

16 April 2010

Department of the Senate
PO BOX 6100
Parliament House
CANBERRA, ACT 2600



By email: economics.sen@aph.gov.au

Dear Senate Committee

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

Thank you for the opportunity to make a submission on the *Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010* ("the Bill").

As a national retailer with more than 2,200 retail outlets¹ across all States and Territories of Australia, Coles strongly supports the introduction of a national Australian Consumer Law (ACL) because we believe it will help reduce some of the multi-jurisdictional complexities we currently face and ultimately result in lower compliance costs for our business.

Despite being largely supportive of the reforms the Bill aims to achieve, Coles remains concerned about a number of specific provisions. Please find below Coles' comments on the proposed reforms in the Bill that may potentially impact on our business. We trust that you will consider these comments and welcome the opportunity for further discussion if required. Target and Kmart have reviewed this submission and requested that Coles acknowledge their endorsement of its contents.

Section 29 False or misleading representations about goods or services

Coles has some concerns regarding the application of the provisions of section 29(1) of the Bill, specifically, those sub-paragraphs of the section dealing with testimonials. Sections 29(1)(e) prohibits false and misleading representations "...that purport to be a testimonial by any person relating to goods or services;" It is Coles' assumption that this provision and s.29(1)(f) are drafted to deal with the issue of false testimonials by publicly known celebrities such as the matter reviewed in *Australian Competition & Consumer Commission v Advanced Medical Institute Pty Ltd (No. 3)* [2006] FCA 1066. Coles supports the new provisions to the extent that this is the aim. However, Coles is concerned with the use of the words "by any person" in the sections and considers that the use of these words may mean that the use of actors that play a character shown to enjoy, use or endorse a product in advertising material risk contravening these new provisions to the extent that that actor does not enjoy, use or endorse the product in their personal life. It is Coles' view that such advertising has not previously contravened section 52, unlike false testimonials using publicly known figures endorsing products, which do.

Coles notes that paragraph 6.121 of the Explanatory Memorandum to the Bill makes clear that the provision seeks to capture both the misrepresentation of a genuine testimonial and a fictional testimonial. Coles is concerned that the use of an actor in advertising in the manner described in the preceding paragraph may constitute a "fictional testimonial" without further detail in the Bill around testimonials.

It is Coles' submission that the Bill should make clear that sections 29(1)(e) and (f) refer to the use of testimonials by high profile or publicly known individuals rather than the use of actors playing a character in advertising material. Coles considers it to be particularly important that this provision is clarified given the existence of the further provisions of section 29 that create a rebuttable presumption that testimonials are false or misleading and also impose an evidentiary onus on the party making the testimonial representation.

¹ This figure comprises of Coles Supermarkets, Coles Express, Liquorland, Vintage Cellars, 1st Choice and Coles Liquor Group Hotels.

Offences, enforcement and remedies

Coles remains concerned by the planned use of infringement notices for allegations of misleading conduct as outlined in section 134A of the Bill. It is Coles' view that the imposition of infringement notices involving a financial penalty where the regulator has "*reasonable grounds to believe*" that a representation is misleading is inconsistent with the Commonwealth *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* which states that infringement notice schemes should only apply to strict or absolute liability offences that "*...carry physical elements on which an enforcement officer can make a reliable assessment of guilt or innocence.*"

It is Coles' view that while some consumer protection matters can be reliably assessed according to "*physical elements*" and are therefore appropriately dealt with via an infringement notice regime, assessments as to whether or not conduct is misleading are difficult to make "on the spot" by enforcement officers. Representations alleged to be misleading require assessment in context, including relevant surrounding facts and circumstances that may not be readily available to the enforcement officer. Further

When considering how a reasonable person might view a particular representation it needs to be borne in mind that there can be more than one reasonable response in any given circumstance. Personal capacity and experience differ and frequently different people, acting reasonably, will respond in different ways to the same matter. The test of reasonableness involves considering the boundaries of the range of those responses (National Exchange Pty Ltd v ASIC [2004] FCAFC 90; (2004) 49 ACSR 369; 22 ACLC 609; ATPR 42-000; 61 IPR 420)

The *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* further states at page 46 that:

The efficacy of an infringement notice scheme depends on the reliability of the assessments made by enforcement officers as to whether an offence has occurred. These assessments will be consistently accurate if the assessment turns on straightforward and objective criteria rather than on complex legal distinctions.

Given the complex legal distinctions that are often required in an assessment as to whether a representation is capable of inducing error, prohibitions of misleading representations are not those that according to the above excerpt are appropriate for an infringement notice scheme.

While Coles appreciates that the rationale of the regime as outlined in paragraph 21.7 of the Explanatory Memorandum is to allow regulators to take action against "minor breaches of unfair practices" efficiently and effectively without court action, it remains Coles' view that such notices are inappropriate where the alleged contravening conduct requires an assessment that might be quite subjective. Despite the Explanatory Memorandum referring to infringement notices being utilised to address "minor breaches" the Bill allows for amounts of up to \$66,000 to be levied against a listed corporation.

It is Coles' view that infringement notices should not be available to the regulator for allegations of misleading representations. Instead these matters should be treated similarly to subsections 32(1), 35(1), 36(1)-(3), section 40 and 43 of the Bill where assessment as to whether or not the conduct contravenes the legislation is left to the court for determination.

Dual Pricing

Coles notes that the Bill adopts the dual pricing regime previously existing only in NSW and the ACT as the new section 47. It remains Coles' position that the existing prohibitions against misleading representations as to price adequately dealt with such situations.

Coles does however acknowledge and support the Ministerial Council on Consumer Affairs' belief that this new section 47 constitutes a "clear rule" that traders can understand regarding what must occur where multiple prices are displayed at the same time for goods. Coles submission is that the new section of the Bill be expanded to include the additional information stated in the Explanatory Memorandum at paragraph 6.5.1, that businesses are under no obligation to sell goods to which multiple prices (or single prices) attach, and that businesses are entitled to withdraw the goods from sale and correct any pricing errors if they occur. Coles considers that including this provision in section 47 of the Bill would result in a more comprehensive "clear rule" for application in these circumstances.

Substantiation notices

Coles is generally supportive of the introduction of substantiation notices to make nationally uniform the investigative tools available to the regulator. Coles notes that the power to issue a substantiation notice under the Bill is not dependent upon any complaint, suspicion or belief that a claim or representation made in relation to goods or services is false. Rather section 219(2) of the Bill permits the regulator to issue a substantiation notice if a person has made a relevant representation.

The existence of the new investigative tool at a national level has the potential to cost business heavily both financially and in relation to the human resources necessary to respond to many notices within their legislated 21 day timeframe. Coles' preference would be for substantiation notices to be made available to regulators upon receipt of a complaint or the development of a belief that a misrepresentation had been made. However in light of the regime as outlined in the Bill, Coles would strongly suggest that the issuing of substantiation notices be controlled, measured, based on articulated criteria and not be used or issued as a substitute for the conduct of ordinary initial inquiries into a matter.

Section 219(4) of the Bill states that a substantiation notice must name the person to whom it is issued. Given the size and complexity of its business Coles considers it appropriate that in the situation of a body corporate any substantiation notice should be issued to the company and at the company's registered office. This practice would assist large organisations like Coles to manage and respond to substantiation notices adequately and within the 21 day timeframe. It is Coles' view that these notices should not be issued to its employees individually or at a store level.

Conclusion

Thank you again for the opportunity to provide comment on this important area of Australian consumer law reform.

Should you have any further questions or wish to discuss further please contact Jodi Dixon - Manager Regulatory Affairs on (...) or via email: (...)

Yours sincerely
(...)

Robert Hadler
General Manager Corporate Affairs, Coles