Law Council
OF AUSTRALIA

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

Mr John Hawkins
Committee Secretary
Senate Standing Committee on Economics
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Mr Hawkins,

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

I have pleasure in enclosing a submission to the Senate Economics Committee's inquiry into the *Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010*.

The submission has been prepared by the Trade Practices Committee of the Business Law Section of the Law Council of Australia. The submission has been endorsed by the Business Law Section. Owing to time constraints, the submission has not been reviewed by the Directors of the Law Council of Australia Limited.

If you have any questions regarding the submission, in the first instance please contact the Committee Chair, Dave Poddar, on (02) 9296 2281.

Thank you for giving us the opportunity to comment.

Yours sincerely.

(...)

Bill Grant
Secretary-General

16 April 2010

Encl.

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Submission on the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 (Cth)

Senate Standing Committee on Economics

16 April 2010

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Table of Contents

Introduction

The Trade Practices Committee of the Business Law Section of the Law Council of Australia (**Committee**) is pleased to offer the following comments on the *Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010* (Cth) (**Bill**).

Executive Summary

In this submission, the Committee provides its preliminary observations on selected areas of the Bill. Those observations are set out in more detail below, but include the following:

- ***Provisions relating to the reversal of the onus of proof should not apply in relation to criminal prosecutions*.** Many provisions in the Bill have the effect of reversing the usual onus of proof. The Committee is generally of the view that reversed onuses of proof should be used only where there is sufficient empirical justification, and should not apply for the purposes of criminal prosecution.
- ***The narrower definition of "consumer" may leave certain vulnerable consumers unprotected, contrary to the policy objectives of the Bill.*** The Committee supports the introduction of consistency across Federal, State and Territory laws in the definition of "consumer". However, in removing the monetary threshold relevant to determining consumer transactions under the current *Trade* Practices Act (**TPA**), the Committee considers that the proposed definition of consumer is now relatively narrow and has the effect of arbitrarily denying protection to genuinely vulnerable consumers simply because the goods or services they have acquired for personal purposes are seen to be "ordinarily" used for business. This definition also exacerbates the odd result already present under current law, in that large businesses who acquire goods or services for business use (provided that the products are ordinarily acquired for personal use) are nevertheless protected. The Committee believes that the definition of "consumer" should not extend to bodies corporate or businesses acquiring goods or services for business use.

  As stated in the Committee's previous submission regarding the information and consultation paper "An Australian Consumer Law: Fair Markets - Confident consumers" (**Consultation Paper Submission**), the Committee believes that the definition of consumer should take into account both the nature of the goods or services acquired and the purpose of the particular acquisition.

- ***The drafting of the unsolicited selling and consumer guarantee regimes requires further refinements to avoid unintended consequences flowing from the provisions.*** While the Committee welcomes new uniform unsolicited selling and consumer guarantee provisions, it submits that the provisions are not drafted with sufficient clarity and certainty.

The meaning of "reasonable foreseeable use" in relation to product safety needs to exclude deliberate use of consumer goods for unintended purposes. On a conceptual level, the Committee acknowledges that product bans, recalls or safety warning notices may be required in some instances even where the relevant goods have been misused. However, the Committee is concerned that the concept of "reasonable foreseeable use" is so broad as to include accidental use for an unintended purpose, and submits that clarification should be added to exclude instances where harm is likely to occur only where users deliberately use a product for an unintended purpose (such as the

use of an otherwise safe instrument such as a knife to commit a crime).

Comments and Suggestions

(a) Onus of proof

The Committee considers that it is not appropriate for onuses of proof to be reversed in the absence of clear evidence that consumers require the benefit of the reversal in order to enforce the protection accorded to them by the Bill. In addition, the Committee considers that the onus of proof should not be modified for criminal offences, as the seriousness of the finding of a criminal contravention should require all elements of the offence to be proved against the accused.

The Bill provides that where an agreement is asserted to be an unsolicited consumer agreement, it is presumed to be an unsolicited consumer agreement unless proved otherwise. The Committee considers that this presumption is not necessary because it should not be unduly difficult for consumers to prove all the elements of an unsolicited consumer agreement as set out in the Bill. In particular, while there is currently a presumption in some jurisdictions that contracts are door-to-door trading or telemarketing contracts if one party asserts that this is the case, the definition of door-to-door and telemarketing contracts in the relevant jurisdictions require the contracts to be made in the "course of door-to-door trading".

It may be difficult for consumers to show that a particular contract was made in the course of door-to-door trading as it requires evidence that the dealer engages in a pattern of behaviour constituting door-to-door trading. In the absence of this element in the definition of unsolicited consumer agreements, the Committee considers that the presumption that certain contracts are unsolicited consumer agreements has not been sufficiently justified. The Committee agrees with the carving out of criminal prosecutions from the presumption.

However, the Committee recognises that there may be sound arguments for reversing the evidentiary burden of proof in relation to false or misleading representations concerning testimonials. In particular, the reversal of the evidentiary burden in proposed s 29(2) may facilitate enhanced protection for consumers. This reversal of the burden recognises the potential difficulty faced by consumers in obtaining information about the basis for a testimonial. Requiring a representor to adduce evidence about the validity of a testimonial is not onerous, particularly given that the relevant evidence is likely to be easily available to the representor, but not to the consumer. Accordingly, the reversal of evidentiary burden in this situation is not likely to unduly restrict businesses' use of testimonials, and may have positive benefits for consumers. Notwithstanding this basis for the reversal of evidentiary burden in relation to the civil prohibitions, the Committee does not support the equivalent reversal of the evidentiary burden in relation to the criminal offences, as in proposed s 151(2). Although the imposition of an evidentiary burden stops short of a true reversal of onus, the finding of a criminal contravention is a serious matter and should require all elements of the offence to be proved against the accused. Further, whether a representation is misleading is a crucial element of the section 151 offence which could well be the subject of detailed argument. In view of this, representations should not be deemed to be misleading on the basis of their connection to a testimonial.

Accordingly, the Committee submits that the proposed s 151(2) is inappropriate, and should be removed. The Committee notes that this submission is consistent with the approach to the presumption as to unsolicited consumer agreements in the proposed s 70, which applies only to the relevant civil prohibitions, and not to the criminal offences.

(b) Definition of "consumer" and scope of the Bill

The Committee believes that the definition of consumer currently proposed in the Bill is relatively narrow and 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 definition should also be limited to consumers who are individuals and not extend to bodies corporate. The Committee considers that bodies corporate acquiring goods or services for business use do not need the protection afforded by the Bill.

The definition of consumer as currently drafted excludes from the scope of the Bill individuals who acquire goods for personal, household or domestic use if those goods are ordinarily acquired for other purposes.

This is particularly concerning in relation to persons with special needs which may require them to purchase specialised goods and services that are not ordinarily acquired for personal, household or domestic use. Although such persons would not be protected under the Bill, they are arguably among the most vulnerable groups in society, required to spend relatively substantial sums on products that meet their unique needs and are thereby most in need of protection. For example, a mobility impaired person may require a lift to be installed in their two storey home in order to provide access to the upper storey. The person would likely not be protected by the proposed consumer guarantees under the Bill if the lift is not held to be a good ordinarily acquired for personal, domestic or household use since it would ordinarily only be installed in commercial buildings. Similarly, a person unable to write or type may require voice recognition software to be installed on their home computer in order to study or access the internet without assistance. If the software was developed for business use and is rarely used by individuals, the purchaser may be left without remedy if the software is defective.

Further, it would be possible for unscrupulous businesses to take advantage of this lacuna in the Bill by targeting vulnerable groups with products developed for uses other than personal, domestic or household use. For example, if a company were to doorknock sufferers of a particular condition with equipment ordinarily supplied to hospitals, individuals who purchased the products would not have the benefit of a termination period under the proposed unsolicited consumer agreements regime because the products would fall outside the regime since they are not ordinarily acquired for personal, household or domestic use.

The narrow definition of consumer with respect to the nature of the acquired products also potentially penalises early individual adopters of new technology. Innovations such as broadband internet and laptop computers were originally developed for business uses but have now been widely adopted by consumers. New technology in the form of products such as smartphones and near real time high quality teleconferencing are currently transitioning from being purely business products to products that are being offered more widely to consumers. Individuals who take up these products as they become available to non-business users are as deserving of protection as consumers of more established consumer technology, but may be denied protection if the proposed definition of consumer is

maintained. In addition, being able to offer protection to individuals who take up new technology in these circumstances may encourage faster uptake and thereby drive innovation.

The Committee recognises that businesses will encounter additional costs in complying with a more complex test if considerations of the subjective purpose of a purchaser are included in the definition of consumer. However, as discussed above, the current proposed definition leaves many vulnerable individuals unprotected.

A monetary threshold as in the current TPA may be appropriate as a functional proxy of purpose. However, while this would be easy to apply, customers who required more expensive goods would remain unprotected under this regime.

Alternatively, it may be possible to require protection for consumers who acquire goods not ordinarily acquired for personal use only if the supplier is subjectively aware of this purpose. This option allows the subjective purpose of the purchaser to be taken into account without overly burdening businesses with compliance costs. This is because it would remain in the discretion of the supplier to decline to sell the product to the prospective consumer.

Finally, a definition analogous to the definition of “consumer good” in the product safety provisions of the Bill could be adopted more widely across the proposed legislation. Many vulnerable consumers who require goods which are not ordinarily acquired for personal use could benefit from the inclusion of products “likely to be used” for personal use in the definition of consumer. This is because products may be “likely to be used” by individuals with a particular need or medical condition without being “ordinarily used” by consumers generally. In any event, a balance should be struck between the legitimate need to limit compliance costs and the public interest in protecting consumers.

The Committee believes that a definition of “consumer” which could strikes a fair balance between all the elements discussed above is one which takes into account the person acquiring the goods or services, the nature of the goods and the purpose of acquisition. In instances where the nature of the goods/services align with the purpose of acquisition, the value of the transaction should be irrelevant. Otherwise, the monetary threshold can be used as a determining factor. This is the view expressed in the Committee’s Consultation Paper Submission and remains appropriate today. The following table, which appeared in that Submission, illustrates how such a definition would apply in practice, and is duplicated below for information purposes.

Ordinary nature and purpose of goods/services	Purpose of acquisition	Above or below monetary threshold	Whether acquirer is a 'consumer'
Personal	Personal	Above or below	Yes
Personal	Business	Above	No
Personal	Business	Below	Yes
Business	Personal	Above	No
Business	Personal	Below	Yes
Business	Business	Above or below	No

Potential application of an alternative three-prong "consumer" definition which takes into account purpose, nature of goods/services as well as a relevant monetary threshold.

(c) Consumer guarantees

Embodiment of consumer guarantees as statutory rights

The Committee considers that, while the embodiment of consumer guarantees as statutory rights rather than implied contractual terms facilitates the bringing of actions by regulators, improved education is also required in order to ensure that barriers to enforcement are minimised.

Comparison with New Zealand regime

While the consumer guarantees scheme under the Bill is based on the New Zealand regime, it differs in several material ways which has the potential to generate uncertainty and unnecessarily increase compliance costs.

First, the guarantee as to fitness for purpose under the Bill requires goods to be reasonably fit for any purpose disclosed to the supplier, or to any person by whom prior negotiations or arrangements in relation to the acquisition of the goods were conducted or made or to the manufacturer. This differs from the New Zealand provision which requires goods to be fit for a disclosed purpose only if that purpose is disclosed to the supplier. This creates the possibility that suppliers may be held to have failed to fulfil the guarantee as to fitness for purpose where the supplier is not aware of the disclosed purpose that the Bill deems to have been communicated by the consumer. It is unclear what mechanisms businesses can employ to ensure that all information regarding consumers' subjective purposes communicated to third party manufacturers and other persons involved in the supply of goods is channelled back to them in order to avoid breach of the guarantee.

Another aspect in which the Bill differs from the New Zealand *Consumer Guarantees Act 1993* (**CGA**) is that it does not permit the supplier to contract out of liability for consumer guarantees where the goods are acquired for business purposes. This creates an anomalous situation where large businesses which purchase products ordinarily acquired for personal use will be protected by the

consumer guarantee regime and neither the supplier nor the acquirer will be able to contract out of those guarantees, for example, in order to lower costs. As set out above, we suggest that the regime should not extend to bodies corporate who acquire goods or services for business use.

Sections 265 and 270 of the Bill also provide that services "connected" with rejected goods are automatically terminated at the time the consumer elects a refund for the rejected goods. Similarly, goods that are "connected" with services that are terminated by a consumer are automatically rejected at the time of termination pursuant to section 270. These provisions create grave uncertainty as "connection" is not defined, leaving it unclear what degree or type of connection would trigger the application of these provisions. In particular, suppliers of services linked to third party goods or goods linked to third party services will be exposed to much higher risk as a result of these provisions and will have to develop mechanisms to determine when automatic terminations or rejections have occurred in order to comply with their obligations under the Bill. The increased costs to business may well be reflected in higher costs for consumers. A more practical approach would be to limit a "connection" for the purposes of sections 265 and 270 of the Bill to goods or services that are acquired from the same supplier and where it is mandatory that the goods or services be used with the goods or services being rejected.

Indemnification of suppliers by manufacturers

Under the Bill, a consumer has the ability to bring action against the supplier or manufacturer of goods in relation to a failure of relevant consumer guarantees.

Where a consumer chooses to bring action against the supplier rather than the manufacturer for a particular failure, section 274 of the Bill provides a statutory indemnity by the manufacturer to the supplier. However, as is the case under the current TPA, this indemnity is not "complete" and can potentially leave suppliers exposed in several situations where they are not at fault in relation to the relevant failures.

For example, the Committee's interpretation of the Bill is that a manufacturer will not be liable to the consumer (and thus not required to indemnify a supplier) where goods are not of acceptable quality because of an intervening act (ie because "of the act or default of a person other than the manufacturer, its servant or agent, or by a cause independent of human control occurring after the goods left the manufacturer's control"). This "exception" is not, however, available to suppliers. This gap in the manufacturer's indemnification means that suppliers will be liable to the consumer (but will not receive indemnification from the manufacturer) where a good is not of acceptable quality even if the quality of the good has been affected by factors outside both the supplier and the manufacturer's control.

The Bill also widens the existing gap in the TPA by excluding from the indemnity situations where the goods are of unacceptable quality by reason of the price charged by the supplier, which is higher than the manufacturer's recommended retail price or the average retail price for the goods. This creates the possibility that manufacturers could limit their liability under the statutory indemnity by setting unrealistically low recommended prices for goods, in particular where the good is a unique product or it is difficult to determine an "average retail price". In these cases, a supplier may be liable to a consumer because a good is not deemed to be of acceptable quality based on its selling price, but will potentially not be

indemnified by the manufacturer because the price charged was higher than the manufacturer's recommended retail price.

(d) Unsolicited consumer agreements

Nationally consistent regime and role of Regulations

The Committee welcomes the adoption of a nationally consistent regime in relation to unsolicited door-to-door and telephone marketing selling.

The Committee notes, however, that the provisions expressly contemplate the modification of any aspect of the regime through the use of State and Territory-based Regulations. While the Committee agrees that a certain degree of flexibility is desirable in relation to unsolicited selling (for example, different enforcement arrangements may be required for different industries/types of goods or services), the legislature must also take care to ensure that such flexibility would not result in significantly inconsistent regimes between jurisdictions (as modified through Regulations).

Given the critical role the regulations currently play in relation to many sections of the Bill (such as the unsolicited selling regime), it will be important to ensure that the exemptions available under the existing State and Territory regulations be reflected in the proposed regulations, to the extent that the policy rationale for the exemption remains appropriate under the new regime.

Payment for services supplied after 10 business days

The Bill currently contemplates that suppliers are able supply services to consumers under an unsolicited consumer agreement after an initial "10 business days" timeframe (notwithstanding that consumers may be entitled to a longer termination period under section 82 of the Bill in certain circumstances, such as where the supplier did not inform consumers of their right to terminate within the termination period).

The Committee submits, however, that there is a lack of clarity in relation to whether or not suppliers are entitled to be paid for services which they have provided to consumers within a termination period (to the extent that the contract is subsequently terminated by the consumer).

Section 85 of the Bill currently sets out obligations and rights of consumers on termination of an unsolicited consumer agreement. Section 85(6) specifically states that if a consumer exercises their termination rights after the initial "10 business days" period, and a service was supplied to the consumer in accordance with the provisions, then *"the termination does not affect any liability of the consumer under the agreement to provide consideration for the service."*

On its face, the Committee assumes that the legislature's intention is to permit the supplier to recover consideration for services supplied. However, the supplier is likely to face difficulties should it attempt to enforce its rights:

- section 83 of the Bill specifies that an agreement which is terminated in accordance with the provisions "is taken to have been rescinded by mutual consent". The Committee is concerned that the consumer's liability "under the agreement to provide consideration for the service" will also cease upon rescission; and

- section 88 of the Bill prohibits a supplier from recovering amounts after termination. In particular, if an agreement is terminated in accordance with the provisions, a person must not take any action "in relation to an amount alleged to be payable, under the agreement …, by the consumer under the agreement".

The Committee submits that the Bill should be amended to clarify the relationship between sections 83, 85 and 88.

Supplier liability in relation to agent conduct

In relation to the negotiation of unsolicited consumer agreements, the Bill retains many of the requirements under existing State and Territory legislation related to dealer "conduct". For example, the Bill sets out strict requirements concerning the hours within which negotiation can take place, that a dealer must disclose their identity and the purpose of door-to-door visits, and concerning a dealer's obligation to leave customer premises upon request.

Taking into account that many suppliers outsource unsolicited selling responsibilities to third parties, section 77 of the Bill acts as a deeming provision, stating that a supplier of goods or services is taken to have contravened the relevant "conduct" provisions if the dealer responsible for negotiating the relevant contracts had contravened those provisions.

While the Committee understands that this is an anti-avoidance measure to prevent suppliers from relying on a "middle man" (while reaping the benefits of the contravention), the Committee is nevertheless concerned that the broad drafting of section 77 will create unintended consequences.

In particular, the supplier's liability under section 77 is entirely unconcerned with the type of relationship between the supplier and the contravening dealers (or in fact, whether or not there is any authorised relationship between the parties at all). While there may be strong policy reasons to require suppliers to be responsible for their own agents and authorised contractors, the Committee submits that the supplier should be provided with a defence against any potential civil remedies 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. For example, if a rogue dealer solicits contracts without the knowledge or authorisation of the supplier (such as if they want to illegitimately obtain benefits under a "refer a friend" type commission), the Committee is of the view that such activities are beyond the control of the supplier and in such instances there is little justification that penalties should attach.

(e) False and misleading representations

Specific prescriptive regulation generally not required

The Bill, under section 29 ("False or misleading representations etc."), incorporates several types of prohibited false or misleading representations which extend beyond the scope of the existing section 53 of the TPA. While some of

these provisions are based on existing legislation (such as the prohibition in relation to false or misleading representations concerning testimonials under sections 29(1)(e) and (f) of the Bill), others are untested new concepts created for the Bill (such as prohibitions relating to false or misleading representations concerning warranties and consumer guarantees under sections 29(1)(m) and (n) of the Bill).

As a general proposition, and as previously noted in its Consultation Paper Submission, the Committee believes that the broad application of section 52 of the TPA (retained as section 18 of the Bill), together with the existing heads of prohibition currently under section 53 of the TPA, are already sufficient in deterring misleading or deceptive conduct. The Committee submits that prescriptive provisions such as those under sections 29(1)(e), (f), (m) and (n) of the Bill are not required and are likely to increase complexity for both consumers and suppliers.

Misrepresentations concerning consumer rights, warranties and guarantees

Even if the "topic specific" prohibitions under section 29 of the Bill are seen to be necessary, the Committee nevertheless has concerns with some of the "new" provisions. In particular, the Committee believes that the role of sections 29(1)(m) and (n) are not sufficiently distinct.

Under section 29(1)(m), a person must not make a false or misleading representation "concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy". Section 29(1)(n) relates to false or misleading representations "concerning a requirement to pay for a contractual right that … is wholly or partly equivalent to any condition, warranty, guarantee, right or remedy … [and under written law]."

In the Committee's view, these two provisions are functionally similar (if not identical).

For example, if a supplier misrepresents a customer's need to pay for a right which they are already entitled to, in all likelihood they would also be taken to have misled the customer in relation to the "existence, exclusion or effect" or those rights. Conversely, in the extended warranties context, a supplier who accurately represents a customer's existing statutory rights in describing its extended warranties product will unlikely be taken to have made any false or misleading representations concerning "a requirement to pay for a contractual right" concerning those warranties and conditions.

The existence of section 29(1)(n) may also lead to confusion that **any** attempt to sell extended warranty products is deemed to be false or misleading (even where the consumers' legal entitlements are clearly explained and understood), which does not appear to be the legislature's intention.

The Committee submits that section 29(1)(n) should be deleted.

(f) Product safety

The meaning of reasonably foreseeable use

The Committee welcomes the introduction of a nationally consistent product safety regulatory system.

It notes, however, that a new element relating to “reasonably foreseeable use (including misuse)” has been incorporated into the threshold tests in relation to product safety. For example, under the Bill, a responsible Minister can (amongst other things):

- impose an interim or permanent ban
- require a compulsory product recall
- publish safety warning notices
- give a disclosure notice requiring further information

concerning a consumer good if *“a reasonably foreseeable use (including a misuse) of consumer goods of that kind will or may cause injury to any person”*.

The concept of "reasonably foreseeable use (including a misuse)" also applies to product related services (that is, a use or misuse of goods that results from the product related services being supplied) under the Bill.

The Committee is concerned that it is not clear on the face of the legislation what is meant by "reasonably foreseeable use" and, in particular, "misuse". The Explanatory Memorandum (EM) to the Bill states that "reasonably foreseeable use" may include use of the good for its primary, normal or intended purpose, *for its unintended purpose*, or misuse of the good. This implies that the legislature intends for the concept of “reasonably foreseeable use” to capture not only unintended misuse by a user (for example, due to some design defect), but also any deliberate use of a good in an unintended manner.

The Committee submits that the broadness of the concept (at least as explained by the EM) is inappropriate, as it means that consumer goods are at risk of being the subject of a ban, recall or warning notice for reasons that can be quite unrelated to the inherent safety of the goods (but merely because there is some probability that a good may cause injury through the behaviour of the user). For example, it appears that ordinary items such as knifes and scissors (which are sharp) or cleaning products (which can be poisonous), which are clearly not intended to be used to harm consumers, can be the subject of a ban.

The Committee believes 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 use is not the intended purpose of the good.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.