

Chapter 9

Enforcement provisions and remedies

9.1 This chapter examines the enforcement and remedies under Schedule 2 of the bill and the application of the ACL.

Enforcement and remedies—Schedule 2 of the bill

9.2 The bill introduces new enforcement powers to complement the introduction of the new consumer protection laws.¹ It amends the TPA:

- to introduce civil pecuniary penalties for breaches of specified consumer protection provisions;
- to enable the ACCC and ASIC to issue substantiation notices relating to consumer protection in certain circumstances;
- to enable the ACCC and ASIC to seek an order disqualifying a person from managing corporations as a consequence of breaches of various consumer protection-related provisions;
- to allow the ACCC and ASIC to seek certain orders for the benefit of persons that are not parties to proceedings; and
- to allow the ACCC and ASIC to issue an infringement notice containing a financial penalty for suspected contraventions of civil pecuniary penalty provisions of the TP Act and the ASIC Act;
- to provide for the ACCC and ASIC to issue public warning notices relating to consumer protection in certain circumstances.

Civil pecuniary penalties

9.3 For some years, civil pecuniary penalties have existed for the restrictive trade practices provisions of the TPA.² However, the consumer protection provisions of the TPA and the ASIC Act are enforced through civil remedies such as injunctions and, in certain circumstances, criminal sanctions. The EM explains that:

While criminal sanctions provide an important deterrent against the most serious forms of contravening misconduct, and civil remedies can achieve timely outcomes for consumers, there is currently no means of obtaining sanctions in the timely manner available under the civil regime.³

1 See chapters 4–9 of the Explanatory Memorandum.

2 The Hon. Dr Craig Emerson, Second Reading Speech, *House of Representatives Hansard*, 24 June 2009, p. 6987.

3 *Explanatory Memorandum*, p. 54.

- 9.4 The bill introduces a civil pecuniary penalty for contraventions of:
- the unconscionable conduct provisions of the TPA and the ASIC Act;
 - the consumer protection provisions in the TPA and the ASIC Act relating to unfair practices (except misleading and deceptive conduct);
 - the consumer protection provisions relating to pyramid selling;
 - certain product safety and product information provisions in the TPA;
 - the provision in the ACL concerning the use of prohibited terms; and
 - failure to respond to a substantiation notice or providing false or misleading information in response to a substantiation notice.⁴
- 9.5 Civil pecuniary penalties will not be available for breaches of section 52 of the TPA.

Views

9.6 The Australian Bankers' Association maintained that the proposed civil pecuniary penalties should not apply to a breach of the unconscionable conduct provisions. It argued that the bill's provisions are:

...inconsistent with the intention behind the use of civil pecuniary penalties, namely, to enable a "middle ground" remedy for provisions which already have criminal sanctions attached. Whether a bank has acted unconscionably will not always be clear and is an issue in respect of which reasonable minds may differ. Often unconscionability is triggered by a party exercising an otherwise valid contractual right. For the reasons that pecuniary penalties do not apply in relation to misleading and deceptive conduct, the ABA believes that pecuniary penalties should be removed in relation to unconscionable conduct.⁵

9.7 The Law Council of Australia argued along similar lines:

...civil pecuniary penalties should not apply to the unconscionable conduct provisions, for the same policy reasons underpinning the decision not to apply penalties to section 52. Civil pecuniary penalties are intended to bridge the gap between civil remedies and criminal penalties and apply only to those consumer protection provisions that attract criminal sanction. Currently, no criminal sanctions apply to unconscionable conduct under the Trade Practices Act...The Committee considers that appropriate and adequate sanctions already apply under the Trade Practices Act to address unconscionable conduct and the imposition of civil pecuniary penalties is inappropriate and unwarranted.⁶

4 *Explanatory Memorandum*, p. 54.

5 Australian Bankers' Association, *Submission 32*, p. 4.

6 Law Council of Australia, *Submission 47*, p. 6.

Substantiation notices power

9.8 The Minister explained in the Second Reading Speech of the bill that a key gap in the powers of the ACCC and ASIC is 'the lack of an ability to quickly and easily require information to substantiate claims made in representations by businesses'.

9.9 The bill enables the ACCC or ASIC to issue a substantiation notice if a person makes claims or representations intended to promote the supply (or possible supply) of goods or services, the sale (or possible sale) of an interest in land by a corporation or employment which is (or may be) offered by a corporation.⁷

9.10 The EM explains that the substantiation notice requires the person to provide documents within 21 days of the notice being issued, information or documents which could be capable of substantiating the representations or their ability to supply. The ACCC or ASIC may seek information so long as it is relevant to the substantiation of the claim or representation or the person's ability to supply.⁸

Views

9.11 The new power is intended as a preliminary investigative tool where the regulator suspects a representation may not be able to be substantiated and, therefore, in breach of the consumer protection laws.⁹

9.12 However, some submitters have criticised this provision of the bill as both unnecessary and potentially disruptive.

9.13 For example, GE has argued that given the regulators' current information-gathering powers, 'there is no demonstrable policy need for introducing a power to issue substantiation notices'. It further claimed that the 'essential requirement' is that the regulator believes that a business is breaching or has breached the law. Finally, GE argued that there is a need for the bill to clarify how the substantiation notices would apply to information and documents subject to legal professional privilege and other protections.¹⁰

9.14 The Australian Bankers' Association argued that the new substantiation power:

...will likely lead to "fishing" type exercises by the relevant regulators and will significantly increase the administrative burden of businesses without corresponding benefits. Both the ASIC and the ACCC already have formal information gathering powers under the ASIC Act and the TPA and this

7 *Explanatory Memorandum*, p. 70.

8 *Explanatory Memorandum*, p. 70.

9 *Explanatory Memorandum*, p. 70.

10 GE, *Submission 26*, p. 6.

additional preliminary investigative tool is unnecessary. If the Committee believes that such a power is necessary, the ABA believes that at the very least any such power to request substantiation must be accompanied by objectively verifiable and reasonable grounds.¹¹

9.15 The Law Council of Australia stated that it is 'not convinced' that substantiation notices will lead to 'additional consumer benefit'. It shared the ABA's concerns on "fishing expeditions". The Law Council described the absence of any 'objective or evidential threshold' as a 'serious omission from the provision given the serious consequences of not complying with these notices'.¹² It recommended inserting a clause into the bill that the regulator must have 'reasonable grounds that the statement is false or misleading'.¹³

Disqualification orders

9.16 Disqualification orders are currently available for breaches of the restrictive trade practices provisions of the TPA and for breaches of the Corporations Act.¹⁴ The bill enables the ACCC and ASIC to seek a disqualification order from the court to ban people who disregard the consumer protection laws from being a director of a company.

9.17 The disqualification orders will apply to the civil pecuniary penalty provisions (except those relating to substantiation notices) and the criminal provisions of the TPA and the ASIC Act. They will not be available in relation to the misleading and deceptive conduct provisions of the TPA (section 52) or the ASIC Act (section 12DA) because these provisions do not create a liability but establish a norm of conduct.¹⁵

Views

9.18 Master Builders Australia argued in its submission that disqualification orders are not 'a proportionate response'. Rather, it argued the merit of an approach:

...which emphasises educating businesses, particularly small businesses, about their obligations under the proposed unfair contract provisions...Master Builders notes that disqualification orders, which effectively ban or restrict individuals from participating in specific activities for specific periods of time, including managing corporations, have the potential to bankrupt many small businesses. Furthermore, disqualification orders improperly applied have the potential to seriously disrupt the operation of a business of any size, where a manager is

11 Australian Bankers' Association, *Submission 32*, p. 4.

12 Law Council of Australia, *Submission 47*, p. 5.

13 Law Council of Australia, *Submission 47*, p. 6.

14 The Hon. Dr Craig Emerson, Second Reading Speech, *House of Representatives Hansard*, 24 June 2009, p. 6988.

15 *Explanatory Memorandum*, p. 66.

appointed or 'works their way up' based on specialised knowledge and expertise. It is also unclear what benefit these orders would have for the public, so are unlikely to meet a proper cost benefit analysis.¹⁶

Infringement notices

9.19 Part VIC of the TPA and Part 2 Division 2 of Subdivision GB of the ASIC Act will be amended to provide a mechanism for the ACCC and ASIC to issue a person with an infringement notice containing a financial penalty for suspected contraventions of the following provisions:

- a contravention of the unconscionable conduct provisions (of Part IVA of the TP Act; and of Part 2, Division 2, Subdivision C of the ASIC Act);
- a contravention of certain of the consumer protection provisions relating to unfair practices (except sections 52, 53A(1)(c), 54, 56(1), 58 or 64) of Part V, Division 1 of the TP Act; and of Part 2, Division 2, Subdivision D (except sections 12DA, 12DC(2), 12DE, 12DG(1), 12DI or 12DM) of the ASIC Act);
- a contravention of the consumer protection provisions relating to pyramid selling (of Part V, Division 1AAA of the TP Act; and of Part 2, Division 2, Subdivision D of the ASIC Act);
- a contravention of certain product safety and product information provisions of Part V, Division 1A of the TP Act;
- a breach of the new provision in the ACL concerning the use of prescribed unfair contract terms (in Schedule 2, Part 2, section 6 of the TP Act; and in section 12BJ of the ASIC Act) once those provisions commence; and
- failure to respond to a substantiation notice or providing false or misleading information in response to a substantiation notice (in Part VID of the TP Act; and in Part 2, Division 2, Subdivision GC of the ASIC Act).¹⁷

9.20 The Minister explained in the Second Reading Speech that this provision of the bill will enable the regulators to deal with alleged breaches of the law without the need for costly legal proceedings. The infringement notices will enable the regulators to deal with minor breaches of the law through the payment of an amount which will enable a person to avoid legal proceedings. While a person issued an infringement notice is not obliged to pay, if s/he does, the regulator cannot take further action for the alleged breach.¹⁸

9.21 Treasury told the committee that:

16 Master Builders Australia, *Submission to the Treasury on the consultation paper 'An Australian Consumer Law'*, March 2009, p. 47.

17 *Explanatory Memorandum*, pp. 86–87.

18 The Hon. Dr Craig Emerson, Second Reading Speech, *House of Representatives Hansard*, 24 June 2009, p. 6988.

Infringement notices are directed to fairly minor breaches. The size of the penalties is fairly small. The largest on the face of the bill is \$6,600 for a corporation. So these would not be used to deal with major breaches that might apply in relation to, say, a national company. They are designed to provide the regulator with a means of drawing to a business's attention a potential breach to give them the option of paying the penalty, which that business is entitled not to pay. But that comes with the risk that they may be then subject to enforcement action for a civil pecuniary penalty, which may be a good deal more substantial. In terms of the way in which the regulator approaches this, there is a process under the intergovernmental agreement for the development of a memorandum of understanding between the ACCC, ASIC and the states' and territories' regulators to provide clarity around the way in which they will interact with one another and to provide guidance as to the way in which they will apply these powers on a consistent national basis.¹⁹

Views

9.22 The Consumer Action Law Centre supports the bill's provisions enabling the regulators to issue infringement notices for breaches of certain consumer protection provisions. It noted that at present, a business can engage in minor breaches 'with relative impunity' because the likelihood of any enforcement action is low. The Centre argued the need for a proportionate response to deal with action that causes minor consumer detriment. It cited the Productivity Commission's assessment that the issuing of infringement notices is desirable to provide scope for the regulators to deal with minor offences in a cost-effective manner.²⁰

9.23 However, the Consumer Action Law Centre argued that the provision to issue infringement notices should be extended to include breaches of provisions in any industry codes made under Part IVB of the TPA. It highlighted the new Retail Grocery Industry (Unit Pricing) Code of Conduct and the Horticulture Code of Conduct as prominent examples of where the issuing of infringement notices would assist in more effective enforcement.²¹

9.24 The Australian Bankers' Association views the infringement notices as a potential source of 'reputation damage to legitimate businesses'. It noted that there is no safeguard in the bill to ensure that the infringement notice mechanism is only applied to minor breaches of the relevant provisions.²²

19 Mr Writer, *Proof Committee Hansard*, 21 August 2009, p. 11.

20 Consumer Action Law Centre, *Submission 19*, p. 14. Productivity Commission, *Review of Australia's Consumer Policy Framework*, Productivity Commission Inquiry Report No. 45, Volume 2 – Chapters and Appendixes, April 2008, p. 248.

21 Consumer Action Law Centre, *Submission 19*, p. 14.

22 Australian Bankers' Association, *Submission 32*, p. 5.

9.25 Minter Ellison also expressed concern at the adverse impact of the infringement notices:

...we believe there is a real risk that the lower standard of proof and the ability of ASIC to impose infringement notices without going to court will do significantly more to create a risk adverse culture amongst regulated businesses. We are concerned that a lower standard of proof will mean that ASIC will be more inclined to prosecute breaches. The infringement notice power certainly seems likely to lead to more aggressive enforcement by ASIC.²³

Redress for non parties

9.26 In 2002, the Full Court of the Federal Court ruled that the existing section 87 of the TPA does not allow orders to be made for those who are not parties to the proceedings.²⁴

9.27 The bill inserts new sections 87AAA of the TPA and 12GNB of the ASIC Act to allow the Court to make certain types of orders to redress, in whole or in part, loss or damage suffered by a person that is not party to the proceedings. A court will be able to issue various forms of redress without the need for all consumers affected to be named as parties to the regulator's court proceedings.

9.28 The Court may make orders to redress non party consumers where a person:

- engages in conduct in contravention of an unconscionable conduct provision (of Part IVA of the TP Act and of Part 2, Division 2, Subdivision C of the ASIC Act);
- engages in conduct in contravention of a consumer protection provision relating to unfair practices (of Part V, Division 1 or Part VC of the TP Act; and of Part 2, Division 2, Subdivision D of the ASIC Act);
- engages in conduct in contravention of a consumer protection provision relating to pyramid selling;
- breaches the new provision in the ACL concerning the use of prescribed unfair contract terms (in Schedule 2, Part 2, section 6 of the TP Act; and in section 12BJ of the ASIC Act);
- is a party to a consumer contract and are advantaged by a term in relation to which the Court has made a declaration under section 87AC of the TP Act or section 12GND of the ASIC Act once those provisions commence; and
- the contravening conduct or declared term caused or is likely to cause loss or damage to a class of persons and the class of persons includes non-party consumers.²⁵

23 Minter Ellison, *Submission 45*, p. 10.

24 *Medibank Private V Cassidy* [2002] FCAFC 290. See *Explanatory Memorandum*, p. 77.

9.29 A court will be able to order various types of redress, including:

- declaring a contract or arrangement void in whole or in part;
- varying a contract or arrangement;
- refusing to enforce provisions of a contract or arrangement;
- refunding monies or return property;
- an order to repair goods or supply services at the respondent's expense; or
- an order varying or terminating an instrument creating or transferring an interest in land.²⁶

9.30 In the Second Reading Speech on the bill, the Minister stated that:

Redress for non-parties will allow the ACCC and ASIC to act more effectively where, for instance, thousands of consumers suffer small losses on which each of them might not take action individually because of cost and inconvenience. Businesses should not profit from consumer detriment, just because the amount is small or the harm is spread widely. This is not a general power to award damages, but a power to order redress where that loss or damage is clearly identifiable and there is no need to decide the merits of each case. It could be used to order redress such as an apology, the exchange of goods or a refund.²⁷

Views

9.31 The Consumer Action Law Centre strongly supports the bill's provision on non-party consumer redress, arguing that it fills a 'significant gap' in the TPA and ASIC Act's remedy provisions. The Centre's submission cites a 2006 OECD report on consumer redress which argued that regulator powers to obtain consumer redress are not only justified on fairness grounds but can also enhance enforcement outcomes.²⁸

9.32 However, the Centre is concerned that the bill does not clarify the types of orders that are intended to be excluded from the court's powers under these provisions. As drafted, the bill states that the court may make orders as it thinks appropriate 'other than an award of damages'. The Centre has argued that:

An award of damages is a general legal concept that can include many different heads of damages, including direct loss or damage, consequential damage and punitive damages. Refunds of money would address one type

25 *Explanatory Memorandum*, p. 79.

26 *Explanatory Memorandum*, p. 78.

27 The Hon. Dr Craig Emerson, Second Reading Speech, *House of Representatives Hansard*, 24 June 2009, p. 6988.

28 Consumer Action Law Centre, *Submission 19*, p. 13. OECD Committee on Consumer Policy, *Best Practices for Consumer Policy: Report on the Effectiveness of Enforcement Regimes*, 20 December 2006, p. 54.

of direct loss or damage suffered by consumers, and indeed the orders are intended to redress consumer loss or damage generally. It is therefore unclear how the exclusion of orders for an "award of damages" interacts with express provisions enabling orders to redress "loss or damage" including to "refund money". The EM also sheds no light on this question. We are concerned that this confusion could lead to unintended problems or set-backs in future court cases in the absence of further clarification.²⁹

9.33 The Centre therefore recommends amending the bill to clarify the types of orders that are intended to be excluded from the court's powers under these provisions, rather than excluding awards of damages generally. To this end, it considered that:

...it would not be reasonable to exclude orders to redress direct loss or damage suffered by consumers, but consequential loss or damage and punitive damages could reasonably be excluded from the non-party redress provisions.³⁰

9.34 Brambles Limited does not support the bill's provision of non-party consumer redress. In its view, the current procedures for representative actions are adequate, making the provision both 'unnecessary and inappropriate'. It added:

...there is a danger that consumers who otherwise would not be able to make out the elements for recovery (e.g. where they have not relied upon any misleading representation) will be entitled to the benefit of any proposed orders made by a court.³¹

9.35 The Law Council of Australia put its objections to the provisions in the following terms:

With regard to the non-party redress orders...essential processes and meanings are not clearly set out in the bill. For example, how would the affected class be determined? The bill has similarly not taken fully into account the consequences of some of the proposed enforcement actions on business reputation and consumer perceptions. The committee is also concerned that, under the bill as presently drafted, the regime will have unintended retrospective application once terms are prohibited or declared as unfair.³²

9.36 On the issue of retrospective application of prohibited terms, Ms Amanda Bodger, representing the Law Council's Trade Practices Committee, explained by way of example:

...sometime after the introduction of the new regime, businesses have been conducting their business with the standard form contracts for some time and under standard form contracts a fee is required to be paid by a

29 Consumer Action Law Centre, *Submission 19*, p. 13.

30 Consumer Action Law Centre, *Submission 19*, p. 13.

31 Brambles Limited, *Submission 16*, p. 5.

32 Mr Dave Poddar, *Proof Committee Hansard*, 21 August 2009, p. 33.

consumer in certain circumstances. The business has been collecting that fee for a number of months or years and believes that the fee is a fair one, action is taken either to get that term declared as unfair or perhaps a regulation is passed prohibiting the collection of an early termination charge or some sort of fee. The bill does not only provide an ability for redress going forward but because the term is void from its inception there is a risk that the regulator could require redress for all amounts that have been paid under that term—for many months, for many years—and the business collecting it in good faith. That is where there is an ability for the regime to act in a retrospective way. That leads to a lot of uncertainty for businesses generally in relation to standard form contracts.³³

9.37 The Australian Bankers' Association queried whether the provision to offer non-party redress is consistent with the broader principles underpinning the legislation. As it commented in its submission:

...the effect of a term being declared by a court to be an unfair term should apply only to the specific contract to which the application for a declaration relates. However, the drafting of the Bill's non-party redress provisions suggests that this is not the current intention. For example, s12GNB provides ASIC with the ability to seek redress for "non-parties" who may be affected by a declared unfair term. In permitting the court to grant orders for a class of unidentified persons who may suffer loss or damage (against a party who is advantaged by the declared term in the contract), the availability of non-party redress is by its very nature intended to apply without knowledge of any individual circumstances. This clearly suggests that the effect of a declaration that a court can make will in fact relate to more than one customer's contract. This seems at odds with the policy of the regime that whether a term is unfair will be dependent upon all of the relevant circumstances, the contract as a whole and the transparency of the term.³⁴

Application of the Australian Consumer Law

9.38 The ACL will be enacted both nationally and in each of the States and Territories by means of an application law scheme. The law will be legislated by the Australian Parliament, and each State and Territory will apply the nationally agreed law. Amendments to the national law would then require agreement by jurisdictions according to an Inter-Governmental Agreement.³⁵

9.39 Schedule 1 Part 2 of the bill inserts a new Part XI into the *Trade Practices Act 1974*. Part XI will:

- apply the ACL as a law of the Commonwealth;

33 Ms Amanda Bodger, *Proof Committee Hansard*, 21 August 2009, p. 32.

34 Australian Bankers' Association, *Submission 32*, p. 3.

35 Paula Pyburne, *Bills Digest*, 18 August 2009, No. 18, 2009–10, p. 11.

- facilitate its application as a law of each State and Territory; and
- make provision for its administration, enforcement and amendment.

9.40 The Commonwealth Government, using its corporations' power under section 51(xx) of the Constitution, will be the lead legislator. Part XI provides that the ACL applies as a law of the Commonwealth to the conduct of corporations (except in relation to financial products and financial services).

9.41 Part XI will provide for participating States and Territories to enact an applied ACL as part of the law of their respective jurisdictions. The States and Territories are required to enact legislation by 31 December 2010 to apply the ACL.

9.42 Part XI will facilitate the application of the ACL in the States and Territories by:

- allowing them to confer functions or powers on a Commonwealth entity;
- conferring original and appellate jurisdiction on the Federal Court in relation to a matter arising under the ACL in a State or Territory's law;
- providing there is no doubling-up of liabilities in a breach of the ACL as set out in the TP Act, and an applied (State or Territory) ACL; and
- confirming that the ACL provisions in the TP Act do not exclude the operation of an application law of a State or Territory.

9.43 The Intergovernmental Agreement will set out the manner in which the ACL will be implemented, the consultation and voting process for amending it and arrangements for its administration and enforcement (see paragraph 2.15).

