

Chapter 2

Harmonising Australia's consumer laws

2.1 In the Second Reading Speech of the bill, the Minister for Competition Policy and Consumer Affairs, the Hon. Dr Craig Emerson, stated that the 'complex array' of state and territory generic consumer laws 'must be rationalised'. The Minister argued that a single national consumer law is the best means of ensuring that the rights of Australian consumers are clear and consistent. A single consumer law also makes compliance simpler for Australian businesses.¹

2.2 This chapter looks at the approach taken in the Australian Consumer Law (ACL) to harmonising Australia's various state and territory fair trading laws. It then considers stakeholders' general support for this initiative, and some concern that the national standard as set in the ACL has set the bar either too high or too low. The chapter necessarily pre-empts some of the discussion in later chapters concerning particular provisions of the ACL.

The Government's approach

2.3 Treasury explained to the committee that the bill will, for the first time, enable consumers to benefit from 'clear and consistent consumer rights'. It described the logic of the bill in the following terms:

...[it] is based on the existing consumer protection and fair trading provisions in the *Trade Practices Act*, but it has been drafted so as to rationalise the way in which provisions are organised to make provisions clearer and easier to understand and include additions and amendments...²

2.4 Treasury responded somewhat tersely to the suggestion made by some witnesses that the bill adds to the complexity of Australia's consumer protection provisions. Mr Simon Writer told the committee:

In terms of complexity, there are probably two points. One is that I find it curious that the argument of complexity is made when we are replacing provisions spread across 17 Commonwealth, state and territory acts and putting them into one piece of legislation which is set out, we would hope, in a fairly rational way.³

2.5 In terms of the bill's unsolicited consumer agreement provisions (see chapter 5), Treasury explained that the Government's intent was not to go beyond the

1 The Hon. Dr Craig Emerson, *Second Reading Speech*, House of Representatives Hansard, 17 March 2010, p. 2718.

2 Dr Steven Kennedy, General Manager, Infrastructure, Competition and Consumer Division, Department of the Treasury, *Proof Committee Hansard*, 27 April 2010, p. 3.

3 Mr Simon Writer, Treasury, *Proof Committee Hansard*, 30 April 2010, p. 39.

provisions set in existing state and territory legislation. Rather, the Government's approach was to harmonise the state and territory approaches contained in the fair trading acts and in some cases in stand-alone acts in the states and territories.⁴

2.6 In terms of the bill's consumer guarantee provisions (see chapter 4), Treasury explained that the Government's purpose was to try and simplify the state laws and make them clear in terms of consumers' rights and remedies. The overarching objective is to consolidate these provisions 'so that consumers and businesses had a clear understanding of the standard of conduct that was required and, if there was a failure to adhere to that standard of conduct, the remedies were clearly expressed. Treasury noted that there is nothing in the bill's consumer guarantee provisions which is different from the existing law.⁵

The regulator's approach

2.7 The Australian Competition and Consumer Commission (ACCC) emphasised that consumer protection will be maximised where there is cooperation between jurisdictions and clear communication of the proposed changes in law to the public at large.⁶ The ACCC explained:

The beauty of our new regime is that we are dealing with one set of laws in an environment where there is enhanced cooperation and information sharing between agencies. So the choice a consumer has as to which agency they go to should not be reduced under this new regime. It will simply be that we are dealing with one set of common laws, with greater information sharing between the parties to allow us to work out who is best placed to assist a consumer or deal with a consumer issue. In some respects it is the same, but in other respects consumers will be much better placed.⁷

2.8 The ACCC told the Committee that it has been working for some time with the states and territories and with the Australian Securities and Investments Commission (ASIC) to identify how and in what form it can raise consumers' and businesses' awareness of the ACL. He added:

We are particularly looking at identifying organisations such as business and industry associations and consumer groups as well as financial counsellor groups and others who we would characterise as intermediaries to make sure they have a good working understanding of the new framework so that they can assist consumers as and when they need to. We are also looking, particularly with respect to the consumer guarantee reforms, to identify the best way that we can help consumers understand

4 Mr Simon Writer, Treasury, *Proof Committee Hansard*, 30 April 2010, p. 34.

5 Mr Simon Writer, Treasury, *Proof Committee Hansard*, 30 April 2010, p. 39.

6 Mr Scott Gregson, Group General Manager, Enforcement Operations, ACCC, *Proof Committee Hansard*, 27 April 2010, p. 13.

7 Mr Scott Gregson, ACCC, *Proof Committee Hansard*, 27 April 2010, p. 18.

their rights when it comes to what avenues of redress they have when things go wrong with the products or services they buy.⁸

Support for harmonising state and territory fair trading laws

2.9 The Committee notes that there is overwhelming support for the bill's objective of harmonising and rationalising the existing suite of state and territory consumer protection laws. There seems no support from practitioners for the theoretical idea of competitive federalism.

2.10 The following is a selection of quotes from submitters to this inquiry expressing support for a clear and consistent set of national consumer protection laws.

2.11 Ms Deborah Healey, an academic expert, told the Committee that in her experience, uniformity will decrease regulatory costs and the time taken by companies dealing with consumer goods nationally. She added:

I think there is a lot of waste involved in complying with a variety of laws. I also think it will be easier for consumers because the law will be clarified, and I think there are a number of attempts to make it simpler, particularly in terms of the consumer guarantees.⁹

2.12 Mr Lynden Griggs, another academic expert, also welcomed the bill's effect of harmonising the range of state and territory consumer guarantees, product defects and remedial provisions. He told the Committee that in this regard, the bill is 'to be applauded and welcomed'.¹⁰

2.13 The consumer advocate CHOICE was glowing in its praise for the bill. Its submission noted that the ACL achieves the central objective of the reform process.¹¹ Mr Christopher Zinn of CHOICE elaborated on this support in evidence to the Committee:

CHOICE believes that 2010 will be recorded as another watershed year in the development of consumer protection laws. This year sees the culmination of a long battle for uniform laws in which we have been involved.

On uniformity, one of the key objectives of the current reform is to achieve a truly national consumer law. In our view, 'national' does not just mean

8 Mr Nigel Ridgway, Group General Manager, Compliance, Research, Outreach and Product Safety, Australian Competition and Consumer Commission, *Proof Committee Hansard*, 27 April 2010, p. 13.

9 Ms Deborah Healey, Senior Lecturer, Faculty of Law, University of New South Wales, *Proof Committee Hansard*, 28 April 2010, p. 32.

10 Mr Lynden Griggs, Senior Lecturer, University of Tasmania Law School, *Proof Committee Hansard*, 29 April 2010, p. 10.

11 CHOICE, *Submission 20*, p. 5.

the same regardless of which state is involved; it should mean the same nationally as well.¹²

2.14 CHOICE told the Committee that in terms of exemptions and exceptions, uniformity minimises competitive distortion within the economy, gives consumers confidence that the bill will be applied fairly and assists consumers to understand their rights.¹³

2.15 As a company that operates in all states and territories, Telstra supports a harmonised set of consumer laws and the policy direction of the ACL.¹⁴ Similarly, Coles 'strongly supports' the introduction of the ACL on the basis that it will 'help reduce some of the multi-jurisdictional complexities we currently face and ultimately result in lower compliance costs for our business'.¹⁵

2.16 The Franchise Council put its support for the bill in the following terms:

...we are supportive of the thrust of this legislation, without doubt. We definitely agree with the harmonisation approach, a national approach, rather than having state-by-state legislature. That suits us as a national operating sector.¹⁶

2.17 The Energy Retailers Association of Australia offered more qualified support for the bill's uniformity:

We still want the national legislation. We certainly do not want the Australian consumer law to delay the National Energy Customer Framework. We accept that for our industry being an essential service there will always need to be some industry specific regulation, but it should be controlled. We recognise that in some areas it is duplicating generic regulation and in that case generic regulation should prevail. But certainly looking at things like disconnections and things unique to our industry, of course you need industry specific regulation.¹⁷

2.18 Harmonisation of the existing rules does not, of course, rule out further improvements in future, or extending some elements of harmonisation across national borders. For example, Associate Professor Luke Nottage believes some countries have introduced more expansive disclosure requirements in the context of ongoing product safety failures and would like to see similar measures taken here.¹⁸

12 Mr Christopher Zinn, *Proof Committee Hansard*, 28 April 2010, p. 8.

13 Mr David Howarth, *Proof Committee Hansard*, 28 April 2010, p. 10.

14 Mr James Shaw, *Proof Committee Hansard*, 29 April 2010, p. 14.

15 Coles, *Submission 3*, p. 1.

16 Mr Steve Wright, *Proof Committee Hansard*, 29 April 2010, p. 51.

17 Mr Cameron O'Reilly, *Proof Committee Hansard*, 29 April 2010, p. 7.

18 Associate Professor Luke Nottage, *Proof Committee Hansard*, 28 April 2010, p. 2.

Views on the bar at which uniform laws are set

2.19 The Committee notes that beyond the broad support for a uniform national consumer law, opinions differed as to the appropriate level of standardised consumer protection.

Sector-specific exemptions

2.20 Treasury explained that under the intergovernmental agreement, the federal, state and territory governments have a commitment to examine sector-specific laws and amend or repeal those which duplicate or are inconsistent with the bill. An assessment is made of whether additional sector-specific protection is necessary for consumers or replicates existing protections in sector-specific contexts.¹⁹

2.21 CHOICE had no objection to higher standards in particular industries. However, it argued that:

...if you allow private agreements and exemptions to undermine that uniformity in different areas then consumers are back to a worse position than we were, and we would say the same thing...we believe it should be uniform across the states, it should be uniform across sectors, and that is because consumers will understand the laws and be more confident about asserting their rights under the laws if they apply everywhere.²⁰

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.²¹

19 Mr Simon Writer, *Proof Committee Hansard*, 27 April 2010, p. 5.

20 Mr David Howarth, Legal Policy Officer, CHOICE, *Proof Committee Hansard*, 28 April 2010, p. 15.

21 CHOICE, *Submission 20*, p. 5.