

24 JUNE 2010

New Australian Consumer Laws: An overview of the proposed *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010*

The implementation of national, uniform consumer laws commenced with the recent enactment of the *Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010 (Act)*, which comes into effect on 1 July 2010 and creates a national unfair contract terms regime for standard-form contracts, introduces new penalties and expands the enforcement powers of the ACCC and ASIC. This Act is just the first part of a planned national consumer regime, broadly termed the Australian Consumer Law (ACL), with further amendments proposed under the *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Bill)*. It was initially thought the ACL would be fully implemented by 1 January 2011; however, with a federal election looming, it is difficult to gauge the likelihood of the Bill being passed (whether at all or in an amended form) and the full ACL coming into effect.

1. THE BILL

The Bill completes the initial text of the ACL and, if enacted, will amend the *Trade Practices Act 1974 (TPA)*, *Australian Securities and*

Investments Commission Act 2001 (ASIC Act) and *Corporations Act 2001* to address general and specific consumer protections, misleading and deceptive conduct, unconscionable conduct, unfair practices, consumer transactions and statutory consumer guarantees. It also aims to create a standard consumer product safety law for consumer goods and product related services, and to expand enforcement powers of Commonwealth agencies and judicial bodies. The Bill also implements a proposed change of title of the TPA to the *Competition and Consumer Act 2010*.

2. APPLICATION

2.1 Definitions

2.1.1 The definition of 'consumer' and the scope of the Bill

The Bill incorporates multiple definitions of consumer, and unfortunately fails to unify the concept. For most purposes, the ACL applies to all persons and is not limited to a defined class

ARTICLE

of consumers. However, in relation to consumer guarantees, unsolicited consumer agreements, lay-by sales agreements, the provision of itemised bills, the definition of continuing consumer credit contracts and linked credit contracts, the relevant provisions apply to a defined class of consumer (namely individuals who acquire goods of a kind ordinarily acquired for personal, domestic or household use or consumption, which do not exceed a value of \$40,000, where the goods are acquired for personal, domestic or household use or consumption). Given the widespread criticism of the definitions and their proposed operation, these provisions may be amended before the Bill is passed.

2.2 Misleading and deceptive conduct

The Bill includes a provision to replace the prohibition on misleading or deceptive conduct currently set out in s52 of the TPA. There are few substantive changes, except that the Bill applies the prohibition to 'a person' rather than 'a corporation'.

This reflects the broader application of the ACL. Jurisprudence relating to the interpretation of the equivalent TPA provision is still relevant. Section 18(1) of the Bill provides that a person must not, in trade or commerce, engage in misleading or deceptive conduct or conduct that is likely to mislead or deceive. Section 19 of the Bill excludes the application of the provisions relating to misleading or deceptive conduct to an information provider if the information provider made a publication in the course of carrying on a business of providing information, unless the publication is related directly to the business activities of the person publishing the notice.

2.3 Unconscionable conduct

The TPA prohibits corporations from engaging in unconscionable conduct: s51AA prohibits unconscionable conduct within the meaning of the common law; s51AB prohibits unconscionable conduct in connection with the supply of goods or services to 'consumers'; and s51AC prohibits unconscionable conduct in connection with the supply of goods or services to a 'business consumer', or in connection with the acquisition of goods or services from a 'small business supplier'. Since 1988, the TPA unconscionable conduct provisions have been mirrored in the ASIC Act, which applies in respect of financial services. In accordance with the *Intergovernmental Agreement for the Australian Consumer Law (IGA)*, the TPA unconscionable conduct provisions will be included in the ACL. Part 2-2 of the Bill includes prohibitions against a person engaging in unconscionable conduct. The concept of 'unconscionable conduct' is not defined for the purposes of the ACL. However, s21 provides a non-exhaustive list of types of conduct which may be unconscionable in the context of a business'

dealings with consumers, and s22 provides two non-exhaustive lists of types of conduct that may be unconscionable in the context of a business' dealings with other businesses, either as a customer or a supplier to those businesses. The unconscionable conduct provisions are designed to ensure that consumers and businesses are able to access a range of remedies under the ACL and that relevant regulatory bodies have access to penalties under the ACL.

2.4 Unfair contract terms

The unfair contract terms provisions apply to standard-form consumer contracts only. A consumer contract is defined in the ACL as a contract for the supply of goods or services or the sale or grant of an interest in land to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption. A term in a consumer contract is void if the term is 'unfair'. The concept of an 'unfair term' arises where the term: (i) would cause a significant imbalance in the parties' rights and obligations under the standard form contract; (ii) is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and (iii) would cause financial or non-financial detriment to a party if the term were to be applied or relied on. In finding that a term in a consumer contract is unfair, a court may take into account any matters it considers relevant. However, the court *must* take into account the extent to which a term is transparent and the contract as a whole.



2.5 Unfair practices

The Bill includes prohibitions on specific conduct that is considered 'unfair', which apply generally to all forms of business activity in all sectors of the economy, rather than to specific industry sectors. Chapter 2 of the Bill includes general prohibitions, whereas Chapter 3 includes provisions targeted at particular kinds of activities. Part 3-1 deals with:

- **False or misleading representations or conduct.** The Bill prohibits false or misleading representations in relation to specific matters, including goods or services, testimonials, sales or grants of interests in land, employment and certain business activities. Information providers are exempt from these requirements in certain circumstances.

- **Unsolicited supplies.** The Bill prohibits the sending of unsolicited credit cards or debit cards, while asserting a right to payment for unsolicited goods or services or unauthorised entries or advertisements.
- **Pyramid schemes.** The Bill prohibits a person from participating in, or inducing another person to participate in, a pyramid scheme. Legitimate multi-level marketing schemes are excluded from the definition of a pyramid scheme.
- **Pricing.** The Bill sets out rules addressing the display of multiple prices for goods, as well as a requirement that businesses state a total, single price for goods or services where quantifiable.
- **Other unfair practices.** The Bill prohibits practices relating to bait advertising, harassment and coercion.
- **Miscellaneous.** The Bill requires that a consumer be given a proof of transaction or an itemised bill in certain circumstances.

2.6 Consumer guarantees

The Bill implements national, uniform statutory consumer guarantees, which replace conditions and warranties that were implied into contracts by the TPA and state and territory Fair Trading legislation.

The Bill provides consumers with the following guarantees with respect to the supply of goods:

- That the supplier has the right to sell the goods.

- That goods are free from any undisclosed security.
- That the consumer will have undisturbed possession of the goods.
- That goods are of 'acceptable quality'.
- That goods are fit for the purpose that the consumer makes known to the supplier.
- That goods match their description or a sample.
- That spare parts and facilities for the repair of goods are reasonably available for a reasonable period.
- That any express warranty is complied with.

The Bill provides the following guarantees with respect to the supply of services:

- That the services are carried out with due care and skill.
- That services are fit for the purpose that the consumer makes known to the supplier.
- That services will be provided within a reasonable time.

In the event that goods or services fail to meet these guarantees, the Bill sets out remedies available to consumers including refunds, repairs and replacements. Damages are also available against suppliers and manufacturers in certain circumstances.

2.7 Unsolicited selling

The Bill includes provisions dealing with unsolicited offers to supply goods and services to a consumer and the agreements arising from such offers. The relevant provisions cover four areas:

- In relation to face-to-face marketing approaches, the



Bill outlines supplier obligations regarding approaching consumers, including permitted hours of visiting consumers, the duty to clearly advise the consumer of the reason for the contract and to display or produce identification, and the duty to leave a consumer's premises on request.

- In relation to face-to-face and telephone marketing approaches, the Bill outlines supplier disclosure obligations regarding agreements, including the duty to inform the consumer prior to making the agreement of their right to terminate and formal requirements for valid agreements. A valid agreement must include, for instance, the terms of the agreement, a termination notice and supplier information.
- In relation to face-to-face and telephone sales, the Bill outlines consumer rights and obligations including a 10-day termination right, provisions specifying that the consumer can also terminate an agreement after the termination period

in certain circumstances, provisions specifying the effect of termination, and provisions specifying the entitlement of a consumer to goods and services upon termination.

- In relation to face-to-face and telephone sales, the Bill outlines supplier obligations about post-contractual behaviour, including prohibitions during the termination period against a supplier supplying goods or services, or requiring/accepting payment for goods or services to be supplied, a requirement that a supplier immediately repay money received under the agreement if the agreement is terminated, prohibitions against a supplier taking action against a consumer under a terminated agreement, and prohibitions against a supplier seeking to avoid provisions concerning a termination right or operation of the regime.

2.8 Lay-by sales

A lay-by agreement is defined in the Bill as an agreement between a supplier and a consumer for the supply of consumer goods after payment by way of three or more instalments. The ACL, if enacted as currently drafted, sets out five fundamental rules that apply to lay-by sales transactions.

1. **A lay-by agreement must be in writing, a copy of which must be given to the consumer** (s96).
2. **The consumer has the right to terminate the agreement at any time, subject to payment of a termination charge** (s97).
3. **In the event of cancellation by the consumer, the consumer may be required to pay a cancellation**

charge reflecting the business' reasonable costs (ie, not more than an amount equal to reasonable costs incurred by the supplier) (s97(2)).

4. **A supplier may cancel a lay-by agreement only if the consumer has breached a term of the agreement, the supplier is ceasing to engage in trade or commerce, or the goods are no longer available** (s98).
5. **In the event of cancellation by either party, the consumer is entitled to a full refund of amounts paid.** However, where a consumer cancels the agreement, the supplier is entitled to recover a reasonable termination charge (s99). This amount may be withheld from any money repaid to, or recovered from, the consumer where necessary.

2.9 Product safety: safety of consumer goods and product related services and liability of manufacturers for goods with safety defects

The Bill creates a national, consumer product safety regulatory regime as part of the ACL. The relevant provisions replace the product safety provisions in Part V, Division 1A of the TPA and equivalent provisions in state and territory Fair Trading legislation.

Under the proposed Bill, permanent product bans and mandatory safety standards will apply nationally. This ensures that product safety concerns which are identified in one jurisdiction can be addressed consistently on a national basis. Individual state and territory Ministers retain the ability to issue interim bans and



conduct recalls. Interim bans and recalls are temporary regulatory measures that usually require rapid implementation after a consumer safety hazard is identified.

The proposed national product safety law is to be administered jointly by the ACCC and the state and territory regulatory bodies.

The product safety provisions of the Bill implement a number of changes, including expanding the scope of product safety regulation to cover services related to the supply, installation or maintenance of consumer goods in all jurisdictions, allowing product safety standards, bans and recalls to be put in place where a reasonably foreseeable use, or misuse, may render an otherwise safe product dangerous, allowing regulators to undertake product recalls directly where no supplier can be found and requiring suppliers to report serious product incidents to regulators.

2.10 Information standards

The Bill empowers the Commonwealth Minister to prescribe information requirements, enabling the Minister to make information standards and prohibit, in certain circumstances, the supply of goods or services that do not comply with a relevant standard. Prescriptions can be made in one of two ways: (i) by *making* a new information standard; or (ii) by declaring a standard made by Standards Australia (or another prescribed organisation) a new information standard.

3. OFFENCES, ENFORCEMENT AND REMEDIES

The proposed Bill contains a uniform set of enforcement powers, penalties, remedies and redress provisions for breaches of the consumer protection provisions. These provisions include court-enforceable undertakings, damages, non-punitive orders, punitive orders (including adverse publicity orders), compensatory orders, civil pecuniary penalties, disqualification orders, substantiation notices, infringement notices, redress for non-parties and public-warning notices.

If enacted in its current form, the Bill will comprise a comprehensive overhaul of consumer protection laws in Australia and will provide uniform operation of those laws across the country.

Want to republish any of this article?

If you would like to republish any part of this article in your staff newsletter or elsewhere please contact our Marketing Team on **+61 3 9608 2168**

Disclaimer

This Article is intended to provide general information on legal issues and should not be relied upon as a substitute for specific legal or other professional advice.



**For further information
please contact:**

Nicole Stevens-Warton, Partner

Phone (direct) **+61 3 9608 2264**

Mobile **+61 403 478 346**

Email **n.stevens-warton@cornwalls.com.au**