Chapter 7

Enforcement and dispute resolution

7.1 This chapter examines the Australian Consumer Law's (ACL) enforcement and dispute resolution provisions. The bill introduces a suite of national enforcement powers for consumer law enforcement agencies to administer the ACL. There will also be national penalties for breaches of the ACL.

Enforcement

7.2 Under the provisions of the bill, a regulator:

- may accept (under section 218) a court-enforceable undertaking in connection with conduct regulated by the bill. If a person becomes aware they may have breached the ACL, they will be able to offer an undertaking to a regulator that they will not engage in the conduct again;
- can issue a notice to a business requesting information relevant to substantiating claims made in the marketplace. When a regulator becomes aware of a representation that may appear to contravene the ACL, it can require a person to provide information which could support the claim; or
- may issue a public warning notice (section 223) to inform the public about the conduct which may be detrimental.[1]

Enforcement agencies

7.3 Treasury notes in its guide to the legislation that the following federal, state and territory consumer agencies will jointly administer and enforce the ACL:

- the Australian Competition and Consumer Commission;
- the Australian Securities and Investments Commission (ASIC);
- NSW Fair Trading;
- Consumer Affairs Victoria;
- Queensland Office of Fair Trading;
- Western Australian Department of Commerce—Consumer Protection;
- South Australian Office of Consumer and Business Affairs;
- Consumer Affairs and Fair Trading Tasmania;
- ACT Office of Regulatory Services; and
- Northern Territory Consumer Affairs.[2]

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1 Treasury, *The Consumer Law: A Guide to the provisions*, April 2010, pp 39–41.

7.4 The Australian Competition and Consumer Commission (ACCC) emphasised in its evidence to the Committee that the bill's additional enforcement tools and remedies, combined with the 'increased scope and enthusiasm for cooperation amongst agencies' will enhance consumer protection.[3]

7.5 In terms of information sharing between the regulatory agencies, the ACCC explained:

> …there will be enhanced lines of communication between agencies. Practically speaking we still have that capacity now to have discussions with our co-regulators around the country, and we share information and track down who is behind a particular scheme. But one of the beauties of this reform process is that it is through having consistent laws encouraging greater cooperation and coordination between agencies. I am sure that will lead to better enforcement.[4]

7.6 The ACCC also referred to the importance of some flexibility in both the regulator to which consumers can complain and where the complaint is subsequently handled:

> There will be situations where a complaint is made directly to the ACCC, and reasonably so from the consumer's point of view, but that matter is already being investigated by one of the state agencies. In that circumstance, we want to make sure that we can pass the complaint that was made to us, in as transparent a way as we can, to the agency already looking into a similar matter or investigating a particular trader.[5]
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> While at times it may sound desirable to have black and white lines about which matters will be handled by each agency, I suggest it is not in the consumer's interest to have such black and white lines. There will be matters of common interest between agencies and I think the best outcome for consumers is to allow that information to the agencies, have an environment where it is shared and discussed, and we collectively work out the best way to get consumer redress.[6]

7.7 The Consumer Action Law Centre explained that the ACCC's role in the enforcement of the ACL is not as a complaints handling organisation. Rather:

> They will take consumer complaints for the purposes of building a picture of conduct in the marketplace that might, and hopefully will, support their enforcement work in this area, but they are not a body, unlike existing state and territory fair trading offices, which will take on a portion of those

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2 Treasury, *Australian Consumer Law: an introduction*, Consultation paper, Canberra, 2010, p. 18.

3 Mr Scott Gregson, *Proof Committee Hansard*, 27 April 2010, p. 13.

4 Mr Scott Gregson, *Proof Committee Hansard*, 27 April 2010, p. 14.

5 Mr Bruce Cooper, *Proof Committee Hansard*, 27 April 2010, p. 19.

6 Mr Scott Gregson, *Proof Committee Hansard*, 27 April 2010, p. 19.

> complaints and resolve them for consumers, separate perhaps entirely to any enforcement action that they may take. That is simply not a role that the ACCC has. It is not a failing on their part that they do not do it; it is just not their job.[7]

Submitters' views on the bill's enforcement provisions

7.8 Several submitters commented on the bill's enforcement requirements. CHOICE told the Committee it supported the introduction of the bill's new remedies and powers for the ACCC and ASIC. It argued that the bill's substantiation notices correctly place the onus of proof on those making the representations. CHOICE also supported the new infringement and warning notice powers for the ACCC. It did note, however, some concern that these powers may become an option in difficult cases, adding, 'we would be concerned if there were parking tickets being issued when full court action was more appropriate'.[8]

7.9 Professor Bob Baxt, representing Freehills, claimed the legislation was likely to build unfair expectations on the regulator:

> When legislation is enacted such as last year with the cartel legislation there was an immediate expectation that the Commission would the very next day start prosecuting people criminally. It is very unfair to expect regulators to be able to suddenly find cases to bring to court and the same thing is happening in relation to this legislation. There will be pressure on the Commission to do something. Why aren't you doing something? We have had this legislation in force now for a month; why haven't you already started issuing infringement notices, et cetera? I think that is such a difficult concept for people out there to understand how difficult it is for the regulators to get on top of this legislation to understand it and train the people, get the resources and apply it. We really do need to be patient and we need to have a sensible approach to what is overall very useful and important legislation.[9]

7.10 Coles identified the use of infringement notices for allegations of misleading conduct (section 13A) as an area of potential difficulty. It argued that:

> …the imposition of infringement notices involving a financial penalty where the regulator has *"reasonable grounds to believe"* that a representation is misleading is inconsistent with the Commonwealth Guide to *Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* which states that infringement notice schemes should only apply to strict or absolute liability offences that "...carry physical elements on which

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7 Ms Catriona Lowe, Co-Director, Consumer Action Law Centre *Proof Committee Hansard*, 29 April 2010, p. 45.

8 Mr David Howarth, *Proof Committee Hansard*, 28 April 2010, pp 10–11.

9 Professor Bob Baxt, *Proof Committee Hansard*, 29 April 2010, p. 38.

> an enforcement officer can make a reliable assessment of guilt or innocence".[10]
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> ...it remains Coles' view that such notices are inappropriate where the alleged contravening conduct requires an assessment that might be quite subjective.[11]

7.11 CHOICE agreed with the broad proposition that infringement notices are appropriate for breaches of industry codes:

> Industry codes provide a useful means to introduce a measure of industry participation in the regulatory process and often involve a degree of detail that exceeds that in the law itself. Breaches of the provisions of codes are often at the less serious end of contraventions. These characteristics make infringement notices a workable and appropriate enforcement option and CHOICE supports a power to allow the ACCC or ASIC to issue infringement notices for suspected breaches of codes.[12]

The need for consumer education and a proactive regulator

7.12 The Consumer Action Law Centre argued the need for a combination of education and enforcement on the part of the regulator to ensure that consumers know their rights of redress under the bill. Their co-director told the Committee that in the area of consumer guarantees:

> …we think that the provisions there will hopefully go some way to making those rights better understood by both parties because there is certainly an issue around consumer and trader awareness of rights. Obviously putting these things into law will not achieve that. There will need to be promotion and education campaigns for consumers around their rights if that is to occur.[13]

7.13 The Centre also emphasised the need for the ACCC to take enforcement action and address 'widespread non-compliance' in terms of consumers' rights. It argued that the bill does not tackle this issue and that the consumer guarantee provisions continue to rely largely on individual consumers taking individual legal action if a supplier fails to comply with their obligations. The Centre noted that consumers do not generally initiate legal actions over small-value disputes, which means that improvements in systemic practices are not encouraged. Even where an individual consumer successfully enforces their contractual rights, this does not

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10 Coles Supermarkets Pty Ltd, *Submission 3*, p. 2.

11 Coles Supermarkets Pty Ltd, *Submission 3*, p. 2.

12 Choice, *Submission 20*, p. 12.

13 Ms Catriona Lowe, *Proof Committee Hansard*, 29 April 2010, p. 45.

benefit other affected consumers or provide any incentive to traders to change their overall practices.[14]

7.14 The Centre recommended to the Commonwealth Consumer Affairs Advisory Council that:

- the regulators undertake a more active and strategic approach to enforcing traders' guarantee obligations including through better use of the prohibitions on misleading conduct and misrepresentations; and
- the guarantee rights, which the bill provides are enforceable by consumers as individual rights, also be stated to be conduct obligations so that the regulators can undertake enforcement action in relation to breaches of guarantee obligations as they might for other breaches of the Australian Consumer Law.[15]

Alternative and low cost dispute resolution

7.15 Many of the remedies available under the proposed bill are through low cost dispute resolution fora such as small claims tribunals.

7.16 Section 277 of the bill enables the regulator to commence an action on behalf of one or more persons on matters relating to consumer guarantees (Part 5-4). CHOICE argued that the bill provides increased scope for alternative dispute resolution mechanisms to assist consumers by avoiding costs of litigation. It identified an area of particular interest as the ACCC's representative actions under section 277.[16]

7.17 Other submitters emphasised the need for greater consumer access to low cost dispute resolution mechanisms. Professor Justin Malbon advocated:

> …greater accessibility for consumers to make complaints and consider the idea of an industry funded dispute resolution scheme that is truly independent so the consumers can get easy redress where they are being sold a dud product or a product that has lots of problems. Because they tend to be relatively low income purchasers dispute resolution is one of the major problems in this area.[17]

7.18 Professor Malbon suggested that the Committee could consider a model for consumer redress in guarantee disputes along the lines of the financial ombudsman's service, and other similar industry funded dispute settlement schemes.[18]

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14 Consumer Action Law Centre, *Submission 28*, pp. 25–26.

15 Consumer Action Law Centre, *Submission 28*, pp. 25–26. Ms Catriona Lowe, *Proof Committee Hansard*, 29 April 2010, p. 45.

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

17 Professor Justin Malbon, *Proof Committee Hansard*, 29 April 2010, p. 32.

18 Professor Justin Malbon, *Proof Committee Hansard*, 29 April 2010, p. 32.

7.19 Mr Lynden Griggs from the University of Tasmania emphasised that:

> …the biggest practical barrier to effective consumer protection is accessibility to alternative dispute resolution options. The proposed legislation does little to improve this. Improvements to the substantive law will do little if access to justice is not improved. The Parliament is encouraged to undertake the research necessary to develop national models of access that will serve and support the improvements made by the substantive law. Something akin to the Victorian Civil and Administrative Tribunal working at the national level may well be worth exploring.[19]

7.20 Mr Griggs elaborated on the need to improve low cost alternative dispute resolution mechanisms:

> It is a matter of encouraging, explaining and putting in place the processes within those small claims tribunals that say to the consumer that you can access this without the assistance of a legal professional and it is not something that will be tied down in legal requirements or the rules of evidence. It is a question of empowering the consumer to be able to access that. There is no doubt that these proposed changes will assist greatly. If we had a national tribunal system of some sort, even if it were attached or connected somehow with the Federal Magistrates Court, that would go a long way to allowing the empowerment of the consumer to act on their own behalf.[20]

7.21 Treasury explained that its approach to dispute resolution mechanisms in the bill was to harmonise what is already in place at the state and territory level, rather than expand the range of options:

> Certainly the scope of this reform was to harmonise existing laws and create a single national consumer law. There are obviously issues around access to justice and dispute resolution mechanisms which are being addressed through other processes, including at the national level through a process that the Attorney-General is leading at present. We have designed this law to deal with the situation as it is now in the states and territories and at the Commonwealth level. It is intended, obviously within the constraints that are provided for by the rules about which forum you can access on which sort of dispute, that people should and can do that.[21]

Onus of proof

7.22 In its submission to this inquiry, Treasury noted ten instances in the bill where there is a reversal of the onus of proof. Of these, five replace existing reversals in the TPA and five are new. The new reversals of proof reflect the inclusion of new areas of consumer law at the Commonwealth level as part of the bill. The new reversals are:

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19 Mr Lynden Griggs, *Submission 7,* p. 2.

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

21 Mr Simon Writer, Treasury, *Proof Committee Hansard,* 30 April 2010, p. 42.

(a) section 24(4) relating to unfair contract terms. There is a rebuttable presumption that an unfair term is not reasonably necessary to protect the legitimate interests of the party who would be disadvantaged by the application or reliance on that term, unless that party can prove otherwise;

(b) section 27(1), introduced in the first bill, relates to where a contract is alleged to be a standard form contract. The onus will then be on the supplier to prove that it is not;

(c) sections 29(2) relates to false or misleading representations (testimonials). The section includes a requirement for respondents to provide evidence in court that testimonials are not false or misleading. The accused person does not have to disprove the alleged breach but must put evidence to the contrary before the court.

(d) section 151(2) is similar to section 29(2); and

(e) section 70 provides that where a contract is alleged to be an unsolicited consumer agreement, then the onus will be on the supplier to prove that it is not.[22]

Concern at the bill's changes to the onus of proof

7.23 Professor Bob Baxt, representing Freehills, cautioned that these changes will create a burden on the defendant who 'in many cases…is going to be the small person, the consumer or the small business'. He added:

> We believe that this can lead to significant accidental non-compliance which will be costly and time consuming to rectify. We would urge the government to slow down the process so that this legislation when it is put into effect can work more effectively.[23]

7.24 Ms Jacqueline Downes, representing the Law Council of Australia, told the Committee that the reversal of the onus of proof should only be used where there is sufficient empirical justification and should not apply for the purposes of criminal prosecution:

> …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 does not consider this reversal necessary as it should not be unduly difficult for the consumer to establish that a particular agreement fulfils the elements of an unsolicited consumer agreement. Even more concerning, the evidential burden regarding testimonials has been reversed for criminal prosecutions. The committee does not support the reversal of the evidentiary burden in relation to the proposed subsection 151(2). Although the imposition of an

22 Treasury, *Submission 46*, p. 10.

23 Professor Bob Baxt, *Proof Committee Hansard*, 29 April 2010, p. 37.

> evidentiary burden stops short of an actual reversal of onus, the finding of a criminal contravention is a very serious matter and should require all elements of the offence to be proved against the accused.[24]

7.25 Mr Stephen Ridgeway, of the Law Council's Trade Practices Committee, noted that there are some circumstances in which it is proper either to reverse the onus of proof or to create an evidentiary presumption. However, in cases where the matter is being prosecuted by the consumer, Mr Ridgeway argued that the consumer probably has the best evidence and recollection of the circumstances:

> If there has been oral contact between the consumer and the business at some prior time, with the breadth of the way the bill is drafted to refer to any prior negotiations or contact—which is drafted in a very broad way for the purposes of inducing the contract or even for the purposes of promoting the product— the bill potentially proposes a very significant burden on business to keep very extensive records. The consumer in the circumstances for the transaction will probably have a pretty good recollection of what happened. Salespeople, who deal with any number of consumers in a day or over time, may not have the same recollection.[25]

7.26 Mr Ridgeway told the Committee that the reversal of the onus of proof could have 'a very significant burden' on business, particularly in the case of criminal prosecution. In these cases, he argued, the consumer is likely to be in a position to be able to establish and get past that evidentiary burden with reasonable ease. Businesses, on the other hand, face developing potentially elaborate systems of record keeping for the most minor of transactions which risks imposing costs on business which will be passed through to consumers. Mr Ridgeway concluded that while the Law Council has no quarrel with the introduction of the substantive amendment itself:

> Procedurally…[it] is not satisfied that there is sufficient evidentiary difficulty that warrants what traditionally in our law and in English law is regarded as a fairly dramatic change in process.[26]

Committee view

7.27 The Committee notes various concerns with the enforcement powers and remedies under the legislation and how these will be administered in practice. There is the need to educate consumers about their consumer rights and promote avenues for low cost dispute resolution. There are related concerns that the regulator must take a proactive approach to enforce traders' guarantee obligations through better use of the prohibitions on misleading conduct and misrepresentations. There are also fears that the bill will impose an unnecessary account keeping burden on businesses by reversing the onus of proof.

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

25 Mr Stephen Ridgeway, *Proof Committee Hansard*, 28 April 2010, p. 44.

26 Mr Stephen Ridgeway, *Proof Committee Hansard*, 28 April 2010, p. 44.

7.28 The Committee believes it is important that the ACCC publicises the provisions of the ACL to make consumers aware of their rights, and the fact that these rights will now be consistent across the states and territories. It is also important that the ACCC takes a proactive approach to enforcing the consumer guarantee obligations.

7.29 In the Committee's view, the government has taken the correct approach in harmonising the dispute resolution mechanisms that are currently available across Australian jurisdictions. There are separate processes examining alternative dispute resolution mechanisms for consumers.

7.30 In terms of the reversal of the onus of proof, the Committee argues that this has only been done where it is impossible or unreasonable to expect a regulator to meet the conventional standard of proof. In the case of solicited contracts, it is not unreasonable to expect that the supplier has evidence of the contact, rather than the consumer.