

# Chapter 1

## Introduction

1.1 The Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 is the second in a suite of trade practices reforms.

1.2 The Trade Practices Amendment (Australian Consumer Law) Act 2009 was the subject of a report by this Committee in September 2009 and received royal assent on 14 April 2010. It introduced a new national unfair contract terms law, which is scheduled to commence on 1 July 2010. It also included the first wave of new enforcement penalties and redress options for the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission.

1.3 This second bill was introduced into the House of Representatives on 17 March 2010 and provisions of the bill were referred to the Senate Economics Legislation Committee on 18 March 2010 for report by 21 May 2010.

1.4 A third bill, reforming 'unconscionable conduct' provisions, is expected later in 2010.

1.5 This bill amends the *Trade Practices Act 1974*, *Australian Securities and Investments Commission Act 2001* and *Corporations Act 2001* to implement a national consumer law regime in relation to: misleading and deceptive conduct; unconscionable conduct; unfair practices; consumer transactions; statutory consumer guarantees; a standard consumer product safety law for consumer goods; and product related services.

1.6 To reflect more accurately the purpose, scope and affected parties of the law, the bill amends section 61 of the *Trade Practices Act 1974* (TPA) to rename it as the *Competition and Consumer Act 2010*.

1.7 The bill amalgamates 17 pieces of federal, state and territory legislation into a single bill.<sup>1</sup> One-third of the bill replicates existing protections under the TPA, but changes the drafting to conform to modern plain English standards. The Minister's second reading speech explains:

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1 Parts IVA, V VA, VC, *Trade Practices Act 1974 (Cth)*; *Fair Trading Act 1992 (ACT)*; *Fair Trading (Consumer Affairs) Act 1973 (ACT)*; *Door to Door Trading Act 1991 (ACT)*; *Lay by Sales Agreements Act 1963 (ACT)*; *Fair Trading Act 1990 (Tas)*; *Fair Trading (Reinstatement of Regulations) Act 2008*; *Door to Door Trading Act 1986 (Tas)*; *Fair Trading Act 1999 (Vic)*; *Fair Trading Act 1987 (NSW)*; *Fair Trading Act 1989 (Qld)*; *Fair Trading Act 1987 (SA)*; *Consumer Transactions Act 1972 (SA)* and the *Manufacturers Warranty Act 1974 (SA)*.

...although [provisions] have been redrafted to reflect modern, easier to comprehend drafting conventions – and draw variously on the existing legislative approaches in the states and territories, and in New Zealand.<sup>2</sup>

1.8 The Minister has characterised the resulting bill as:

The most far-reaching consumer law reforms since the inception of the Trade Practices Act 35 years ago.<sup>3</sup>

1.9 The Minister indicated that some of the risk associated with the new protections would be ameliorated through the use of legal authority from the parent jurisdiction:

...the case law associated with the understanding and interpretation of these protections...will continue to be relevant to the interpretation and application of the Australian Consumer Law.<sup>4</sup>

1.10 This report focuses on the aspects of the bill which stakeholders considers carried the most risk, or which may have not achieved the overall policy intent expressed by the Minister. For this reason, there is little discussion of those provisions of the TPA which have been translocated into the new bill.

## Reform history

1.11 The reforms proposed in the bill implement a series of recommendations to government by agencies charged with maximising efficiency in the Australian economy and improving consumer understanding of their rights.

1.12 The Treasury indicated that the initial catalyst for reform was:

...the recommendations made by the Productivity Commission in its 2008 review of Australia's consumer policy framework.<sup>5</sup>

1.13 The Productivity Commission's 2008 *Review of Australia's Consumer Policy Framework* found that many minor variations exist in different laws across Australia and these differences create additional costs for business and increase uncertainty for consumers.<sup>6</sup> It also stated that this inconsistent and complex enforcement regime

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2 The Hon. Dr Craig Emerson MP, Minister for Competition Policy and Consumer Affairs, *House of Representatives Hansard*, 17 March 2010, p. 2720.

3 The Hon. Dr Craig Emerson MP, Minister for Competition Policy and Consumer Affairs, *House of Representatives Hansard*, 17 March 2010, p. 2719.

4 The Hon. Dr Craig Emerson MP, Minister for Competition Policy and Consumer Affairs, *House of Representatives Hansard*, 17 March 2010, p. 2720.

5 Mr Simon Writer, Manager, Consumer Policy Framework Unit, Treasury, *Proof Committee Hansard*, 27 April 2010, p. 2.

6 Productivity Commission 2008, *Review of Australia's Consumer Policy Framework: Final Report*, Sydney.

deterred consumers from pursuing their rights and regulators from pursuing breaches of the law. The report concluded that:

...[the current consumer protection regime] will make it increasingly difficult to respond to rapidly changing consumer markets, meaning that the associated costs for consumers and the community will continue to grow.<sup>7</sup>

1.14 The Productivity Commission estimated that reforms consistent with its recommendations could provide a net gain to the community of between \$1.5 billion and \$4.5 billion a year.<sup>8</sup>

1.15 On 24 May 2008, following the Productivity Commission's report, the Ministerial Council on Consumer Affairs (MCCA) recommended that the Council of Australian Governments (CoAG) agree to:

...introduce a single, national law for fair trading and consumer protection, [applied] equally in all Australian jurisdictions, to all sectors of the economy and to all Australian consumers and businesses.<sup>9</sup>

1.16 In developing a new regime for national consumer protection, the MCCA expressed its guiding principles as:

- maintaining consumer protection for all Australian consumers;
- minimising the compliance burden on business;
- creating a law which can apply to all sectors of the economy and to all Australian businesses;
- ensuring that the Australian Consumer Law is clear and easily understood; and
- having laws which can be applied effectively by all Australian courts and tribunals.<sup>10</sup>

1.17 Together these principles outline the policy rationale for harmonising these laws (see chapter 2 for a discussion of harmonising consumer laws).

1.18 CoAG agreed the introduction of a national consumer product safety system recommended by the MCCA in July 2008. At the November 2008 meeting, CoAG

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7 Productivity Commission 2008, *Review of Australia's Consumer Policy Framework*, Key Points released at time of report 8 May 2008, (accessed online 11 May 2010): <http://www.pc.gov.au/projects/inquiry/consumer/docs/finalreport/keypoints>; see also Dr Steven Kennedy, *Proof Committee Hansard*, 27 April 2010, p. 2.

8 Executive Summary, Productivity Commission 2008, *Review of Australia's Consumer Policy Framework: Final Report*, Sydney, p. 55.

9 Ministerial Council on Consumer Affairs, *Joint Communiqué of 22<sup>nd</sup> meeting*, 4 December 2009 [http://www.consumer.gov.au/html/download/MCCA\\_Meetings/Meeting\\_22\\_4\\_Dec\\_09.pdf](http://www.consumer.gov.au/html/download/MCCA_Meetings/Meeting_22_4_Dec_09.pdf) (accessed 6 April 2010).

10 Treasury, 2010, *Australian Consumer Law: an introduction*, Consultation paper, Canberra, p. 14.

further agreed two frameworks for the consumer protection reforms: the National Partnership Agreement to Deliver a Seamless National Economy (November 2008) and the Inter-Governmental Agreement for the Australian Consumer Law (July 2009). Under the agreement, the Australian Consumer Law will be fully implemented by 1 January 2011; it will apply nationally and in all states and territories and to all Australian businesses.

1.19 In March 2009, the Australian Government asked the Commonwealth Consumer Affairs Advisory Council (CCAAC) to undertake a review of the current laws on implied conditions and warranties in federal, state and territory legislation. The CCAAC report recommended the creation of a nationally consistent consumer protection system 'to replace existing laws which only imply such protections' and commented that 'unlike consumers in the United Kingdom and the United States, Australia does not need special laws dealing with extended warranties'.<sup>11</sup>

## **Consultation on the bill**

### *Policy development consultations*

1.20 The majority of stakeholders who provided evidence to the Committee on this inquiry had also participated in range of consultations on specific reforms proposed by the Treasury to streamline competition, consumer, credit and financial services regulation.

1.21 Following the CoAG agreement, the Standing Committee of Officials of Consumer Affairs (SCOCA) released a consultation paper with initial information about harmonisation of laws, entitled *An Australian Consumer Law: Fair markets — Confident consumers*,<sup>12</sup> which expounded on measures agreed by CoAG, including unfair contract terms, new penalties, enforcement powers and remedies, and redress for consumers. The paper also gave suggestions for reform:

...as to how the TPA could be augmented, if appropriate, by incorporating additional provisions based on best practice from state and territory legislation, for example, door-to-door trading or telemarketing.<sup>13</sup>

1.22 Treasury received 102 submissions and conducted consultations with a number of contributors. This consultation closed on 17 March 2009.

1.23 On 11 May 2009, the Minister for Competition Policy and Consumer Affairs Chris Bowen, released for public consultation a consultation paper entitled *The*

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11 *Explanatory memorandum*, p. 177.

12 Treasury, *An Australian Consumer Law: Fair markets — Confident consumers*, 17 February 2009, Canberra.

13 Treasury, *An Australian Consumer Law: Fair markets — Confident consumers*, 17 February 2009, Canberra. Online summary, (accessed 11 April 2010).  
<http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1482>

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*Australian Consumer Law: Consultation on draft provisions on unfair contract terms.* Consultation on this draft, which closed on 22 May 2009, informed the first Australian Consumer Law bill.

1.24 Following this, CCAAC conducted a review of statutory implied conditions and warranties between 26 July and 24 August 2009. The terms of reference included the need to consider ways to improve the current implied terms, protect consumers who purchase goods which continually fail and identify other means for improving the operation of existing statutory conditions and warranties.<sup>14</sup> The consultation, which closed on 24 August 2009, received 33 submissions from stakeholders. The report to Minister Bowen contained recommendations which formed the basis of the consumer guarantee provisions in the bill.

1.25 Finally, SCOCA provided a regulatory impact statement on consumer protection and a national product safety regime. The impact on regulation was based on the best practice in operation in state and territory laws. The consultation on the statement, which received 28 submissions, closed on 27 November 2009.<sup>15</sup>

#### *Consultation on this bill*

1.26 A number of submissions and witnesses to this inquiry acknowledged and commented positively on the initial consultation processes undertaken by the Government on the Australian Consumer Law suite. In particular, the first bill, dealing with unfair contracts, was regarded by some stakeholders as being the product of extensive consultation.<sup>16</sup>

1.27 The bill is the product of a large number of submissions to the above listed consultations run by the Productivity Commission, the CCAAC, the MCCA and SCOCA.

1.28 A significant number of submissions to the inquiry, however, were critical of the level of consultation undertaken by Treasury and its consultative committees in relation to the draft language in the second bill. It would appear that the impact on some industries was not clear in the policy documents, and became clear only once the bill was tabled in the House of Representatives on 17 March 2010. The Consumer Action Law Centre, wrote:

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14 The Treasury, Commonwealth Consumer Affairs Advisory Council (CCAAC), *Review of Statutory Implied Conditions and Warranties*; (accessed online 3 May 2010) <http://www.treasury.gov.au/contentitem.asp?ContentID=1521&NavID=014>.

15 The Treasury, Standing Committee of Officials on Consumer Affairs, *Consultation Regulation Impact Statement - Australian Consumer Law - Best Practice Proposals and Product Safety Regime*, consultation website: (accessed online 3 May 2010) <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1665>.

16 Consumer Action Law Centre, *Submission 28*, pp. 3-4.

...in contrast with the ACL 1 Act, regardless of one's views on the content of the current Bill, in our view the provisions have not been subject to appropriate public consultation.<sup>17</sup>

1.29 In particular, stakeholders commented that it was difficult for them to comment on the regulatory impact on business or consumers of this bill without Treasury releasing an exposure draft of the bill.<sup>18</sup>

1.30 To enable businesses to prepare for their new responsibilities under the bill, the Motor Trades Association of Queensland recommended that:

...consideration could be given to the compilation of publication similar to the draft *Australian Consumer Law: A guide to unfair contract terms* at the appropriate time to assist the transition to the new consumer laws contained in (No 2) Bill.<sup>19</sup>

## **The bill**

1.31 The bill consists of three parts. Firstly, general protections, for example, section 18 replicates the prohibition on misleading and deceptive conduct currently in section 52 of the TPA. The drafting is identical except that section 18 refers to 'persons' rather than 'corporations'.

1.32 The Trade Practices Committee of the Law Council of Australia argued in its submission that it:

...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 [Law Council Trade Practices] 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.<sup>20</sup>

1.33 Section 20 of the bill mirrors the current section 51AA of the TPA which states that a corporation must not, in trade or commerce, engage in conduct that is

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17 Consumer Action Law Centre, *Submission 28*, p. 3.

18 Consumer Action Law Centre, *Submission 28*, p. 4.

19 Motor Trades Association of Queensland, *Submission 4*, p. 1.

20 Law Council of Australia, *Submission 18*, p. 11.

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unconscionable within the meaning of the unwritten law, from time to time, of the states and territories'.<sup>21</sup>

1.34 Secondly, the bill introduces specific protections such as consumer guarantees and addresses some undesirable practices of unsolicited sellers, lay-by contract requirements and miscellaneous unfair practices. Finally, the bill introduces new remedies and enforcement mechanisms for regulators and consumers.

### **Conduct of the inquiry**

1.35 The inquiry was advertised in both *The Australian* and on the Committee's website. The Committee also wrote to a range of stakeholders inviting written submissions by Friday 16 April 2010. The Committee received [47] submissions. Submitters included legal experts and academics, consumer advocates, retailers, manufacturers and suppliers of products and services captured by the consumer guarantee and product safety provisions, exempted from the guarantee or seeking an exemption, direct sellers and marketers and individual stakeholders. The details of the organisations and individuals who made those submissions are listed at Appendix 1.

1.36 The Committee held public hearings in Sydney, Melbourne and Canberra from 27 to 30 April 2010. A full list of witnesses is at Appendix 2.

1.37 The Committee thanks all those individuals and organisations who contributed to and participated in the inquiry process for their valuable input.

### **Structure of the report**

1.38 In Chapter 2, this report discusses policy arguments in support and against 'harmonisation' of laws and the degree to which this public policy objective has been met with the bill. It will also discuss where future opportunities for consumer law reform lie with respect to harmonisation.

1.39 Chapter 3 examines the coverage of this bill and the modern notion of the Australian 'consumer'. In particular, it explores the case for small business and bodies corporate to be protected in their purchases of some goods by this bill. In doing so, it also considers whether all goods under a set monetary limit should be guaranteed under the bill. Chapter 3 also discusses where the line ought to be drawn in relation to

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21 'Unwritten law' refers to the law developed by the courts of common law and equity. The TPA refers to conduct that is 'unconscionable' in two different contexts. The first is section 51AA which is based on the concept of 'special disadvantage' in the common law of equity. The doctrine of special disadvantage protects individuals who, in seeking to make judgements in their best interests, are disabled by age, infirmity, mental illness or other characteristics. A contract that is formulated under this duress is known as a breach of 'procedural unconscionability'. The second context arises under sections 51AB (relating to consumer transactions) and 51AC (business transactions). These sections were intended to extend the equitable doctrine of unconscionable conduct to include contract terms and the progress of the contract. This is known as 'substantive unconscionability'.

exempting suppliers from liability where the consumers' use of goods or services is not the intended use of that good or service.

1.40 Chapter 4 discusses the new consumer guarantees scheme, which replaces the TPA and common law system of implied and statutory warranties. This chapter focuses on the guarantee under the bill that a good or service be fit for its intended purpose. Consequently, it debates the merits of claims for exemptions to the 'fitness for purpose' guarantee currently provided to telecommunications and utilities companies and a claim by representatives of architects and engineers that an industry-specific exemption from 'fitness for purpose' requirements should also apply to their work.

1.41 The bill introduces national regulation of unsolicited selling. Chapter 5 discusses the new restrictions with respect of various types of unsolicited sales: telemarketing, door-to-door, direct selling and any other selling which is characterised as 'store selling without the store'.<sup>22</sup> This chapter reflects evidence heard by the Committee about addressing the tactics of the most aggressive parts of the unsolicited sales companies and, conversely, the unintended implications in the bill for some business.

1.42 Chapter 6 considers the new 'incident-based' product safety regulation scheme, in particular the reporting obligations under the bill. The burden on regulators imposed by the new scheme is also discussed in this chapter.

1.43 Chapter 7 discusses the avenues for consumers to seek remedies under the new Australian Consumer Law. It also examines the regulators' powers under the bill.

1.44 Chapter 8 discusses some other, minor drafting amendments recommended by stakeholders.

### **The Committee's overall impression of the bill**

1.45 The Committee believes the bill represents a substantial achievement in unifying many diverse pieces of consumer legislation. It also offers improved protection for consumers in a number of areas.

### **Recommendation 1**

**1.46 The Committee recommends that the Senate pass the bill, preferably adopting the other recommendations in the report.**

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22 Mr Anthony Greig, Chairman, Direct Selling Association of Australia Association, *Proof Committee Hansard*, 30 April 2010, p. 9.