

Chapter 3

The definition of 'consumer' and the scope of the bill

The Australian Consumer Law and Trade Practices Act's definitions

3.1 Schedule 1, section 3(1) of the bill states that a person is taken to have acquired particular goods as a consumer if, and only if:

- (a) the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption; or
- (b) the goods consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads.

3.2 The explanatory memorandum (EM) notes that paragraph 3(1)(a) is an assessment based on the nature and usual purpose of the goods. In terms of paragraph 3(1)(b), the question of whether a vehicle or trailer is acquired as a consumer is determined 'with reference to the actual purpose for which the vehicle or trailer were acquired'.¹

3.3 Section 3(2) states that subsection (1) does not apply if the person acquired the goods, or held himself or herself out as acquiring the goods:

- (a) for the purpose of re-supply; or
- (b) for the purpose of using them up or transforming them, in trade or commerce:
 - (i) in the course of a process of production or manufacture; or
 - (ii) in the course of repairing or treating other goods or fixtures on land.

Section 4B of the Trade Practices Act

3.4 Section 4B(1) of the *Trade Practices Act (1974)* (TPA) states that a person shall be taken to have acquired particular goods as a consumer if, and only if:

- (i) the price of the goods did not exceed the prescribed amount [currently \$40,000]; or
- (ii) where that price exceeded the prescribed amount—the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption or the goods consisted of a commercial road vehicle;

and the person did not acquire the goods, or hold himself or herself out as acquiring the goods, for the purpose of re-supply or for the purpose of using them up or transforming them, in trade or commerce, in the course of a

1 *Explanatory Memorandum*, p. 23.

process of production or manufacture or of repairing or treating other goods or fixtures on land.

Comparison

3.5 'Consumer' in the bill is therefore defined in the same way as section 4B of the TPA, without the reference to the monetary threshold of \$40 000. Treasury noted in its submission to the inquiry that the Commonwealth Consumer Affairs Advisory Council (CCAAC) had indicated in October 2009 that:

...there is no meaningful distinction to be made between a person who pays \$40,000 for goods or services and a person who pays \$40,001. The focus of the definition should be on the class of person who makes the purchase, or on the kind of goods or services which are purchased.²

3.6 The Ministerial Council of Consumer Affairs accepted this recommendation.

Ordinarily acquired for personal, domestic or household use / consumption

3.7 Case law assists in defining the meaning of the phrase 'ordinarily acquired for personal, domestic or household use or consumption'. 'Ordinarily' means 'commonly' or 'regularly', not 'principally', 'exclusively' or 'predominantly'.³

Definitions of 'consumer' where section 3 does not apply

3.8 There are some uses of the word 'consumer' in the bill to which the definition in section 3 does not apply:

- the use of the term consumer in the unconscionable conduct provisions of Part 2–2;
- the definitions of consumer good in section 2 and consumer contract in section 23 (which use similar but not identical terms to the definition of consumer); and
- the definition of non-party consumer in section 2 of the bill.⁴

Criticism of multiple definitions of 'consumer'

3.9 Citing these exceptions to the section 3 definitions, the law firm Freehills criticised the bill for failing to unify the concept of consumer. It argued that the variations on the concept of 'consumer' 'will be confusing for consumers'. As Professor John Carter, a consultant to Freehills, stated:

2 Treasury, *Submission 46*, p. 7.

3 Ray Steinwall, *Trade Practices Act 1974*, 2010 Edition, p. 94. The case of most relevance is *Bunnings Group Ltd v Laminex Group Ltd* (2006).

4 *Explanatory Memorandum*, p. 23.

A consumer might well think that consumer goods are goods supplied to a consumer, but they are not. A consumer might well think that a consumer contract is a contract to which the consumer guarantees apply, but it is not. There is a definition of 'consumer' which is not followed through in the act.⁵

3.10 Freehills argued that 'it is difficult, as a matter of principle, to understand why, in a bill which makes fundamental changes to Australian law, the decision was not also taken to rationalise this central concept of consumer'.⁶ Professor Bob Baxt feared that as a result:

I think we are going to pay very dearly...because we are going to get courts coming down with different interpretations. Remember this is new legislation. The courts will be dealing with it for the first time. As with all legislation, there will be a lot of interpretations. They will disagree with each other. It is going to be years before we get clarity.⁷

Committee view

3.11 The Committee believes that the Government should aim to arrive at a single definition of 'consumer' throughout the provisions of the bill in future consultations and amendments to the legislation.

Concerns about the bill's definition of 'consumer' in section 3

3.12 The Committee received evidence from organisations including Freehills, the Law Council, CHOICE, the Motor Trades Association of Australia (MTAA) and the Consumer Action Law Centre that the definition of 'consumer' in the bill may reduce the level of consumer protection. Arguments were put that various categories of purchase would fall outside the bill's definition of 'consumer' including:

- goods that are not 'ordinarily acquired for personal use';
- small purchases that are not 'ordinarily acquired for personal use';
- goods purchased for the infirm and incapacitated that do not pass the 'ordinarily acquired' test;
- customers who use business technologies for personal use;
- a small business that purchases an identical product as a consumer but, unlike the consumer, will no longer be protected;
- goods that are not consumer goods but are used by consumers and pose potential harm to consumers; and

5 Professor John Carter, *Proof Committee Hansard*, 29 April 2010, p. 38. See also Ms Deborah Healey, *Proof Committee Hansard*, 28 April 2010, p. 34.

6 Freehills, *Submission 35*, p.

7 Professor Bob Baxt, *Proof Committee Hansard*, 29 April 2010, p. 40.

- consumers who hire goods which are not 'ordinarily acquired for personal use'.

Goods that are not 'ordinarily acquired' for personal use

3.13 The Consumer Action Law Centre queried the effect of the removal of the TPA's monetary ceiling in section 3 of the bill. It argued that the bill's reliance on the threshold of goods 'ordinarily acquired for personal, domestic or household use or consumption' raises uncertainties that have not been publicly scrutinised. For example:

...whether household consumers buying goods such as trade tools or commercial fridges for personal use will be adequately protected or whether sole traders using goods partly for business and partly for personal purposes will be protected.⁸

3.14 Freehills' submission also focussed on this dilemma. It noted that under current section 4B of the TPA, for purchases under \$40 000 it is not relevant that the goods or services are of a kind ordinarily acquired for personal, domestic or household use or consumption. Under the TPA, however, if an air conditioning unit of a type ordinarily acquired for industrial use is acquired by a home owner for use in the home at a price of \$41 000, the question of whether the goods are of a kind ordinarily acquired for personal, domestic or household use or consumption is crucial.⁹

3.15 Freehills claimed that this problem will not disappear under the bill. It gave the example of a person hiring a cement mixer to construct a driveway at his or her home. Under the bill, the person will not be regarded a 'consumer' unless the cement mixer can be categorised as goods of a kind ordinarily acquired for personal, domestic or household use or consumption. Freehills argued that the same is true if the person is a small business which acquires the goods for commercial use.¹⁰

Small purchases that fail the 'ordinarily acquired' test

3.16 Whereas small purchases (under \$40 000) do not have to pass the 'ordinarily acquired' test under current law, they will under the bill. Freehills argued that in the absence of a monetary ceiling, a \$100 acquisition which is not of a kind ordinarily acquired for personal, domestic or household use or consumption will not be an acquisition by a 'consumer'. Consumer protection will be denied.¹¹

3.17 Mr Stephen Ridgeway of the Law Council's Trade Practices Committee foresaw similar difficulties. He told the Committee:

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

9 Freehills, *Submission 35*, p. 4.

10 Freehills, *Submission 35*, p. 4.

11 Freehills, *Submission 35*, p. 4.

If you are talking about small-value transactions, there is a risk that you complicate the provisions by introducing this need for an inquiry about what the purpose is when some businesses, particularly small businesses, might get the benefit of those provisions.¹²

Special circumstances

3.18 The Committee received evidence that removing the monetary threshold in the TPA may leave some vulnerable consumers without protection. The Law Council, for example, expressed concern that the definition of 'consumer' in section 3 of the bill excludes individuals who acquire goods for personal, household or domestic use if those goods are ordinarily acquired for other purposes. It gave three examples:

- a mobility impaired person who required a lift to be installed in their two storey home in order to provide access to the upper storey. In this case, the Council argued, the person would likely not be protected by the bill's consumer guarantees since the lift would ordinarily only be installed in commercial buildings;
- a person, unable to write or type, requiring voice recognition software to be installed on their home computer. 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; and
- 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.¹³

Early movers

3.19 The Law Council also observed that early adopters of new technology may not receive protection under the definition of consumer in section 3. Innovations such as broadband internet were originally developed for business use before they were offered more widely to consumers.¹⁴

Small businesses as consumers

3.20 The Committee also heard evidence that the provision in section 3 of the bill will remove the current protection enjoyed by both big and small businesses for purchases under \$40 000.

12 Mr Stephen Ridgeway, *Proof Committee Hansard*, 28 April 2010, p. 46.

13 Law Council of Australia, *Submission 18*, p. 5. See also Mr Lynden Griggs, *Proof Committee Hansard*, 29 April 2010, p. 10.

14 Law Council of Australia, *Submission 18*, pp. 5–6.

3.21 The MTAA argued that the bill's definition of consumer may 'significantly weaken' the position of small business as consumers. It argued that the 'ordinarily acquired' test—relating to goods of *any* value—means that if a 'consumer' and a small business purchase an identical product, the 'consumer' is protected under the proposed warranties and guarantees law but the small business is not. The Association concluded that:

...if a product is purchased in good faith, it should always come with the same warranty protection, regardless of who purchases it.¹⁵

3.22 Not all small business groups shared the MTAA's concern, however. The Australian Communications Consumer Action Network told the Committee that the definition of 'consumer' in the bill:

...has not been a priority issue for us. I would be prepared to support that concern at a very broad level. Our organisation reads 'consumers' quite broadly. We have a specific agreement to advocate on behalf of small business customers as well as consumers using communications services for personal services.¹⁶

The dilemma for suppliers

3.23 The Committee recognises that the distinction between business and consumer purchases is not always clear and that, as a result, suppliers will be uncertain as to whether consumer protections should apply. Mr Lynden Griggs of the University of Tasmania illustrated the point with the following example:

...[a] person who lives on a small acreage that might have some free-range chooks and buys an incubation machine, and it is not that authorities suggest that would not be for domestic or personal use, yet for the personal or small acreage that is not running a business it could be in that category. The danger is that when you remove the financial threshold you are then going to have the small business trader who buys their computer for that business perhaps being excluded from the protections when at the moment they would not be. The argument that suppliers could put up would be that they are not able to determine whether this is a business purchase or consumer purchase, which to me does not really stack up.¹⁷

'Consumer goods'

3.24 CHOICE argued in its submission that the product safety provisions of the bill should be extended to goods other than consumer goods. It noted that some goods, which have the potential to harm consumers, are not covered by the bill. CHOICE thereby argued that the product safety regime powers of the bill should not be restricted to 'consumer goods'. Some products, such as a drink vending machine, are

15 Motor Trades Association of Australia, *Submission 24*, p. 2.

16 Ms Elissa Freeman, *Proof Committee Hansard*, 30 April 2010, p. 6.

17 Mr Lynden Griggs, *Proof Committee Hansard*, 29 April 2010, p. 13.

used by consumers to purchase a good. The machine, however, falls outside the section 2 definition of a 'consumer good'.¹⁸

3.25 CHOICE was also concerned that the definition of 'consumer goods' is weaker in the bill than in the TPA. It noted that while the bill's definition of 'consumer goods' is drafted similarly to the TPA's, it does not have a monetary threshold.¹⁹

Contracts for the supply of goods

3.26 Freehills observed that the sale of goods under the bill does not apply to contracts for the supply of goods by way of licence, hire or lease, or to contracts for the supply of services. Therefore, if a consumer hires goods which are not of a kind ordinarily acquired for personal, domestic or household use or consumption, the consumer will be relegated to the common law regarding implied terms of the contract. Under the TPA, assuming the contract price is less than \$40 000 and the acquisition is not for the purpose of resupply, the conditions and warranties provisions in Part V Division 2 would apply.²⁰

Bodies corporate

3.27 The Law Council argued that the definition of 'consumer' should be limited to consumers who are individuals and should not extend to bodies corporate. It considered that bodies corporate acquiring goods or services for business use do not need the protection afforded by the bill.²¹ Freehills made the same argument:

...the position of a small business supplying to a large corporation is that it must treat the large corporation as if it were a consumer such as people like you and I who buy goods for our own personal use. It can be a large corporation or a small corporation. Any corporation that acquires goods of a kind without being for resupply or that acquires services of that kind is treated as a consumer and has all the rights as an ordinary consumer. Consumer protection there seems to be a misnomer and the end result is to devalue the consumer protection regime because there is, in fact, no special regime for Australian consumers. All there is a concept of 'consumer' that serves to protect large corporations as much as individuals.²²

3.28 In this context, Mr Alan Peckham, a partner at Freehills, observed the possibility of a small business supplying goods or services of a kind ordinarily supplied for personal, domestic or household purposes to an ASX100 company. In

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

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

20 Freehills, *Submission 35*, p. 4.

21 Law Council of Australia, *Submission 18*, p. 3.

22 Professor John Carter, *Proof Committee Hansard*, 29 April 2010, pp 38–39.

this case, he noted, the large company gets the protection of the legislation and the small business supplier does not.²³

Treasury's position

3.29 The Committee asked Treasury to explain the amendment in the bill to the definition of 'consumer'. It explained that the provision in section 3 is drafted in general terms 'so that cases can be dealt with on a case-by-case basis'. Treasury explained that the amendment is intended to remove an arbitrary monetary threshold and focus instead on the nature of the purpose:

The only difference is that some goods which were of a value less than \$40,000 might be taken out of the scope of this provision because they are not ordinarily used for personal, household or domestic purposes. I am perhaps a little perplexed as to why that might cause confusion given that it is a fairly minor change from what is there now. It is really designed to remove a fairly arbitrary threshold and focus the provisions on the types of purchases that consumers typically make, which is of goods which are ordinarily used for personal, household or domestic purposes.²⁴

3.30 In its submission, Treasury argued that a key consideration in defining 'consumer' as it is in the bill is to avoid 'undue complexity'. It noted that:

When a consumer returns a good to a supplier for a repair it is often not possible to conduct an inquiry into the nature of the person, the purpose of the acquisition or whether the goods are being returned on behalf of a body corporate. Any move to amend the definition of 'consumer' such that these inquiries are necessary would add to costs for business and limit the enforceability of consumer guarantees, reducing the scope of an important consumer protection. Similar considerations also apply to the other provisions of the ACL that rely on the definition of consumer, namely unsolicited consumer agreements, lay-by sales and the provision of itemised bills.²⁵

Options to amend section 3 of the bill

3.31 The Committee is aware of three options (other than that proposed in the bill) to address concerns with the proposed definition of 'consumer' in section 3 of the bill.

The status quo

3.32 The first option is simply to retain the monetary ceiling in the TPA. The Committee asked Mr Michael Delaney of the MTAA if the best solution to his concerns with section 3 is to retain a financial limit rather than define 'consumer' by

23 Mr Alan Peckham, *Proof Committee Hansard*, 29 April 2010, p. 3.

24 Mr Simon Writer, *Proof Committee Hansard*, 30 April 2010, p. 33.

25 Treasury, *Submission 46*, p. 7.

what the goods are intended to be used for. He responded: 'it has worked pretty well for 35 years, so we would prefer the status quo, unless there are better policy instruments'.²⁶

The 'purpose' test

3.33 The second option is to focus solely on the actual use of the good or service. Freehills told the Committee that there is 'a good working definition [of consumer] in the unfair terms regime' which should be the definition for purposes of consumer guarantees.²⁷ That definition states:

A consumer contract is a contract for:
a supply of goods or services; or
a sale or grant of an interest in land;
to an individual whose acquisition of the goods, services or interest is *wholly or predominantly for personal, domestic or household use or consumption*.²⁸

3.34 Another way to achieve the purpose test would be to remove the word 'ordinarily' from section 3. Mr Lynden Griggs, a legal academic, elaborated:

The simplest answer may be to remove the word 'ordinarily'. The way the cases have interpreted personal, domestic, household use has generally been an urban-centric approach. I think country purchasers, even though they may be personal or domestic in a country sense, because they are not ordinarily acquired by people in a metropolitan or suburban area they have been ruled outside the consumer protection guarantees.²⁹

3.35 However, the Consumer Action Law Centre cautioned that a definition of 'consumer' focussing solely on the use of the good:

...would be a further narrowing...[I]t comes linked to a reverse onus of proof in terms of the standard form contracts issue and certainly the purpose of the contract. We know from our work in the credit space, for example, that one reason we would strongly oppose a definition that simply focused on the use rather than a concept of 'ordinarily used' is because it begs for avoidance behaviour. What we would start to see happen in consumer contracts generally, as we have seen in a number of consumer credit contracts, is a little box that says, 'Tick. I am using this product for business

26 Mr Michael Delaney, *Proof Committee Hansard*, 30 April 2010, p. 21.

27 Professor John Carter, *Proof Committee Hansard*, 29 April 2010, pp 40–41.

28 Trade Practices Amendment (Australian Consumer Law) Bill (No. 1) 2010, p. 6. Emphasis added.

29 Mr Lynden Griggs, *Proof Committee Hansard*, 29 April 2010, p. 11.

purposes.’ All of a sudden the consumer has excluded themselves from the range of protections that is available under the act.³⁰

3.36 The purpose test could also be achieved by adopting a definition analogous to the definition of 'consumer good' in the bill. This refers to goods that are intended to be used, or are of a kind likely to be used, for personal, domestic or household use or consumption. The Law Council explained that some products may be 'likely to be used' by individuals with a particular need or medical condition without being 'ordinarily used' by consumers generally.³¹ This approach would seem to accord with Treasury's approach of dealing with scope of coverage issues on a case-by-case basis.

The Law Council's proposal

3.37 The third option is to allow consumer protection for goods not ordinarily acquired for personal use in cases where the supplier is 'subjectively aware of this purpose'. It would remain at the discretion of the supplier to decline to sell the product to the prospective consumer.³² This approach would seem to accord with Treasury's approach of considering the purpose of the purchase on a case-by-case basis.

3.38 The Law Council of Australia proposed a definition of 'consumer' based on a case-by case assessment of the nature and purpose of a good. It produced the following matrix in its submission to demonstrate how a monetary threshold could be maintained using a dual test of the nature and the purpose of the good or service.³³

Table 3.1: A hybrid test

Ordinary nature and purpose of goods	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

Source: Law Council of Australia, *Submission 18*, p. 7.

3.39 Ms Jacqueline Downes, representing the Law Council, told the Committee that the purpose of the purchase would need to be made known to the supplier. She elaborated:

30 Ms Catriona Lowe, *Proof Committee Hansard*, 29 April 2010, pp 48–49.

31 Law Council of Australia, *Submission 18*, p. 6.

32 Law Council of Australia, *Submission 18*, p. 6.

33 Law Council of Australia, *Submission 18*, p. 7.

For example, this would be where the supplier is aware that a good that may ordinarily be a business good is actually being supplied to a consumer who is acquiring it for a personal reason. So it is objectively made known to the supplier of the good. We submit that in that case, if the supplier of the good does not believe that the good is suitable for that personal purpose, they could have the option not to in fact supply the good. This would apply on a case-by-case basis, where the supplier of the good is aware that the good—which may otherwise be of a kind for business—is being used for personal reasons. If they continue to be aware of that purpose and are determined to still supply that good to the consumer, then our submission is that it would be appropriate for the consumer to be protected by the provisions of the act, in particular the consumer guarantees. Conversely, if a good that is ordinarily used for domestic purposes is supplied to a large business customer or a corporation, or for a business purpose, then they should not be afforded the protection that is provided to consumers under the act.³⁴

3.40 Mr Griggs suggested that suppliers could be given more clarity if all transactions were made consumer transactions, but allowing business the opportunity to contract out of the guarantees. He explained:

The person may well say, 'If you're a business purchaser I can provide this at a lower cost to you if you are willing to contract out of the guarantees or the consumer protections being offered.' From my direction, I would be looking to bring more transactions into the frame rather than less. Off the top of my head, I am struggling to come up with the arguments that business could put forward to actually have a tighter or narrower definition of 'consumer'.³⁵

Comparison of the options

3.41 The strengths and drawbacks of these three alternative approaches are compared in Table 3.2.

Committee view

3.42 On balance, the Committee believes that the bill's definition of consumer is appropriate. It has long been recognised that the monetary threshold is arbitrary and contentious. It is anomalous that a business should have the same protection as an individual consumer if they buy goods for less than \$40 000 regardless of whether the goods are 'of a kind ordinarily acquired for personal, domestic or household use or consumption'. The key must be the *nature* of the good.

3.43 The Committee agrees with Treasury that it would be overly complex and time consuming to conduct an inquiry into the nature of the person and the purpose of

34 Ms Jacqueline Downes, *Proof Committee Hansard*, 28 April 2010, p. 42.

35 Mr Lynden Griggs, *Proof Committee Hansard*, 29 April 2010, p. 13.

the acquisition. The range of options canvassed illustrates clearly the complexity of the problem of definition. The nature of the good or service is the simplest determinant of a 'consumer'.

Table 3.2

	Current law (monetary threshold and nature test)	The Law Council's proposal (monetary threshold, nature test and purpose test)	The purpose test (remove 'ordinarily', no monetary threshold)	The bill's proposal (nature test, no monetary threshold)
<i>Strengths</i>	Covers small business consumers and 'special circumstances'	Covers small business consumers and 'special circumstances' Covers consumers making small & large purchases if the 'nature' test is not passed	Threshold is arbitrary Covers 'special circumstances' Covers consumers making small & large purchases if the 'nature' test is not passed Does not cover small and big business purchases	Threshold is arbitrary Nature of person and purpose of acquisition tests are complex
<i>Drawbacks</i>	Small and big business consumers should not be covered Threshold is arbitrary	Difficulty of determining for what purpose the purchaser will use good Ticking 'business' use means consumers may forego protections Threshold is arbitrary	Difficulty of determining for what purpose the purchaser will use good Ticking 'business' use means consumers will forego protections	Does not cover 'special circumstances' Does not cover consumers making small & large purchases if the 'nature' test is not passed Does not cover 'early movers'