwealth, the requirement is deemed to be met for an electronic communication if:

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58 ***Fair Trading Act 1987*** (NSW), paragraph 58A(7)(a); ***Fair Trading Act 1999*** (Vic), subparagraph 27(5)(a)(i).
59 Sensis, submission no. 2, p 2-3.
60 Sensis, submission no. 2, p 3-4.
61 Sensis, submission no. 2, p 3-4; see also Evidence to Economics Legislation Committee, Senate, Melbourne, 29 April 2010, E15-E18 (Telstra and Sensis).

- a method is used to identify the person and to indicate the person's approval of the information communicated;

- having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated; and

- the person to whom the signature is required to be given consents to that requirement being met by way of the use of the method mentioned above.

This would cover, for example, authorisations given by email, or from an electronic form over the internet. In those cases, a person can satisfy the requirement to provide the 'signed document', whether it be a copy of the authorising email or the completed form, to the authorising person by email.

In relation to the requirement that a person provide a copy of the document authorising the placing of an entry or advertisement under paragraph 43(5)(b) of the ACL, section 9 of the ***Electronic Transactions Act 1999*** (Cth), provides for the giving of such information by electronic communication where:

- at the time the information was given, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference; and

- the person to whom the information is required to be given consents to the information being given by way of electronic communication.

Pyramid schemes

The Direct Selling Association of Australia[62] sought clarification on the new requirement in section 46 that courts ***must*** consider certain factors in determining whether a scheme is a multi-level marketing scheme or a pyramid scheme. Part V, Division 1AAA of the TPA stated that courts ***may*** consider such factors.

The new requirement was considered and approved by MCCA at its meeting on 4 December 2009, which clarifies the operation of the existing provision so as to ensure that the court, in any decision concerning a pyramid scheme, must have regard to two specific matters in addition to any other relevant matter.[63] Consistent with the previous pyramid selling provisions in Part V, Division 1AAA of the TPA, a court may have regard to any other matter it considers relevant.[64]

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62 Direct Selling Association of Australia, submission no. 17, p 8-9.

63 MCCA Communiqué (4 December 2009), p. 5, http://www.consumer.gov.au/html/download/MCCA_Meetings/Meeting_22_4_Dec_09.pdf; section 46(1) of the ACL.

64 Explanatory Memorandum, paragraph 6.332

Multiple pricing

Coles

Coles' submission suggests[65] that section 47 of the ACL should include the information in the Explanatory Memorandum[66], which states that the retailer retains the right to withdraw goods from sale and correct pricing errors.

Section 47 of the ACL does not have the effect of requiring the goods to be sold. It requires that goods should not be sold for more than the lowest of the displayed prices for that good, where two or more prices are displayed for the same item.

A price displayed in a shop is an 'invitation to treat' and not a contract term. Accordingly, the retailer is entitled to withdraw the item from sale at any point prior to the conclusion of the transaction between the retailer and the customer. If a retailer withdraws the item from sale and corrects the prices, then the new prices apply and the old, incorrect prices are no longer 'displayed'.[67]

The Explanatory Memorandum explains that the effect of the provision is that the rights of non-sale and withdrawal from sale remain with the business.[68]

Telstra

Telstra suggests[69] that section 47 of the ACL should not require catalogue retractions to be made in 'a manner that has at least a similar circulation or audience', rather that it should be reasonably effective in the circumstances, such as publishing a retraction in a different newspaper that circulates in generally the same area or by publishing in-store notices.

Section 47 of the ACL requires at least a similar circulation to ensure that those who are potentially misled by an incorrect price are informed.

Section 40 of the ***Fair Trading Act 1987*** (NSW) and section 22 of the ***Fair Trading Act 1992*** (ACT), upon which section 47 of the ACL is based, do not contain explicit subsections dealing with retractions, unlike section 47 of the ACL.

Harassment and coercion

Mr Lynden Griggs[70] and the Consumer Action Law Centre[71] suggest that section 50 of the ACL, which prohibits harassment and coercion, should include a list of conduct which is deemed to amount to harassment and coercion for the purposes of the section, in similar terms as section 21(2) of the ***Fair Trading Act 1999*** (Vic).

The examples listed in the Victorian provision are either:

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65 Coles Supermarkets Australia, submission no. 3, p 3.
66 Explanatory Memorandum, p 159.
67 Explanatory Memorandum, p 160.
68 Explanatory Memorandum, p 159.
69 Telstra, submission no. 11, p 17.
70 Evidence to Economics Legislation Committee, Senate, Melbourne, 29 April 2010, E11 (Mr Lynden Griggs).
71 Consumer Action Law Centre, submission no. 28, p 8-12.

- conduct which is already prohibited under the ACL, for example instances of misleading and deceptive conduct or false or misleading representations; or

- conduct which is illegal under other laws, such as carrying a firearm or impersonating a member of the police force, and which attract significant criminal penalties.

Section 50 of the ACL adopts the approach used in section 60 of the TPA, which has proven effective in dealing with harassing and coercive behaviour which is of a nature not specified in the Victorian FTA's list, but which fits within a much broader category of behaviour. For example, in ***ACCC v McCaskey*** [2000] FCA 1037, the Federal Court found that the conduct of a debt collector who made an excessive number of telephone calls, adopted an aggressive, threatening and abusive manner in those telephone calls and misled debtors and others about debt recovery procedures and the non-payment of debts amounted to undue harassment under section 60 of the TPA.

The use of a list which deems specific conduct as falling within the ambit of the section runs the risk that, even if expressed in a non-exclusive manner, the nature of those things listed will condition the significance of the sorts of conduct which might be caught by the section. The view of jurisdictions in developing the ACL was that the better place for such lists was in guidance issued by regulators, which would be able to more flexibly identify the broad range of conduct which is of concern and likely to result in enforcement action.

Under the IGA, regulators are to develop and publish joint national guidance on the ACL.[72] This will include guidance on types of conduct that may amount to harassment or coercion under section 50 of the ACL.

CONSUMER TRANSACTIONS

Consumer guarantees

Complexity

Freehills has raised the issue of complexity[73] in the new consumer guarantees provisions in Part 3-2, Division 1 of the ACL. It may be that the argument is that because the provisions are different to the current law, they are complex.

The National Education and Information Advisory Taskforce (NEIAT) published the ***National Baseline Study on Warranties and Refunds*** in October 2009 (the NEIAT study). The NEIAT study revealed evidence that consumers and businesses have limited knowledge and understanding of the existing law implying conditions and warranties into consumer contracts. When told of their statutory rights, 71 per cent of consumers indicated that they had never heard of such rights.[74] Similarly, 57 per cent of retailers and 47 per cent of manufacturers were unaware of the existence of consumer rights beyond manufacturers' express warranties[75]. NEIAT estimated that Australian consumers spent $2 billion over a

72 IGA, clause 25.
73 Freehills, submission no. 35, p 2.
74 NEIAT, ***National Baseline Study on Warranties and Refunds***, October 2009, p 51.
75 NEIAT, ***National Baseline Study on Warranties and Refunds***, October 2009, p 53.

two year period dealing with problems with whitegoods, electronic goods and mobile telephones.[76]

The new consumer guarantees regime is a single national law which will replace the various implied statutory conditions and warranties provisions in the TPA and in a large number of State and Territory Acts. It is designed to express in plain language the current rights consumers enjoy, and replace complex or obscure language with more easily understood concepts. It also sets out, for the first time, the remedies that consumers have where a guarantee is breached and does not require consumers to rely on unstated common law remedies.

As part of the development of the ACL, MCCA agreed on 4 December 2009 that the new provisions should be supported by national guidance issued by all Australian consumer regulators and a range of initiatives designed to improve consumer and business understanding of their obligations. These are being progressed by the Education & Information and Compliance & Dispute Resolution Advisory Committees of SCOCA.

The provisions are essentially based on the similar provisions of the New Zealand ***Consumer Guarantees Act 1993***.

The New Zealand Ministry of Consumer Affairs' 2009 ***National Consumer Survey*** showed that 67 per cent of New Zealanders were able to name a piece of consumer protection legislation, 84 per cent correctly indicated that they would be eligible for a replacement, refund or repair of a faulty product and only 16 per cent of consumers indicated that they were not confident that the New Zealand legislation would protect them if they had a problem.[77]

Australian consumers, businesses and others will be able to draw on the guidance provided by the New Zealand Government on these provisions[78], the extensive experience of New Zealand courts and tribunals in enforcing them and the effective consumer education approaches taken in New Zealand to build consumer and business awareness of the law.

Exemption for architects and engineers from the 'fitness for purpose' guarantee[79]

The statutory guarantees regime in the ACL does not include an exemption for architects and engineers from the guarantee that services will be fit for any disclosed purpose (section 61 of the ACL). Such an exemption currently exists in section 74 of the TPA. This exemption was included by the government in 1986 in order to secure passage of the Trade Practices Revision Bill 1986 (TP Revision Bill) through the Senate. [80]

CCAAC considered this issue and determined that the exemption should be removed. CCAAC noted that the same factors that apply to architects and engineers apply to many other service industries. CCAAC recommended that the exemption be removed '...in the

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76 NEIAT, ***National Baseline Study on Warranties and Refunds***, October 2009, p 20.
77 NZ Ministry of Consumer Affairs, ***National Consumer Survey 2009***, A Colmar Brunton Report, p 3 and 5.
78 See, for example, the New Zealand Ministry of Consumer Affairs website, http://www.consumeraffairs.govt.nz/consumerinfo/cga/.
79 See also pages 11 and 12, above.
80 Commonwealth, ***Parliamentary Debates***, House of Representatives, 2 May 1986, 269 (L. F. Bowen, Attorney-General).

interests of simplicity, uniformity and fairness.'[81] It should also be noted that there is no exemption for architects and engineers in relation to consumer guarantees in New Zealand's Consumer Guarantees Act, which has been in place since 1993.[82]

Whilst Consult Australia[83] indicated that architects and engineers may be held liable for the conduct of others, such as builders, the guarantee only applies to the services that the architect or engineer actually provides to a consumer — later failures by a builder, plumber or carpenter, would give rise to liability of the builder or other party, not the architect or engineer. This has not created the sorts of problems, as claimed by representatives of architects and engineers, for other occupations in a similar position. For example, the position of architects and engineers is similar to that of an interior designer and his or her tradespeople, a landscape designer and his or her labourers or an artist or designed and his or her fabricator.

An architect or engineer is liable for their services, not the contractually unrelated services of another party. Further, section 267 of the ACL provides explicitly that action is not possible against a supplier of services if an act, default, omission or representation is made by any person other than the supplier or an agent or employee of the supplier.

Consult Australia quoted a passage[84] from a speech made by Senator Baume, during debate on the TP Revision Bill. Senator Baume indicated that:

> ***… the providers of these services are not people with unlimited deep pockets. The users of people in this area will charge rates which will ultimately be forced to be reflected upon the users of these services. This kind of law, by encouraging a much more enthusiastic pursuit of providers of services, in effect without fault, or without proof of causation, seems to me a step in the wrong direction in the interests of everyone …***

Given that, in 1986, the statutory warranty was a new legislative concept, concerns about increased costs being passed onto consumers might have been valid at the time. However, the practical application of the statutory warranty has shown that such concerns have not been borne out with respect to all other occupational groups. Every other occupational grouping has been subject to fitness for purpose warranties since 1986, without the effects that are claimed for architects and engineers..

The guarantee only applies to services provided directly to consumers, not projects where a consumer contracts only with a developer for a whole package and the developer uses an architect or engineer, nor commercial projects involving business parties. Accordingly, the provision is targeted at providing protection for consumers who acquire services from engineers or architects.

The argument has been made to the Committee[85] that architectural services are substantially different to any other services due to their sometimes creative or prototypical nature. The existing law has applied to every other occupation in Australia for 24 years and many other occupations also involve elements of a creative or prototypical nature. For example, portrait

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81 CCAAC, ***Consumer rights: Reforming statutory implied conditions and warranties***, p 121.
82 New Zealand *Consumer Guarantees Act 1993*, section 8.
83 Consult Australia, submission no. 14, p 8.
84 Consult Australia, submission no. 14, p 7.
85 Australian Institute of Architects, submission no. 16, p 6.

artists, interior and exterior designers, landscape gardeners, cosmetic surgeons and event planners, along with the tradespeople they may work with, are all subject to the requirements of fitness for purpose currently provided in the TPA.

A significant benefit of the consumer guarantee is that it is written on the face of the law. As such, a statutory guarantee is more accessible to consumers compared to actions for negligence, which usually requires the services of a lawyer to understand. This is a different protection to the common law notion of negligence, which provides consumers with protection when services are provided in a way which does not meet the standard of care required. The consumer guarantee is directed to ensuring that the services are provided in accordance with the purpose expressed by the consumer. A particular service might be provided in a way that is not negligence but may, nevertheless, fail to achieve the purpose that a consumer made known to a supplier.

Timing of application of statutory guarantees

Senator Bushby asked a question[86] of the ACCC during the Committee hearing regarding whether guarantees might apply to certain services where some activities have been undertaken prior to commencement of the ACL. Section 6 of Schedule 7 of the Bill states that acts or omissions that occurred prior to commencement of the ACL will be subject to the pre-ACL provisions of the TPA.

With respect to the issue of conduct that continuously occurs before and after the commencement of the Act, courts must observe the general presumption against retrospective application.[87] In practice this means that where conduct starts to occur before commencement of the ACL, would not be covered by the new consumer guarantees provisions.

However, to the extent that particular transitional concerns are identified, section 12 of Schedule 7 of the Bill provides that regulations may be made to deal with additional transitional matters.

Application to gas, electricity and telecommunications

Section 65 of the ACL gives the Commonwealth Minister the power to provide that Division 1 of Part 3-2 of the ACL does not apply to supply of gas, electricity or telecommunications if a supply of the relevant kind is specified in the regulations. As the explanatory memorandum to the Bill indicates, special policy considerations may apply to consumer protection related to purchases of these types of goods and services.

As gas, electricity and telecommunications are supplied through an interconnected system of wires or pipes, a disruption to supply can affect many consumers. Losses can also be substantial for each consumer since these goods and services are crucial to many areas of human activity. These factors point to a potential need for industry-specific regulation that deals with mass claims in an efficient way and also limits the risk that mass claims will lead to the collapse of businesses that provide essential goods and services to consumers.

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86 Committee ***Hansard***, Canberra, 27 April 2010, E18.

85 See, for example, ***Maxwell v Murphy*** (1957) 96 CLR 261.

The ***Telecommunications (Consumer Protection and Service Standards) Act 1999*** (CPSS Act) provides for consumer protection in respect of telecommunication services. Part 5 of the CPSS Act provides for a Customer Service Guarantee in respect of the supply of telecommunication services. To provide an efficient mechanism for dealing with mass claims, the CPSS Act allows for Australian Communication and Media Authority (ACMA) specifying a scale of damages for contravention of service standards. For example, a payment of $14.52 is specified for each of the first five days of delay in effecting a repair to a residential telephone service, followed by $48.40 for each subsequent day. This approach allows consumers to avoid the cost and inconvenience of court proceedings to recover amounts lost as a result of the failure of a telephone service.

Part 7 of the Second Exposure Draft of the National Energy Customer Framework (NECF) provides for a small compensation claims regime that would apply to supplies of gas and electricity. As with the CPSS Act, the NECF would provide a streamlined process for small claims and would also provide for damages being capped.

As set out above, there are strong policy reasons for industry-specific laws that provide for compensation in respect of consumer claims related to supplies of gas, electricity and telecommunications where this may be more appropriate than the solution applied to other goods and services. In addition, given that industry-specific regulation applies, or will apply, in this area, duplicated regulation by way of consumer guarantees may be difficult to justify and potentially confusing in its application. Accordingly, the ACL provides for the making of regulations to provide that consumer guarantees do not apply to supplies of gas, electricity and telecommunications.

Whether regulations will be made in relation to each type of supply listed in section 65 is yet to be decided and will, in part, likely be determined by a consideration of the effectiveness of other laws that provide for consumer redress in these markets, including, for example, the final form of the small compensation claims regime in the NECF.

Unsolicited selling

Balancing the interests of consumers and businesses

Submissions and public hearing statements from the Direct Selling Association of Australia[88], the Australian Direct Marketing Association[89], Austar[90], Salmat, Aegis Direct and CPM[91], Telstra[92], and the LCA[93] suggest that the unsolicited selling provisions in the ACL regulating consent to call on consumers outside the permitted hours (subsection 73(2)), disclosing purpose and identity (section 74), and liability for dealer conduct by suppliers (section 77), are too restrictive.

88 Direct Selling Association of Australia, submission no. 17, p 13.
89 Australian Direct Marketing Association, submission no. 22, p 6 and 8.
90 Austar, submission no. 23, p 6.
91 Salmat, Aegis Direct and CPM, submission no. 13, p 5; Evidence to Economics Legislation Committee, Senate, Melbourne, 29 April 2010, E23 (Mr Joshua Faulks).
92 Telstra, submission no. 11, p 5; Evidence to Economics Legislation Committee, Senate, Melbourne, 29 April 2010, E14 (Ms Jennifer Crichton).
93 LCA, submission no. 18, p 10.

The unsolicited selling regime seeks to achieve a balance between the interests of consumers — particularly those of vulnerable consumers who are often targeted through aggressive selling techniques such as high pressure sales — and those of businesses.

Various published studies[94] indicate that the potential for abuse in this area is considerable. The unsolicited selling provisions, including those provisions identified above, have been developed so as to balance an appropriate level of consumer protection with business compliance costs and also avoid the potential for loopholes to be exploited.

Calling hours

Salmat, Aegis Direct and CPM, for example, state that the requirement in subsection 73(2) of the ACL that consent to call outside the permitted calling hours cannot be given face-to-face is 'likely to result in unnecessary inconvenience to consumers'.[95] This provision was designed to reduce the incentives for traders to use unfair conduct, such as coercion and harassment, to avoid the permitted calling hours provisions and potentially engaging in unscrupulous practices to secure an unsolicited sales agreement.

Requests to leave premises

The Australian Direct Marketing Association, for example, suggests that the requirement in section 74 of the ACL for a dealer to advise the consumer prior to negotiation that the dealer must leave the premises immediately on request will unfairly prejudice the ability of the dealer to initiate discussions about the product.[96] This provision is intended to address the provision of sufficient information to consumers about their rights and reflects a similar provision in Victorian legislation.[97]

Liability of suppliers

The LCA expresses concern that section 77 of the ACL, which imposes liability on suppliers for contraventions by dealers, will create unintended consequences and submits that a defence should be available for suppliers where:

- a supplier has done all things reasonable to ensure that its authorised dealers comply with the provisions; or
- there is not a sufficient nexus between the supplier's conduct and the dealer's conduct.[98]

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94 See, for example, Consumer Action Law Centre and the Financial & Consumer Rights Council's (2007), ***Coercion and harassment at the door — Consumer experiences with energy direct marketers***, http://www.consumeraction.org.au/downloads/EnergyMarketinginVictoria-Finalv.3.pdf; Consumer Affairs Victoria (2009), ***Cooling-off periods in Victoria: their use, nature, cost and implications***, Research Paper no. 12, http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines_2/$file/Cooling%20Off%20Research%20Paper.pdf.

95 Salmat, Aegis Direct and CPM, submission no. 13, paragraph 20; see also Evidence to Economics Legislation Committee, Senate, Melbourne, 29 April 2010, E24 (Mr Joshua Faulks).

96 Australian Direct Marketing Association, submission no. 22, paragraph 4A.3.

97 ***Fair Trading Act 1999*** (Vic) subsection 62E(b).

98 LCA, submission no. 18, p 10. See also Evidence to Economics Legislation Committee, Senate, Melbourne, 29 April 2010, E14 (Ms Jennifer Crichton) and E25 (Ms Melinda Rohan).

The potential for such a defence to be exploited by unscrupulous operators in a market where there are incentives for them to avoid the full effect of regulation and take advantage of consumers is considerable.

Section 77 is designed to prevent the setting up of 'front' operations to shield such suppliers from liability.[99] Similar deeming provisions exist in Victoria[100], New South Wales[101], Queensland[102] and South Australia[103], which do not contain defences for suppliers; and the Treasury is not aware of any unintended consequences resulting from the deeming provisions in those jurisdictions.

Definition of 'unsolicited consumer agreement'

Legal Aid Queensland's submission and public hearing comments[104] suggest that the definition of 'unsolicited consumer agreement' in section 69 of the ACL may not cover an invitation by the consumer that was solicited and where the trader alleges another primary purpose of their visit — for example, research, offering a seminar or undertaking a survey.

The unsolicited selling provisions will regulate the making of unanticipated offers to supply goods and services to a consumer and the agreements arising from such offers, regardless of whether the initial invitation by the consumer was for another purpose, or relates to the supply of a related or unrelated product or service.[105]

Regulation-making power

The LCA's submission[106] raises the possibility that the regulation-making power to modify any aspect of the unsolicited selling regime may result in significantly inconsistent regimes between jurisdictions (as modified by the regulations).

The regulation-making power in section 94 of the ACL could not be used to create differences between jurisdictions in the unsolicited selling regime as applied by the ACL, or to exempt jurisdictions from certain provisions of the ACL. Any such regulations must have national effect, and as these will be Commonwealth regulations there are constitutional impediments to making distinctions between States and between parts of States in them.[107]

Under the IGA, the Commonwealth is responsible for implementing regulations agreed to be made under the ACL; and future amendments to the ACL must be made in accordance with the voting arrangements in the IGA.[108] As the ACL will be implemented as an application law scheme, any legislative changes to the ACL or subordinate legislation agreed to be made under the ACL will apply to all jurisdictions once made.

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99 Explanatory Memorandum, paragraph 8.42.
100 Sections 62 and 67F of the ***Fair Trading Act 1999*** (Vic).
101 Sections 40C and 40D of the ***Fair Trading Act 1987*** (NSW).
102 Sections 59, 61 and 62 of the ***Fair Trading Act 1989*** (Qld).
103 Sections 15, 17 and 18 of the ***Fair Trading Act 1987*** (SA).
104 Legal Aid Queensland, submission no. 12, p 5; Evidence to Economics Legislation Committee, Senate, Sydney, 28 April 2010, E19 (Mr Paul Richard John Holmes).
105 Explanatory Memorandum, paragraphs 8.14-8.15.
106 LCA, submission no. 18, p 9.
107 For example, section 99 of the ***Australian Constitution*** provides that the Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to any one State or any part thereof over another State or any part thereof.
108 IGA, clauses 8-14.

Under the ACL, the Commonwealth has the power to make various regulations or other legislative instruments required for commencement of the ACL.[109] The policy for the ACL regulations is currently being developed with the States and Territories. Once this policy is finalised, the Treasury will engage the Commonwealth Office of Legislative Drafting and Publishing to draft the regulations. The regulations will be put to the Federal Executive Council after the passage of the Bill and in advance of the commencement of the ACL, allowing for their commencement in line with the ACL.

Permitted calling hours

Section 73 of the ACL sets the default permitted calling hours at 9am-6pm on weekdays and 9am-5pm on Saturdays, with no face-to-face visits permitted on Sundays and public holidays. These default hours were agreed by MCCA on 4 December 2009. Individual States and Territories would be able to vary the default permitted calling hours in their own jurisdictions if they chose to do so, under their respective application laws. Queensland currently has these calling hours and at the 4 December 2009 MCCA meeting New South Wales, Victoria and South Australia indicated that they would move to these hours.[110]

The submissions and public hearing statements by the Australian Direct Marketing Association[111], the Direct Selling Association of Australia[112], Austar[113], Salmat, Aegis Direct and CPM[114], and Telstra[115] suggest that these calling hours are too restrictive.

The default permitted calling hours, as well as the express supplier obligations relating to disclosing purpose and identity (section 74 of the ACL), and ceasing to negotiate no request (section 75 of the ACL), will apply to face to face visits only and will not alter the operation of existing Commonwealth laws applicable to telemarketing activities, namely the ***Do Not Call Register Act 2006*** and ***Telecommunications (Do Not Call Register) (Telemarketing and Research Calls) Industry Standard 2007***. Organisations engaging in activities covered by the ***Do Not Call Register Act 2006*** and associated regulations will continue to be regulated under that Act and the associated regulations.[116]

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109 Sections 25(n), 27(2)(f), 10(1), 40(3)(b), 43(2)(b), 43(3)(a), 43(3)(d), 65, 69(1), 69(3), 69(4), 74, 76(a)(iii), 76(d), 79(b)ii) and (iii), 79(c), 94, 102(1), 103(1), 105(1)(a), 114, 131(2)(c) and (d), 132(2)(c) and (d), 135, 136(6), 255(4), 255(6), 256(2), 256(3), 257 and 284 of the ACL.

110 See also media reports: Daily Telegraph, ***Sunday ban on door-to-door salesman***, 4 December 2009, http://www.dailytelegraph.com.au/news/sunday-ban-on-door-to-door-salesmen/story-e6freuy9-1225806767879; Herald Sun, ***Door-to-door sales people and telemarketers could be banned from badgering households after 6pm***, 4 December 2009, http://www.heraldsun.com.au/news/door-to-door-sales-people-and-telemarketers-could-be-banned-from-badgering-households-after-6pm/story-e6frf7jo-1225806769790.

111 Australian Direct Marketing Association, submission no. 22, p 5.

112 Direct Selling Association of Australia, submission no. 17, p 12.

113 Austar, submission no. 23, p 5.

114 Salmat, Aegis Direct and CPM, submission no. 13, p 4; Evidence to Economics Legislation Committee, Senate, Melbourne, 29 April 2010, E23 (Mr Joshua Faulks).

115 Evidence to Economics Legislation Committee, Senate, Melbourne, 29 April 2010, E14 (Ms Jennifer Crichton).

116 Explanatory Memorandum, paragraphs 8.5 and 8.27.

Tied credit contracts

Legal Aid Queensland's submission and public hearing comments[117] suggest that if a sales contract is terminated, any tied continuing credit or loan contract will not be deemed to be cancelled.

Under section 83 of the ACL, if an unsolicited consumer agreement is terminated lawfully, any related contract, except a tied continuing credit contract or a tied loan contract (within the meaning of the ***National Consumer Credit Protection Act 2009*** (the NCCPA)) is deemed void. Tied credit contracts were excluded from the scope of the termination provisions of the unsolicited selling regime because the NCCPA, which includes the National Credit Code, contains provisions that govern the effect on such contracts in circumstances where the related sale contract is terminated.[118]

Section 135 of the ***National Credit Code*** provides specifically for the termination of a tied continuing credit contract and a tied loan contract if a sale contract is rescinded under the Code or any other law.

Prohibition on supplies for 10 business days

Submissions and public hearing comments from the Australian Direct Marketing Association[119], Austar[120], Telstra[121] and Salmat, Aegis Direct and CPM[122] consider that suppliers should not be prohibited from supplying goods or services within the 10 day cooling-off period on the basis that some consumers will want to accept goods and services during this period.

The prohibitions in section 86 of the ACL are designed to preserve the right of consumers in subsection 82(3) of the ACL to terminate an unsolicited consumer agreement within 10 business days.[123] The rationale for prohibiting the supply of goods and services is highlighted by a research report by Consumer Affairs Victoria into the use of cooling-off periods, which states that 'taking delivery of goods during the cooling-off period may make the contract more difficult and costly to reverse. This is the case with many services, which cannot be returned once they are provided'.[124] Similar prohibitions against providing

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117 Legal Aid Queensland, submission no. 12, p 2; Evidence to Economics Legislation Committee, Senate, Sydney, 28 April 2010, E17 (Mr Paul Richard John Holmes).
118 Explanatory Memorandum, paragraph 8.63.
119 Australian Direct Marketing Association, submission no. 22, p 10; Evidence to Economics Legislation Committee, Senate, Melbourne, 29 April 2010, E24-E25 (Ms Melinda Rohan).
120 Austar, submission no. 23, p 7.
121 Telstra, submission no. 11, p 7; Evidence to Economics Legislation Committee, Senate, Melbourne, 29 April 2010, E14 (Ms Jennifer Crichton).
122 Salmat, Aegis Direct and CPM, submission no. 13, p 8; Evidence to Economics Legislation Committee, Senate, Melbourne, 29 April 2010, E24 (Mr Joshua Faulks).
123 Explanatory Memorandum, paragraphs 8.71 — 8.74.
124 Consumer Affairs Victoria (2009), ***Cooling-off periods in Victoria: their use, nature, cost and implications***, Research Paper no. 12, http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines_2/$file/Cooling%20Off%20Research%20Paper.pdf, p 24.

services during the cooling-off period exist in all jurisdictions except Victoria and New South Wales.[125]

Lay-by agreements

The Consumer Action Law Centre[126] suggested a number of changes to the lay-by agreement provisions of the ACL, to provide further information surrounding a lay-by agreement, to specify what costs constitute a supplier's reasonable costs for the purpose of a termination charge, and to add a requirement that a supplier must give a consumer seven days notice of their intention to terminate a lay-by agreement, and to allow the consumer to rectify a breach or to cancel or complete the lay-by within that period.

The suggested changes are based on existing requirements for lay-by sales transactions in the ACT, NSW and Victoria, which all have specific regulation of lay-by sales.[127] Other Australian jurisdictions do not specifically regulate lay-by sales.

Further information and notice to terminate lay-by agreement

As noted by the Consumer Action Law Centre, the Explanatory Memorandum states that the ACL provisions regulating lay-by agreements are 'expressed in principles-based form'.[128] This reflects the agreement reached at MCCA for a set of 'fundamental rules for lay-by sales transactions'[129], rather than the more prescriptive provisions that currently exist in the ACT, NSW and Victoria.

Reasonable costs for a supplier

Subsection 97(3) of the ACL provides that, if a supplier imposes a termination charge on a consumer, such a charge must not be more than the reasonable costs of the supplier in relation to the lay-by agreement.

The Explanatory Memorandum gives examples of what may be considered as reasonable costs of the supplier, such as storage and administration costs, and the loss in value of the goods between the time when the lay-by agreement was entered into and when it was terminated.[130]

The Explanatory Memorandum also highlights the fact that determining what constitutes a reasonable cost involves a subjective assessment.[131] An attempt to define what constitutes a reasonable cost in the ACL is likely to limit the range of factors that can be considered for this purpose.

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125 ***Fair Trading Act 1989*** (Qld) section 62; ***Fair Trading Act 1987*** (SA) section 18; ***Door to Door Trading Act 1987*** (WA) section 8; ***Door to Door Trading Act 1986*** (Tas) section 8; ***Door-to-Door Trading Act 1991*** (ACT) section 8; ***Consumer Affairs and Fair Trading Act 1990*** (NT) section 102.

126 Consumer Action Law Centre, submission no. 28, p 16-20.

127 See ***Lay-by Sales Agreement Act 1963*** (ACT), Part 5B of the ***Fair Trading Act 1987*** (NSW), and Part 5 of the ***Fair Trading Act 1999*** (Vic).

128 Explanatory Memorandum, paragraph 9.5.

129 MCCA Communiqué (4 December 2009), p 4.

130 Explanatory Memorandum, paragraph 9.20.

131 Explanatory Memorandum, paragraph 9.21.

Proof of transaction

Proof provided upon request up to six years after transaction

Consumer Credit Legal Service (WA) Inc[132] suggested that consumer contracts be provided upon request for a period of six years subsequent to the transaction.

Most businesses would enter into many transactions with consumers every year. To require businesses to maintain records for individual transactions for six years, and to provide such records to consumers upon request, would impose a significant compliance burden, which would be unlikely to be met by the benefits of such a requirement.

To the extent that a consumer contract is proof of a transaction, section 100 of the ACL already provides that it must be provided to a consumer as soon as practicable after the supply of the goods or services, or within seven days after the consumer requests such proof.

Credit card or debit card statement as proof of transaction

The Australian National Retailers Association[133] submitted that a credit card or debit card statement is not suitable for use as proof of a transaction. Such a statement is currently used as one of the examples of a proof of transaction in section 100(4) of the ACL.

The list of examples of proofs of transaction is based on that contained in section 161A of the ***Fair Trading Act 1999*** (Vic). The credit card or debit card statement, which has been incorporated into section 100(4) of the ACL, refers to the receipt generated by the EFTPOS terminal at the supplier, rather than the summary statement provided by the cardholder's financial institution. Such a receipt, if it satisfies the requirements of section 100(4), would be considered as a valid proof of transaction.

132 Consumer Credit Legal Service (WA) Inc, submission no. 15, p 2-3.
133 Australian National Retailers Association, submission no. 45, p 4.

PRODUCT SAFETY

GENERAL ISSUES

Statutory General Safety Provision

Associate Professor Luke Nottage[134] and the consumer group CHOICE[135] submitted that there should be a General Safety Provision (GSP) in the ACL.

Professor Nottage noted that a GSP currently exists in other jurisdictions, including the European Union.[136] The European Union Directive 2001/95/EC of 3 December 2001 on general product safety[137] requires member states to introduce legislation to ensure that 'producers shall be obliged to place only safe products on the market'.

The Productivity Commission (PC), in its 2006 ***Review of the Australian Product Safety System*** (2006 Review), considered the effects of introducing a GSP in Australia. The PC identified a number of benefits and costs of implementing a GSP but considered on balance that the benefits would be unlikely to justify the costs involved. The PC found that while a GSP would deliver some benefits, these are not likely to be substantial given that:

- in the main the current product safety system seems to be generating reasonable safety outcomes;
- much of the current product safety regulatory framework would need to remain; and
- a GSP would fail to address the areas of biggest risk, namely the manner and physical context in which products are used by consumers, and recalcitrant traders.[138]

Scope of goods and services subject to the product safety provisions

CHOICE[139] submitted that goods which are not 'consumer goods' as defined in the ACL should be covered under the product safety provisions of the ACL. CHOICE further submitted that the range of goods covered under the ACL may be less than that currently covered by the TPA, due to the removal of the monetary threshold from the definition of 'consumer'.[140]

The product safety provisions of the ACL will apply to all 'consumer goods' and 'product-related services'.

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134 Associate Professor Luke Nottage, submission no. 26, point 11.
135 CHOICE, submission no. 20, p 11.
136 Associate Professor Luke Nottage, submission no. 26, point 11.
137 Article 3 of Directive 2001/95/EC of the European Parliament and the Council of 3 December 2001 on general product safety (Official Journal L 11 of 15.1.2002).
138 Productivity Commission, ***Review of the Australian Consumer Product Safety System,*** Research Report, 16 January 2006, p 101.
139 CHOICE, submission no. 20, p 11.
140 CHOICE, submission no. 20, p 11.

- Consumer goods are defined at section 2 of the ACL to mean goods that are intended to be used, or are of a kind likely to be used, for personal, domestic or household use or consumption.

- 'Product-related services' are defined in section 2 of the ACL to include services for or relating to the installation, maintenance, assembly or delivery of consumer goods.

The relevant TPA provisions currently apply to goods that are 'intended to be used, or of a kind likely to be used by the consumer'.[141]

In addition, commercial or industrial goods used in environments where consumers or other members of the public may come into contact with them are subject to more sector specific laws such as workplace or health and safety laws like the ***Occupational Health and Safety Act 1991*** (Cth).

The threshold test for certain product safety regulatory actions

The threshold test for imposing interim or permanent bans or ordering a compulsory recall includes consideration of whether a reasonably foreseeable use (including misuse) of a consumer good or product-related service will or may cause injury to any person.[142]

The LCA submitted that the concept of 'reasonably foreseeable use' should be clarified to exclude instances where harm will likely occur only due to deliberate use of a product, and where that is not the intended use of the good.[143]

The phrase 'reasonably foreseeable use (including a misuse)' includes using the product for its primary, normal or intended purpose, as well as covering uses not for its intended purpose or misusing the product.[144] This trigger allows a Minister to take action where common uses of a good may pose a safety risk. This is the case even if such use is not the supplier's intended use for the good, or if it is used in a way that is different to the product's intended or normal use, provided it is readily foreseeable by the supplier. It is not intended to cover situations where a consumer has unreasonably used a product, after taking into account the ordinary use which a product of that kind is safely put to and the presence of any warning or other information. Nor is it intended to cover a deliberate misuse of a good where such use cannot reasonably be foreseen.

A baseline study of consumer product-related accidents in 2006 undertaken on behalf of MCCA found that the vast majority of accidents involving consumer products arise through misuse of the product by consumers. In some cases, this misuse could represent a common use of that product or a use that would readily be foreseen by the supplier. This is often the case with children toys.[145]

In its 2006 Review, the PC recommended that the triggers for regulatory action should include where the reasonably foreseeable use of a product poses an unacceptable safety risk.

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141 For example, see TPA section 65C(1).
142 Sections 109, 114 and 122 of the ACL.
143 LCA, ***Submission on the Trade Practices Amendment (ACL) Bill (No.2) 2010***, p 12.
144 Explanatory Memorandum, paragraph 10.50.
145 Productivity Commission, ***Review of Australia's Consumer Policy Framework***, Inquiry Report, No.45, Vol.2, 30 April 2008, p 186.

It found that the definition of 'reasonably foreseeable use' should reflect both the predictability of the use and the reasonableness of the use.[146]

Possession of non-compliant goods

Sections 106, 118 and 136 of the ACL prohibit a person from manufacturing, possessing or having control of goods that are subject to a product safety standard, a product ban or an information standard, respectively.

The Australian National Retailers Association sought clarification of whether a retailer that holds stock from a supplier that has not yet passed the retailer's own quality control processes (and hence has not yet been offered for sale) would contravene the ACL.[147]

The ACL includes a defence to this contravention where a person can prove that their manufacture, possession or control is not for the purposes of supply.[148]

MANDATORY REPORTING OF DEATH OR SERIOUS INJURY OR ILLNESS

Sections 131 and 132 of the ACL require that a supplier notify the ACCC if they become aware that a consumer good or product-related service it has supplied is associated with a death, serious injury or illness.

In its 2006 Review, the PC recommended that 'governments should require suppliers to report to the appropriate regulator products which have been associated with serious injury or death'.[149] In conjunction with a number of non-legislative improvements to the way regulators access existing product hazard information, the PC considered this would improve the responsiveness of the current regulatory regime to existing and emerging product-related hazards.[150] The mandatory reporting requirement builds on the existing requirement in the TPA for suppliers to report products that have been the subject of a voluntary recall because of a product safety fault or risk.[151]

Scope of the requirement

The Federal Chamber of Automotive Industries (FCAI)[152] and Hasbro Australia Ltd[153] raised concerns with the scope and breadth of the reporting requirement.

The ACL provides scope for exemptions where there are existing reporting obligations under other laws or industry codes.[154] Further, where it is clearly the case that the product was not associated with the accident or very unlikely to have been associated with the accident, then

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146 Productivity Commission, ***Review of the Australian Consumer Product Safety System,*** Research Report, 16 January 2006, p 142.
147 Australian National Retailers Association, Submission, point 6.
148 ACL subsections 106(4), 118(4) and 136(4).
149 Productivity Commission, ***Review of the Australian Consumer Product Safety System,*** Research Report, 16 January 2006, Recommendation 9.3.
150 Productivity Commission, ***Review of the Australian Consumer Product Safety System,*** Research Report, 16 January 2006, p 222.
151 TPA section 65R.
152 FCAI, submission no. 29, p 1.
153 Hasbro Australia Ltd, submission no. 6, point 6.
154 ACL subsection 131(2).

the reporting requirement will not apply.[155] This would often be the case where consumer behaviour, operator error, external influences and environmental factors are the causes of product-related injuries.[156]

Compliance costs to businesses

In a Question on Notice to the Treasury, Senator Eggleston asked what the compliance costs to businesses are in relation to the mandatory reporting requirement. The FCAI and the Motor Trades Association of Australia (MTAA) also specifically raised concerns about compliance burdens for motor vehicle suppliers.

A regulatory impact statement (RIS) on the product safety reforms, including introducing the reporting requirement, was prepared by the Treasury and released for public consultation on 16 November 2009.[157] The RIS provided an analysis of the key costs and benefits of introducing the reporting requirement on stakeholders, including suppliers and consumers. The RIS assessed that the potential benefits outweighed the potential costs to warrant introducing a mandatory reporting requirement on suppliers.[158]

On balance the RIS found that the cost of providing each report would be straightforward and should be relatively inexpensive. This finding is based on there being no requirement on suppliers to investigate or monitor the safety of products they supply,[159] over and above the commercial imperative they face to do so.

In relation to motor vehicles, section 131(2) the ACL exempts suppliers from reporting accidents that are not clearly related or very unlikely to be related to a defect in the product or to a product failure, but instead could have arisen, for instance, by user behaviour, environmental factors (like the weather), external influences (like alcohol or another person), or a combination of these. As observed by the MTAA, many motor vehicle accidents may have resulted from operator error where the safety of the vehicle was not in question.[160]

Penalties for non-compliance and investigations

Senator Eggleston in a Question on Notice to the Treasury, and Senator Bushby during the Committee hearing, asked what penalties would apply to non-compliance with the reporting requirement and how the Government would investigate where a business has not reported. Senator Bushby also queried why the level of penalty for non-compliance with the reporting requirement was smaller compared to the penalty for breaching an information standard.[161]

The ACL provides for both civil contraventions and criminal offences for failing to report in contravention of the mandatory reporting requirement. [162] The civil pecuniary penalties and criminal fines associated with non-compliance are $16,650 for corporations and $3,330 for

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155 ACL subsection 131(2).
156 Explanatory Memorandum, paragraph 10-171-10.172.
157 SCOCA, ***Consultation Regulation Impact Statement on best practice proposals and product safety regime*** (2009)
158 Explanatory Memorandum, paragraph 24.117.
159 Explanatory Memorandum, paragraph 10.179.
160 Motor Trades Association of Australia, submission no. 21, p 3.
161 Committee ***Hansard***, Canberra, 27 April 2010, E9.
162 ACL Schedule 1, section 202.

individuals.[163] The Australian Competition and Consumer Commission will be responsible for enforcing the mandatory reporting requirement.

In the majority of cases, the maximum pecuniary penalty amounts for contravening a product safety provision in the ACL mirror the existing penalty amounts for breaching a similar provision currently in the TPA. Currently, the TPA imposes penalties of $1.1 million for corporations ($220,000 for individuals) for breach of an information standard.[164] The ACL provides the same penalties for non-compliance with the requirements of an information standard.[165] There is currently no provision in the TPA that is similar to the mandatory reporting requirement under the ACL. Accordingly, the maximum penalty amounts for contravening the new reporting requirement (that is, $16,650 for corporations and $3,330 for individuals) mirror the existing penalties for contravening the reporting requirement for voluntary recalls.[166]

Industry consultation

A Question on Notice from Senator Eggleston queried what level of contact the Treasury had with businesses when designing the reporting requirement.

A consultation RIS on the product safety reforms, including the mandatory reporting requirement, was released by the Standing Committee of Officials of Consumer Affairs (SCOCA) on 16 November 2009 for public comments. A total of seven submissions were received on the consultation RIS. All submissions agreed with the policy for introducing a provision similar to the mandatory reporting requirement, although some did express concerns with how the proposed reform would operate in practice in terms of clarity of its intended scope and application.

Subsequent to publishing the RIS, the Treasury met a number of times with the FCAI during the course of developing the ACL to discuss this issue.

Reporting obligation where another supplier has already made a report

In a Question on Notice to the Treasury, Senator Eggleston asked what penalties will apply to a company who fails to report where another company has already done so adequately. Similarly, Hasbro[167] suggested that the reporting requirement should not apply where the supplier knows another company has already reported and it has no further information to add. Senator Eggleston also asked the Treasury how the ACCC will take account of conflicting reports lodged by different participants in the supply chain.

All participants in the supply chain of the product associated with the death, serious injury or illness, will be required to report.[168] This could result in a duplication of information being reported where multiple suppliers in the supply chain become aware of the same information in relation to a product incident. The risk of multiple reporting is offset to some extent by the risk that a particular supplier having exited the market and hence, if safety

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163 Section 224 of the ACL.
164 Section 75AZT of the TPA.
165 Section 224 of the ACL.
166 Section 224 of the ACL; Section s.65R of TPA.
167 Hasbro Australia Ltd, Submission no. 6, point 2.
168 Explanatory Memorandum, paragraph 10.180.

concerns do arise, no report would be made to the regulator if the requirement is not imposed at multiple points in the supply chain.[169]

Information that is reported will be investigated and verified by the ACCC before being shared with other product safety regulators on a confidential basis. Any regulatory action proposed in response to these notifications, such as a product recall, would only be taken after a thorough product risk assessment, and when it is clearly necessary to protect consumers.[170]

The supply chain for the final product and suppliers of intermediary goods

Senator Eggleston in a Question on Notice to the Treasury queried whether the supply chain includes a supplier of an intermediary product within a good which had nothing to do with the damage caused.

The reporting requirement will apply only to participants in the supply chain of the final product and not to participants in the supply chain of an intermediary good that was used in the process of producing the final product.

Anti-competitive conduct amongst companies

Senator Eggleston, in a Question on Notice to the Treasury, asked what protections will be put in place to ensure that companies don't use the reporting requirement for anti-competitive purposes. Senator Eggleston also asked how the Government proposes to monitor how a company is monitoring a competitor.

Sections 131 and 132 of the ACL impose a positive reporting obligation on a person (which includes a corporation) in respect of the products that he or she supplies. The ACL does not require a supplier to report information about their competitors products.

Under the TPA currently any person is able raise concerns with the ACCC about the safety of any consumer products in the market. The reporting of a safety concern to the ACCC does not of itself, require the product in question to be withdrawn of withheld from the market. The ACCC will continue to assess all reports on their merits on a case-by-case basis before determining whether a regulatory response is necessary.

Time frame for reporting

Upon becoming aware that a product they have supplied has been associated with a death, serious injury or illness, the ACL provides suppliers two days within which to report the incident to the ACCC.[171] The adequacy of this time was questioned by Senator Eggleston in a Question on Notice to the Treasury and in written submissions to the Committee.[172]

The two day time frame in the ACL is consistent with the current reporting time frame for voluntary recalls.[173] The two day time frame for the mandatory reporting requirement

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169 Explanatory Memorandum, paragraph 24.95.
170 Explanatory Memorandum, paragraph 24.98.
171 Section 131(1) of the ACL.
172 Australian Toy Association, submission no. 42, point 2; Australian National Retailers Association, Submission no. 45, point 5.
173 Section 65R of the TPA.

excludes the time for suppliers to verify whether they should report information to the regulator; the 'clock' only starts once a supplier becomes aware that one of the product it has supplied has been associated in a serious accident.[174]

The trigger of an 'association' between the product and a serious accident

Senator Eggleston in a Question on Notice to the Treasury asked whether the requirement in the mandatory reporting obligation for an 'association' between the product and the serious injury, illness or death seems too broad as a trigger for reporting. Similar comments were made by the Australian Toy Association (ATA)[175] and the Australian National Retailers Association[176] in their written submissions to the Committee.

The reporting requirement strikes a balance between minimising unnecessary regulatory burdens on suppliers and regulators with ensuring enough flexibility in the scope of the requirement to yield adequate information to allow appropriate action to be taken (if any) to prevent future accidents. The reporting requirement, including the term 'associated with', does not apply to situations where the serious injury, illness or death is clearly not related or very unlikely to be related to a defect in the product or to a product failure.[177] A supplier is not required to investigate and establish that their product has caused the incident in order to determine whether they have a reporting obligation.

Senator Eggleston further asked whether suppliers will be able to disclose conditions of use within a product to exempt them from the need to report by listing instances of use which do not constitute as an 'association'.

The ACL exempts suppliers from the reporting obligation where it is clearly the case their product was not associated with the accident (that is, it was clearly not a cause or contributor to the accident), or is highly unlikely to have contributed to the accident.[178] To list conditions of use for the purpose the reporting trigger of 'associated with' cannot provide an exhaustive and conclusive list to exempt suppliers from the reporting obligation.

Confidential information

Senator Eggleston in a Question on Notice to the Treasury, as well as Hasbro[179] and the ATA[180] in their written submissions to the Committee, queried how information reported under the mandatory reporting obligation will be kept confidential and private.

Information received by the Commonwealth under the requirement would be subject to the information protection requirements in Part XII of the TPA. These requirements allow the ACCC to only share the information for the purposes of carrying out its obligations under the Act, and only with specified bodies, such as state and territory regulators.

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174 Explanatory Memorandum, paragraph 10.184-10.185.
175 Australian Toy Association, submission no. 42, point 1.
176 Australian National Retailers Association, submission no. 45, point 2.
177 Explanatory Memorandum, paragraph 10.171-10.172.
178 ACL subsection 131(2); Explanatory Memorandum, paragraph 10.169-10.170.
179 Hasbro Australia Ltd, Submission no. 6, point 8.
180 Australian Toy Association, submission no. 42, point 3.

'Risk-based' approach as a trigger for reporting

Professor Nottage[181] and CHOICE[182] both suggested a 'risk-based' approach to be adopted. Professor Nottage submits that the reporting requirement under the ACL should have closer adherence to the approaches adopted by some of Australia's trading partners, including the US, the EU, Canada, Japan and China.[183]

Sections 131 and 132 of the ACL are based on a recommendation of the PC in its 2006 Review. This approach requires the reporting of product incidents rather than a broader category of risks associated with a product. Linking the reporting requirement to incidents, rather than risks, does not require a supplier to undertake an assessment of whether its product was the cause of the accident of not. A key objective of the reporting requirement is to give the regulator access to timely information about emerging product hazards, rather than potentially delayed information once the existence of a hazard has been established.

The trigger of 'serious injury or illness'

Dr Nottage[184] questioned the policy rationale for excluding 'disease' from the definition of 'serious injury or illness'.

For the purposes of the mandatory reporting requirement, 'serious injury or illness' does not include an aliment, disorder, defect or morbid condition. The reporting requirement relates to situations where there is a clear relationship between an incident and injury to person. It is less likely that the onset of more complicated aliments, where a direct cause and effect between an incident and an illness would be able to be meaningfully covered by this reporting requirement, without requiring a supplier to undertake more detailed investigations in the product or incident.

Review process

In his evidence to the Committee, Professor Nottage asked that a statutory requirement for periodic reviews of the mandatory reporting requirement should be incorporated into the ACL.[185]

The PC also recommended that the mandatory reporting provisions should be reviewed within three years of their commencements. In its RIS for these measurements, the Government has acknowledged the benefit of review of these provisions.[186]

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181 Associate Professor Luke Nottage, submission no. 26, point 5.
182 CHOICE, submission no. 20, para 4.3.
183 Associate Professor Luke Nottage, submission no. 26.
184 Associate Professor Luke Nottage, submission no. 26 , point 2.
185 Associate Professor Luke Nottage, Evidence to Economics Legislation Committee, Sydney, 28 April 2010, E6.
186 Explanatory Memorandum, paragraph 24.144-24.145.

PENALTIES AS DOLLAR AMOUNTS

Professor Lynden Griggs[187] and the Consumer Action Law Centre[188] note that the ACL does not use penalty units.

Section 4AB of the ***Crimes Act 1914***, which provides for the conversion of penalties expressed in dollar amounts into penalty units, does not apply to the ACL. As an application law scheme, the ACL has been drafted in accordance with the Parliamentary Counsel's Committee's ***Protocol on Drafting National Uniform Legislation***.[189] Among other things, the Protocol requires penalties to be expressed in dollar amounts to be used for application law schemes because:

- some jurisdictions do not use penalty units and so the concept may cause confusion in the practical application of the ACL; and
- the amount of penalty units varies between those jurisdictions which use them and so the use of the term may also pose confusion for those applying penalties under the ACL.

Penalty amounts are stated as maximums

Senator Bushby asked a question[190] of the Treasury during the Committee hearing querying whether the penalty amounts stated in the ACL are mandatory or maximums. As is the case for penalty amounts under the TPA, penalties are maximums. Section 4D(1) of the ***Crimes Act 1914*** (Cth) provides that penalties set out in an Act are not mandatory, but are the maximums that can be applied to a particular offence.

187 Evidence to Economics Legislation Committee, Melbourne, 29 April 2010, E11 (Mr Lynden Griggs).
188 Consumer Action Law Centre, submission no. 28, p 27.
189 Australasian Parliamentary Counsel's Committee, ***Protocol on Drafting National Uniform Legislation Third Edition: July 2008***, p 8.
190 Committee ***Hansard***, Canberra, 27 April 2010, E8.

INFRINGEMENT NOTICES

Queensland Consumers' Association/CHOICE

The Queensland Consumers' Association[191] and CHOICE[192] advocate infringement notices for breaches of industry codes made under Part IVB of the TPA.

Infringement notices are provided to the ACCC as an alternative to proceedings seeking civil pecuniary penalties under the Commonwealth-applied ACL.

Industry codes are a co-regulatory measure designed to foster compliance and specific outcomes in industry sectors. As such they are couched in terms of mutual obligations between parties, rather than a series of prohibitions of specified conduct. They currently apply with respect to:

- the negotiation, content and operation of franchising agreements (the ***Franchising Code of Conduct***);
- the negotiation, content and operation of agreements between farmers , wholesalers and retailers (the ***Horticulture Code of Conduct***);
- the negotiation, content and operation of agreements between petrol retailers and oil companies (the ***Oilcode***); and
- the display of unit pricing in certain supermarkets (the ***Unit Pricing Code of Conduct***).

The introduction of penalties for breaches of codes would fundamentally alter their nature, effectively introducing penalties for what are, in effect, commercial disagreements and matters of opinion. It would remove an important tool in fostering better outcomes in specific industries without the need for regulatory intervention in all cases where a dispute arises.

Further, the enhanced enforcement and redress measures for industry codes in Schedule 4 of the Bill (including a random audit power, public warning notices and orders for redress for non-parties to an ACCC action) creates greater disincentives for breaches of industry codes in keeping with their co-regulatory nature.

Coles

Coles suggests[193] that infringement notices should not be applied to such broad contraventions as those relating to misleading representations. It suggests that infringement notices should only attach to provisions that contain 'physical elements' and references the

191 Queensland Consumers' Association, submission no. 1
192 CHOICE, submission no. 20, p. 11-12
193 Coles Supermarkets Australia, submission no. 3, p 2.

Attorney-General's Department's ***Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers***.[194]

The contraventions to which infringement notices will apply under the Commonwealth-applied ACL apply to conduct which can be made out through 'physical elements', such as the making of statements and evidence suggesting that the statement was capable of misleading. The Guide notes that 'the physical elements of an offence may be conduct, a result of conduct and a circumstance in which conduct, or a result of conduct, occurs. The physical elements of an offence can include an act, omission or state of affairs.'[195]

The sections in Part 3-1 that have been specifically excluded from the infringement notice regime[196] contain a mental element, such as a person's belief or intention. While an objective assessment is able to be made by a regulator about a representation or conduct before issuing a notice, making a determination about a person's state of mind should be left to a court of law. As such, the infringement notice regime does not extend to provisions which would require that type of determination.[197]

194 Page 50.
195 Page 17.
196 Sections 32(1), 35(1), 36(1), (2) or (3), 40 or 43 of the ACL.
197 Explanatory Memorandum, p 434.

COUNTRY OF ORIGIN REPRESENTATIONS

The ACL provides a specific methodology for determining whether claims about the country of origin of goods are false, misleading or deceptive. Claims that meet the criteria set out in Part 5-3 of the ACL cannot be found to be false, misleading or deceptive in action bought under the prohibitions of the ACL on misleading or deceptive conduct, or false or misleading representations.

The ACL incorporates the existing country of origin defences in the TPA as well as a new defence for claims that goods, or components or ingredients of goods, are grown in a particular country. In addition, the provisions have been redrafted to reflect plain English drafting style.

Existing provisions

In their submissions CHOICE[198], Consumer Action Law Centre[199] and Australian Made Campaign Ltd[200] have raised concerns related to perceived deficiencies in the current TPA provisions that are being transferred to the ACL. Due to complexities associated with ensuring any substantive changes to existing provisions achieve an appropriate balance between consumer expectations, business needs and health and safety issues, concerns with existing provisions as part of the ACL are not dealt with in this Bill.

The Food Labelling Law and Policy Review Committee is currently undertaking the Food Labelling Law and Policy Review, as agreed by the Council of Australian Governments.[201] For the purposes of this review, the term 'food labelling' includes information, representations and claims about food that are, or could be, regulated under the Australia and New Zealand Food Standards Code or consumer protection laws.

Information about the review can be found at www.foodlabellingreview.gov.au.

New 'grown in' defences

The new defences would protect unqualified 'grown in [country]' claims from being challenged as false or misleading under section 52 and section 53 of the TPA. The proposed provisions (s.255 Item 4 and s.25 Item 5) are respectively analogous to the existing 'product of [country]' and 'made in [country]' defences under the TPA. Section 255 Item 5 operates somewhat differently from the 'made in [country]' defence in that it provides a 'safe harbour' defence for ingredients or components of a good only if the components grown in the claimed country of origin constitute at least 50% of the good. Item 5 does not protect statements that individual minor components are 'grown in' a particular country but such claims are and will remain perfectly legitimate as long as they are true.

198 CHOICE, submission no. 20, p 6.
199 Consumer Action Law Centre, submission no. 28, p 3.
200 Australian Made Campaign Limited, submission no. 31.
201 http://www.coag.gov.au/coag_meeting_outcomes/2008-11-29/docs/communique_20081129.rtf p 10.

Australian Made Campaign Ltd[202] raised specific concerns in relation to the new 'grown in [country]' claims. Under Section 255 Item 5, the threshold for total local grown content is 50 per cent or more by weight in s255 (1) item 5 of the ACL, whilst in the ***Australian Made, Australian Grown Code of Practice*** there is currently a threshold of 90 per cent. However, the test in the ***Australian Made, Australian Grown*** rules for 'Grown in Australia' claims is a mandatory threshold, not a safe harbour. The provision proposed to be included in the ACL is not strictly comparable to the rule in the ***Australian Made, Australian Grown Code of Practice*** and has a different purpose.

Under the new Item 5 provision it would not be possible for a product which is comprised of 1 per cent Australian mango juice, 49 per cent water and 50 per cent imported ingredients to be labelled 'Australian grown mangoes'. The water would not be considered to be 'grown in' Australia, even if it were sourced here. Therefore the only ingredient that could be considered to be grown in Australia would be the 1 per cent mango juice. The product would therefore fail the requirement for the weight of ingredients or components grown in the country claimed to comprise at least 50 per cent of the total weight of the product.

Item 5 would allow an 'Australian grown mangoes' representation to be made in relation to a product that comprised, by weight, 50 per cent mango juice, 39 per cent water and 11 per cent imported orange juice.

[202] Australian Made Campaign Limited, submission no. 31

APPENDIX A
AUSTRALIAN CONSUMER LAW — TABLE OF PROVISIONS THAT HAVE SUBSTANTIVELY CHANGED COMPARED TO THE *TRADE PRACTICES ACT 1974**

Description	ACL	TP Act or other source	Comments
Chapter 1			
Meaning of consumer	3	TPA 4B	$40,000 threshold removed, as recommended by CCAAC.
Misleading representations with respect to future matters	4	TPA 51A	Amended to clarify that burden of proof is evidentiary only in nature; no legal burden on defendant; and not a defence to otherwise misleading or deceptive conduct. Proposed changes agreed by MCCA on 4 December 2009.
When donations are treated as supplies	5	--	New provision — based on NZ Consumer Guarantees Act (CG Act).
Meaning of manufacturer	7	TPA 74A	Draws on the meaning of manufactured in section 74A of the TPA.
Part 2-1: Misleading or deceptive conduct			
Application of this Part to information providers	19	TPA 65A	Subsections 19(3) and 19(4) reflect the High Court's interpretation of 65A of the TPA in *ACCC v Channel Seven Brisbane Pty Ltd* [2009] HCA 19.
Part 2-2: Unconscionable conduct			
Unconscionable conduct in business transactions	22	TPA 51AC	Amended to give effect to Government response to the 2009 Senate Economics Committee report on unconscionable conduct. s22(2)(j) and 22(3)(j) inserted to allow the court to have regard to the progress of a contract in considering unconscionability.
Part 3-1 Unfair practices, Division 1: False or misleading representations etc.			
False or misleading representations about goods or services	29	TPA 53	Section 53 of the TPA expanded to: • clarify that discharging an evidentiary burden does not amount to a defence; • prohibit both false or misleading representations (whereas s53 prohibited only false representations in some instances); and • include additional prohibitions relating to: — representations that are testimonials and representations about testimonials (based on s14 FT Act (Vic)); and — representations concerning consumer guarantees. These changes were agreed by MCCA on 4 December 2009.
False or misleading representations about sale etc of land	30	TPA 53A	Prohibition on offering gifts and prizes in connection with the sale of land moved to s32 of ACL.
Offering rebates, gifts, prizes etc	32	TPA 54; s.16(6) of FT Act (Vic)	Combines s54 of TPA and s16 of FT Act (Vic). Land transactions are covered as they are now not dealt with in s30. Defences added to not providing rebate, gift, prize or other free item within time specified (or reasonable time) if act or omission of another person or cause beyond person's control. Defence also added if person took reasonable precautions to ensure rebate, gift, prize or other free item would be provided within time specified (or reasonable time).

Description	ACL	TP Act or other source	Comments
Wrongly accepting payment	36	TPA 58	Provision now includes requirement to provide goods or services for which payment has been accepted within a specified time, or if no time is specified, within a reasonable time (s36(4)). Based on section 19 of FT Act (Vic). A defence is provided if the failure to if act or omission of another person or cause beyond person's control. Defence also added if person took reasonable precautions.
Applications of provision of this Division to information providers	38	TPA 65A	Subsections 38(3) and 38(4) reflect the High Court's interpretation of 65A of the TPA in *ACCC v Channel Seven Brisbane Pty Ltd* [2009] HCA 19.
Part 3-1, Division 2: Unsolicited supplies			
Assertion of right to payment for unsolicited goods or services	40	64	Adds requirement for a warning statement to be set out in the regulations. Based on s58 FT Act (NSW). Agreed by MCCA on 4 December 2009.
Liability of recipient for unsolicited services	42	--	Based on s 26 FT Act (Vic).
Assertion of right to payment for unauthorised entries or advertisements	43	64	Adds prohibition on asserting a right to payment for unauthorised advertisements. Expansion to advertisements based on s27 FT Act (Vic).
Part 3-1, Divisions 3 to 5: Pyramid schemes, multiple pricing and other unfair practices			
Marketing schemes as pyramid schemes	46	65AAE	Amended such that a court 'must' have regard to certain matters, instead of 'may'. MCCA agreed to clarification of pyramid selling provisions on 4 December 2009.
Multiple pricing	47	---	Similar to s40 FT Act (NSW). The inclusion of this provision in the ACL was agreed by MCCA on 4 December 2009.
Harassment and coercion	50	60 & 53A(2)	Combines harassment and coercion in connection with supply of goods and services (s60) with the same in relation to interests in land (s53A(2)).
Part 3-2, Division 1: Consumer guarantees			
Guarantees relating to the supply of goods	51-59	CG Act (NZ) 1993	Guarantees correspond to existing conditions and warranties in the Part V, Division 2 of the TP Act.
Guarantees relating to the supply of services	60-63	CG Act (NZ) 1993	Guarantees correspond to existing conditions and warranties in the Part V, Division 2 of the TP Act. A new guarantee, based on a NZ provision, relates to supply of services within a reasonable time. An exemption for architects and engineers in s74 TP Act has not been carried over to s61 of the ACL.
Application of Division to supplies of gas, electricity and telecommunications	65		New provision — regulation making power to allow for exclusion of guarantees for these supplies.
Display notices	66		New provision based on CCAAC recommendation. The inclusion of this provision in the ACL was agreed by MCCA on 4 December 2009.
Part 3-2, Division 2: Unsolicited consumer agreements			
All provisions	69-95		New law — based on existing arrangements in all States and Territories.
Part 3-2, Division 3: Lay-by agreements			
All provisions	96-99		New law — high level principles, as agreed at MCCA on 4 December 2009.
Part 3-2, Division 4: Miscellaneous			
Supplier must provide proof of transaction	100		Similar to s161A FT Act (Vic). The inclusion of this provision in the ACL was agreed by MCCA on 4 December 2009.
Customer may request itemised bill	101		Similar to s161A FT Act (Vic). The inclusion of this provision in the ACL was agreed by MCCA on 4 December 2009.
Prescribed requirements for warranties against defects	102		Allows regulation to be made to prescribe requirements similar to FT Act (Qld) Part 3, Division 5 — contact details, etc to be provided when warranty provided by supplier.

Description	ACL	TP Act or other source	Comments
Repairers must comply with prescribed requirements	103		Allows regulations to be made requiring repairers of goods to provide information to consumers about, for example, the potential for data to be erased from electronic storage media when goods are repaired, as agreed at MCCA on 4 December 2009.
Parts 3-3 and 3-4, Product Safety and Information Standards			
Safety standards	104-137	65B, 65C, 65D, 65E, 65F, 65G, 65H, 65R, 65T	MCCA agreed to a new approach to product safety at its meeting on 23 May 2008. on 4 December 2009 MCCA agreed to the detailed operation of this approach. It is based on existing arrangements for safety standards, interim bans, permanent bans, mutual recognition, compulsory recalls, voluntary recalls, safety warning notices and information standards under the TPA and recommendations by the Productivity Commission. A new reporting requirement for incidents occasioning death or serious injury has been included in the ACL. The Productivity Commission recommended a mandatory reporting requirement along these lines.
Part 3-5, Manufacturer's liability for safety defects			
Manufacturer's liability	138-150	Part V, Div 2A	No policy change between TPA and ACL.
Chapter 4, Offences			
Offences replicate Chapter 3 provisions			
Parts 5-1 and 5-2: Enforcement and Remedies			
Pecuniary penalties	224-231	76E	Penalties apply to new provisions in Chapter 3 based on best practice from States and Territories.
Injunctions	232-235	80	Addition of an injunction restraining a person from carrying on a business. Based on s65(2) FT Act (NSW).
Actions for damages	236	82	Provisions dealing with damages for personal injury moved to Part XI of the TPA, to apply only as Commonwealth law.
Compensation orders for injured persons	237, 238	87	Provisions dealing with damages for personal injury moved to Part XI of the TPA, to apply only as Commonwealth law.
Privilege against exposure to a penalty	249		New law
Defences for certain civil prosecutions	251-253		New law
Part 5-3, Country of origin representations			
Country or origin representations	254-258		New defence to misleading or deceptive conduct for goods 'grown in' a particular country.
Part 5-4, Remedies relating to consumer guarantees			
Actions against suppliers of goods	259-266		Based on CG Act (NZ)
Actions against suppliers of services	267-270		Based on CG Act (NZ)
Actions for damages against manufacturers of goods	271-273		Based on CG Act (NZ)
Indemnification of suppliers by manufacturers	274	74H	Indemnity expanded to cover not only situations where a manufacturer would be required to pay damages, but to circumstances in which a supplier incurs costs because goods are not of acceptable quality, fit for purpose or fail to match their description.
Part 5-5, Liability of linked credit providers			
Linked credit contracts	278-287	73	Based on s73 of TPA and s135 of National Credit Code, to ensure that amounts can be recovered in State and Territory tribunals in respect of linked credit contracts. NCC is otherwise only enforceable in courts (but not tribunals).

* Provisions of the Australian Consumer Law have been redrafted, when compared to provisions of the *Trade Practices Act 1974*, for increased clarity, based on the Office of Parliamentary Counsel's preference for plain language in the drafting of Commonwealth statutes.

APPENDIX B
UNINTENTIONAL DRAFTING ERRORS KNOWN TO THE TREASURY

A small number of unintentional drafting errors (which do not reflect a policy position) have been identified by the Treasury since the Bill was introduced into the Parliament on 17 March 2010. These are listed below:

- A consequential amendment is required to section 87CB (proportionate liability) of the TPA to replace a reference to section 82 of the TPA with section 236 of the ACL.

- Section 25 of the ACL (Examples of unfair terms) does not reflect the amended version of this provision in the First ACL Act. Section 25 of the ACL should be the same as section 4 of the First ACL Act.

- Section 231 of the ACL should be removed from the ACL and included as a provision in Schedule 2 of the Bill, instead of Schedule 1, as it relates to application of the ACL as a law of the Commonwealth.

- The definition of 'conduct' in subsection 4(2) of the TPA has been omitted from the ACL. It should be included.

APPENDIX C
SENATOR EGGLESTON'S QUESTIONS ON NOTICE

EGGLESTON Qs re NoIQ

Consumer law Bill No. 2

The following issues have been found with Consumer Law Bill No. 2.

General questions

- What is the time frame for the implementation of this Bill?
- There have been many suggestions that the Bill contains a number of issues (as below) not intended by the Minister and that the Bill may have been drafted poorly. What is the Treasury's response?

Product Reporting

- The requirement that suppliers inform the Minister when the supplier becomes aware that a product they have supplied has caused injury, death or illness (Part 3-3 Division 5).
    - What are the compliance costs to business? Why does treasury feel they will be low?
    - What penalties will be imposed on business for not reporting? How will the Government investigate where a business has not reported?
    - What level of contact did the treasury have with businesses when designing this policy?
- All participants in the supply chain in providing a particular product associated with death, injury or illness will be required to report to the Government on the incident.
    - What are the penalties for a company who fails to report where another company has already done so adequately?
    - Can Treasury explain its definition of who is involved in the supply chain? What about where a supplier has supplied an intermediary product within a good that had nothing to do with any damage caused?
    - How will the ACCC take account of conflicting reports lodged by different participants in the supply chain?
- As currently drafted, s 131(1) requires that any supplier of a 'particular kind' of good will have to report to the Minister when becoming aware of injury, death or illness, even when it is a competitor's good that has caused the issue.

Eggleston Q&A on Notice

- What protections will be in place to ensure that companies don't use this requirement for any anti-competitive purposes (i.e. making false claims about rival companies)?

- How does the Government propose to monitor how a company is monitoring a competitor?

- The time frame for reporting is two days after the incident.

  - How did Treasury determine that two days in an adequate amount of time for a supplier to lodge a report?

  - There is concern from stakeholders that this is not enough time. How is the Government addressing those claims?

  - Will companies be required to put in place better monitoring systems to report in this timeframe? Does Treasury know the costs that businesses will face to implement these systems?

- The requirement for an 'association' between the product and the injury or death seems too broad as a trigger for a company needing to report on an incident.

  - Can the Government explain the requirement for an association between the product and the injury or death? Can it give examples?

  - Will suppliers be able to disclose conditions of use within the product exempting them from the need to report by listing instances of use which don't constitute an association?

- The Bill does not address the issue of confidentiality of reports made by companies.

  - How will the Government and the ACCC keep reports made by companies confidential and private?

Auto Industry (ordinarily acquired test)

- In relation to warranties, small businesses are currently captured within the definition of "consumer" under certain circumstances where the purchase price of the good is under $40,000 and the good is of a kind ordinarily used for personal, domestic or household use or consumption, or in relation to the purchase of a vehicle, where it is for use in the transport of goods on public roads.

  The Bill as drafted will remove the inclusion of the purchase of a vehicle. This will mean that small businesses using a vehicle for transportation will no longer be

covered under the same guarantees and warranties as consumers using the same vehicle.

- Was it Government's intent to exclude motor vehicles owned by businesses from the ordinarily acquired test?
- What are the policy reasons for preventing motor vehicles owned by business from being covered by statutory warranty?
- Has the Government completed any analysis on how this will affect small business when compared to larger businesses?

- Section 113 with regards to product reporting will also now include motor vehicles and require all suppliers to report a product when it is associated with the death or serious injury of illness of any person. Motor vehicle suppliers already comply with a detailed reporting system for monitoring the safety of their vehicles. This is done through State and Territory registration regimes as well as checks performed by designers.
  - Was it Government's intent to include motor vehicles in the product reporting scheme?
  - Does the Government see any duplication of processes already undertaken by State and Territory governments as part of their motor vehicle registration process? Will the system be more onerous on reporting required by motor vehicle suppliers?
  - Did the Treasury do any modelling on the number of motor accidents leading to death or serious injury and the number of reports that will need to be filed each year? Can it release this modelling?

Guarantees as to a fitness for a reasonable purpose

- Section 61 will include architects and engineers as service suppliers subject to the proposed statutory guarantee to consumers of fitness for purpose. Architects and Engineers will have to guarantee that their products are ~~fit~~ for purpose. This would apply to consumers who engage an architect for their house, but not for those who will on-sell their home as a developer.

  This law will impose liability on architects and engineers where consumers already have adequate protection in the form of negligence actions and misleading and deceptive conduct actions under the TPA as currently operating.

  - What do you say to that