





Submission to Senate Economics Committee

on

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



19 April 2010



CHOICE is a not-for-profit, non-government, non-party-political organisation established in 1959. CHOICE works to improve the lives of consumers by taking on the issues that matter to them. We arm consumers with the information to make confident choices and campaign for change when markets or regulation fails consumers.

CHOICE is fiercely independent: we do not receive ongoing funding or advertising revenue from any commercial, government or other organisation. With over 200,000 subscribers to our information products, we are the largest consumer organisation in Australia. We campaign without fear or favour on key consumer issues based on research into consumers' experiences and opinions and the benefit or detriment they face.

To find out more about CHOICE's campaign work visit www.choice.com.au/campaigns and subscribe to CHOICE Campaigns Update at www.choice.com.au/ccu.





Executive summary

CHOICE welcomes the reforms contained in the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 (Bill).

This submission makes the following general points:

- more time should be allowed for submissions on the detail of the Bill, including several drafting issues;
- the Australian Consumer Law should be applied as minimum, uniform standard across both states and industries. Any existing exemptions or exceptions under the *Trade Practices Act 1974* should be subject to debate before being adopted in the new law.

The following issues are addressed in detail:

- new provisions on false, misleading or deceptive conduct are to be welcomed, although some aspects of the drafting should be reconsidered;
- the consumer guarantees regimes will provide considerable benefits to consumers but can be improved by removing exemptions, strengthening provisions on extended warranties and improving remedies;
- the product safety and information regime is an improvement on current arrangements. CHOICE supports expanding its scope and enhancing the duty to inform the regulator of unsafe products;
- the infringement notice regime should also be available to ensure compliance with industry codes.



1. General

1.1. Welcome reforms

CHOICE welcomes the move to a national, uniform approach to consumer protection and supports the passage of the Bill ¹ subject to the comments in this submission. CHOICE thanks the Senate Economics Committee (Committee) for the opportunity to comment on the Bill.

This submission addresses the following aspects of the Bill:

- misleading or deceptive conduct;
- consumer guarantees;
- product safety; and
- industry codes.

In the following areas we make no or only limited submissions:

- unconscionable conduct – we understand these provisions will be addressed in later legislation;
- unfair contract terms regime – this was included in the Trade Practices Amendment (Australian Consumer Law) Bill (No.1) 2009 and CHOICE has contributed extensively to the public consultation on those provisions. In regard to the application of the regime to insurance, we would support the implementation of Option A set out in the “Unfair terms in insurance contracts – Options paper”² and support the submission by the Consumer Action Law Centre (CALC);
- new enforcement powers – which were also introduced in Trade Practices Amendment (Australian Consumer Law) Bill (No. 1) 2009;
- unsolicited supplies – we support the submissions by CALC.

¹ The following reference styles are used in this submission:

- the *Trade Practices Act 1974*: eg “TPA s. 52”
- the draft Competition and Consumer Act: “CCA s. 132”
- the draft Australian Consumer Law: “ACL s. 18”.

² *Unfair terms in insurance contracts – Options paper*, issued by the Hon. Chris Bowen MP, 17 March 2010. Available at: <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1756> (this and all references to internet sources are as viewed at the date of the submission).



1.2. Drafting

In our review of the legislation, we have found several instances where slight changes to the drafting from the equivalent provisions in the *Trade Practices Act 1974* (TPA) has the potential to raise problems. While these changes usually simplify the drafting, which CHOICE applauds, there are some examples given in the comments below where we consider new complexities or gaps in coverage result. We are concerned that other drafting issues will not be addressed as a result of the Bill not having been subject to a full exposure review.

1.3. Exemptions, exceptions, liability limitations and other distortions

CHOICE supports the application of the Australian Consumer Law as a national, economy-wide set of consumer protection measures. This objective has been central to the current reform process, which is intended to realise a national, uniform consumer law.

The protections in the Australian Consumer Law (ACL) – and the consumer guarantees in particular – should be universal minimum standards that are always available to consumers. The introduction of sector-specific exemptions (and prospective exemptions under regulation) has the potential to introduce economic distortions and to compromise consumer understanding of and confidence in the consumer law. Only where there is a clear and compelling need for sector-specific rules should they be allowed to diverge from the generic law and even in these cases, the preferred approach is to make the minimum modifications necessary to avoid conflicts with the generic law (such as through remedies). Any special treatment should preserve the operation of the ACL to the maximum extent possible, not simply abrogate it.³

CHOICE is encouraged to see that the Government has used the opportunity of this reform to remove some exemptions that existed in the TPA but we would urge the Committee to recommend that all special treatment be removed from the Bill. It would then be open for particular industries and professions to seek individual amendments to the ACL through new legislation. This would avoid the risk of exceptions and exemptions being perpetuated without public and parliamentary exposure.

2. False, misleading or deceptive conduct

2.1. New provisions

Testimonials

CHOICE supports the introduction of the new prohibitions on false or misleading representations relating to testimonials.

³ See Productivity Commission, *Review of Australia's Consumer Policy Framework*, (Australian Government, Canberra, 2008), ch 5 generally, specifically pp. 82-84.



We are concerned that the drafting of ACL s. 29(e) is ambiguous and may not be effective in addressing the conduct that we understand is the object of the section. Strictly interpreted, the sub-section simply prohibits a person making any false or misleading representation that also purports to be a testimonial. As we understand the policy intention of this provision, it should prevent representations that are false or misleading *because* they purport to be a testimonial.

Extended warranties

The Bill introduces a new prohibition against “false or misleading representations concerning a requirement to pay for a contractual right that is wholly or partly equivalent” to the consumer guarantees in Division 1 of Part 3-2 of the ACL or other law (ACL s. 29(n)). The intention of this provision is to address inappropriate sales of extended warranties. While CHOICE supports the policy objective, and we do not necessarily oppose the new sub-section, our view is that it is unlikely to address many representations that would not also be caught by ACL s. 29(m).

As discussed in CHOICE’s submission to the Commonwealth Consumer Affairs Advisory Council (CCAAC), the central problem with extended warranties lies in offering them without adequate disclosure of the existence and effect of the statutory warranties. We therefore take the view that a successful policy response will require a positive disclosure obligation, rather than a new prohibition against false or misleading representations.⁴

Country of origin

The Bill restructures the current scheme of safe harbours for country of origin claims and includes a new safe harbour for representations about where a good is “grown”.

Country of origin labelling is frequently at the top of CHOICE members’ concerns about food labelling and grocery supply chain issues in our surveys. The problem of providing a workable scheme for business that also gives consumers confidence in the accuracy of origin representations has occupied consumer policy for some time. In our view, the main problem is that the breadth of defences provided in the TPA ss. 65AA et seq. risks opening up loopholes.

CHOICE supports the approach of requiring “grown in...” claims to also satisfy other tests in the table to ACL s. 255(1) (“made in...” or “product of...”) and to avoid the protection for the “grown in...” claim where the supplier makes multiple origin claims. However, the drafting in ACL s. 255 is almost incomprehensibly complex, involving a circular (and negative) cross-reference between sub-sections (1) and (2). We would encourage the Committee to request alternative drafting.

⁴ See below at 3.3.



3. Consumer guarantees

3.1. General

CHOICE supports the change in the legal basis of consumer guarantees from implied contract terms to statutory rights.

This is an important reform that has been debated for decades. The move to statutory guarantees, the concomitant removal of the confusing distinction between conditions and warranties and the change to clearer wording in the standards (“acceptable” rather than “merchantable” quality) are in line with the recommendations of CCAAC.⁵ These changes will increase consumer awareness and understanding of their rights and should also reduce compliance and dispute resolution costs.

Research conducted by CHOICE indicates that the greatest obstacle to consumer guarantees being effective in the marketplace is consumer and supplier awareness and understanding of their rights. We look forward to working with enforcement agencies to ensure effective education, compliance and enforcement of these rights.

3.2. New terminology

An inevitable part of introducing new concepts to legislation is that there will be a period of uncertainty as the law is clarified. We would encourage the Australian Competition and Consumer Commission (ACCC) to consult stake-holders and to publish guidance notes on the new provisions as soon as possible.

3.3. Extended warranties

The issue of misleading conduct relating to extended warranties is discussed above at 2.1.

The essential problem with extended warranties, as discussed in CHOICE’s submission to CCAAC in July 2009,⁶ is that they are often sold to consumers without adequate disclosure and explanation of consumers’ statutory rights, which may render the extended warranty redundant. Accordingly, any successful reform in this area should include a mandatory disclosure requirement when a supplier offers a consumer an extended warranty.

CHOICE repeats the submissions it made to CCAAC. Suppliers should be required:

- to provide consumers with a written quote for an extended warranty valid for 30 days;

⁵ CCAAC, *Consumer Rights: reforming statutory and implied conditions and warranties*, Final Report (2009), p. 65 (available at: <http://www.treasury.gov.au/contentitem.asp?NavId=014&ContentID=1521>)

⁶ Available at: <http://www.treasury.gov.au/documents/1614/PDF/CHOICE.pdf>.



- when providing a quote, to give a written explanation of the relationship between the extended warranty and the consumer's rights under the manufacturer and statutory warranties;
- to allow consumers a “cooling-off” period on the purchase of extended warranties.

There is a power (ACL s. 66) for the Minister to make a written determination requiring suppliers to put up display notices at the point of sale. At least in the situation where an extended warranty is sold to a consumer, CHOICE submits that this section should be enhanced to a general power to require information to be provided in an appropriate form.

In addition, where extended warranties are offered, suppliers should be under a positive duty to inform the consumer about the consumer guarantees. This could be either by providing the consumer with an information sheet in a prescribed form (if the sale is made at the supplier's premises) or in writing or by scripted audio or video material in other cases. The express warranty itself should also detail the consumer guarantees. This duty of disclosure and the 30 day written quote would allow consumers to make an informed decision as to whether the extended warranty provides them with any better protection than that offered under the consumer guarantees. A breach of the duty should attract the enforcement remedies set out in ACL Part 5-1 and also a right for the consumer to rescind the extended warranty at any time.

3.4. Exemptions and limitations

As discussed at 1.3 of this submission, CHOICE supports the application of the ACL as a national, economy-wide set of consumer protections. We have particular concerns about the sector-specific exemptions already included in the consumer guarantee provisions.

Architects and engineers

For the reasons given above, CHOICE supports the removal of the exemption for architects and engineers.

Telecommunications

We support the submissions made by the Australian Communications Consumers Action Network (ACCAN) that there is no case for an exemption or a power to exempt telecommunications services.

That an exemption should be contemplated in the telecommunications industry is of particular concern to CHOICE, given that industry's notoriously poor record of consumer protection. Our own experience and that of the Telecommunications Industry Ombudsman⁷ indicate that, even if other, telecommunications-specific consumer protection mechanisms such as the Consumer Service Guarantee exist, compliance with those provisions and general consumer

⁷ Telecommunications Industry Ombudsman, *Annual Report*, 2009 recorded a 54% increase in complaints under the scheme.



law has been woeful.⁸ Telecommunications is a clear case where any industry-specific consumer protection measures are required *in addition* to the general protections that apply to all businesses in the economy.

In practice, CHOICE is also concerned that any exemption for telecommunications *services* will be used by some suppliers as a false pretence for denying consumers their rights under the consumer guarantees that apply to telecommunications goods.

Gas and electricity

CHOICE does not support the retention of the exemptions for gas and electricity in regard to consumer guarantees. As discussed above at section 1.3, CHOICE is of the view that any exemptions that are to be rolled over from the TPA to the ACL should be exposed to public and parliamentary debate.

Limitation of liability under State laws

CHOICE acknowledges that there several State regimes that will be replaced by the ACL provisions on consumer guarantees. There is some justification for the limitation provision in ACL s. 275 to allow States and Territories to limit liability during a transitional period.

Given the importance of national uniformity, CHOICE submits that ACL s. 275 should be subject to a sunset clause, after the expiration of which, any limitations should be introduced to the ACL itself. This would ensure that any limitations to liability that are soundly based would apply nationally. It would also remove the incentive for industries or professions to seek individual State or Territory government agreement to a limitation of liability that then becomes a backdoor exemption.

3.5. Remedies and enforcement

It is generally acknowledged that personal enforcement of consumer guarantees through courts or even tribunals is often ineffective.⁹

Rescission

CHOICE supports the consumer right to rescind contracts where there is a “major” failure to comply with the consumer guarantees.

The Bill proposes that the contract for services will be automatically terminated when a consumer exercises a right to reject goods. While this may be appropriate in many situations, there may also be cases where automatic termination will result in consumer detriment. For example, in the case given in the EM of a mobile phone contract, the consumer may reject the phone handset supplied but may not want the contract to terminate immediately, if this means

⁸ See, Australia, House of Representatives, *Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009*, p. 5.

⁹ See CCAAC, above note 5, p. 65.



they will lose rights under the contract, such as the ability to receive calls or to transfer the connection to another carrier. In other circumstances, there may be establishment costs that the consumer would incur if the contract were terminated and the consumer has to acquire services from another supplier. For example, if a consumer enters into a contract for the supply of an internet service that includes optional hardware at an additional cost and if the hardware fails to meet one of the consumer guarantees, the consumer may wish to continue using the service with hardware obtained from a third party.

Section 265 should be redrafted to give the consumer the right to terminate the contract for services, rather than automatically terminating the contract.

4. Product safety and information standards

4.1. National approach to product safety

In its 2008 publication, *Product Safety – It’s no accident*¹⁰, CHOICE argued for six key reforms to Australia’s product safety system:

- a national product safety system including a dedicated Commonwealth product safety agency or a special product safety unit in the ACCC;
- improved data collection about injuries from consumer products;
- more research on product safety related injuries;
- a General Safety Provision;
- mandatory detailed recall notices; and
- compensation for foreseeable misuse.

CHOICE is pleased that a large part of this agenda – and in particular a national product safety system – has been taken up by MCCA and implemented in the Bill. We look forward to working with the ACCC and state agencies on the remaining elements.

There remains a need for a General Safety Provision in Australia, which would set a clear, uniform and proactive legal basis for ensuring product safety. We note that a general safety requirement has exists in other jurisdictions.¹¹

¹⁰ <http://www.choice.com.au/~media/Files/Consumer%20Action/Other%20campaigns/Product%20safety/f132143.ashx>

¹¹ eg Article 3 of the 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) requires Member States to introduce legislation to ensure “Producers shall be obliged to place only safe products on the market”.



4.2. Scope

As a national consumer organisation, CHOICE's principal concern regarding product safety is in relation to consumer goods and services. Nevertheless, we are concerned that all products that reach Australian markets should be safe. Further, there are many instances where goods that are not supplied as consumer goods (for example, industrial equipment used in retail premises or a drink vending machine) have the potential to harm consumers. If the use of powers under the product safety regime could prevent injuries in these cases, we submit that those powers should not be limited to consumer goods.

In this regard, the position may be worse under the ACL than under existing law because of the somewhat narrower definition of "consumer". The product safety provisions under the TPA apply to "goods that are intended to be used, or are of a kind likely to be used, by a consumer...". This limitation has been held to be based on the definition of consumer in section 4B of the TPA¹² and therefore includes goods purchased for less than \$40,000. The new definition of consumer goods ("intended to be used, or are of a kind, likely to be used for personal, domestic or household use or consumption") is narrower at least in this respect.

Further, there is a possible gap in the legislation where a good is not a consumer good (ie not intended to be used or of a kind likely to be used for personal, domestic or household use) but are used by a consumer in acquiring other goods that are consumer goods. For instance, a drink vending machine is not a consumer good but could have a safety defect that could result in injury to a consumer seeking to acquire a can of drink. In these circumstances, it would be appropriate that the product safety standard power could be employed.

4.3. Duty to report goods *before* death, serious injury or illness

CHOICE supports the introduction of a general duty on suppliers to report incidents to the Minister where a consumer good or related service is associated with death, serious injury or illness (ACL ss. 131, 132).

The policy objective of this provision is to introduce a more proactive approach to product safety by suppliers and regulators. The duty to report product problems is only a half-step in this direction. While it will assist to stop multiple injuries, by definition, it is only triggered when a serious injury or death has already occurred. CHOICE is strongly of the view that the same duty should apply when a supplier becomes aware of facts or circumstances that indicate death, serious injury or illness would be likely.

5. Industry codes

Industry codes provide a useful means to introduce a measure of industry participation in the regulatory process and often involve a degree of detail that exceeds that in the law itself. Breaches of the provisions of codes are often at the less serious end of contraventions.

¹² *Theo Holdings Pty Ltd v Hockey* [2000] FCA 665, at 23.



These characteristics make infringement notices a workable and appropriate enforcement option and CHOICE supports a power to allow the ACCC or ASIC to issue infringement notices for suspected breaches of codes.