



Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010

Paula Pyburne
Law and Bills Digest Section

Contents

Purpose.....	5
Comment.....	5
Background.....	6
The terms of the IGA	6
Commitment by the Ministerial Council on Consumer Affairs	7
Committee consideration	7
Financial implications	8
Schedule 1—the Australian Consumer Law	8
Chapter 1—Introduction to the Australian Consumer Law.....	8
Definition of consumer	8
Comments	9
Senate Committee recommendation	10
Chapter 2—General protections in the Australian Consumer Law	10
Misleading or deceptive conduct	10
Unconscionable conduct	11
Civil penalties	12
Unfair contract terms.....	12
Chapter 3—Specific protections in the Australian Consumer Law	13
False or misleading representations	13
Comments	13
Civil penalties	14
Pricing	14
Comments	14
Civil penalties	15
Consumer guarantees	15

Productivity Commission report	15
How conditions and warranties operate at present	16
Manufacturers' voluntary warranties	16
Extended warranties	16
Statutory warranties	16
Supply of goods	17
Supply of services.....	17
Existing remedies	18
Comment.....	18
The extent of the problem	18
Commonwealth Consumer Affairs Advisory Council report	19
Proposed provisions	20
Senate Committee recommendation	21
Exemption for architects and engineers	21
Senate Committee recommendation	22
Unsolicited consumer agreements.....	22
The nature of the problem.....	22
Proposed provisions	23
Issues.....	23
Senate Committee recommendation	24
Civil penalties	25
Lay-by agreements	25
Issue	25
Proposed provisions	26
Civil penalties	26
Consumer guarantees—remedies	26
Issue—'lemon laws'	26
Proposed provisions	27
Minor failure	27
Major failure	28
Senate Committee recommendation	29
Rejected goods	30
Actions against manufacturers	30
National consumer product safety provisions	31
Background.....	31
Productivity Commission	32

Input by COAG.....	32
Safety standards	33
Civil penalties	34
Bans on consumer goods and product related services	34
Issue—reasonably foreseeable use, or misuse	35
Civil penalties	36
Recall of consumer goods	36
Civil penalties	37
Consumer goods, or product related services associated with death or serious injury or illness.....	37
The nature of the problem.....	37
Issue—‘associated with’	38
Civil penalties	39
Information standards.....	39
Civil penalties	40
Liability of manufacturers for goods with safety defects.....	40
Issue—unidentified manufacturer.....	41
Senate Committee recommendation	41
Chapter 4—offences in the Australian Consumer Law	42
Issue—onus of proof.....	43
Chapter 5—enforcement provisions in the Australian Consumer Law	44
Undertakings.....	44
Substantiation notices	44
Public warning notices.....	44
Chapter 5—remedies in the Australian Consumer Law	45
Pecuniary penalties	45
Country of origin representations	45
Current provisions	45
Nature of the problem.....	46
Proposed provisions.....	47
Schedule 2 of the Bill—application of the Australian Consumer Law	48
The purpose of Schedule 2.....	48
Achieving the first purpose.....	49
Achieving the second purpose	49
Proposed bans and recall notices—Commonwealth only	49
Enforcement—Commonwealth only.....	50

Infringement notices—Commonwealth only	51
Remedies	52
Jurisdictional matters.....	52
Achieving the third purpose.....	53
Schedule 3 of the Bill—amendment of the Corporations legislation	53
Schedule 4 of the Bill—enforcement of industry codes	54
Background.....	54
Proposed changes.....	55
Issue—no infringement notice regime.....	56
Schedule 5 of the Bill—other amendments to the Trade Practices Act.....	56
How it works.....	56
Comment—application to government bodies	57
Schedule 6 of the Bill—amendments to other statutes	58
Concluding comments	58

Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010

Date introduced: 17 March 2010

House: House of Representatives

Portfolio: Treasury

Commencement: There are various commencing dates as set out in the table in clause 2.

Links: The [links](#) to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bills page, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The primary purpose of the Bill is to:

- incorporate the fair trading and consumer protection provisions of the *Trade Practices Act 1974* (TPA) into the Australian Consumer Law
- create a national legislative scheme for statutory consumer guarantees
- create a national legislative scheme for consumer product safety
- create an infringement notice regime that will apply to specified provisions of the Australian Consumer Law, and
- change the name of the TPA to the *Competition and Consumer Act 2010* (CCA).

The CCA will allow for two separate operations. The provisions about competition which existed in the TPA will remain in the main body of the CCA. The provisions about consumer protection will lie in Schedule 2 of the CCA. Each of these will have its own definitions.

Comment

Due to the broad scope of the Bill and the number of amendments, this Digest will concentrate on key issues arising from the proposed changes rather than dealing with each and every proposed provision. In addition, in discussing specific provisions, it is not possible to note all conditions, qualifications or exceptions that might apply to a particular provision. Thus the practical effect of a provision may vary from circumstance to circumstance, according to whether any condition, qualification, or exception applies.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Background

On 15 August 2008, Ministerial Council on Consumer Affairs (MCCA) agreed to the following operational objectives to support its national consumer policy:

- to ensure that consumers are sufficiently well-informed to benefit from and stimulate effective competition
- to ensure that goods and services are safe and fit for the purposes for which they were sold
- to prevent practices that are unfair
- to meet the needs of those consumers who are most vulnerable or are at the greatest disadvantage
- to provide accessible and timely redress where consumer detriment has occurred, and
- to promote proportionate, risk-based enforcement.¹

This agreement provides the basis for the development of the Australia Consumer Law which is to be created in two separate steps. The first step is contained in the *Trade Practices Amendment (Australian Consumer Law) Act (No.1) 2010* (Australian Consumer Law Act No. 1) which establishes the new Australian Consumer Law within the existing TPA.² The commencement date for the new consumer law has been proclaimed as 1 July 2010.

The terms of the IGA

On 2 July 2009 the Council of Australian Governments (COAG) entered into a formal Intergovernmental Agreement on National Consumer Law (IGA).³ The IGA specifies

-
1. Ministerial Council on Consumer Affairs, Joint communiqué, 15 August 2008, viewed 11 May 2010, http://www.consumer.gov.au/html/download/MCCA_Meetings/Meeting_20_15_Aug_08.pdf
 2. The background to the Bill and a discussion of its provisions is available in P Pyburne, *Trade Practices Amendment (Australian Consumer Law) Bill 2009*, Bills digest, no. 19, 2009–10, Parliamentary Library, Canberra, 18 August 2009, viewed 11 May 2010, <http://www.aph.gov.au/library/pubs/bd/2009-10/10bd019.pdf>
 3. Council of Australian Governments *Intergovernmental Agreement for the Australian Consumer Law*, 2 July 2009, viewed 11 May 2010, http://www.coag.gov.au/coag_meeting_outcomes/2009-07-02/docs/IGA_australian_consumer_law.pdf

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

how the Australian Consumer Law will be implemented. First, the Commonwealth will introduce into the Australian Parliament a Bill or Bills to:

- enact the text of the Australian Consumer Law as a Schedule to the TPA
- amend relevant provisions of the TPA to ensure that they are consistent with the Australian Consumer Law, and
- enact changes to the investor protection provisions of the *Australian Securities and Investments Commission Act 2001* and the *Corporations Act 2001* to ensure that they are consistent with the Australian Consumer Law.

Secondly, each State and Territory government will introduce into its Parliament a Bill or Bills to enact application Acts no later than 31 December 2010 (or a later date which is agreed) which will apply the Australian Consumer Law in its jurisdiction.

Thirdly, each Party, including the Commonwealth, will use best endeavours to have its Parliament repeal, amend or modify any legislation that is inconsistent with, or alters the effect of, the Australian Consumer Law.

Fourthly, a Party will not submit a Bill to its legislature which would be inconsistent with, or alter the effect of, the Australian Consumer Law.⁴

Commitment by the Ministerial Council on Consumer Affairs

On 4 December 2009, the MCCA agreed to amendments to the existing TPA, fair trading and consumer protection provisions including:

- a new national product safety legislative and regulatory framework
- a new national consumer guarantees law, which will replace the provisions in 15 existing national, state and territory laws about implied warranties and conditions in consumer contracts for goods and services, and
- reforms, drawing on best practice in State and Territory laws, which will make the Australian Consumer Law reflective of national consumer policy and which both enhances its effectiveness, and minimises business compliance costs.⁵

Committee consideration

The Bill was referred to the Senate Economics Committee (the Senate Committee) for inquiry and report.⁶ The Senate Committee recommended that the Senate pass the Bill,

4. Ibid., pp. 5–6.

5. Ministerial Council on Consumer Affairs, *Joint communiqué*, 4 December 2009, viewed 11 May 2010, http://www.consumer.gov.au/html/download/MCCA_Meetings/Meeting_22_4_Dec_09.pdf

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

preferably adopting a further eight recommendations in the report.⁷ The Senate Committee report contains additional comments by Coalition Senators including specific drafting amendments to some sections. These comments and the formal recommendations in the report will be addressed in the body of this Digest.

Financial implications

According to the Explanatory Memorandum, ‘the Bill has no significant financial impact on Commonwealth expenditure or revenue at this time’.⁸

However, in the 2009 Budget, the Government announced that the Australian Competition and Consumer Commission (ACCC) would be provided with \$24.8 million over five years to help it implement reforms to Australia’s consumer product safety framework.⁹

Schedule 1—the Australian Consumer Law

Chapter 1—Introduction to the Australian Consumer Law

Definition of consumer

Chapter 1 of Schedule 1 to the Bill contains a number of new definitions. Of these the most contentious is the definition of ‘*consumer*’ which is contained in **proposed section 3**. The definition operates by having regard to the purpose for which goods or services are to be used so that a person acquires goods as a ‘*consumer*’ if the goods were of a kind ‘ordinarily acquired’ for personal, domestic or household use or consumption or if the goods consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads.

-
6. Details of the inquiry are at:
http://www.apf.gov.au/Senate/committee/economics_ctte/tpa_consumer_law_10/index.htm
 7. Economics Legislation Committee, *Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 [Provisions]*, Commonwealth of Australia, Canberra, 21 May 2010, p. 1, viewed 1 June 2010,
http://www.apf.gov.au/Senate/committee/economics_ctte/tpa_consumer_law_10/report/report.pdf
 8. Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010, p. 13.
 9. C Bowen (Assistant Treasurer, Minister for Competition Policy and Consumer Affairs), *Budget 2009: next step towards a national product safety framework*, media release, no. 50, 12 May 2009, viewed 16 June 2010,
<http://parlinfo.apf.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FKSJT6%22>

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

The existing definition of ‘*consumer*’ in section 4B of the TPA is in different terms. Under that section a person has acquired goods as a ‘*consumer*’:

- if the price of the goods is less than \$40 000, the goods or services can be of any kind (that is, ordinarily of a domestic, household, personal or business nature)
- if the price of the goods is more than \$40 000, the goods or services must be of a kind ordinarily acquired for personal, domestic or household use or consumption (unless it is a commercial road vehicle).

The Australian Consumer Law does not apply to goods which were acquired for re-supply or for the purpose of using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land.

Comments

The Commonwealth Consumer Affairs Advisory Council supports removing the monetary threshold from the definition of ‘consumer’ on the grounds that:

The threshold is—by necessity—set at an arbitrary level, which is subject to change over time... there is no meaningful distinction to be made between a person who pays \$40,000 for goods or services and a person who pays \$40,001.¹⁰

The submission by Freehills to the Senate Committee argues that the Bill ‘fails to unify the concept of ‘consumer’ for the purposes of the ACL’.¹¹ By way of example, Freehills cites the following:

- the definition of ‘*consumer*’ in section 3 which refers to whether the goods or services were ‘of a kind ordinarily acquired for personal, domestic or household use or consumption’
- the definition of ‘*consumer contract*’ in section 23 (for the purpose of the unfair terms provisions) means a contract for a supply of goods or services ‘to an individual whose acquisition is wholly or predominantly for personal, domestic or household use or consumption’
- the definition of ‘*consumer goods*’ in section 2 (for the purposes of the product safety provisions) 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, and includes any such

10. Commonwealth Consumer Affairs Advisory Council, *Consumer rights: reforming statutory implied conditions and warranties, Final report*, Commonwealth of Australia, Canberra, October 2009, p. 80, viewed 1 June 2010, http://www.treasury.gov.au/documents/1682/PDF/Report_CCAAC_091029.pdf

11. Freehills, Submission to Economics Legislation Committee, *Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 [Provisions]*, 23 April 2010, p. 3.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

goods that have become fixtures since the time they were supplied if the subject of a recall notice or voluntary call' and

- in sections 21 and 22 the words '*consumer*' and '*business consumer*' are used for the purposes of the unconscionable conduct provisions.¹²

There was also some concern that existing protections will be lost. The submission on behalf of the Queensland Newsagents Federation and the NSW and ACT Newsagents Association states:

Implications for small business are obvious, for instance purchasing IT equipment that is clearly for business use only and is below \$40,000 is no longer covered. A household type fridge is still covered but a cooling display cabinet under \$40,000 is not. There can be many more examples, shop fittings under \$40,000 are currently covered but will not be in future.¹³

Their additional comments, the Coalition Senators noted that the effect of the amendments was that there will no longer be a class of 'consumer' which encompasses small business stating that 'this is of grave concern, particularly given that small business is the largest employer of people in Australia'.¹⁴

Senate Committee recommendation

The Senate Committee considered 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'.¹⁵

The additional comments by the Coalition Senators recommended that the term '*consumer good*' be redrafted to include goods which do not exceed a specified value—being \$40 000.¹⁶

Chapter 2—General protections in the Australian Consumer Law

Misleading or deceptive conduct

Proposed section 18 provides a general prohibition that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive, or is likely to mislead or

12. Ibid.

13. Spier Consulting, Submission to Economics Legislation Committee, *Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 [Provisions]*, 16 April 2010, p. 3.

14. Economics Legislation Committee, op. cit., p. 87.

15. Ibid., p. 21.

16. Ibid., p. 89.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

deceive. This provision is different from the prohibition in existing section 52 of the TPA which refers to a 'corporation' rather than a 'person'. This is a universal change which occurs throughout the Bill and is based on the IGA.

Proposed section 19 operates in the same way that subsections 65A(1) and (2) (which will be repealed by **item 49 of Schedule 5** to the Bill) of the TPA currently operate.¹⁷ It exempts '**information providers**' from the general prohibition against misleading or deceptive conduct. An '**information provider**' is defined in **proposed subsection 19(5)** as a person who carries on a business of providing information and **proposed subsection 19(6)** provides the examples of various broadcasters, including the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service Corporation (SBS) as being information providers. Importantly, **proposed subsection 19(4)** is specifically directed at the publication of matter in connection with the sale, possible sale or promotion of a sale of a grant in land. Those publications will not be covered by the exemptions. As a result, real estate agents will not be protected should they publish information about a prospective property which is found to be misleading or deceptive.

Unconscionable conduct

Discontent in the franchising sector has been the primary catalyst for change to the laws about unconscionable conduct.¹⁸ That discontent was aired in a number of enquiries and subsequent reports.¹⁹ In particular, the Senate Standing Committee on Economics

-
17. These section were inserted into the TPA after the court decisions in *Australian Ocean Line Pty Ltd v West Australian Newspapers Ltd* (1983) 66 FLR 453, viewed 21 June 2010, <http://www.austlii.edu.au/au/cases/cth/FCA/1983/66.html> and *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82, viewed 21 June 2010, <http://www.austlii.edu.au/au/cases/cth/FCA/1984/180.html>. According to Miller, 'In those cases the Federal Court held that the publication of statements in newspapers in the course of reporting the news was capable of breach section 52 if the statements were misleading and deceptive. The government was persuaded that it was not appropriate to permit use to be made of section 52 in that way and section 65A was inserted to give publishers special protections from the consumer protection provisions'. See R V Miller, *Miller's annotated Trade Practices Act*, 31st edition, Lawbook Co., Pyrmont, 2010, p. 703
 18. For background information see P Pyburne, *Current legal issues in franchising in Australia*, Background note, Parliamentary Library, Canberra, 17 November 2008, viewed 12 May 2010, <http://www.aph.gov.au/library/pubs/BN/2008-09/Franchising.htm>
 19. For example House of Representatives Standing Committee on Industry, Science and Technology, *Finding a balance: towards fair trading in Australia*, Department of the House of Representatives, Canberra, 26 May 1997, viewed 12 May 2010, <http://www.aph.gov.au/house/committee/isr/Fairtrad/report/contents.htm>, Economic and Finance Committee, *Final report: Franchises*, Parliament of South Australia, Adelaide, 6 May 2008; and Small Business Development Corporation, *Inquiry into the operation of franchise businesses in Western Australia: Report to the Western Australian Minister for Small Business*, Perth, April 2008.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

published a report on its inquiry into the statutory definition of ‘unconscionable conduct’ in December 2008.²⁰ That report recommended:

an amendment to section 51AC of the Trade Practices Act which states that the prohibited conduct in the supply and acquisition of goods or services relates to the terms or progress of a contract.²¹

The unconscionable conduct provisions are contained in **proposed sections 20–22** of the Bill. Although **proposed paragraphs 22(2)(j)** and **22(3)(j)** of the Bill go some way towards this by referring to ‘any conduct that the supplier or the business consumer engaged in, in connection with their commercial relationship, after they entered into the contract’ it does not go as far as that recommendation. Rather, item 4 of the Competition and Consumer Amendment Bill 2010 which was introduced into the House of Representatives on 27 May 2010 will, when enacted, repeal and substitute sections 21 and 22 of this Bill to deliver on the recommendation.²²

Civil penalties

Also in December 2008, the Parliamentary Joint Committee on Corporations and Financial Services (Joint Committee) tabled its report *Opportunity not opportunism: improving conduct in Australian franchising*. The Joint Committee made 11 recommendations including that the TPA be amended to provide for pecuniary penalties in relation to breaches of the unconscionable conduct provisions.²³ **Item 1** in the table contained in **proposed subsection 224(3)** provides for penalties of up to \$1.1 million for corporations and up to \$200 000 for individuals engaging in unconscionable conduct.

Unfair contract terms

The unfair contract terms were part of the first tranche of the Australian Consumer Law. As enacted the unfair contract terms comprised sections 2–8 of Schedule 2 of the TPA.

20. Senate Standing Committee on Economics, *The need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the Trade Practices Act 1974*, Commonwealth of Australia, Canberra, December 2008, viewed 11 May 2010, http://www.aph.gov.au/Senate/committee/economics_ctte/tpa_unconscionable_08/index.htm

21. *Ibid.*, recommendation 1, p. 36.

22. Competition and Consumer Legislation Amendment Bill 2010 homepage, viewed 16 June 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4376%22>

23. Parliamentary Joint Committee on Corporations and Financial Services, *Opportunity not opportunism: improving conduct in Australian franchising*, Commonwealth of Australia, Canberra, 1 December 2008, paragraph 9.37, viewed 11 May 2010, http://www.aph.gov.au/Senate/committee/corporations_ctte/franchising/report/index.htm

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

This Bill renumbers the unfair contract provisions as **proposed sections 23–28** of the Australian Consumer Law. The text of the provisions in the Bill is not the same as the text as enacted, because of amendments which were made to the original provisions by the Parliament. However, it is not proposed to discuss these provisions further in this Digest. The ACCC has published a guide to unfair contract.²⁴

Chapter 3—Specific protections in the Australian Consumer Law

False or misleading representations

Proposed sections 29–38 contain the provisions relating to false and misleading representations. In particular, **proposed section 29** contains the general prohibition on the making of false or misleading representations. Whilst it is similar to existing section 53 of the TPA it is not the same. In particular:

- it prohibits a person from making a false or misleading representation in trade or commerce, rather than the current prohibition of ‘falsely representing’. The reason is that there is some confusion about the meaning of ‘falsely representing’.²⁵ For example in *Murphy v Farmer* (1988) 165 CLR 19, a case involving importation of a motor vehicle in which the importer made an incorrect but not deliberately incorrect customs declaration, the High Court was inclined to interpret ‘false’ to mean ‘purposely untrue’. However in *Sternberg v The Queen* (1953) 88 CLR 646 and in *Davidson v Watson* (1953) 28 ALJ 63, the High Court interpreted false to mean contrary to fact. That seems to be the prevailing view on what the term means, and
- inserts **proposed paragraph 29(1)(n)** which is a prohibition about making false or misleading representations concerning a requirement to pay for a contractual right which is wholly or partly equivalent to any condition, warranty, guarantee, right or remedy that a person has under Part 3-2.

Comments

According to the Law Council of Australia, the role of **proposed paragraphs 29(1)(m)** and **29(1)(n)** are ‘not sufficiently distinct’.²⁶ The submission to the Senate Committee by the Law Council of Australia states:

24. The text of the guide is available at

<http://www.accc.gov.au/content/item.phtml?itemId=930750&nodeId=737d2e2070ad014010a9f151a544a7be&fn=A%20guide%20to%20the%20unfair%20contract%20terms%20law.pdf>

25. R V Miller, op. cit., p. 663.

26. Law Council of Australia, Submission to Economics Legislation Committee, *Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 [Provisions]*, 16 April 2010, p. 11.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Under section 29(1)(m), a person must not make a false or misleading representation ‘concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy’. Section 29(1)(n) relates to false or misleading representations concerning a ‘requirement to pay for a contractual right that ... is wholly or partly equivalent to any condition, warranty, guarantee, right or remedy ... [and under written law]’.

In the Committee’s view, these two provisions are functionally similar (if not identical) ... The Committee submits that section 29(1)(n) should be deleted.²⁷

However, these additional prohibitions were recommended by the Commonwealth Consumer Affairs Advisory Committee in its report *Consumer rights: Reforming statutory implied conditions and warranties*. There is no recommendation by the Senate Committee to delete either of them.²⁸

Civil penalties

Item 2 in the table contained in **proposed subsection 224(3)** provides for civil penalties of up to \$1.1 million for corporations and up to \$200 000 for individuals for a breach of sections 29–46 and 48–50.

Pricing

Proposed sections 47–48 relate to pricing. Specifically, **proposed section 47** provides that a person must not, in trade or commerce, supply goods if the goods have more than one ‘*displayed price*’ and the supply takes place for a price that is not the lower, or lowest, of the displayed prices.²⁹ It is intended, in part, as a response to a series of cases about catalogues advertising ‘was/now’ prices where the price comparison was misleading.³⁰ ‘*Supply*’ is defined in **proposed section 2** as a supply or re-supply of goods by way of sale, exchange, lease, hire or hire-purchase; or the provision, grant or conferring of services. ‘*Supplied*’ and ‘*supplier*’ have corresponding meanings.

Comments

The submission by Coles to the Senate Committee was to the effect that **proposed section 47**:

27. Ibid.

28. Commonwealth Consumer Affairs Advisory Council, *Consumer rights: reforming statutory implied conditions and warranties, Final report*, op. cit., finding 7.6.

29. The term ‘*displayed price*’ is defined in **proposed subsection 47(2)**.

30. For example, *ACCC v Allans Music Group Pty Ltd* [2002] FCA 1552, viewed 2 June 2010, <http://www.austlii.edu.au/au/cases/cth/FCA/2002/1552.html>; *ACCC v Prouds Jewellers Pty Ltd (No. 2)* [2008] ATPR 42-230, viewed 2 June 2010, <http://www.austlii.edu.au/au/cases/cth/FCA/2008/476.html>

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

should be expanded to include the additional information stated in the Explanatory Memorandum ... that businesses are under no obligation to sell goods to which multiple prices (or single prices) attach, and that businesses are entitled to withdraw the goods from sale and correct any pricing errors if they occur.³¹

However, the Treasury submission disagreed with the need for such an amendment, stating that:

section 47 does not have the effect of requiring the goods to be sold. Rather, it requires that goods should not be sold for more than the lowest of the displayed prices for that good, where two or more prices are displayed for the same item.³²

Nevertheless, **proposed subsection 47(5)** does provide that a *'displayed price'* is no longer the price for goods if it has been retracted, and the retraction is published in a manner that has at least a similar circulation or audience as the catalogue or advertisement in which it originally appeared.

Civil penalties

Item 3 in the table contained in **proposed subsection 224(3)** provides for penalties of up to \$5000 for corporations and up to \$1000 for individuals who breach the multiple pricing provision in proposed section 47.

Consumer guarantees

Productivity Commission report

In 2008, the Productivity Commission published a report of its review of Australia's consumer policy framework.³³ That report noted, amongst other things that:

While Australia's consumer policy framework has considerable strengths, parts of it require an overhaul.

The current division of responsibility for the framework between the Australian and State and Territory Governments leads to variable outcomes for consumers, added costs for businesses and a lack of responsiveness in policy making.

31. Coles Supermarkets Australia Pty Ltd, Submission to Economics Legislation Committee, *Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 [Provisions]*, 16 April 2010, p. 3.

32. Treasury, Submission to Economics Legislation Committee, *Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 [Provisions]*, 11 May 2010, p. 20.

33. Productivity Commission, *Review of Australia's consumer policy framework, Inquiry report no. 45*, Commonwealth of Australia, Canberra, 30 April 2008, viewed 13 May 2010, <http://www.pc.gov.au/projects/inquiry/consumer/docs/finalreport>

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

There are gaps and inconsistencies in the policy and enforcement tool kit and weaknesses in redress mechanisms for consumers.

These problems 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.³⁴

How conditions and warranties operate at present

There are three types of ‘warranty’ that consumers can rely on to protect themselves if they have a problem with the goods or services they buy. These are a manufacturer’s voluntary warranty, an extended warranty and a statutory warranty.³⁵

Manufacturers’ voluntary warranties

Manufacturers often provide a ‘voluntary’ warranty to their customers setting out the terms and conditions under which the manufacturer agrees to repair or replace the product, or refund the purchase price. As a manufacturer’s warranty is voluntary, its terms and conditions are not prescribed by law.³⁶ However, if such a warranty is provided, a buyer has the right to take legal action against the seller if the warranty is not honoured.³⁷

Extended warranties

Some businesses also offer consumers the option of purchasing an extended warranty in the form of service or insurance contracts which cover the costs of product repairs or replacement for a set period beyond the expiration of any voluntary warranty offered by the manufacturer.³⁸

Statutory warranties

Regardless of whether a voluntary or extended warranty is available, the TPA, State and Territory Fair Trading Acts or Sale of Goods Acts protects consumers when they buy

34. Ibid., p. 2.

35. Commonwealth Consumer Affairs Advisory Council, *Consumer rights: statutory implied conditions and warranties, Issues paper*, Commonwealth of Australia, Canberra, July 2009, viewed 13 May 2010, http://www.treasury.gov.au/documents/1586/PDF/Issues_paper_20090726.pdf

36. Ibid., p. 4.

37. Most consumer electronics manufacturers, rather than retailers, voluntarily offer a standard one-year warranty. The manufacturer’s warranty is typically operated in partnership with the retailer. Consumer Affairs Victoria, *Warranties and refunds in the electronic goods, white goods and mobile telephone industries*, op. cit., p. 35.

38. Commonwealth Consumer Affairs Advisory Council, *Consumer rights: statutory implied conditions and warranties, Issues paper*, op. cit., p. 4.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

goods and services. They do so by **implying** certain rights and obligations into all consumer contracts. These are:

- ‘conditions’— essential terms that, if breached, will allow a consumer to cancel the contract and seek a refund as well as seek compensation for loss or damage, and
- ‘warranties’ —secondary terms that, if breached, will generally allow consumers to seek damages, but will not allow consumers to terminate the contract.

Supply of goods

In contracts for the supply of goods, the statutory *conditions* in the TPA require that:

- goods must be of ‘merchantable quality’—they must meet a level of quality and performance that would be reasonable to expect, given their price and description³⁹
- goods must be fit for their intended purpose—they should be suitable for any particular purpose the buyer made known to the seller⁴⁰
- the goods must match the description given to the consumer, or the sample shown,⁴¹ and
- a consumer must receive clear title to the goods —that is, the seller must be entitled to sell the goods and consumers can expect to own the goods outright.

The statutory *warranties* in the TPA require that:

- the consumer will enjoy quiet possession of the goods, and
- the goods are free from any charge or encumbrance not disclosed to the consumer.⁴²

Supply of services

All contracts for services contain a number of statutory *warranties*. Existing section 74 of the TPA requires that:

- any service must be carried out with due care and skill
- any materials supplied in connection with the service must be reasonably fit for the purpose for which they are supplied, and
- the service, and any materials supplied in connection with the service, should be reasonably fit for any particular purpose the consumer made known to the seller.

39. Section 71 of the TPA.

40. Section 71 of the TPA.

41. Sections 70 and 72 of the TPA.

42. Section 69 of the TPA.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Existing remedies

If goods or services do not satisfy any one of these warranties (the manufacturer's warranty, an extended warranty or a statutory warranty) or conditions, it is a breach of the contract between the seller and the consumer, and the consumer is entitled to a remedy from the seller. The type of remedy depends on the circumstances but may include repair or replacement of goods, compensation for loss or damage, a refund, or having a service performed again.⁴³

Comment

The discussion about the definition of '*consumer*' above makes clear that small business is not a 'consumer' for the purposes of the Australian Consumer Law. That being the case, if a small business is experiencing difficulty which respect to a product which it has purchased, for example a refrigerator, it will have to rely on the common law warranties and conditions which are set out above.

The extent of the problem

The Standing Committee of Consumer Affairs' National Education and Information Taskforce report provides valuable information about the extent of the problems faced by both business and consumers in relation to the existing laws:

- consumers mostly experienced faults (64 per cent of problems) rather than total product failure (10 per cent)
- problems typically occurred early in product life, within the first three to four months after purchase
- 70 per cent of products were still under warranty (primarily the standard manufacturer's warranty, and generally for 12 months duration) when the problem occurred
- in seven out of 10 cases, consumers first approached either the retailer or the manufacturer, although one in five consumers simply disposed of the product or did nothing because it was out of warranty
- most consumers wanted either a replacement product (46 per cent) or repairs (40 per cent). Only eight per cent wanted a refund of the purchase price. For more than half of the problems experienced (57 per cent), consumers got everything they wanted, but more than a third got nothing at all

43. Commonwealth Consumer Affairs Advisory Council, *Consumer rights: statutory implied conditions and warranties*, Issues paper, op. cit., p. 5.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- when consumers do not get what they are seeking, the key problems are unsatisfactory repairs, time delays, red tape, and a mismatch with what traders are prepared to offer
- both retailers and manufacturers/importers are more likely to offer repairs (50-60 per cent) than replacements (30-40 per cent). They claim to be offering what consumers are seeking, but the research shows consumers are more likely to want a replacement product than a repair
- while a quarter of problems were resolved on the spot (by replacement, repair, or refund) and many others led to proactive moves by traders, almost one in five consumers were ‘fobbed off’—told to contact the manufacturer, send the product off, or told there was nothing wrong or to sort it out themselves
- only one in six consumers sought advice when things didn’t turn out as hoped, and this was mostly from personal or technical sources—family, friends, colleagues, repairers, manufacturers or product websites. Only three per cent of consumers not receiving full redress contacted government fair trading/consumer affairs agencies
- most problems were sorted out within about a week, but about one in seven took more than a month to resolve.⁴⁴

Similarly, Consumer Affairs Victoria reports:

It is estimated that over half of total consumer detriment (around \$3.3 billion for the 12 months to July 2008) is attributable to problems that relate to warranties and refunds, such as faulty or damaged goods or services, services not performed or below standard, or repairs not carried out effectively.⁴⁵

Commonwealth Consumer Affairs Advisory Council report

On 30 October 2009 the Commonwealth Consumer Affairs Advisory Council presented the Minister for Competition Policy and Consumer Affairs, the Hon Dr Craig Emerson MP, with its final report.⁴⁶ That report recommended a raft of changes to improve the legal framework for consumer rights that apply to the acquisition of goods and services. Those recommendations are the basis for the proposed amendments.

44. National Education and Information Taskforce, *Baseline study for statutory warranties and refunds*, Research paper no. 2, October 2009, p. 8, viewed 12 May 2010, http://www.consumer.gov.au/html/download/National_baseline_study.pdf

45. Consumer Affairs Victoria, *Warranties and refunds in the electronic goods, white goods and mobile telephone industries*, Research paper no. 17, May 2009, p. 1, viewed 12 May 2010, [http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines_2/\\$file/Warranties_and_Refunds_Research_Paper.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines_2/$file/Warranties_and_Refunds_Research_Paper.pdf)

46. Commonwealth Consumer Affairs Advisory Council, *Consumer rights: reforming statutory implied conditions and warranties*, Final report, op. cit.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Proposed provisions

Proposed sections 51–59 formally codify the rights of consumers in relation to the goods they buy. The most contentious of these is **proposed section 54**—a guarantee of ‘acceptable quality’. This is a significant change from the existing requirement that goods be of ‘merchantable quality’. **Proposed subsections 54(2)** and **(3)** provide that goods will be of ‘acceptable quality’ if they satisfy all of the following criteria:

- fitness for all the purposes for which goods of that kind are commonly supplied
- acceptable in appearance and finish
- free from defects
- safe, and
- durable.

The test to be applied is that of a reasonable consumer, fully acquainted with the state and condition of the goods (including any hidden defects of the goods), having regard to:

- the nature of the goods
- the price of the goods (if relevant)
- any statements made about the goods on any packaging or label on the goods
- any representation made about the goods by the supplier or manufacturer of the goods, and
- any other relevant circumstances relating to the supply of the goods.

However, **proposed subsections 54(6)–(7)** provide that goods will not fail the ‘acceptable quality’ test in circumstances where the consumer misuses or damages the goods or where the consumer examined the goods prior to purchase, and that examination ought reasonably to have revealed that the goods were not of acceptable quality.

Proposed subsection 59(1) contains a guarantee that where a manufacturer provides an express warranty⁴⁷ in relation to goods, the manufacturer will comply with the warranty, provided that the supply to the consumer was not by way of auction. **Proposed subsection 59(2)** imposes a similar requirement upon the supplier of goods if the supplier provided an express warranty in relation to the goods.

Proposed sections 60–63 formally codify the guarantees relating to the supply of services. In particular, **proposed section 60** creates a broad requirement that where a person supplies services to a consumer, they will be rendered with ‘due care’ and skill. **Proposed section 63** excludes contracts of insurance, and contracts for the transportation or storage

47. An express warranty is also known as a manufacturer’s warranty.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

of goods for the purposes of a business, trade, profession or occupation from the guarantees referred to in **proposed sections 60–62**.

The submission from Stephen Corones, Professor of Law, Queensland University of Technology questions the use of the term ‘due care’ in proposed section 60:

... and whether it is intended to reflect the common law standard of ‘reasonable care’ or to impose a more stringent standard, in the same way the new standard of ‘acceptable quality’ in relation to goods is more stringent than the current standard of ‘merchantable quality’.⁴⁸

He has suggested that:

... the standard required by the guarantee in section 60 of the ACL should be that the supplier must exercise such care and skill as is necessary to complete the contract in an acceptable way. It should mirror the standard of acceptable quality imposed in relation to goods.⁴⁹

Senate Committee recommendation

The Senate Committee noted the low rate of Australian consumers’ awareness of their statutory rights when purchasing goods and services, particularly in relation to warranties. It recommended that:

the Government introduce a programme to educate Australian consumers about their statutory rights ... particularly ... about the guarantee that goods must be of ‘acceptable quality’, which may offer protection above that included in manufacturers or extended warranty contracts.⁵⁰

Exemption for architects and engineers

Existing subsection 74(2) of the TPA essentially exempts professional services provided by a qualified architect or engineer from the requirement that the services they render are ‘fit for the purpose’. Importantly, the exemption for architects and engineers is not replicated in the Bill.

Submissions to the Senate Committee from both Engineers Australia and the Australian Institute of Architects strongly argued that the exemption should be retained on the grounds that the services they provide are affected by both builders and the construction

48. S Corones, Submission to Economics Legislation Committee, *Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 [Provisions]*, 30 April 2010, p. 1.

49. *Ibid.*, p. 6.

50. Economics Legislation Committee, *op. cit.*, p. 34.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

materials that are utilised.⁵¹ Both cited concerns that it may not be possible to obtain sufficient and relevant insurance coverage in response to the proposed legislative requirements.

Senate Committee recommendation

The additional comments by the Coalition Senators included a recommendation that the exemption for engineers and architects be retained in the Australian Consumer Law.⁵²

Unsolicited consumer agreements

The nature of the problem

The recently published report entitled '*Shutting the gates*' provides valuable insight into the on-going problem of in-home selling as follows:

Consumer groups and policy makers have concerns about the high pressure selling techniques used in some in-home sales (IHS).

IHS differs [from door-to-door selling] in that a consumer makes an appointment, and therefore a practical and psychological commitment, for a salesperson to visit their home. The invitation is most often orchestrated by the seller of the product, for example through a competition entry or by soliciting names at a shopping centre or home-show. The consumer 'invites' the salesperson into their home environment to provide what many consumers believe to be an educational assessment. The salesperson then undertakes an extended and highly contrived sales process to convince the consumer of the need for the educational software. During this sales process, a number of key psychological and social processes are activated or employed to increase the likelihood that certain consumers will sign up to contracts for educational software (often with related finance) that can result in financial stress.⁵³

51. Engineers Australia, Submission to Economics Legislation Committee, *Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 [Provisions]*, April 2010 and Australian Institute of Architects, Submission to Economics Legislation Committee, *Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 [Provisions]*, 30 April 2010.

52. Economics Legislation Committee, op. cit., p. 92.

53. P Harrison, M Massi, K Chalmers and Consumer Action Law Centre, *Shutting the gates: an analysis of the psychology of in-home sales of educational software*, March 2010, p. 4, viewed 2 June 2010, <http://www.consumeraction.org.au/downloads/ShuttingtheGates.pdf>

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Proposed provisions

Proposed sections 69–95 relate to unsolicited consumer agreements. In particular, **proposed section 69** sets out the characteristics of an *‘unsolicited consumer agreement’* as:

- an agreement for the supply of goods or services to a consumer
- made as a result of negotiations between a dealer and the consumer **at a place other than the business or trade premises** of the supplier of the goods or services, **or by telephone**
- the **consumer did not invite the dealer** to come to that place, or **to make a telephone call**, and
- the total price paid or payable by the consumer under the agreement is not ascertainable at the time the agreement is made, or if it is ascertainable at that time, the price is more than \$100, or another amount prescribed by the regulations.

In addition, the Bill contains the following consumer protections:

- the hours during which an unsolicited consumer agreement may be negotiated are specified: **proposed section 73**
- any dealer who seeks to enter into an unsolicited consumer agreement with a person must advise the person of their purpose and their identity, and must tell the person that the dealer must leave the premises on request: **proposed section 74**
- a dealer who has been asked to leave premises must not contact the prospective consumer again for at least 30 days: **proposed section 75**
- a person must be informed by the dealer that they have the right to terminate an unsolicited consumer agreement, and how to do so: **proposed section 76**
- the termination period (‘cooling off’) is 10 business days starting on the first business day after the an unsolicited consumer agreement was made: **proposed section 82**
- where an unsolicited consumer agreement is terminated, it is taken to be rescinded and any related contract or instrument (such as a finance contract) is void: **proposed section 83**
- the supplier under an unsolicited consumer agreement is prohibited from supplying the goods to the consumer or accepting any payment during the ‘cooling off’ period: **proposed section 86.**

Issues

According to the Senate Committee four key issues were highlighted by submitters to the inquiry:

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- the definition of ‘unsolicited consumer agreements’ and concerns that this may be too narrow to protect vulnerable consumers from ‘solicited’ door-to-door selling
- the restriction on the hours during which an unsolicited consumer agreement can be negotiated
- the proposed 10 business day cooling off period, and
- the prohibition of supplies to the consumer during the cooling off period.⁵⁴

Senate Committee recommendation

The Explanatory Memorandum makes it clear that the section is intended to capture the circumstances set out in the ‘*Shutting the gates*’ report.⁵⁵ However, having regard to the vulnerability of some consumers to the marketing techniques of in-home traders, and in response to the submissions from Legal Aid Queensland⁵⁶ and the Consumer Action Law Centre⁵⁷, the Senate Committee recommended that:

the bill defines an ‘unsolicited consumer agreement’ to include circumstances in which consumers are contacted (and contact dealers) through indirect means. This should include circumstances where a consumer is contacted in relation to the supply of goods or services after providing his or her name or contact details to a person, and the predominant purpose for providing those details was not to supply those goods or services, and where a consumer contacts a dealer in response to a ‘missed call’.⁵⁸

In their additional comments, the Coalition Senators stated that they agreed that the definition of ‘unsolicited consumer agreement’ should contain those matters dealt with in the recommendation.⁵⁹

The Senate Committee considered the submissions in relation to the other three issues raised, but did not recommend any changes to the Bill in relation to those matters.

54. Economics Legislation Committee, op. cit., p. 49.

55. Explanatory Memorandum, op. cit., p. 218.

56. Legal Aid Queensland, Submission to Economics Legislation Committee, *Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 [Provisions]*, 14 April 2010.

57. Consumer Action Law Centre, Submission to Economics Legislation Committee, *Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 [Provisions]*, 21 April 2010.

58. Economics Legislation Committee, op. cit., p. 54.

59. Ibid., p. 92.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Civil penalties

Item 5 in the table contained in **proposed subsection 224(3)** provides for civil penalties of up to \$50 000 for corporations and up to \$10 000 for individuals who breach the provisions of proposed sections 74–76, 78–81, 84 and 87–90 which contain the provisions about unsolicited consumer agreements.

It should also be noted that **proposed sections 278–286** relate to liability of suppliers and credit providers. In essence these provisions makes suppliers of goods and services and a person providing certain types of connected finance jointly liable for certain breaches of contract in relation to either the contract of sale or the linked credit contract.

Lay-by agreements

Proposed sections 96–99 relate to lay-by agreements. There are no comparable provisions in the TPA, as the existing laws about lay-by are state-based. Lay-by agreements are defined in **proposed subsection 96(3)** as an agreement between the supplier of consumer goods and a consumer by which the consumer pays for the goods by (three or more) instalments and the consumer goods remain in the possession of the supplier until the final instalment is paid. ‘Lay-by provides a means for consumers to afford a more expensive purchase through paying by instalments without having to become a borrower’.⁶⁰

Issue

The Consumer Law Action Centre sets out the problems with lay-by, in the absence of specific regulation, as follows:

... both consumers and suppliers were often confused about the specific terms and conditions of their lay-by agreement because there were no minimum standards and thus terms relating to cancellation and refund rights for both consumers and suppliers varied greatly from supplier to supplier. Traders faced problems in dealing with customer defaults and extra administration costs. Consumers also faced a range of problems, including being unable to obtain a refund and thus losing deposit and instalment payments, suppliers going into liquidation and contracts being cancelled without notice. Consumers who experienced financial hardship and thus became unable to complete payment of remaining instalments could also be left unfairly stuck—between being unable to complete the agreement and unable to cancel and obtain a refund of payments already made.⁶¹

60. Consumer Law Action Centre, op. cit., p. 17.

61. Ibid.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Proposed provisions

The Bill contains the following consumer protections:

- where a lay-by agreement is terminated by either party to the agreement before the goods are delivered to the consumer, the supplier must refund all the amounts already paid by the consumer: **proposed section 99**.
- where the consumer terminates the lay-by agreement—the consumer may be required to pay a *‘termination charge’* only if, the written lay-by agreement sets out the requirement for a termination charge, and the supplier has not breached the lay-by agreement: **proposed subsection 97(2)**. In addition, the amount of the termination charge must be no more than the supplier’s reasonable costs in relation to the agreement: **proposed subsection 97(3)**
- a supplier must not terminate a lay-by agreement unless:
 - the consumer has breached a term of the agreement, or
 - the supplier is no longer engaged in trade or commerce, or
 - the consumer goods to which the agreement relates are no longer available: **proposed section 98**.

Whilst the intention is that a consumer is entitled to a refund of monies paid in the event that the agreement is terminated, the consumer is not a secured creditor or entitled to any priority in the case of bankruptcy or insolvency.

Civil penalties

Item 6 in the table contained in **proposed subsection 224(3)** provides for penalties of up to \$30 000 for corporations and up to \$6000 for individuals who breach the lay-by provisions.

Consumer guarantees—remedies

Issue—‘lemon laws’

When the review of statutory warranties and conditions was announced, Chris Bowen MP stated that:

The review will also examine the need for a ‘lemon law’ in Australia and whether or not they would provide an effective mechanism for consumers to seek the appropriate redress when purchasing motor vehicles that fail to meet their reasonable expectations.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

This review will explore the issue of whether or not ‘lemon laws’ are the best way to help consumers respond to motor vehicles they may have purchased, that repeatedly fail to meet expected standards of performance and quality.⁶²

According to the Commonwealth Consumer Affairs Advisory Council

The idea of the ‘lemon’ as an undesirable or unsatisfactory thing has been in common use for at least one hundred years, particularly in the United States... In its colloquial use, a lemon is considered to be something that is completely useless or without value. It is something that will not function as intended and, when bought, returns to its owner more grief than utility.⁶³

A lemon law in respect of a motor vehicle would protect motorists who purchase vehicles that suffer repeated repairs on the same component, or endure a vehicle which is susceptible to the failure of numerous components over a set period of time. A problem must occur within a set time frame from purchase, with the overall aim being to limit the chance of a manufacturer repairing the vehicle repeatedly until the end of the warranty period, by which time the repair costs are then payable by the owner. In the United States the *Magnuson-Moss Warranty Act* protects citizens of all states and covers anything mechanical.

The Commonwealth Consumer Affairs Advisory Council did not consider that a law, specific to the purchase of motor vehicles was necessary. Instead the Bill contains generic provisions which dictate whether a failure is ‘major’ or ‘minor’ as a precondition for a consumer rejecting goods.

Proposed provisions

The remedies which are available to a consumer, when consumer guarantees are not complied with, are set out in **proposed sections 259–266** of the Bill. The Bill refers to failures to comply with consumer guarantees in respect of goods as either major or minor failures. The applicable remedy depends on which guarantee has not been complied with, and whether the failure to comply is of a major or minor nature.

Minor failure

Where the failure is not a major failure, and can be remedied, the consumer may require the supplier to remedy the failure within a reasonable time. **Proposed section 261**

62. C Bowen (Assistant Treasurer and Minister for Competition Policy and Consumer Affairs), *Review of statutory warranties and conditions*, media release, no. 14, 12 March 2009, viewed 16 June 2010
<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FVU3U6%22>

63. Commonwealth Consumer Affairs Advisory Council, *Consumer rights: reforming statutory implied conditions and warranties*, *Final report*, op. cit., p. 91.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

provides that where a supplier is required to remedy a minor failure, the supplier may comply with that requirement as follows:

- if the failure relates to title—by curing any defect in title
- if the failure does not relate to title—by repairing the goods
- by replacing the goods with goods of an identical type, or
- by refunding any money paid by the consumer for the goods and an amount that is equal to the value of any other consideration provided by the consumer for the goods.

If the supplier does not comply with the requirement, or does not comply within a reasonable time, the consumer may either:

- have the failure remedied and then take action against the supplier to recover the reasonable costs he or she has incurred, or
- under some limited circumstances the consumer may notify the supplier that he or she rejects the goods.

Those limited circumstances are set out in **proposed section 262** which provides that a consumer is not entitled to reject goods if:

- the *‘rejection period’* for the goods has ended⁶⁴
- the goods have been lost, destroyed or disposed of by the consumer
- the goods were damaged after being delivered to the consumer for reasons not related to their state or condition at the time of supply, or
- the goods have been attached to, or incorporated in, any real or personal property and they cannot be detached or isolated without damaging them.

Major failure

Under **proposed section 260**, a *‘major failure’* applies to goods if:

- the goods would not have been acquired by a reasonable consumer *fully acquainted* with the nature and extent of the failure
- the goods depart, *in one or more significant respects*, from the description, or any sample or demonstration model on which the supply of the goods was based

64. The *‘rejection period’* for goods is the period from the time of the supply of the goods to the consumer within which it would be reasonable to expect the relevant failure to comply with a guarantee to become apparent having regard to the type of goods, the use to which they are put, the length of time for which it is reasonable for them to be used, the amount of use to which the goods are put before the failure became apparent and the grounds for rejection: **proposed subsection 262(2)**.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- the goods are substantially unfit for a purpose for which goods of the same kind are commonly supplied and they cannot, easily and within a reasonable time, be remedied to make them fit for such a purpose
- the goods are unfit for a disclosed purpose that was made known to the supplier and they cannot, easily and within a reasonable time, be remedied to make them fit for such a purpose; or
- the goods are not of acceptable quality because they are unsafe.

In the case of a major failure, the consumer may, under **proposed subsection 259(3)**, either reject the goods (in the same circumstances as above) or in the alternative, take action against the supplier to:

- recover compensation for any reduction in the value of the goods below the price paid, or
- recover damages for any loss or damage suffered by the consumer because of the failure to comply with the guarantee if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure.

The submission from Telstra considered there should be ‘greater clarity of new and unfamiliar terms (such as major failure)’ on the grounds that:

... it is defined by use of terms that are new and in respect of which there is no jurisprudence. For example, when would a consumer be ‘fully acquainted’ with the nature and extent of the failure? When does a good ‘depart significantly’ from its description? The [Explanatory Memorandum] gives the example of a red bicycle, stating that a red bicycle might depart significantly from a green bicycle. Is the fact the bicycle actually works properly not relevant to whether there is a ‘significant departure’ or not? If a handset includes all major functions (for example you can make calls and SMS) but is missing an ancillary function that is referred to in the technical specification for the handset, such as a news or weather shortcut or application, would that be a ‘significant departure’? In whose view does there need to be a ‘significant departure’? Is the assessment quantitative or qualitative? Questions such as these need to be clarified and are of critical importance so that consumers and businesses are able to readily assess whether a failure is major or not major, as it will dictate the appropriate remedies and redress.⁶⁵

Senate Committee recommendation

In response to these valid concerns, the Senate Committee recommended that the ACCC and consumer regulators should issue national guidance in relation to the new consumer

65. Telstra Corporation Ltd., Submission to Economics Legislation Committee, *Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 [Provisions]*, 16 April 2010.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

guarantees to ensure regulators, consumers and businesses have a consistent understanding of their new rights and responsibilities.⁶⁶

Rejected goods

Where a consumer opts to reject goods, **proposed section 263** requires two things:

- the consumer—must return the goods to the supplier unless the goods have already been returned, or the consumer cannot return the goods without significant cost because of matters such as the size or height, or method of attachment, of the goods
- the supplier—must, depending on what the consumer elects, either:
 - **refund** any money paid by the consumer for the goods as well as any amount that is equal to the value of any other consideration provided by the consumer for the goods, or
 - **replace** the rejected goods with goods of the same type, and of similar value, if such goods are reasonably available to the supplier: **proposed subsection 263(4)**.

Importantly, **proposed section 265** covers those circumstances where a supplier of goods also supplies services connected with those goods—for example, a supplier of a mobile phone handset may also provide mobile telephone services under a separate contract. In that case, where a consumer notifies the supplier that he or she rejects goods, and the supplier is required to give the consumer a refund, then the consumer is taken to have terminated the contract for the supply of the services at the time the consumer elects that the refund be given.

Proposed sections 267–270 operate in similar terms for a failure of a guarantee in respect of services.

Actions against manufacturers

Proposed sections 271–273 give an ‘*affected person*’⁶⁷ the right to take action against a manufacturer of goods to recover damages in respect of the following guarantees:

- that the goods supplied are of acceptable quality—section 54
- that goods supplied by description comply with the description—section 56

66. Economics Legislation Committee, op. cit., p. 36.

67. The term ‘*affected person*’ in relation to goods is defined in **proposed section 2** of the Australian Consumer Law as (a) a consumer who acquires the goods, (b) a person who acquires the goods from the consumer (other than for the purpose of re-supply), or (c) a person who derives title to the goods through or under the consumer.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- that a manufacturer of goods will take reasonable action to ensure that facilities for the repair of goods and parts for the goods are reasonably available for a reasonable period after the goods are supplied—section 58, and
- that the manufacturer of goods will comply with any express warranty given or made by the manufacturer in relation to the goods—section 59.

Manufacturers are required to indemnify suppliers in respect of the costs of complying with the guarantee obligations related to acceptable quality, descriptions applied to goods by manufacturers and fitness for a purpose that a consumer makes known to a manufacturer: **proposed section 274**.

Proposed section 277 authorises the regulator to take action in relation to remedies for consumer guarantees, on behalf of one or more persons.

National consumer product safety provisions

Background

Prior to August 2004, the Standing Committee of Officials of Consumer Affairs (SCOCA) identified two major areas for improvement in Australia's consumer product safety regulatory system.

Firstly, the system needed to be able to deal with potential safety hazards more swiftly, with a greater emphasis on the prevention of problems, rather than on reacting once consumers suffered harm.

The second set of problems concern the impact of the system on the efficient trade in consumer products throughout Australia and the efficient use of government regulatory resources. Many of these problems relate to the fragmentation of product safety regulation amongst the different jurisdictions in Australia, accompanied by a lack of uniformity in product safety legislation and its administration.⁶⁸

To further inform the debate on how best to bring about these improvements, the Ministerial Council on Consumer Affairs issued a discussion paper in August 2004. Following on from the responses to the discussion paper, an options paper was circulated in August 2005.⁶⁹

68. Ministerial Council on Consumer Affairs, *Review of the Australian consumer product safety system, Discussion paper*, Commonwealth of Australia, August 2004, viewed 3 June 2010, http://www.consumer.gov.au/html/Consumer_Product_Safety_Review/download/Consumer_Product_Safety_Review.pdf

69. Ministerial Council on Consumer Affairs, *Review of the Australian consumer product safety system, Options paper*, Commonwealth of Australia, August 2005, viewed 3 June 2010, http://www.consumer.gov.au/html/product_safety/downloads/product_safety.pdf

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Productivity Commission

In March 2005, the then Coalition Government asked the Productivity Commission to undertake a research study into Australia's consumer product safety laws and to examine the various reform options raised in the discussion paper of August 2004.

The Productivity Commission subsequently made a number of findings, including that there were a number of ways governments could make the regulation of consumer product safety more efficient, effective and responsive, the priorities being:

- addressing fragmented policy making, administration and enforcement through a much stronger national approach
- addressing significant data and information gaps
- improving the responsiveness of government regulation to existing and emerging product-related hazards
- focusing more strongly on hazard identification, risk assessment and risk management
- improving the standards-making process
- ensuring the regulation of consumer product safety is adequately resourced, and
- clarifying boundaries and areas of responsibility between the general consumer product safety system and the specific safety regimes.⁷⁰

In another report, on its Review of Australia's Consumer Policy Framework, the Productivity Commission reiterated its earlier comments that

... the Australian Government, through the Australian Competition and Consumer Commission (ACCC), should be responsible for enforcing the product safety provisions nationally, though possibly with scope for states and territories to implement, time limited, interim product safety bans.⁷¹

Input by COAG

On 3 July 2008, COAG announced that it had taken:

... a significant step in streamlining the processes associated with ensuring the safety of consumer products. COAG has agreed that the Commonwealth will assume responsibility for the making of permanent product bans and standards under the *Trade Practices Act 1974*. States will retain powers to issue interim product bans.⁷²

70. Productivity Commission, *Review of the Australian Consumer Product Safety System, Research report*, Commonwealth of Australia, Melbourne, 7 February 2006, viewed 3 June 2010, <http://www.pc.gov.au/projects/study/productsafety/docs/finalreport>

71. Productivity Commission, *Review of Australia's Consumer Policy Framework*, op. cit., p. 23.

72. Council of Australian Governments, *Communiqué*, 3 July 2008 p. 3.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Safety standards

Proposed sections 104–108 provide for the making of, and compliance with, safety standards. In particular, **proposed subsection 104(1)** empowers the Commonwealth Minister to make a safety standard for consumer goods of a particular kind and/or product related services⁷³ of a particular kind. Any such standard must be published on the internet.⁷⁴

Under **proposed subsection 104(2)** a safety standard for *consumer goods* of a particular kind may consist of requirements about the following matters which are reasonably necessary to prevent or reduce risk of injury to a person:

- the performance, composition, contents, methods of manufacture or processing, design, construction, finish or packaging of the consumer goods
- the testing of consumer goods of that kind during, or after the completion of, manufacture or processing
- the form and content of markings, warnings or instructions to accompany the consumer goods.

Under **proposed subsection 104(3)** a safety standard for a *product related service* of a particular kind may consist of requirements about the following matters which are reasonably necessary to prevent or reduce risk of injury to a person:

- the manner in which services of that kind are supplied (including, but not limited to, the method of supply)
- the skills or qualifications of persons who supply such services
- the materials used in supplying such services
- the testing of the services, and
- the form and content of warnings, instructions or other information about the services.

In addition, the Commonwealth Minister may declare, by written notice published on the internet, that an existing standard, such as one prepared and approved by Standards Australia to be a '*safety standard*'. **Proposed subsection 106(1)** prohibits a person from supplying consumer goods that do not comply with a safety standard once that standard is in force. Further, **proposed subsection 106(3)** prohibits a person from manufacturing,

73. The term '*product related service*' is defined in **proposed section 2** of the Bill, to mean a service for or relating to (a) the installation of consumer goods of a particular kind, (b) the maintenance, repair or cleaning of consumer goods of a particular kind, (c) the assembly of consumer goods of a particular kind, or (d) the delivery of consumer goods of a particular kind and includes any other service that relates to the supply of consumer goods of that kind.

74. According to **paragraph 131E(1)(b) of Schedule 2** to the Bill the written notice is a legislative instrument in accordance with the *Legislative Instruments Act 2003*.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

possessing or having control of consumer goods, if the supply of those goods is prohibited under **subsection 106(1)**. The export of goods which are the subject of the prohibition in subsection 106(1) will be strictly controlled. A person wishing to export such goods must first seek the written approval of the Minister.⁷⁵ Where approval is given the Minister must make a statement setting out the particulars of the approval to be tabled in each House of the Parliament within seven sitting days of the date that the approval is given.

Proposed section 107 contains a similar prohibition on the supply of product related services if a safety standard is in force, and the services do not comply with the standard.

Civil penalties

Item 9 in the table contained in **proposed subsection 224(3)** provides for penalties of up to \$1.1 million for corporations and up to \$220 000 for individuals who breach the prohibition against supplying goods that do not comply with safety standards.

Bans on consumer goods and product related services

Proposed sections 109–121 set out the rules related to bans of certain goods and services. There are two types of bans—interim and permanent.

An interim ban may be imposed on consumer goods where it appears to the ‘responsible Minister’ that consumer goods of a particular kind may, or will, cause injury to a person, or a *reasonably foreseeable use, or misuse*, of the consumer goods may, or will, cause injury to a person.⁷⁶ The responsible Minister may also impose an interim ban on product related services if it appears that as a result of the supply of the services, consumer goods may, or will, cause injury to a person, or that the use or misuse of such consumer goods may, or will, cause injury to a person. The interim ban must take the form of a written notice, published on the internet: **proposed subsections 109(1)–(2)**.⁷⁷

An interim ban imposed by the Commonwealth Minister applies in all States and Territories. However an interim ban imposed by a responsible Minister who is a Minister of a State or a Territory applies only in that State or Territory: **proposed section 110**.

75. The written approval given by the Minister to the person is not a legislative instrument according to **paragraph 131E(2)(a) of Schedule 2** to the Bill.

76. The term ‘*responsible Minister*’ is defined in section 2 to mean a Commonwealth Minister, the Minister of a State who administers the application law of the State or the Minister of a Territory who administers the application law of the Territory.

77. According to **paragraph 131E(1)(c) of Schedule 2** to the Bill the written notice imposing an interim ban is a legislative instrument in accordance with the *Legislative Instruments Act 2003*.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

The period of an interim ban is initially 60 days. However, before the ban period has ended the responsible Minister may extend the ban period for a further 30 days.⁷⁸ If the original ban was not imposed by the Commonwealth Minister, then, before the 30 day extension has elapsed, the responsible Minister may request the Commonwealth Minister to extend the interim ban by a further 30 days. If the Commonwealth Minister has not made a decision by the time that the extension period has elapsed, the Commonwealth Minister is deemed to have made a decision that the ban will extend for a further 30 days—taking the period of the interim ban to a maximum of 120 days: **proposed section 111**.

The Commonwealth Minister may, by written notice published on the internet, impose a permanent ban on consumer goods or product related services where it appears that the consumer goods may, or will cause, injury to a person or that the reasonable use or misuse of the goods may, or will cause, injury to a person: **proposed section 114**.⁷⁹ Once a permanent ban is imposed, it applies in all States and Territories. Just as the Commonwealth Minister has the power to impose a permanent ban, so too, the Commonwealth Minister has the power to revoke such a ban. In that case the Commonwealth Minister must publish a written notice on the internet revoking the ban.⁸⁰

A person must not supply consumer goods: **proposed section 118**, or product related services: **proposed section 119** which are covered by a ban.

Issue—reasonably foreseeable use, or misuse

The Law Council of Australia submitted that ‘it is not clear on the face of the legislation what is meant by ‘reasonably foreseeable use’ and in particular, ‘misuse’.⁸¹ In particular it was concerned that:

... the legislature intends for the concept of ‘reasonably foreseeable use’ to capture not only unintended misuse by a user (for example, due to some design defect), but also any deliberate use of a good in an unintended manner.⁸²

78. According to **paragraph 131E(1)(d) of Schedule 2** to the Bill the written notice to extend an interim ban is a legislative instrument in accordance with the *Legislative Instruments Act 2003*.

79. According to **paragraph 131E(1)(f) of Schedule 2** to the Bill the written notice to impose a permanent ban is a legislative instrument in accordance with the *Legislative Instruments Act 2003*.

80. According to **paragraph 131E(1)(e) of Schedule 2** to the Bill the written notice revoking a ban is a legislative instrument in accordance with the *Legislative Instruments Act 2003*.

81. Law Council of Australia, op. cit., p. 12.

82. Ibid.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Treasury responded to this criticism by stating that the Minister needed to take action where common uses of a good may pose a safety risk stating that the provision:

... is not intended to cover situations where a consumer has unreasonably used a product, after taking into account the ordinary use which a product of that kind is safely put to and the presence of any warning or other information. Nor is it intended to cover a deliberate misuse of a good where such use cannot reasonably be foreseen.⁸³

Civil penalties

Item 9 in the table contained in **proposed subsection 224(3)** provides for penalties of up to \$1.1 million for corporations and up to \$220 000 for individuals who breach the prohibition against supplying goods or services that are subject to a ban.

Recall of consumer goods

Proposed sections 122–128 set out the process for the recall of consumer goods. In particular **proposed section 122** provides that the responsible Minister may issue a notice for the compulsory recall of consumer goods of a particular kind⁸⁴ where, amongst other things:

- it appears to the responsible Minister that the goods will or may cause injury to any person
- it appears to the responsible Minister that a reasonably foreseeable use (including a misuse) of such goods will or may cause injury to any person
- a safety standard for such goods is in force and the goods do not comply with the standard
- an interim ban, or a permanent ban, on such goods is in force.

The required contents of a recall notice are set out in **proposed section 123**. Under **proposed paragraph 123(1)(c)** a recall notice directed to a supplier may require the supplier to inform the public, or a class of persons specified in the notice, that the supplier undertakes to repair the goods, replace the goods or refund the purchase price of the goods to the supplier. However, if the identity of the supplier or suppliers is not known, the recall notice may direct the regulator to take action.

Where a supplier is given a notice under paragraph 123(1)(c), the cost of any repair or replacement of the goods, and any transport costs incurred, must be paid by the supplier:

83. Treasury, op. cit., p. 33.

84. According to **paragraph 131E(1)(h) of Schedule 2** to the Bill the written notice for the compulsory recall is a legislative instrument in accordance with the *Legislative Instruments Act 2003*.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

proposed section 124. If a recall notice for consumer goods is in force, a person must comply with the notice and must not supply those goods to a person: **proposed section 127.**

Proposed section 128 contemplates that a person may take voluntary action to recall consumer goods in circumstances where:

- the consumer goods may cause injury to another person
- a safety standard is in force for the consumer goods and the consumer goods do not comply, or it is likely that they do not comply with the standard, or
- an interim ban or a permanent ban on the consumer goods is in force.

Where a person does voluntarily recall consumer goods, the person must, within two days give the Commonwealth Minister a written notice in the form prescribed in **proposed subsection 128(7)** setting out the reasons for the voluntary recall. Upon receipt of that notice the Commonwealth Minister may publish a copy of the notice on the internet.⁸⁵

Civil penalties

Item 11 in the table contained in **proposed subsection 224(3)** provides for penalties of up to \$1.1 million for corporations and up to \$220 000 for individuals who fail to comply with a recall notice as required by proposed section 127.

Item 12 in the table contained in **proposed subsection 224(3)** provides for penalties of up to \$16 500 for corporations and up to \$3 300 for individuals who fail to comply with the requirement to notify the Commonwealth Minister of voluntary recall action within the relevant time frame.

Consumer goods, or product related services associated with death or serious injury or illness

The nature of the problem

The Productivity Commission report describes the problems with the existing system for identifying significant hazards which should be removed from the market as follows:

- there is little direct integration of injury data and regulatory action—emerging problems with products tend to be identified informally by regulators, sometimes including informal input from coroners and injury surveillance units
- the system often appears to be driven excessively by pressure to deal with the latest ‘problem product’, rather than by an objective and even-handed assessment of all the

85. According to **paragraph 131E(2)(c) of Schedule 2** to the Bill that written notice is not a legislative instrument in accordance with the *Legislative Instruments Act 2003*.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

hazards associated with a generic product and the costs and benefits of government intervention, and

- duplication of hazard evaluation occurs as jurisdictions may undertake separate assessments of the risks attached to a product and, in some cases, may not share the results for considerable periods of time.⁸⁶

Proposed section 131 requires a *'supplier'* who becomes aware that consumer goods of *'a particular kind'* have been *'associated with'* the death or serious injury or illness of a person to give the Commonwealth Minister a notice to that effect within two days.⁸⁷ Similarly **proposed section 132** imposes the same requirement on a supplier of product related services where consumer goods to which those services relate have been associated with the death or serious injury or illness of a person.

It is appropriate to revisit the definition of *'supply'* here. As already stated, a supply of goods is a sale, exchange, lease, hire or hire-purchase, whilst a supply of services is to provide, grant or confer services. This means that a manufacturer is also a supplier of goods and so must comply with these reporting requirements.

Issue—'associated with'

Of concern to many of the submitters to the Senate Committee inquiry was the requirement to report an injury, illness or death 'associated with' the supply of a good or service. Freehills argues that:

in ordinary parlance, the term 'associated with' may have a very general connotation of 'being involved with' or 'having some connection with'. The phrase does not necessarily connote a causative relationship.

The use of the phrase in the Bill means that the reporting obligation will be enlivened if a supplier becomes aware that the consumer goods in question were in some way involved with or connected with a death or serious injury or illness. This will be so even if there is no suggestion or possibility that the goods caused or contributed in (in a legal sense) the death or serious illness or injury.⁸⁸

86. Productivity Commission, *Review of the Australian Consumer Product Safety System*, op. cit., p. 200.

87. **Item 13** of Schedule 5 to the Bill inserts a new definition of *'personal injury'* as including a pre-natal injury, impairment of a person's physical or mental condition or disease but does not include an impairment of a person's mental condition unless the impairment consists of a psychiatric illness.

88. Freehills, op. cit., p. 16.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Hasbro Australia Limited complains of the burden on industry in that ‘not only the manufacturer of the good involved with the incident but all other suppliers in the supply chain would have to report the same incident’.⁸⁹

The Senate Committee noted the cautionary comment by Associate Professor Luke Nottage from the Faculty of Law, University of Sydney, ‘that reporting duties must be supported by adequate information systems with government to ensure consumers benefit from the policy’.⁹⁰ Importantly the Bill does not give any indication of how or where these notifications will be held. However the Senate Committee has stated that:

On 15 April 2010, Consumer Affairs Minister Dr Craig Emerson launched a new clearing house government website, www.productsafety.gov.au, for the publication of information garnered through product safety information collected voluntarily or under duties provisions in the bill. The website will be administered by the ACCC and will be the main vehicle for information to be conveyed to the public.⁹¹

Civil penalties

Item 12 in the table contained in **proposed subsection 224(3)** provides for penalties of up to \$16 500 for corporations and up to \$3 300 for individuals who fail to serve the required notice within the two day time limit.

Information standards

Proposed sections 134–137 contain provisions about information standards. In particular, **proposed subsections 134(1) and 135(1)** empower the Commonwealth Minister, by written notice published on the internet, to make an ‘*information standard*’ for goods and/or services of a particular kind.⁹² **Proposed subsection 134(2)** provides that an information standard may:

- make provision in relation to the content of information about goods or services of that kind
- require the provision of specified information about goods or services of that kind

89. Hasbro Australia Limited, Submission to Economics Legislation Committee, *Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 [Provisions]*, 16 April 2010, p. 3.

90. Economics Legislation Committee, op. cit., p. 64.

91. Ibid.

92. According to **paragraph 131E(1)(i) of Schedule 2** to the Bill the written notice of the information standard is a legislative instrument in accordance with the *Legislative Instruments Act 2003*.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- provide for the manner or form in which such information is to be provided
- provide that such information is not to be provided in a specified manner or form
- provide that information of a specified kind is not to be provided about goods or services of that kind, or
- assign a meaning to specified information about goods or services.

In addition, Commonwealth Minister may declare, by written notice published on the internet, that an existing standard, such as one prepared and approved by Standards Australia is an *'information standard'*. **Proposed sections 136 and 137** impose prohibitions on the supply of good and/or services if an information standard is in force and the goods and/or services do not comply with the information standard.

Civil penalties

Item 13 in the table contained in **proposed subsection 224(3)** provides for penalties of up to \$1.1 million for corporations and up to \$220 000 for individuals who supply goods and/or services which do not comply with the information standard where one is in force.

Liability of manufacturers for goods with safety defects

Proposed sections 138–150 set out the liability of manufacturers of goods with safety defects. In effect, a manufacturer who supplies goods which have a safety defect is liable to compensate a person for the loss or damage caused by the defect, for:

- personal injury—including death—to an individual to whom the defective goods were supplied
- personal injury—including death—to an individual other than the person to whom the defective goods were supplied
- property damaged or destroyed where the property was of a kind that is ordinarily acquired for personal, domestic or household use or consumption and the person used or intended to use the goods for that purpose
- damage or destruction of land, buildings or fixtures which are of a kind ordinarily acquired for private use and the person used or intended to use the land, buildings or fixtures for that purpose

Proposed section 142 sets out the various defences on which a manufacturer may rely. In particular, **proposed paragraph 142(b)** includes the circumstances where the goods had that safety defect only because there was compliance with a mandatory standard for them. Under **proposed section 143**, a person who wishes to commence a defective goods action must do so within three years of the time the person became aware of **all** of the following:

- the alleged loss or damage
- the safety defect of the goods, and

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- the identity of the person who manufactured the goods.

However **proposed subsection 143(2)** provides that a defective goods action **must** be commenced within ten years of the supply by the manufacturer of the goods to which the action relates.

Where, in a defective goods action, the manufacturer relies on the defence that the goods had a safety defect only because there was compliance with a Commonwealth mandatory standard for them, the manufacturer must give formal notice to the Commonwealth of the action and defence. In that case the Commonwealth will become a defendant in the action: **proposed section 148**. The ACCC may, by application, commence a defective goods action on behalf of one or more persons as long as those persons have given their written consent: **proposed section 149**.

Issue—unidentified manufacturer

Where a person who wishes to bring a defective goods action against a manufacturer does not know the identity of the manufacturer, **proposed section 147** authorises the person to give a written notice to the supplier who supplied the defective goods or to any other supplier of the defective goods, requesting the particulars of the manufacturer.

If, after 30 days, the person who made the request for information still does not know who manufactured the goods, then every supplier to which a written request for information was made, and who did not comply with the request, will be deemed to be the manufacturer of the goods. According to the Explanatory Memorandum, ‘this deeming provision provides an incentive to encourage suppliers to respond, and in a timely manner, to request for identifying information for the purposes of bringing a safety defective goods action’.⁹³

In any event the content of **proposed section 147** is in the same terms as existing section 75AJ of the TPA and is not a new concept.

Senate Committee recommendation

The Senate Committee recommended that:

the provisions of the legislation relating to product safety be reviewed within three years of implementation, particularly with regard to the costs of compliance versus the benefits obtained, the integrity of confidentiality of reports and any requirement to review definitions of product safety and risk in mandatory reporting.⁹⁴

93. Explanatory Memorandum, op. cit., p. 299.

94. Economics Legislation Committee, op. cit., p. 70.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Chapter 4—offences in the Australian Consumer Law

In addition to civil pecuniary penalties, the Bill creates strict liability criminal offences in respect of breaches of the specific protections in Chapter 3. A ‘strict liability’ offence is one which does not require proof of ‘mens rea’ (a guilty mind) but to which the common law defence of honest and reasonable mistake of fact applies.⁹⁵ The offences are broadly as follows:

- **proposed sections 151–168** create offences in relation to unfair practices although **proposed section 160** provides an exemption for prescribed information providers in respect of certain types of false or misleading representations or conduct which is consistent with the terms of proposed section 19
- **proposed sections 169–193** create offences in relation to consumer transactions
- **proposed sections 194–202** create offences in relation to safety of consumer goods and product related services
- **proposed sections 203–204** create offences in relation to information standards, and
- **proposed sections 205–206** create offences in relation to substantiation notices.

These criminal offences mirror the terms of the duties and obligations set out in the relevant provisions of Chapter 3. In particular, the financial penalties in respect of the criminal offences and the civil pecuniary penalties for the breaches of the provisions of Chapter 3 are the same.

Chapter 4 contains the following defences:

- where the defendant proves that the contravention was caused by a reasonable mistake of fact, including a mistake of fact caused by reasonable reliance on information supplied by another person: **proposed section 207**
- where the defendant proves that the contravention is due to an act or default of another person or some other cause which was beyond the defendant’s control and the defendant took reasonable precautions and exercised due diligence to avoid the contravention: **proposed section 208**
- in a prosecution for publication of advertisements by a person whose business it is to publish and arrange the publication of advertisements, if the defendant proves that he or she did not know, and had no reason to suspect, that a contravention would result from the publication: **proposed section 209**
- in a prosecution of supply of goods or services that do not comply with safety standards and information standards, in certain circumstances, if the defendant proves that the goods were acquired for re-supply: **proposed sections 210 and 211.**

95. *Butterworths Concise Australian Legal Dictionary*, third edition, LexisNexis Butterworths, Australia, 2004, p. 413.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Issue—onus of proof in testimonials

Generally the onus of proof lies with the plaintiff in a criminal prosecution. However under **proposed section 151(2)**, in a proceeding concerning a representation about a testimonial⁹⁶ that is alleged to be false and misleading, the representation is assumed to be false or misleading unless evidence is adduced to the contrary. However, **proposed subsection 151(3)** provides, for the avoidance of doubt, that this assumption does not have the effect of placing on any person an onus of proving that the representation is not false or misleading.

According to the Law Council of Australia:

It is not appropriate for onuses of proof to be reversed in the absence of clear evidence that consumers require the benefit of the reversal in order to enforce the protection accorded to them by the Bill... the [Law Council of Australia] does not support the ... reversal of the evidentiary burden in relation to the criminal offences, as in proposed s 151(2). Although the imposition of an evidentiary burden stops short of a true reversal of onus, the finding of a criminal contravention is a serious matter and should require all elements of the offence to be proved against the accused.⁹⁷

On the other hand Treasury states that:

Reversals or partial reversals of the onus of proof have been included in the ACL in situations where:

- it would be impossible or unreasonable to expect a consumer or a regulator to meet the conventional standard of proof; and
- the supplier would easily be able to meet the standard of proof.

All provisions of the ACL have been developed in accordance with the Commonwealth Attorney General's Department's A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers.⁹⁸

The Senate Committee acknowledged that various submitters expressed a concern about the apparent reversal or partial reversal of the onus of proof. However it argued 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.⁹⁹

96. That is, in accordance with **proposed paragraphs 151(1)(e) and (f)**.

97. Law Council of Australia, op. cit., p. 4.

98. Treasury, op. cit., p. 9.

99. Economics Legislation Committee, op. cit., p. 81.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Chapter 5—enforcement provisions in the Australian Consumer Law

The Bill provides that the regulator may take the following enforcement actions:

- enforceable undertakings
- substantiation notices, and
- public warning notices.

Undertakings

The regulator may accept a written undertaking given by a person in connection with a matter in relation to which the regulator has a power or function under the Australian Consumer Law. If the regulator subsequently considers that the person has breached the terms of the undertaking, the regulator may apply to the court for an order. In that case, the court may order any of the following:

- the person is directed to comply with that term of the undertaking
- the person is directed to pay to the Commonwealth, or to a State or Territory, an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach
- the person is directed to do anything that the court considers appropriate to compensate any other person who has suffered loss or damage as a result of the breach, and
- any other order that the court considers appropriate: **proposed section 218**.

Substantiation notices

Substantiation notices were introduced in the Australian Consumer Law Act No. 1. Under **proposed section 219**, the regulator may give the person who made a claim or representation a written notice requiring the person to give information and/or produce documents to substantiate or support the claim or representation, within 21 days after the notice is given to the person.

A person who has been given the substantiation notice may apply to the regulator within the 21 day time limit for an extension of the period for complying with the notice: **proposed section 220**. A person may refuse or fail to provide information or produce a document in compliance with a substantiation notice if the information or document might tend to incriminate the person or to expose the person to a penalty: **proposed subsection 221(3)**.

Public warning notices

Public warning notices were introduced in the Australian Consumer Law Act No. 1. **Proposed section 223** empowers the regulator to issue a written notice to the public containing a warning about the conduct of a person where there are reasonable grounds to

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

suspect that the conduct may constitute a contravention of the Australian Consumer Law, that one or more other persons has suffered, or is likely to suffer, detriment due to the conduct; and the regulator is satisfied that it is in the public interest to issue the notice.

Chapter 5—remedies in the Australian Consumer Law

Chapter 5 contains a number of remedies which are available to a person where there has been conduct in contravention of the Australian Consumer Law. The remedies include injunctions, order for damages, pecuniary penalties and compensation orders and orders for non-party consumers. Orders for non-party consumers were included in the TPA by the Australian Consumer Law Act No. 1.

Pecuniary penalties

The pecuniary penalties in respect of the contravention of a provision of the Australian Consumer Law are contained in **proposed section 224** and are outlined under separate headings above. Proceedings for an order that a person pay a pecuniary penalty in relation to a consumer protection breach are stayed if criminal proceedings are started or have already been started against the person for an offence which is constituted by conduct that is substantially the same as the conduct alleged to constitute the consumer protection breach: **proposed section 225**.

Country of origin representations

Current provisions

The TPA currently provides for country of origin representations as follows:

- paragraph 53(a) contains a broad prohibition against making a false representation that goods, among other things, have a particular history. Importantly, a representation about the country of origin of goods is a representation of the history of those particular goods
- paragraph 53(eb) provides a specific prohibition against making a false or misleading representation about the place of origin of goods
- section 55 prohibits a person from engaging in conduct which is liable to mislead the public as to the nature, manufacturing process, the characteristics, suitability for their purpose or the quantity of any goods. A representation about country of origin may be a representation about the nature, manufacturing process or the characteristics of particular goods
- a breach of any of the above may give rise to either criminal or civil action.

However, the TPA also contains defences to an action about country of origin representations as follows:

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- the words ‘Product of Australia’ may be used if all the significant ingredients are Australian, and all, or virtually all, of the processing occurred in Australia¹⁰⁰
- the words ‘Made in Australia’ apply where the product has been *substantially transformed* in Australia and where 50 percent or more of production costs have been incurred in Australia¹⁰¹
- goods are *'substantially transformed'* in a country if they undergo a fundamental change in form, appearance or nature such that the goods existing after the change are new and different goods from those existing before the change¹⁰²
- in addition, the ACCC encourages qualified country of origin representations, provided the qualification provides more complete information to consumers, for example ‘Made in Australia from local and imported ingredients’ where the product is made predominantly from local ingredients or ‘Made in Australia from imported and local ingredients’ (predominantly imported ingredients).¹⁰³

Nature of the problem

The debate in the Senate on the Trade Practices (Country of Origin Representations) Bill 1998 contains pertinent comments about the test relating to whether goods are entitled to be labelled ‘Made in Australia’. Those comments are as relevant today as they were in 1998. Senator Brown stated:

The Greens are saying ‘Made in Australia’ should mean ‘Made in Australia’... I give the example of a bottle of cordial. It is entirely possible under this legislation, because the manufacturing costs are a major component, that you could have Tasmanian raspberries going into one bottle of cordial and being put on the shelf and a mixture of raspberries from Chile and South Africa and maybe some from Australia going into a second bottle and being put on the shelf, and both of them will have ‘Made in Australia’. The consumer will not be able to know which is the real homemade produce through and through and which is the fake.

The people walking down the supermarket lanes with their trolleys who look for the ‘Made in Australia’ label, believing it means ‘Made in Australia’, are going to be hoodwinked under this legislation. As the Australian Consumers Association points out, a series of studies in recent years has made it quite clear that, when Australians see ‘Made in Australia’ on an item, they think that means two things: firstly, it has been manufactured and packaged in this country and, secondly, that the ingredients have come from this country.

100. This is currently expressed in paragraph 65AC(c) of the TPA.

101. This test is currently expressed in paragraph 65AB(c) of the TPA. The method of calculating the costs of production or manufacture is set out in sections 65AG–65AM of the TPA.

102. This test is currently expressed in paragraph 65AB(b) of the TPA.

103. Australian Competition and Consumer Commission website, viewed 11 June 2010, <http://www.accc.gov.au/content/index.phtml/itemId/268486>

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

What the government is saying is that for that category we will allow the words 'Product of Australia' or 'Australian Produced'. The problem is that Australian consumers do not differentiate between the terms 'Product of Australia' and 'Made in Australia'. They are taken to mean the same thing.¹⁰⁴

The Greens proposed amendments to the legislation which:

... will stick with the concept of 'Product of Australia' meaning 100 per cent manufacture and ingredients, but it will mean that goods that are manufactured in Australia of less than 100 per cent Australian content can have the 'Made in Australia' label provided they also stipulate that the ingredients come from elsewhere.¹⁰⁵

The proposed amendments were not passed.

Proposed provisions

Proposed sections 254–258 deal with country of origin representations. Essentially, **proposed section 254** makes clear that a person does not contravene the provisions of section 18 (about misleading and deceptive conduct) or section 29 (about false or misleading representations) merely by making a 'country of origin' representation about certain goods.

Proposed section 255 contains a table which sets out the requirements to be met by a person in relation to the following country of origin representations. There has been no change to the existing provisions relating to:

- the 'country of origin' of goods
- the 'produce' of a particular country
- country of origin of goods by means of a logo specified in the regulations.

The Bill does contain two, new 'country of origin' representations, being:

- goods were 'grown in' a particular country, or
- 'ingredients' or 'components' of goods were grown in a particular country.

104. B Brown, 'Trade Practices (Country of Origin Representations) Bill 1998', Senate, *Debates*, 3 July 1998, p. 4885, viewed 11 June 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F1998-07-03%2F0080%22>

105. *Ibid.*

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

These are set out as items 4 and 5 in the table. The amendments are made as a result of a promise made by the Australian Labor Party in the 2007 election.¹⁰⁶

Proposed subsection 255(7) provides that goods, or ingredients or components of goods, are *grown* in a country if they:

- are materially increased in size or materially altered in substance in that country by natural development
- germinated or otherwise arose in, or issued in, that country, or
- are harvested, extracted or otherwise derived from an organism that has been materially increased in size, or materially altered in substance, in that country by natural development.

In addition **proposed subsection 255(8)** specifies that packaging materials are not treated as ingredients or components of the goods and that the weight of packaging materials is to be disregarded in working out the weight of the goods.

Where an ingredient or component that has been dried or concentrated by the evaporation of water, has had water added to return the water content of the ingredient or component to no more than its natural level, that water is treated as having the same origin as the ingredient or component, regardless of its actual origin: **proposed subsection 255(9)**.

Schedule 2 of the Bill—application of the Australian Consumer Law

As already stated, the Australian Consumer Law is established in accordance with the IGA.

The purpose of Schedule 2

The purpose of Schedule 2 of the Bill is threefold. First, it amends the TPA so that the Australian Consumer Law applies as a law of the Commonwealth. Secondly, it inserts certain provisions into Part XI of the TPA ‘that are either relevant only at the Commonwealth level, or are not compatible with State and Territory legal systems and are not able to be included in the Australian Consumer Law’.¹⁰⁷ Thirdly, it inserts Part XI AA to facilitate the application of the Australian Consumer Law in participating jurisdictions—that is, in the States and Territories which are parties to the IGA.

106. Australian Labor Party, *Labor’s plan for primary industries*, 20 November 2007, p. 9, viewed 15 June 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fparty%2F00P6%22>

107. Explanatory Memorandum, op. cit., p. 374.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Achieving the first purpose

The Australian Consumer Law Act No. 1 established the first part of the Australian Consumer Law within the existing TPA by inserting a **new Part XI** into the TPA. Schedule 2 to this Bill repeals the whole of Part XI and substitutes a new Part XI which sets out the application of the Australian Consumer Law as a law of the Commonwealth. The new Part XI contains relevant definitions in **proposed section 130**.

As the Australian Consumer Law refers to ‘persons’, rather than ‘corporations’, **proposed section 131** operates so that contraventions of the general protections in Chapter 2 of the Australian Consumer Law, the specific protections in Chapter 3 of the Australian Consumer Law and the offences contained in Chapter 4 of the Australian Consumer Law will apply to corporations. **Proposed section 131A** clarifies that financial services are excluded from the operation of the Australian Consumer Law.

Future references in the Bill and the CCA (*Competition and Consumer Act 2010*), when enacted, to ‘Part XI or Schedule 2’ will be a reference to the Australian Consumer Law and how it applies.

Achieving the second purpose

In relation to the national consumer product safety provisions, Schedule 2 to the Bill inserts product safety market surveillance and enforcement powers that may only be exercised by the responsible Commonwealth Minister or an inspector appointed by the Chairperson of the ACCC.

Proposed bans and recall notices—Commonwealth only

The Bill also sets out the protocol to be followed in relation to bans, whether interim or permanent, and recall notices.¹⁰⁸ **Proposed sections 132–132K** set out the procedure as follows:

- the Commonwealth Minister must issue a *‘proposed ban notice’*
- that notice must comply with the form set out in **proposed subsection 132(3)**—including that it is in writing, published on the internet, contains details of the goods or services which are the subject of the proposed ban and inviting interested persons to contact the ACCC if they wish the ACCC to hold a conference about the imposition of the ban
- similarly the Commonwealth Minister must issue a *‘proposed recall notice’* which must comply with the manner and form requirements of **proposed subsection 132A(3)**

108. See **proposed sections 109–121** of Schedule 1 to the Bill.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- a notice under either **proposed subsection 132(3)** or **proposed subsection 132A(3)** must specify the period within which persons may notify the ACCC of their wish for a conference
- where no person wishes the ACCC to hold a conference about the imposition of the ban or the issuing of the recall notice the ACCC will notify the Commonwealth Minister of that fact
- where one or more persons do request that the ACCC hold a conference, the ACCC must appoint a date, time and place for the conference and notify those details to the persons and Commonwealth Minister
- as soon as practicable after the conference is held the ACCC must give written notice to the Commonwealth Minister that it recommends the ban or recall be imposed, imposed with modifications or not imposed at all
- the Commonwealth Minister is not bound by the recommendation. However, if the Commonwealth Minister makes a decision which is not in accordance with the ACCC recommendation, the Commonwealth Minister must publish written reasons for that decision on the internet: **proposed subsection 132D(3)**.

Proposed section 132K requires that the Commonwealth Minister must provide a copy of a proposed ban notice or recall notice to each person who supplies the goods and/or services to which the notice relates.

Enforcement—Commonwealth only

Proposed sections 133–133J contain enforcement provisions which are applicable to the Commonwealth only. In particular, **proposed section 133** provides that the Chairperson of the ACCC may appoint inspectors. Inspectors will be authorised to enter premises to which the public has access or to issue a *‘disclosure notice’* for the production of information or documents in circumstances where the goods or services themselves may cause an injury to a person or where a reasonable use or misuse of goods may cause an injury to a person: **proposed sections 133B–133D**.¹⁰⁹ In addition, an inspector may apply to the court for an order authorising one or more inspectors to:

- enter the premises of the person that are specified in the order
- search the premises for consumer goods specified in the order
- seize any such consumer goods found at those premises, or
- destroy or dispose of the consumer goods that are seized.

109. Under **proposed section 133F** a person who has been given a disclosure notice commits a strict liability offence if they refuse or fail to comply with the notice. The penalty is 200 penalty units for a body corporate and 60 penalty units for an individual.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Proposed subsection 133H(1) provides that the court will make such an order where it is satisfied that:

- the consumer goods do not comply with a safety standard that is in force for consumer goods of that kind and the cause of that non-compliance cannot be remedied
- a permanent ban on consumer goods of that kind is in force, or
- a recall notice for consumer goods of that kind is in force and a defect or dangerous characteristic of such consumer goods identified in the notice cannot be remedied.

The powers of inspectors are further detailed in **proposed sections 135–135Z**.

Infringement notices—Commonwealth only

Proposed sections 134–134G contain provisions relevant to the issuing of infringement notices. **Proposed subsection 134A(2)** details the provisions of the Australian Consumer Law which are *‘infringement notice provisions’* as follows:

- a provision of Part 2-2—sections 20–22 relating to unconscionable conduct
- some provisions of Part 3-1—sections 29–50 relating to unfair practices, other than subsections 32(1), 35(1) or 36(1)–(3), or sections 40 and 43
- subsection 66(2)—relating to display notices
- a provision of Division 2 of Part 3-2—sections 69–95 relating to consumer guarantees, other than section 85
- a provision of Division 3 of Part 3-2—sections 96–99 relating to lay-by, other than subsection 96(2)
- subsection 100(1) or (3), 101(3)–(4), 102(2) or 103(2)
- subsections 106(1)–(3) and (5), subsections 107(1)–(2), subsections 118(1)–(3) and (5), subsections 119(1)–(2), subsection 125(4), subsections 127(1)–(2), 128(2) or (6), 131(1), 132(1), subsections 136(1)–(3) and subsections 137(1)–(2)
- subsections 221(1) and 222(1).

An infringement notice may be issued by the ACCC for a breach of any of the above provisions as an alternative to seeking a pecuniary penalty under proposed section 224 of Schedule 1 to the Bill. In that case the infringement notice must comply with all the requirements set out in **proposed section 134B**. The table in **proposed section 134C** contains the relevant penalties. The infringement penalties are substantially lower than the pecuniary penalty for the same contravention. For example Division 2 of Part 3-2 (other than section 85) relating to consumer guarantees:

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Infringement Penalty—body corporate	Pecuniary Penalty—body corporate	Infringement Penalty—not body corporate	Pecuniary Penalty—not body corporate
\$6600 (60 penalty units)	\$50 000	\$1320 (12 penalty units)	\$10 000

Where a person pays the penalty specified in the infringement notice within the prescribed ***‘infringement notice compliance period’***,¹¹⁰ no proceedings may be started or continued against the person by, or on behalf of, the person in relation to the alleged contravention of the infringement notice provisions or an offence constituted by the same conduct that constituted the alleged contravention: **proposed section 134D**. However, where a person does not comply with an infringement notice by paying the infringement penalty, the person is liable to proceedings in relation to the alleged contravention: **proposed section 134E**. The ACCC may withdraw an infringement notice, on application by the person to whom the infringement notice was given.

Remedies

According to the Explanatory Memorandum:

Many of the enforcement powers in the [Australian Consumer Law] had certain limits or qualifications on those powers when they were in the [TPA], including, but not limited to, provisions relating to occupational liability, liability for recreational services, and liability for personal injury and death. These have not been included in the [Australian Consumer Law] in recognition of the fact that some of these requirements, which must apply at the Commonwealth level, may not be able to be applied within differing State and Territory legal systems.¹¹¹

Proposed sections 137–137H set out provisions relating to the access to remedies under the Australian Consumer Law.

Jurisdictional matters

Proposed sections 138–138E set out the jurisdiction of the Courts in relation to any matter arising under the Australian Consumer Law, including the various Parts which apply to the Federal Court of Australia and the Federal Magistrates Court or to State Courts.

110. The ***‘infringement notice compliance period’*** is set out in **proposed section 134F** as 28 days beginning on the day after the day that the infringement notice is issued. The period may be extended once only—for a further 28 days.

111. Explanatory Memorandum, op. cit., p. 383.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Achieving the third purpose

Proposed sections 140–140K facilitate the application of the Australian Consumer Law in the States and Territories in the following ways:

- allowing participating jurisdictions to confer functions or powers, or impose duties, on a Commonwealth entity, for the purposes of an applied Australian Consumer Law
- conferring original and appellate jurisdiction on the Federal Court of Australia in relation to a matter arising under the Australian Consumer Law in a participating Territory's law
- providing that there is no doubling-up of liabilities with respect to a contravention of the Australian Consumer Law as set out in the TPA, and an applied Australian Consumer Law, and
- confirming that the Australian Consumer Law provisions in the TPA do not exclude the operation of an application law of a participating jurisdiction to the extent that they are capable of operating concurrently.¹¹²

Schedule 3 of the Bill—amendment of the Corporations legislation

Items 1–32 of Schedule 3 to the Bill amend the *Australian Securities and Investments Commission Act 2001* (the ASIC Act). As with the Australian Consumer Law Act No. 1, this Bill amends 'the consumer protection laws in the ASIC Act to maintain consistency with the Australian Consumer Law concerning consumer protection for financial services'.¹¹³

Items 33–35 amend the *Corporations Act 2001* (the Corporations Act). A new **section 206EA** is inserted into the Corporations Act for the purposes of disqualifying a person from managing a corporation with respect to a contravention of the Australian Consumer Law or the Competition and Consumer Act (formerly TPA). There are consequential amendments to section 1349 of the Corporations Act, which deals with the disqualification of persons from managing a corporation with respect to contraventions of the ASIC Act.

112. Proposed section 140H.

113. C Emerson (Minister for Small Business, Independent Contractors and the Service Economy, Minister Assisting the Finance Minister on Deregulation and Minister for Competition Policy and Consumer Affairs), 'Second reading speech: Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010', House of Representatives, *Debates*, 11 March 2010, p. 2718, viewed 11 June 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2010-03-17%2F0035%22>

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Schedule 4 of the Bill—enforcement of industry codes

Background

Part IVB of the TPA allows the Minister to prescribe industry codes of conduct (industry codes). Currently, there are four mandatory industry codes prescribed under Part IVB:

- the Franchising Code of Conduct
- the Horticulture Code of Conduct
- the Oilcode, and
- the Unit Pricing Code.

According to subsection 51ACA(1) of the TPA ‘*industry codes*’ are codes that regulate the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry. At present non-compliance with a relevant mandatory code attracts civil remedies under the TPA, including injunctions, actions for damages, non-punitive orders and other orders. However, there is no provision which imposes civil pecuniary penalties on persons whose conduct is in breach of the terms of an industry code.

In July 2008, the ACCC published a report of its inquiry into the competitiveness of retail prices for standard groceries.¹¹⁴ That report made a number of recommendations including that the TPA be amended to introduce civil pecuniary penalties and infringement notices in relation to Part IVB provisions, such as the Horticulture Code, and introduce random record audits as an enforcement mechanism available under the code.¹¹⁵

The issue of industry codes was also canvassed by the Parliamentary Joint Committee on Corporations and Financial Services in December 2008.¹¹⁶ That report also recommended that civil pecuniary penalties be available in respect of breaches of industry codes¹¹⁷ and

114. Australian Competition and Consumer Commission, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, Commonwealth of Australia, Canberra, July 2008, viewed 9 June 2010, <http://www.accc.gov.au/content/index.phtml?itemId=838251>

115. *Ibid.*, p. xvii.

116. Parliamentary Joint Committee on Corporations and Financial Services, *Opportunity not opportunism: improving conduct in Australian franchising*, Commonwealth of Australia, Canberra, December 2008, viewed 9 June 2010 http://www.aph.gov.au/Senate/committee/corporations_ctte/franchising/report/index.htm

117. *Ibid.*, recommendation 10, p. xvii.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

that the ACCC be given the power to investigate suspected breaches of industry codes without having to rely on specific complaints from industry participants.¹¹⁸

Proposed changes

Schedule 4 to the Bill does not insert the industry code provisions into the Australian Consumer Law. It inserts the following enforcement and redress measures for contraventions of industry codes into the main body of the TPA:

- public warning notices
- orders for non-party redress in proceedings for contraventions of a relevant industry code, and
- a random audit power.

Item 4 inserts **proposed sections 51ADA–51ADG** into the TPA. **Proposed section 51ADA** empowers the ACCC to issue a written warning notice to the public about the conduct of a person (‘naming and shaming’) in circumstances where the ACCC has reasonable grounds to suspect that the conduct may constitute a contravention of an industry code.

Proposed sections 51ADB–51ADC relate to the orders that a court can make to redress the loss or damage suffered by *‘non-parties’*. A ‘non-party’ is a person who is not, or has not been a party to an enforcement proceeding under Part VI of the TPA. The provisions operate as follows:

- the ACCC can apply to the court for an order where a person has engaged in *‘contravening conduct’*—that is, conduct which constituted a breach of an industry code and that conduct caused, or is likely to cause, loss or damage to non-parties
- the order of the court must redress the loss or damage, or act to prevent or reduce the loss or damage suffered by non-parties
- the types of order the court may make include but not limited to:
 - an order declaring the whole or any part of a contract made between the respondent and a non-party to be void
 - an order varying a contract or arrangement
 - an order refusing to enforce any or all of the provisions of a contract or arrangement.

The ACCC will be authorised to conduct random audits under **proposed sections 51ADD–51ADG**. The ACCC will be allowed to give written notice to a corporation

118. Ibid., recommendation 11, p. xvii.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

requiring the corporation to provide information or documents in relation to an industry code. Where a corporation has been given such a notice, it must comply within 21 days.

Issue—no infringement notice regime

The Queensland Consumers Association submission suggested that issuing infringement notices for non-compliance with industry codes—particularly the unit pricing code would be a benefit.¹¹⁹

Similarly, the Consumer Action Law Centre:

... strongly advocates that an infringement notice regime is required for contraventions of industry codes under the TPA. Industry code obligations are precisely the type of provision that might be subject to minor breaches that do justify a proportionate response but do not necessarily justify full court action by the regulator.¹²⁰

However, the Treasury submission is not supportive of this suggestion stating:

The introduction of penalties for breaches of codes would fundamentally alter their nature, effectively introducing penalties for what are, in effect, commercial disagreements and matters of opinion....

... the enhanced enforcement and redress measures for industry codes in Schedule 4 of the Bill (including a random audit power, public warning notices and orders for redress for non-parties to an ACCC action) creates greater disincentives for breaches of industry codes in keeping with their co-regulatory nature.¹²¹

Schedule 5 of the Bill—other amendments to the Trade Practices Act

Item 2 of Schedule 5 to the Bill changes the name of the TPA to the *Competition and Consumer Act 2010* (CCA).

How it works

As has already been stated, the Australian Consumer Law Act No. 1 essentially set up a new schedule—Schedule 2—to the TPA which would contain the Australian Consumer Law. When the Australian Consumer Law Act No. 1 was enacted, the Australian Consumer Law contained only the unfair contract provisions, including relevant

119. Queensland Consumers Association, Submission to Economics Legislation Committee, *Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 [Provisions]*, 23 April 2010, p. 3.

120. Consumer Action Law Centre, op. cit., p. 29.

121. Treasury, op. cit., p. 41.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

definitions. The Australian Consumer Law Act No. 1 also inserted a number of definitions into section 4 of the TPA which is the interpretation provision.

What Schedule 5 of this Bill does, is make clear that the new CCA—that is, the existing TPA—will have two very separate operations. The provisions about competition which existed in the TPA will remain in the main body of the CCA. The provisions about consumer protection will lie in Schedule 2 of the CCA. Each of these will have its own definitions. In fact, **item 22** inserts a **new section 4KA** which clarifies that sections 4–4K of the CCA do not affect the meaning of any expression used in Part XI or Schedule 2, unless the contrary intention appears. This is one way of signalling the separate natures of the competition and the consumer protection provisions.

Items 3–21 repeal certain definitions from subsection 4(1) of the TPA. Those definitions relate to the Australian Consumer Law and will be located in Schedule 2 of the CCA, when this Bill is enacted.

Item 49 repeals existing Part IVA (about unconscionable conduct), Part V (containing the existing consumer protection provisions), Part VA (about liability of manufacturers and importers for defective goods) and Part VC (which contains the offences provisions in relation to unfair practices and product safety and product information). Following the enactment of this Bill, these matters will be dealt with under the new provisions that are to be contained in Schedule 2—the Australian Consumer Law.

Items 50–100 amend Part VI of the TPA which contains the enforcement and remedies provisions. The purpose of the amendments is to repeal those provisions which will lie in the Australian Consumer Law after the enactment of this Bill. What will remain, is those enforcement and remedies provisions which relate to the competition provisions.

The remaining items in Schedule 5 of the Bill are consequential amendments.

Comment—application to government bodies

Existing sections 2A, 2B and 2BA of the TPA provide, in essence, that the TPA applies to the following only in so far as they carry on a business:

- the Commonwealth and Commonwealth authorities
- the States, the Australian Capital Territory and the Northern Territory, and
- local government bodies.

There is no proposal to amend these sections. Nor is there any equivalent provision in the Australian Consumer Law. In the context of the Commonwealth government this would prevent a consumer from bringing proceedings for instance, alleging that a service to a consumer was not provided with due care and skill.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Schedule 6 of the Bill—amendments to other statutes

Items 1–149 contain consequential amendments to forty-four separate Acts to substitute existing references to the TPA with references to the *Competition and Consumer Act 2010*.

Items 150–191 contain amendments to seventeen separate Acts to substitute any references to specific sections of the TPA with the appropriate section or schedule reference in the CCA.

Concluding comments

This Bill which introduces the bulk of the provisions for the Australian Consumer Law creates a momentous change in consumer law. However, there is no doubt that it will need further amendment as judicial interpretation of the various provisions becomes available. This has been acknowledged by the Senate Committee in its report.

The biggest loser in terms of the Bill is small business. No longer does it fall within the definition of ‘consumer’ and so the statutory consumer protections will not apply, although small business will continue to be protected by the common law.

The nature of the harm which the Bill is intended to cure is clearly the loss and damage caused to those members of the community who are the most vulnerable when they are ‘consumers’. Some of the examples cited in the Shutting the Gates report make harrowing reading. In that respect, the provisions of the Bill are an appropriate response to the needs of disadvantaged consumers.

However, small business may well argue that it also suffers disadvantage when it is in the position of being a ‘consumer’ and, in that case, is also deserving of statutory protection.

The Senate Committee has recommended that the provisions of the legislation relating to product safety should be reviewed within three years of implementation. That recommendation is valid.

However it is considered that review of the operation of the whole of the legislation may be warranted to measure whether small business is suffering as an unintended consequence of this Bill.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

This work is copyright. Except to the extent of uses permitted by the *Copyright Act 1968*, no person may reproduce or transmit any part of this work by any process without the prior written consent of the Parliamentary Librarian. This requirement does not apply to members of the Parliament of Australia acting in the course of their official duties.

This work has been prepared to support the work of the Australian Parliament using information available at the time of production. The views expressed do not reflect an official position of the Parliamentary Library, nor do they constitute professional legal opinion.

Feedback is welcome and may be provided to: web.library@aph.gov.au. Any concerns or complaints should be directed to the Parliamentary Librarian. Parliamentary Library staff are available to discuss the contents of publications with Senators and Members and their staff. To access this service, clients may contact the author or the Library's Central Entry Point for referral.

Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2434.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.