

2009-2010

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

---

TRADE PRACTICES AMENDMENT  
(AUSTRALIAN CONSUMER LAW) BILL (NO.2) 2010

---

EXPLANATORY MEMORANDUM

(Circulated by the authority of the  
Minister for Competition Policy and Consumer Affairs,  
the Hon Dr Craig Emerson MP)



---

## ***Table of contents***

---

Glossary .....	1
General outline and financial impact .....	3
Chapter 1      Preliminary matters .....	19
Chapter 2      Introduction .....	21
Chapter 3      Misleading or deceptive conduct .....	35
Chapter 4      Unconscionable conduct .....	41
Chapter 5      Unfair contract terms .....	57
Chapter 6      Unfair practices .....	77
Chapter 7      Consumer Guarantees .....	177
Chapter 8      Unsolicited selling .....	211
Chapter 9      Lay-by sales .....	233
Chapter 10     Safety of consumer goods and product related services .....	241
Chapter 11     Information standards .....	279
Chapter 12     Liability of manufacturers for goods with safety defects .....	289
Chapter 13     Offences .....	303
Chapter 14     Enforcement .....	317

Chapter 15	Remedies .....	329
Chapter 16	Country of origin representations .....	361
Chapter 17	Application of the Australian Consumer Law .....	373
Chapter 18	Commonwealth enforcement and administration .....	385
Chapter 19	Administration and enforcement of consumer product safety .....	395
Chapter 20	Liability of suppliers and credit providers .....	427
Chapter 21	Infringement notices .....	435
Chapter 22	Amendments to Part IVB of the TP Act .....	445
Chapter 23	Regulation Impact Statement: The Australian Consumer Law — Reforms based on best practice in State and Territory consumer laws .....	455
Chapter 24	Regulatory Impact Statement: The Australian Consumer Law — Aspects of the new national product safety law .....	565
Chapter 25	Regulatory Impact Statement: The Australian Consumer Law — A national consumer guarantees law .....	595
Index.....		637

---

# Glossary

---

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
ACL Bill or Bill	Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010
Applied ACL	Applied Australian Consumer Law
ASIC Act	<i>Australian Securities and Investments Commission Act 2001 (Cth)</i>
CC Act	<i>Competition and Consumer Act 2010</i>
Corporations Act	<i>Corporations Act 2001 (Cth)</i>
Corporations law	The ASIC Act and the <i>Corporations Act 2001 (Cth)</i>
COAG	Council of Australian Governments
Federal Court	Federal Court of Australia
first ACL Bill	Trade Practices Amendment (Australian Consumer Law) Bill 2009
FT Act or FT Acts	State and Territory Fair Trading Legislation, including <i>Fair Trading Act 1987</i> (New South Wales), <i>Fair Trading Act 1999</i> (Victoria), <i>Fair Trading Act 1989</i> (Queensland), <i>Fair Trading Act 1987</i> and <i>Consumer Transactions Act 1972</i> (South Australia), <i>Fair Trading Act 1987</i> and <i>Consumer Affairs Act 1971</i> (Western Australia), <i>Fair Trading Act 1990</i> (Tasmania), <i>Fair Trading Act 1987</i> and <i>Fair Trading (Consumer Affairs) Act 1973</i> (Australian Capital Territory) and <i>Consumer Affairs and Fair Trading Act 1990</i> (Northern Territory).

<b><i>Abbreviation</i></b>	<b><i>Definition</i></b>
IGA	<i>Intergovernmental Agreement for the Australian Consumer Law</i> signed on 2 July 2009 by COAG
LI Act	<i>Legislative Instruments Act 2003</i> (Cth)
MCCA	Ministerial Council on Consumer Affairs
NPA	<i>National Partnership Agreement to Deliver a Seamless National Economy</i>
PC	Productivity Commission
Regulators	The ACCC and the consumer agencies of the States and Territories, including: NSW Office of Fair Trading, Consumer Affairs Victoria, Queensland Office of Fair Trading, Department of Commerce — Consumer Protection (Western Australia), Office of Consumer and Business Affairs (South Australia), Department of Justice — Consumer Affairs and Fair Trading (Tasmania), Department of Justice — Consumer Affairs (Northern Territory) and Department of Justice and Community Safety — Office of Regulatory Services — Fair Trading (Australian Capital Territory)
TP Act	<i>Trade Practices Act 1974</i> (Cth)

---

# ***General outline and financial impact***

---

## **Outline**

The Trade Practices Amendment (Australian Consumer Law) Bill 2010 (the ACL Bill) is a Bill for an Act to amend the *Trade Practices Act 1974* (TP Act) to complete the initial text of the Australian Consumer Law (ACL), to make related amendments to the TP Act, the *Australian Securities and Investments Commission Act 2001* (ASIC Act), the *Corporations Act 2001* (Corporations Act) and to make consequential amendments to other Commonwealth Acts.

The ACL Bill will deliver the agreements of the Council of Australian Government (COAG) made on July 2008 and October 2008, to create a single national consumer law for Australia, including a national product safety law. The Trade Practices Amendment (Australian Consumer Law) Bill 2009 (first ACL Bill) will implement the first tranche of these reforms.

The first ACL Bill creates a new Part XI of the TP Act, which makes provision for the application, administration and amendment of the ACL. The text of the ACL is contained in Schedule 2 of the TP Act. The first ACL Bill will also implement the new national unfair contract terms law.

The measures in the ACL Bill complete the initial text of the ACL by:

- incorporating the fair trading and consumer protection provisions of the TP Act into the ACL, including unfair contract terms and provisions implementing enhanced enforcement powers, penalties and redress options;
- creating a national legislative scheme for consumer product safety, to replace the existing Commonwealth, State and Territory regulatory schemes;
- creating a national legislative scheme for statutory consumer guarantees, to replace the existing Commonwealth and State and Territory legislation concerning implied conditions and warranties in consumer transactions; and
- augmenting the fair trading and consumer protection provisions of the TP Act with changes drawn from existing provisions of the consumer laws of the States and Territories,

as agreed by the Ministerial Council on Consumer Affairs (MCCA) at its meeting on 4 December 2009.

The ACL Bill also creates an infringement notice regime that will apply to specified provisions of the ACL. The infringement notice regime will be a law of the Commonwealth but may be used as the basis for provisions in the application Act of a State or Territory to complement enforcement of the ACL in that jurisdiction. The infringement notice provisions are not included in the ACL as some States have their own State-wide infringement notice schemes.

In addition, the ACL Bill implements other measures:

- changing the name of the TP Act to the *Competition and Consumer Act 2010* (CC Act) and making necessary consequential changes to the TP Act and other Acts;
- amending the consumer protection provisions of the ASIC Act and Corporations Act, where relevant, to maintain consistency with the ACL;
- providing for Commonwealth-specific enforcement and administrative provisions, to enable Commonwealth agencies and judicial bodies to enforce the ACL as a law of the Commonwealth; and
- making changes to the enforcement powers for Part IVB of the TP Act, which implements key elements of the Australian Government's response to the Parliamentary Joint Committee on Corporations and Financial Services inquiry *Opportunity not opportunism: improving conduct in Australian franchising*.

## **The Australian Consumer Law**

Legislative arrangements for the administration and enforcement of the ACL are provided in Part XI of the TP Act. The text of the ACL is contained in Schedule 2 of the TP Act. Currently, the ACL contains only the provisions relating to unfair contract terms.

On 2 July 2009, COAG signed the *Intergovernmental Agreement for the Australian Consumer Law* (IGA). The IGA sets out the arrangements for creating the initial text of the ACL, as well as procedures for future changes to the ACL by agreement of the Australian, State and Territory Governments.



The Bill completes the text of the ACL, in accordance with the requirements of the IGA. Under the IGA, the ACL is to commence on 1 January 2011.

The IGA requires that the ACL is based on the fair trading and consumer protection provisions of the TP Act, modified as agreed by MCCA.

The TP Act fair trading and consumer protection provisions comprise:

- Part IVA (unconscionable conduct);
- Part V (consumer protection);
- Part VA (liability of manufacturers and importers for defective goods);
- Part VC (offences); and
- relevant parts of Part VI (enforcement and remedies).

At its meeting on 4 December 2009, MCCA agreed to amendments to the TP Act fair trading and consumer protection provisions to be included in the ACL. MCCA also agreed to include in the ACL some fair trading and consumer protection provisions that currently exist in the FT Acts of the States and Territories only.

The ACL is a generic law that applies to all sectors of the economy. However, separate laws dealing with financial products and services are necessary, due to constitutional issues relating to the States' referral of those powers under the *Corporations Agreement 2002*. The IGA requires the Commonwealth to enact changes to the investor protection provisions of the ASIC Act and, to the extent necessary, the Corporations Act, to ensure that they are consistent with the ACL. This Bill enacts changes to the ASIC Act and Corporations Act, consistent with the objectives of the IGA.

Commonwealth, State and Territory industry-specific legislation will continue to apply in some areas to the extent that it does not duplicate or is inconsistent with the ACL. Under the IGA, the Australian Government and the governments of the States and Territories are to repeal or modify any laws which duplicate or are inconsistent with the ACL.

MCCA will commence a process of reviewing existing sector-specific laws to remove inconsistent or duplicative provisions following commencement of the ACL.

### ***Administration and enforcement***

In October 2008, COAG agreed that the ACL will be administered jointly by the Australian Governments and the governments of the States and Territories.

Through the Standing Committee of Officials of Consumer Affairs, the Australian Competition and Consumer Commission (ACCC), the Australian Securities and Investments Commission (ASIC) and the State and Territory offices of fair trading (regulators) are developing a Memorandum of Understanding (MOU) and supporting frameworks to guide coordinated administration of the ACL.

New Zealand's Ministry of Economic Development and Commerce Commission will also participate in the MOU to facilitate greater coordination of consumer law administration and enforcement between Australia and New Zealand.

### **Product safety**

The ACL Bill creates a national consumer product safety regulatory regime as part of the ACL.

The national consumer product safety provisions in the ACL replace the product safety provisions in Part V, Division 1A of the TP Act and equivalent provisions in State and Territory FT Acts.

Product safety law and regulation differs between jurisdictions. In broad terms current Commonwealth, State and Territory consumer product safety laws are similar and allow governments to:

- regulate the supply of products that pose a risk to consumers, through the imposition of mandatory standards for the design, manufacture and labelling of such products;
- prohibit outright the supply of products that pose a risk to consumers, through the imposition of interim or permanent bans; and
- monitor or direct recalls of consumer products that have already been supplied.

Under the ACL, permanent product bans and mandatory safety standards will only be able to be made to apply nationally. This ensures that product safety concerns that 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 to conduct recalls. Interim bans and recalls are temporary regulatory measures that usually need to be implemented rapidly after a consumer safety hazard is identified.

As is the case with the other provisions of the ACL, the national product safety law is to be administered jointly by the ACCC and the State and Territory regulators.

The product safety provisions of the ACL implement a number of recommendations made by the Productivity Commission (PC) in its *Review of the Australian Consumer Product Safety System*, 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 reasonable 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.

The ACL Bill also streamlines the operation of the temporary exemption process for product bans and standards under the *Mutual Recognition Agreement* and the *Trans-Tasman Mutual Recognition Agreement*.

In addition to the legislative reforms contained in the ACL Bill, MCCA charged the ACCC and State and Territory product safety agencies with implementing a number of non-legislative reforms to the product safety framework. These reforms include:

- creating a hazard identification system based on a clearing house approach;
- creating a national system for exchange of consumer product safety complaint information;
- establishing an internet based consumer product safety ‘one stop shop’;
- undertaking a review of existing recall guidelines to determine how recalls might be improved;

- developing guidelines for encouraging suppliers to explain to consumers and retailers how they can notify the supplier of unsafe products; and
- moving to a 'hazard focused', rather than 'product focused' approach to developing mandatory safety standards.

These non-legislative reforms will be implemented throughout 2010 in time for commencement of the ACL on 1 January 2011.

### **Consumer guarantees**

The ACL Bill provides for statutory consumer guarantees that will apply uniformly across Australia. Statutory consumer guarantees replace conditions and warranties that were implied into contracts by the TP Act and FT Acts.

The ACL provides consumers with the following guarantees in respect of supplies of goods:

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

The ACL provides the following guarantees in respect of supplies of services:

- a guarantee that the services are carried out with due care and skill;

- a guarantee that services are fit for a purpose made known to the supplier; and
- a guarantee that services are provided within a reasonable time.

The ACL sets out the remedies that are available to consumers when goods or services fail to meet consumer guarantees. The appropriate remedy varies depending on whether a failure to comply with a guarantee is major or not major, but generally includes refunds, repairs and replacements. Damages are also available against suppliers and manufacturers in certain circumstances.

### **Offences, enforcement and remedies**

The ACL contains a single set of enforcement powers, penalties, remedies and redress provisions applicable to breaches of the consumer protection provisions, which will apply nationally and in each State and Territory.

These provisions allow for:

- court-enforceable undertakings to allow administrative resolution with the regulator for minor breaches;
- injunctions to restrain conduct or require something to be done;
- damages to redress loss or damage caused by a breach;
- non-punitive orders such as orders for community service;
- punitive orders — adverse publicity orders, which require a person to publish particular information;
- compensatory orders to allow compensation for breaches of the ACL;
- civil pecuniary penalties of up to \$1.1 million for bodies corporate and \$220,000 for persons other than a body corporate for breaches of many provisions of the ACL;
- disqualification orders to prevent a person from managing a corporation;
- substantiation notices to allow a regulator to assess claims relating to goods or services;

- infringement notices to allow regulators to issue a penalty that a person can (but does not have to) pay to avoid liability to further court action;
- redress provisions allowing regulators to seek redress for consumers that are not identified as a party to proceedings to receive redress such as refunds or variation of contract; and
- public warning notices for regulators to warn the public about conduct.

These enforcement powers, penalties and remedies apply to the majority of the provisions in the ACL. Each enforcement, penalty or remedy provision identifies those other provisions of the ACL to which it applies.

Many of the consumer protection provisions have corresponding criminal offences with maximum fines of up to \$1.1 million for bodies corporate and \$220,000 for persons other than a body corporate.

### ***Product safety***

The ACL includes an enhanced market surveillance and enforcement framework for the new national product safety law. The framework recognises the greater role of the responsible Commonwealth Minister and the ACCC will play under the national product safety law as well as the focus of product safety regulatory activity on proactively removing hazardous products from the marketplace. Product safety market surveillance enforcement powers include the power to:

- enter premises to which the public has access in order to inspect, take photographs of, or purchase any consumer goods or product related services;
- require a person who supplies consumer goods or product related services in trade or commerce, to provide the ACCC or the Minister with information, documents or evidence about those goods or services; and
- enter premises under a search warrant, or without a warrant in cases where the occupier has consented or there is an immediate danger to life or public safety, and exercise search-related powers.

## **Amendments that do not form part of the ACL**

### ***Amendments to facilitate administration and enforcement of the ACL by the Commonwealth***

Schedule 2 of the Bill provides Commonwealth-specific administrative and enforcement provisions. These provisions relate to:

- procedures to be followed by the ACCC when undertaking investigations or bringing proceedings for alleged breaches of the ACL;
- rules to be followed by Commonwealth Courts in conducting proceedings or making findings or awards in respect of the ACL; and
- saving of State and Territory laws and equitable and common law principles, where appropriate.

Similar provisions may be included in State and Territory ACL application legislation, as required.

Schedule 2 of the Bill provides for an infringement notice scheme in respect of specified provisions of the ACL.

In Schedule 5 of the Bill, the short title of the TP Act is changed to the *Competition and Consumer Act 2010*. The long title of the CC Act is changed to 'An Act relating to competition, fair trading and consumer protection, and for other purposes'.

In Schedules 5 and 6, consequential amendments are made to the CC Act and other Acts to reflect this and to alter references to sections of the TP Act that are repealed and replaced by sections in the ACL.

### ***Amendments to the corporations law***

Separate laws dealing with financial products and services are necessary, due to constitutional issues relating to the States' referral of powers to regulate those matters under the *Corporations Agreement 2002*.

Part 2, Division 2 of the ASIC Act currently contains consumer protection provisions in respect of financial services. Schedule 4 of the ACL Bill amends certain provisions of the ASIC Act to maintain consistency with the ACL.

In addition, Schedule 4 of the ACL Bill makes some amendments to the Corporations Act to facilitate the disqualification of persons from managing corporations, in respect of breaches of the ACL.

***Government response to the Parliamentary Joint Committee on Corporations and Financial Services***

The ACL Bill implements a strengthened enforcement and redress regime for industry codes of conduct prescribed under Part IVB of the TP Act.

These measures were announced in the Australian Government's response to the Parliamentary Joint Committee's franchising inquiry and comprise:

- substantiation notices for suspected breaches of prescribed industry codes;
- public warning notices for repeated or serious breaches of prescribed industry codes;
- non-party redress where there has been a breach of a prescribed industry code; and
- a random audit power to allow the ACCC to inspect documents or records required to be kept pursuant to a prescribed industry code.

The ACCC is responsible for enforcing industry codes prescribed under Part IVB.

Part IVB of the TP Act does not form part of the ACL.

***Date of effect:*** The ACL Bill will commence on different dates for different purposes.

Sections 1 to 3 of the ACL Bill and the remaining provisions of the Bill not included in Schedules 1 to 7 commence on the day of Royal Assent.

Schedules 1 to 5, Schedule 6, items 1 to 46, Schedule, items 48 to 141, Schedule 6, items 143 to 191 and Schedule 7 commence on the later of 1 January 2011 or the commencement of Schedule 1 of the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (the first ACL Bill). The first ACL Bill is currently before the Parliament.

The remaining items of Schedule 6 commence either on the date of the commencement of the remainder of Schedule 6, or a later date, to be determined by reference to the passage of other legislation.



The Australian, State and Territory governments have agreed, in accordance with the *National Partnership Agreement to Deliver a Seamless National Economy* (NPA), to enact the ACL as a law of each of their respective jurisdictions by 1 January 2011.

**Proposal announced:** On 2 October 2008, the COAG agreed to a new consumer policy framework comprising a single national consumer law, having agreed to develop a national consumer law on 3 July 2008.

In so doing, COAG based its decision on the proposals of MCCA, which were announced on 15 August 2008.

At its meeting on 4 December 2009, MCCA agreed to the final form of the ACL.

**Financial impact:** This Bill has no significant financial impact on Commonwealth expenditure or revenue at this time.

**Compliance cost impact:** Moderate. The ACL Bill applies regulatory provisions and concepts in a single national law, drawing on Commonwealth and State and Territory laws that exist in only some jurisdictions presently.

Four Regulation Impact Statements (RIS) have been prepared in respect of measures included in the ACL. All four of these RISs were considered by MCCA in the context of developing the ACL.

- **Framework and unfair contract terms.** This RIS examined recommendations made by the Productivity Commission in its *Review of Australia's Consumer Policy Framework*. These recommendations form the basis of the ACL.

The measures considered in this RIS will be implemented by first ACL Bill and the RIS is published in the explanatory memorandum to that Bill.

- **Reforms based on best practice in State and Territory consumer laws.** This RIS examined measures intended to modify or augment the existing consumer protection provisions of the TP Act, based on existing best practice provisions in State and Territory consumer laws. These reforms are of two types: those that create a single, simplified national law; and those which draw on best practice in State and Territory laws.

The full text of this RIS is included at Chapter 23.

- **Product safety.** This RIS examines the case for implementing legislative recommendations made by the Productivity Commission in its *Review of the Australian Consumer Product Safety System*.

The full text of this RIS is included at Chapter 24.

A separate RIS was prepared in May 2008 to support the agreement of MCCA to create a national product safety system.

- **Consumer guarantees.** This RIS examines the case for implementing the findings of the Commonwealth Consumer Affairs Advisory Committee's report *Consumer rights: Reforming statutory implied conditions and warranties*.

The full text of this RIS is included at Chapter 25.

## **Summary of regulation impact statement**

### **Regulation Impact: Reforms based on best practice in State and Territory laws**

#### ***Impact:***

Moderate. This Bill establishes a single, national consumer law framework and, in doing so, promotes consistency and protections across all Australian jurisdictions. This framework will reduce multi-jurisdictional complexities and result in lower compliance costs for businesses operating nationally. Once implemented, major parts of 17 jurisdictional laws dealing with generic consumer protections will be reduced to one law, substantially reducing business compliance costs.

There will be a transitional cost for these businesses as they adjust to the operation of the new, national regime and, specifically, to the new unfair contract terms provisions.

The compliance cost in relation to the new penalties, enforcement and consumer redress powers will be minimal, as these provisions provide for additional powers to deal with existing breaches of, or the investigation of suspected breaches of, the ACL and the new unfair contract terms provisions. Once the ACL takes effect, there will be common national enforcement powers covering all of Australia's consumer law agencies.

The publication of national guidance on subjects under the ACL, developed jointly by the ACCC and the State and Territory regulators

(and, where appropriate, ASIC), will assist business in compliance with the ACL.

Once the initial period of implementation is completed, ongoing compliance with the ACL will not impose significantly greater costs on businesses, as they should already comply with provisions in the ACL as they are either similar to existing laws or the same as existing national, State and Territory obligations.

***Main points:***

- The PC estimated that the implementation of a national consumer law could result in benefits to Australian consumers of between \$1.5 billion and \$4.5 billion a year.
- Businesses will benefit from consistent national regulation, which will reduce complexity and compliance costs by eliminating significant jurisdictional variation. This will provide:
  - savings for businesses currently operating nationally;
  - incentives for expansion and innovation for businesses previously unwilling to deal with the complexity of multi-jurisdictional regulation;
  - greater incentives for new entrants to markets due to a simpler regulatory framework;
  - greater clarity and certainty in relation to consumer law, allowing for more efficiency in the markets;
  - easier understanding of consumer contracts and greater opportunities for exercising choice when considering consumption possibilities; and
  - greater consistency in enforcement for businesses and a realignment of resources as more emphasis can be placed on effective enforcement by the most appropriate consumer law agency.
- Consumers will also benefit from the changes through:
  - greater confidence in dealing with businesses due to more consistent laws;
  - easier understanding of consumer contracts and greater opportunities for exercising choice when considering consumption possibilities;
  - greater confidence in dealing with businesses due to greater consistency in the enforcement of these laws; and

- lower prices for goods and services to the extent that businesses pass on the benefits of lower compliance costs to their customers.

### **Regulation Impact: Product Safety**

**Impact:** Moderate. This measure affects suppliers of consumer goods or product related services, to the extent that they are required to comply with a consumer safety order (such as a safety standard, ban or recall) or a reporting requirement. The consumer safety provisions of the ACL are modelled on the current product safety provisions of the TP Act and State and Territory FT Acts.

Where a supplier is already required to comply with a similar safety requirement in respect of a good or service, the additional compliance costs, if any, associated with a safety order made under the national consumer law will be minimal. Separate regulatory impact analysis must be undertaken on a case-by-case basis before bans, standards or recalls can be issued under the ACL.

#### ***Main points:***

- Product safety regulatory actions impose requirements only on suppliers where particular consumer goods or product related services are judged to pose a risk of injury.
- The ACL will create a single national set of product safety standards and permanent bans that will apply in all jurisdictions.

#### ***Reasonable foreseeable use or misuse***

- Incorporating the concept of ‘reasonably foreseeable use or misuse’ into the threshold tests for imposing safety bans and recalls may impose additional compliance burdens on suppliers as bans and recalls will no longer be confined to circumstances where the primary, normal or intended use of a good creates a risk of injury. Suppliers will also have to consider the possibility that an improper or unintended use or misuse of the goods, which is foreseeable, may pose a risk of injury.

#### ***Product related services***

- Where applicable, the consumer safety provisions of the ACL extend to cover product related services. Suppliers of such services would incur compliance costs, but only if the

services they supply are of the kind to which a safety order relates.

- Suppliers of services required to comply with requirements under industry-specific regulation would need to continue observing those requirements, together with any extra requirement in a safety order made under the generic consumer safety provisions of the ACL, with the more industry-specific requirement prevailing to the extent of any inconsistency between the two requirements.

#### *Mandatory reporting*

- The requirement for suppliers to report incidents where consumer goods or product related services have been associated with death or serious injury would impact on suppliers only to the extent that they become aware of incidents within their ordinary course of business. This provision does not require suppliers to gather information they would not otherwise have gathered.

#### *Regulator-led recalls*

- Where regulators undertake a recall directly, there would be no compliance cost impact on businesses. Rather this measure will help manage consumer expectations and concerns about unsafe goods where no supplier of the goods can be found.

### **Regulation Impact: Consumer Guarantees**

**Impact:** Moderate. This measure affects businesses that supply goods or services to consumers. The obligations imposed upon such businesses are similar to those that apply under pre-existing law. Compliance costs for business are expected to be reduced under a national system of consumer guarantees, when compared to laws that imply conditions and warranties that vary slightly across each jurisdiction within Australia. This is especially the case for suppliers who trade in more than one State or Territory of Australia.

#### ***Main points:***

- Statutory consumer guarantees provide consumers with a basis for seeking redress when goods or services do not meet the standards that they are entitled to expect.

- Statutory consumer guarantees replace conditions and warranties that were implied into contracts by the TP Act and the FT Acts. The substantive rights and obligations under statutory consumer guarantees are broadly similar to those that were implied under pre-existing laws.
- Implied conditions and warranties are difficult for consumers and businesses to understand, leading to confusion, increased disputation and increased costs.
- Statutory consumer guarantees will be more readily understood by businesses and consumers since archaic terms, such as 'merchantable quality', will be replaced and, in some instances, defined, when previously the meaning of these terms was determined only by judicial pronouncement.
- Remedies applicable to consumer guarantees are set out in the ACL. Previously, businesses and consumers required an understanding of remedies under the law of contract to effectively apply implied conditions and warranties to their particular situation. By setting out the applicable remedies, the ACL will reduce costs for businesses and consumers when they seek to assert, or defend, their rights.

---

# **Chapter 1**

## ***Preliminary matters***

---

### **Outline of chapter**

1.1 The ACL Bill changes the long title and short title of the *Trade Practices Act 1974* (TP Act).

### **Context of amendments**

1.2 On 24 June 2009, the Minister for Competition Policy and Consumer Affairs announced that the name of the TP Act will be changed to the *Competition and Consumer Act 2010*.

### **Detailed explanation of new law**

#### **Competition and Consumer Act 2010**

1.3 The long title of the TP Act is changed from ‘An Act relating to certain Trade Practices’ to ‘An Act relating to competition, fair trading and consumer protection, and for other purposes’. [*Schedule 5, item 1*]

1.4 The short title of the TP Act is changed from ‘*Trade Practices Act 1974*’ to ‘*Competition and Consumer Act 2010*’. [*Schedule 5, item 2*]

### **Application and transitional provisions**

1.5 The ACL commences on the later of 1 January 2011 or the commencement of Schedule 1 of the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (the first ACL Bill). The first ACL Bill is currently before the Parliament. [*Section 2*]

## **Consequential amendments**

1.6 Consequential amendments are made to the CC Act and a wide range of Commonwealth Acts which refer to the TP Act by name, or to sections of the TP Act which are now repealed and replaced by sections of the applied ACL as a law of the Commonwealth. [*Schedule 5, items 1 to 129 and Schedule 6, items 1 to 191*]



---

# **Chapter 2**

## ***Introduction***

---

### **Outline of chapter**

2.1 The Australian Consumer Law (ACL) includes definitions, application and miscellaneous provisions in Chapter 1.

### **Context of amendments**

2.2 At its meeting on 4 December 2009, the Ministerial Council on Consumer Affairs (MCCA), agreed to the final form of the ACL.

2.3 The provisions of the ACL Bill build upon the first ACL Bill. The first ACL Bill creates the ACL as a schedule to the TP Act and introduced unfair contract terms regulation into the schedule. The first ACL Bill also introduces a range of penalties, enforcement and redress provisions into the TP Act.

2.4 The first ACL Bill makes similar amendments to the *Australian Securities and Investments Commission Act 2001* (ASIC Act), to maintain consistency between the consumer protection provisions of the TP Act and ASIC Act.

2.5 The States and Territories are able to apply schedule version of the ACL, containing only the unfair contract terms provisions, as laws of their jurisdictions from 1 July 2010, if they choose to do so.

### **Summary of new law**

2.6 Chapter 1 of the ACL covers the defined terms and other definitions that are relied on throughout the ACL.

## Detailed explanation of new law

### *Definitions*

2.7 The ACL applies to the extent provided by Part XI of the CC Act or a State or Territory's application law. *[Schedule 1, item 1: Chapter 1, section 1]*

2.8 Section 2 of the ACL defines terms that are relevant to the understanding, interpretation and application of the provisions of the ACL. *[Schedule 1, item 1: Chapter 1, section 2]*

2.9 These terms are explained in the context of the provisions in which they are used, as they are discussed in this explanatory memorandum.

### *The meaning of 'consumer'*

2.10 For many purposes the provisions of the ACL apply to all persons and are not limited to a defined class of consumers. However, for some purposes, provisions apply with respect to a defined class of **consumer** on the basis that it is not appropriate to extend the protection afforded by the relevant provision more broadly.

2.11 A reference to a supply of goods or services to a consumer in the ACL, is a reference to a supply to a person who is taken to have acquired them as a consumer within the meaning of section 3 of the ACL. *[Schedule 1, item 1: Chapter 1, subsection 3(5)]*

2.12 The definition of a consumer is relevant to the following provisions in the ACL:

- consumer guarantees; *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 1]*
- unsolicited consumer agreements; *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 2]*
- lay-by sales agreements; *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 3]*
- the provision of itemised bills; *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 4, section 101]*
- the definition of *continuing credit contracts*; *[Schedule 1, item 1: Chapter 1, section 14]*
- linked credit contracts. *[Schedule 1, item 1: Chapter 5, Part 5-5, Division 1]*

2.13 The use of the term consumer in the unconscionable conduct provisions of Part 2-2 of the ACL [*Schedule 1, item 1: Chapter 2, Part 2-2*] is not linked to the definition of consumer in section 3. A consumer for the purposes of the unconscionable conduct provisions is the other person to whom a person supplies or will possibly supply with goods and services. [*Schedule 1, item 1: Chapter 2, Part 2-2, section 21(1)*]

2.14 The definitions of **consumer good** in section 2 and **consumer contract** in section 23 of the ACL are couched in similar terms to the definition of consumer in section 3, but are not subject to that definition.

2.15 The definition of **non-party consumer** in section 2 of the ACL is not defined by reference to the definition of consumer in section 3.

2.16 The definition establishes when a person is a consumer, which is determined by reference to the nature of the goods or services acquired or to be acquired. [*Schedule 1, item 1: Chapter 1, section 3*] The concept of consumer is defined separately with respect to the supply of goods and the supply of services.

2.17 A person is taken to have acquired goods as a consumer if:

- the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption [*Schedule 1, item 1: Chapter 1, paragraph 3(1)(a)*]. This is an objective assessment based on the nature and usual purpose of the goods; or
- the goods consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads [*Schedule 1, item 1: Chapter 1, paragraph 3(1)(b)*]. Neither ‘vehicle’ nor ‘trailer’ is defined in section 2 of the ACL or elsewhere in the ACL. The question of whether a vehicle or trailer is acquired as a consumer is determined subjectively with reference to the actual purpose for which the vehicle or trailer were acquired.

2.18 A person is taken not to have acquired goods as a consumer if the person acquired the goods, or held himself or herself out as acquiring the goods for commercial purposes, including for the purpose of:

- re-supply; or
- using them up in the course of trade or commence.

[*Schedule 1, item 1: Chapter 1, subsection 3(2)*]

2.19 A person is taken to have acquired services as a consumer if, and only if, the services were of a kind ordinarily acquired for personal, domestic or household use or consumption. [*Schedule 1, item 1: Chapter 1, subsection 3(3)*]

2.20 With regard to the interpretation of goods or services ‘of a kind ordinarily acquired for personal, domestic or household use or consumption’ the jurisprudence relating to section 4B of the TP Act is relevant.

2.21 There is a rebuttable presumption that a person is a consumer with respect to the acquisition or possible acquisition of goods and services. Where a claimant has alleged that he or she is a consumer, then it is for the respondent to prove, according to the civil standard of proof, that the claimant is not a consumer within the meaning of section 3 of the ACL. [*Schedule 1, item 1: Chapter 1, section 3*]

#### ***Misleading representations with respect to future matters***

2.22 Section 4 of the ACL includes a provision that replaces section 51A of the TP Act. It places an evidentiary burden on a defendant who is alleged to have made a representation as to a future matter that is misleading. When compared to section 51A, the new provision seeks to clarify that [*Schedule 1, item 1: Chapter 1, section 4*]

- the burden of proof under this section is evidentiary in nature and does not place a legal burden on defendants to prove that representations were not misleading;
- satisfying the burden of proof under this section does not constitute a substantive defence for breach of any other section of the ACL; and
- the section can operate in proceedings against accessories to contraventions as well as primary contraveners.

2.23 The clarification of the burden as requiring only evidence of reasonable grounds to be adduced is to reverse the effect of some past court decisions, such as *Australian Competition & Consumer Commission v IMB Group Pty Ltd*<sup>1</sup>, that have interpreted section 51A of the TP Act as requiring a respondent to prove that he, she or it had reasonable grounds.

2.24 In certain cases, Section 51A of the TP Act was interpreted in such a way to, by implication, provide that proving reasonable grounds is a substantive defence to an allegation of misleading conduct.<sup>2</sup> To reverse the

---

1 [1999] FCA 819 (17 June 1999).

2 *Quinlivan v Australian Competition and Consumer Commission* [2004] FCAFC 175 (5 July 2004) at 14.

effect of such decisions, section 4 of the ACL states explicitly that it does not imply that a representation as to a future matter is not misleading merely because the person had reasonable grounds for making the representation.

2.25 Section 51A of the TP Act has been interpreted to not allow the provision to apply to alleged accessories to a contravention because it was worded as to require the ‘corporation’ to adduce evidence<sup>3</sup>. Section 4 of the ACL reverses the effect of such decisions to allow its application to accessories.

2.26 The drafting of section 4 of the ACL clarifies the operation of this provision and ensures that it has the effect of facilitating the presentation of evidence to the court when a representation of a future matter is alleged to be misleading. [*Schedule 1, Item 1: Chapter 1, section 4*]

2.27 Section 12BB of the ASIC Act is in the same terms as section 51A of the TP Act. The changes made to section 51A for the purposes of its inclusion in the ACL have been mirrored in the ASIC Act. [*Schedule 3, Item 6: section 12BB*].

#### ***When donations are treated as supplies or acquisitions***

2.28 For the purposes of the provisions of the ACL except those concerning the safety of consumer goods and product related services [*Schedule 1, item 1: Chapter 3, Part 3-3*], information standards [*Schedule 1, item 1: Chapter 3, Part 3-4*] and offences relating to safety of consumer goods and product related services [*Schedule 1, item 1: Chapter 3, Part 4-3*] a donation is not treated as a supply of the goods unless the donation of the goods is for promotional purposes. Nor is the receipt of a donation of goods or services treated as an acquisition of those goods or services unless the donation is for promotional purposes. Neither ‘donation’ nor ‘promotional purposes’ are defined specifically in the ACL. [*Schedule 1, item 1: Chapter 1, Subsection 5(1)*]

2.29 For the purposes of the provisions of the ACL concerning the safety of consumer goods and product related services [*Schedule 1, item 1: Chapter 3, Part 3-3*], information standards [*Schedule 1, item 1: Chapter 3, Part 3-4*] and offences relating to safety of consumer goods and product related services [*Schedule 1, item 1: Chapter 3, Part 4-3*] any donation is treated as a supply of the goods and the receipt of a donation of goods or services is treated as an acquisition of those goods or services. [*Schedule 1, item 1: Chapter 1, Subsection 5(2)*]

---

3 See *Australian Competition and Consumer Commission v Universal Sports Challenge* [2002] FCA 1275 at 44.

### ***Related bodies corporate***

2.30 It is recognised that, for the purposes of the ACL, there are many potential applications of the Law that could be:

- avoided or frustrated unless the activities of all corporations forming part of a corporate group are treated in the same way and taken together; or
- may apply inconsistently or inappropriately if the activities of a corporate group are not recognised and treated accordingly.

2.31 The ACL imports the meaning of related bodies corporate from section 4A(5) of the CC Act [*Schedule 1, item 1: Chapter 1, Subsection 6(1)*] Subsection 4A(5) of the CC Act deems a body corporate to be related to another body corporate where the first-mentioned body corporate is:

- the holding company of another body corporate;
- a subsidiary of another body corporate; or
- a subsidiary of the holding company of another body corporate.

2.32 For the purposes of the ACL, it is presumed that bodies corporate are not related to each other. [*Schedule 1, item 1: Chapter 1, Subsection 6(1)*]

2.33 The provisions are relevant to circumstances in which a body corporate is either subject to an obligation or a liability under the ACL.

2.34 With regard to the interpretation of ‘related bodies corporate’ the jurisprudence relating to section 4A of the TP Act is relevant. Further guidance on the interpretation of concepts associated with the concept of a ‘body corporate’ may be found in the Corporations Act and related jurisprudence.

### ***The meaning of ‘manufacturer’***

2.35 The meaning of **manufacturer** is relevant to the consumer guarantees [*Schedule 1, item 1: Chapter 3, Parts 3-2 and 5-4*], liability of manufacturers for defective goods [*Schedule 1, item 1: Chapter 3, Part 3-5*] and country of origin representations [*Schedule 1, item 1: Chapter 1, Part 5-3*] of the ACL.

2.36 The meaning of manufacturer in section 7 of the ACL draws on the definition of ‘manufactured’ is the repealed section 74A of the TP Act. The jurisprudence relating to that definition may be relevant to the interpretation

or understanding of the meaning of manufacturer under the ACL, insofar as those provisions are similar.

2.37 The meaning of manufacturer encompasses a wide range of activities that that represent the first point in the chain of distribution of a product into an Australian market, whether directly by a person or in that person's name or brand.

2.38 For the purposes of the ACL, the activities of a manufacturer include:

- the activities of a person (being the manufacturer for these purposes) of growing, extracting, producing, processing or assembling the goods. [*Schedule 1, item 1: Chapter 1, paragraph 7(1)(a)*] These activities encompass a very wide range of agricultural, mining, forestry, fishing and aquacultural, manufacturing, product assembly, trade, craft and artisanal activities.
- the activities of a person (being the manufacturer for these purposes) who holds himself or herself out to the public as the manufacturer of the goods. [*Schedule 1, item 1: Chapter 1, paragraph 7(1)(b)*] This covers, among other things, a range of activities that relate to the activities of importers and agents and entities acting as the local representative of manufacturers.
- the activities of a person (being the manufacturer for these purposes) who causes or permits the name of the person, a name by which the person carries on business or a brand or mark of the person to be applied to goods supplied to the person. [*Schedule 1, item 1: Chapter 1, paragraph 7(1)(c)*] This covers, among other things, a range of activities that relate to the activities of importers and agents and entities acting as the local representative of manufacturers.
- the activities of a person (the 'first person', being the manufacturer for these purposes) who causes or permits another person, in connection with the supply or possible supply, or the promotion of the supply, of the goods, to hold out the first person to the public as the manufacturer of the goods. [*Schedule 1, item 1: Chapter 1, paragraph 7(1)(d)*] This covers, among other things, a range of activities that relate to the activities of importers and agents and entities acting as the local representative of manufacturers.

- the activities of a person (being the manufacturer for these purposes) who imports goods into Australia if that person is not the actual manufacturer of the goods and, at the time of the importation of the goods, the manufacturer does not have a place of business in Australia. [Schedule 1, item 1: Chapter 1, paragraph 7(1)(e)] ‘Import’ is not specifically defined for the purposes of the ACL.

2.39 A person is taken to have associated their name or brand with a product if their name, brand or mark is:

- woven in, impressed on, worked into or annexed or affixed to the goods;
- it is applied to a covering, label, reel or thing in or with which the goods are supplied. [Schedule 1, item 1: Chapter 1, paragraph 7(2)(a)]

2.40 It is presumed for the purposes of the ACL that if a person’s name, brand or mark is applied to goods, then that person caused their name, brand or mark to be so applied. [Schedule 1, item 1: Chapter 1, paragraph 7(2)(b)]

2.41 If goods are imported into Australia on behalf of a person, that person is taken to have imported the goods. [Schedule 1, item 1: Chapter 1, subsection 7(3)]

#### ***Goods affixed to land or premises***

2.42 For the purposes of the ACL, goods are taken to be supplied to a consumer (within the meaning of section 3) even if they are affixed to land or premises at the time of the supply. Goods supplied in relation to another transaction, for example the transfer of an interest in a property, are subject to the ACL for certain purposes. This could include, for example, kitchen or laundry fittings supplied as part of a home construction contract, which would otherwise become fixtures at the time of their installation. [Schedule 1, item 1: Chapter 1, section 8]

#### ***The meaning of ‘safety defect’ in relation to goods***

2.43 The meaning of *safety defect* is relevant to the provisions of the ACL dealing with the liability of manufacturers for goods with safety defects. [Schedule 1, item 1: Chapter 5, Part 5-3]

2.44 The general test for the existence of a safety defect in a good is whether the safety of the goods is not such as persons generally are entitled to expect. [Schedule 1, item 1: Chapter 1, subsection 9(1)]



2.45 The concept of safety or what a person is generally entitled to expect is not defined. However the provision sets out a non-exhaustive set of principles to which a court or tribunal may have regard in determining this question. [*Schedule 1, item 1: Chapter 1, subsection 9(2)*]

2.46 The question of whether a good has a safety defect is an absolute, rather than relative, proposition and must be determined with reference to the state of scientific or technical knowledge that existed at the time the goods were supplied. The ACL provides that an inference is not to be made that a good has a safety defect only because:

- after they were supplied by their manufacturer, safer goods of the same kind were supplied; or
- the goods complied with a Commonwealth mandatory standard that was not the safest possible standard having regard to the latest state of scientific or technical knowledge. [*Schedule 1, item 1: Chapter 1, subsections 9(3) and 9(4)*]

#### ***Asserting a right to payment***

2.47 The meaning of ***asserting a right to payment*** is relevant to the provisions of the ACL relating to asserting a right to payment for unsolicited goods or services, and unauthorised directory entries or advertisements. [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 2, sections 40 and 43*] [*Chapter 4, Part 4-1, Division 2, sections 162 and 163*]

2.48 A person is taken to assert a right to payment from another person if the person takes some action with a view to obtaining payment from the other person. Such actions could include:

- making a demand for payment or asserting a present or future right to payment for the goods or services;
- threatening to commence legal proceedings with a view to obtaining payment;
- placing or causing to be placed the name of the person on a list of defaulters or debtors, or threatening to do so, with a view to obtaining payment;
- invoking or causing to be invoked any other collection procedure, or threatening to do so, with a view to obtaining payment;
- sending any invoice or other document that:

- states the amount of the payment (to which a right to payment is asserted); or
- sets out the price of unsolicited goods or unsolicited services (to which a right to payment is asserted); or
- sets out the charge for placing, in a publication, an entry of advertisement (to which a right to payment is asserted),

and does not contain a statement, to the effect that the payment is not an assertion of a right to payment, that complies with any requirements prescribed by the regulations. *[Schedule 1, item 1: Chapter 1, subsection 10(1)]*

2.49 Regulations specifying the requirements for statements concerning the assertion of rights to payment have not yet been prepared.

2.50 An invoice or other document purporting to have been sent by or on behalf of a person is taken to have been sent by that person unless the contrary is established. *[Schedule 1, item 1: Chapter 1, subsection 10(2)]*

#### *ASIC Act*

2.51 A provision in similar terms to section 10 of the ACL is included in the ASIC Act. Section 12BEA of the ASIC Act deals with the meaning of asserting a right to payment in the context of financial services and products. *[Schedule 3, item 8: section 12BEA]*

#### ***References to acquisition, supply and re-supply***

2.52 Section 11 of the ACL is relevant to the many provisions of the ACL covering conduct concerning the acquisition, supply or re-supply of goods and services. It draws on section 4C of the CC Act, which will continue to apply only for the purposes of the CC Act, and not the ACL. The jurisprudence relating to section 4C may be relevant to the interpretation or understanding of the meaning of section 11 of the ACL, insofar as those provisions are similar.

2.53 For the purposes of the ACL:

- a reference to the acquisition of goods includes a reference to the acquisition of property in, or rights in relation to, goods pursuant to a supply of the goods; and
- a reference to the supply or acquisition of goods or services includes a reference to agreeing to supply or acquire goods or services; and

- a reference to the supply or acquisition of goods includes a reference to the supply or acquisition of goods together with other property or services, or both; and
- a reference to the supply or acquisition of services includes a reference to the supply or acquisition of services together with property or other services, or both; and
- a reference to the re-supply of goods acquired from a person includes a reference to:
  - a supply of the goods to another person in an altered form or condition; and
  - a supply to another person of goods in which the first-mentioned goods have been incorporated; and
- a reference to the re-supply of services (the ‘original services’) acquired from a person (the ‘original supplier’) includes a reference to:
  - a supply of the original services to another person in an altered form or condition; and
  - a supply to another person of other services that are substantially similar to the original services, and could not have been supplied if the original services had not been acquired by the person who acquired them from the original supplier.

*[Schedule 1, item 1: Chapter 1, section 11]*

2.54 The purpose of this provision is to make clear the circumstances in which transactions may be covered by the ACL.

***Application of Schedule in relation to leases and licenses of land and buildings***

2.55 This provision is relevant to any provision of the ACL that applies to a contract which involves a lease of, or licence in respect of, land or a building. It clarifies that any reference to a **contract** includes a reference to a lease of, or licence in respect of, land or a building, regardless of whether there are express references to **leases** or **licences** in the provisions of the ACL). *[Schedule 1, item 1: Chapter 1, section 12]*

2.56 Similarly, a reference to making or entering into a contract for such a lease or licence refers to granting or taking the lease or licence, and a

reference to a party to a contract in respect of such a lease or licence includes any person bound by, or entitled to the benefit of, any provision contained in the lease or licence.

***Loss or damage to include injury***

2.57 For the purposes of the ACL, references to ‘loss or damage’ includes injury. *[Schedule 1, item 1: Chapter 1, subsection 13(a)]* Injury includes bodily or personal injury and may extend to other forms of harm.

2.58 A reference to the amount of any loss or damage includes a reference to damages in respect of any injury. *[Schedule 1, item 1: Chapter 1, subsection 13(b)]*

2.59 ‘Loss and damage’ is not defined for the purposes of the ACL.

***Continuing credit contract***

2.60 Section 12 of the ACL provides, for the purposes of the provisions of the ACL dealing with liability of suppliers and credit providers *[Schedule 1, item 1: Chapter 5, Part 5-5]*, that a ***continuing credit contract*** is one where:

- a creditor agrees to provide credit for goods or services (either supplied by the creditor or another person) or cash paid to the consumer or another person;
- they have an arrangement or course of dealing; and
- the amounts owing and paid are kept in accounts for the purposes of the arrangement or dealing. *[Schedule 1, item 1: Chapter 1, subsection 14(1)]*

2.61 Where the credit relates to goods, services or cash provided by another person, the creditor is taken to have provided credit to the consumer even though the payments were not to the consumer. *[Schedule 1, item 1: Chapter 1, subsection 14(2)]*

### ***Contraventions of the ACL***

2.62 Conduct covered by:

- the voiding of a unfair contract term under section 23(1) of the ACL;
- a failure to honour the consumer guarantees set out in Division 1 of Part 3-2; or
- a failure to meet obligations under the provisions dealing with the liability of manufacturers for goods with safety defects in Part 3-5,

are not contraventions of the ACL. *[Schedule 1, item 1: Chapter 1, section 15]*

### ***Severability***

2.63 A provision in a contract which causes that contract to contravene the ACL, is severable from that contract. The concept of severability means that the contract remains valid and enforceable otherwise than in relation to the particular provision, so far as it can be without that provision. *[Schedule 1, item 1: Chapter 1, subsection 16(1)]*

2.64 Where an order made under a provision of Part 5-2, Division 4 of the ACL applies to a contract, the rule created by section 16 of the ACL applies subject to those orders. *[Schedule 1, item 1: Chapter 1, subsection 16(2)]* Part 5-2, Division 4 covers a wide range of potential remedies for breaches of the ACL that may, among other things, include variations to provisions in a contract.

### ***References to provisions in the ACL***

2.65 A reference to a section in the ACL is a reference to that section only, and cannot be taken to be a reference to the same numbered section in the CC Act or any other Act, unless otherwise provided for. *[Schedule 1, item 1: Chapter 1, section 17]*



---

## **Chapter 3**

# ***Misleading or deceptive conduct***

---

### **Outline of chapter**

3.1 The ACL contains a general prohibition against misleading and deceptive conduct in trade or commerce.

### **Context of amendments**

3.2 The ACL includes a provision to replace the prohibition on misleading or deceptive conduct currently set out in section 52 of the TP Act, without substantive change. A similar prohibition is in the FT Acts of the States and Territories in substantially the same form as section 52 of the TP Act.

3.3 The only change made in including the prohibition in the ACL is to apply the prohibition to 'a person' rather than 'a corporation'. This reflects the broader application of the ACL.

3.4 The jurisprudence associated with the understanding and interpretation of section 52 of the TP Act and the equivalent provisions in State and Territory fair trading laws is still relevant.

### **Summary of new law**

3.5 Subsection 18(1) of the ACL 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. This is a general prohibition, which creates a norm of business conduct in the market.

3.6 Section 19 of the ACL provides that the provisions relating to misleading or deceptive conduct do not apply 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.

## Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Engaging in misleading or deceptive conduct is prohibited.	Engaging in misleading or deceptive conduct is prohibited in section 52 of the TP Act. Provisions in essentially the same form as section 52 of the TP Act exist in the FT Acts of the States and Territories, namely: Section 42 NSW FT Act Section 9 Vic. FT Act Section 38 Qld FT Act Section 56 SA FT Act Section 10 WA FT Act Section 14 Tas. FT Act Section 12 ACT FT Act Section 42 NT FT Act
The prohibition of misleading or deceptive conduct does not apply to an information provider if the information provider made the publication in the course of carrying on a business of providing information, unless the publication is: <ul style="list-style-type: none"> <li>• an advertisement;</li> <li>• in connection with the supply of certain goods or services; or</li> </ul> in connection with the sale or grant of certain interests in land, or the promotion of such a sale or grant.	A similar provision is contained in section 65A of the TP Act and section 12DN of the ASIC Act. Provisions with the same effect as section 65A of the TP Act exist in the FT Acts of the States and Territories, namely: Section 60 NSW FT Act Section 32 Vic. FT Act Section 51 Qld FT Act Section 63 WA FT Act Section 74 SA FT Act Section 28 Tas. FT Act Section 31 ACT FT Act Section 60 NT FT Act



## Detailed explanation of new law

3.7 Section 18(1) of the ACL prohibits a person from engaging in conduct in trade or commerce that is:

- misleading and deceptive; or
- likely to mislead or deceive.

*[Schedule 1, item 1: Chapter 2, Part 2-1, subsection 18(1)]*

3.8 Section 18(2) provides that the application of section 18(1) is not (and cannot be) limited by the operation of a provision in Chapter 3, Part 3-1, which prohibits specific unfair practices, and the provisions may apply concurrently. *[Schedule 1, item 1: Chapter 2, Part 2-1, subsection 18(2)]*

3.9 The provisions of the ACL apply to all persons — whether they are individual persons or bodies corporate — as it will be a law both of the Commonwealth and of each State and Territory. Section 131 of the CC Act applies the ACL to the conduct of corporations. *[Schedule 3, item 1: section 131]*

3.10 The prohibition on misleading or deceptive conduct creates a broad norm of conduct in the market. A finding that the prohibition is proven according to the relevant standard of proof does not result in exposure to a criminal sanction or civil penalty under the ACL. Rather, such a finding exposes the person who has breached the provision to the wide range of remedies available under Chapter 5, Part 5-2 of the ACL, including redress for non-party consumers. *[Schedule 1, item 1: Chapter 5, Part 5-2]*

3.11 Section 18 of the ACL replaces the repealed section 52 of the TP Act. The substance of the drafting of the prohibition has not been changed, other than changing the reference to ‘a corporation’ to ‘a person’. Accordingly, the well-developed jurisprudence relating to section 52 of the TP Act is relevant to the interpretation or understanding of the meaning and application of section 18 of the ACL.

3.12 Section 18 of the ACL applies to conduct ‘in trade or commerce’. ‘Trade or commerce’ is defined as meaning ‘trade or commerce within Australia, or between Australia and places outside Australia, and includes any business or professional activity (whether or not carried on for profit)’. The ACL applies to conduct engaged in outside of Australia, provided that at least some aspect of the trading relationship between two or more parties has taken place in Australia. *[Schedule 1, item 1: Chapter 1, section 2]*

3.13 The High Court has found, for the purposes of section 52 of the TP Act, that ‘trade or commerce’ includes conduct which is itself an aspect or

element of activities or transactions which, of their nature, bear a trading or commercial nature.<sup>4</sup>

3.14 'Misleading or deceptive' is not defined for the purposes of the ACL. The High Court has found that, for conduct to be misleading or deceptive, the conduct must either induce error or be capable of inducing error.<sup>5</sup>

3.15 Section 18 of the ACL does not specify a requirement for intention on the part of the person engaged in the conduct to be shown. The High Court has found that intention is not a requirement for a person to have engaged in misleading or deceptive conduct.<sup>6</sup>

3.16 Section 18 of the ACL refers only to 'conduct' which is misleading or deceptive or is likely to mislead or deceive. The High Court has found that the ambit of 'conduct' is not limited to a positive action or representation, and that silence can be considered misleading or deceptive in certain circumstances.<sup>7</sup>

#### ***Enforcement and remedies***

3.17 The following enforcement powers and remedies apply to section 18 of the ACL:

- undertakings; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 1*]
- substantiation notices; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 2*]
- public warning notices; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 3*]
- injunctions; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 2*]
- damages; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 3*]
- compensatory orders; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision A*]
- redress for non-parties; and [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision B*]

---

4 *Concrete Constructions (NSW) Pty Ltd v Nelson* [1990] HCA 17.

5 *Parkdale Custom Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 190.

6 *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216.

7 *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31.

- non-punitive orders [Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, section 246]

3.18 For further information on these powers, remedies and penalties generally see Chapters 14 and 15.

### ***Information providers***

3.19 The prohibition in section 18 of the ACL does not apply to publications by an information provider, where the information provider made the publication in the course of carrying on a business of providing information or, in the case of a radio or television broadcaster, the publication was by radio or television broadcast by the information provider. This exemption does not apply to:

- advertisements;
- a publication in connection with the supply (or promotion of the supply) of goods or services by the information provider; or
- a publication in connection with the sale or grant (or promotion of the sale or grant) of an interest in land by the information provider.

*[Schedule 1, item 1: Chapter 2, Part 2-1, section 19]*

3.20 Section 19 of the ACL operates in the same way as the repealed subsections 65A(1) and (2) of the TP Act, and the jurisprudence on the understanding, interpretation and application of those provisions is relevant to section 19.

3.21 In particular, subsections 19(3) and (4) have been drafted in such a way as to maintain the High Court's interpretation of section 65A of the TP Act in *ACCC v Channel Seven Brisbane Pty Limited* [2009] HCA 19. In that case, the High Court held that the second exception applies for publications made on behalf of, or pursuant to a contract, arrangement or understanding with a person who supplies goods or services, rather than for publications made in connection with relevant goods or services in relation to the information provider. The exceptions have a wide application rather than a narrow one. *[Schedule 1, item 1: Chapter 2, Part 2-1, subsections 19(2)-(4)]*

3.22 Information provider is defined expansively for the purposes of the ACL in subsections 19(5) and (6), and includes media organisations such as radio and television stations (including the Australian Broadcasting Corporation and the Special Broadcasting Service Corporation), as well as publishers of newspapers and magazines. This definition operates in the

same way as the one in the repealed subsection 65A(3) of the TP Act. *[Schedule 1, item 1: Chapter 2, Part 2-1, subsections 19(5) and (6)]*

#### *ASIC Act*

3.23 Section 12DN of the ASIC Act is repealed and replaced by a new provision which reflects section 19 of the ACL. *[Schedule 3, item 29: section 12DN]*

## **Application and transitional provisions**

3.24 The ACL commences on the later of 1 January 2011 or the commencement of Schedule 1 of the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (the first ACL Bill). The first ACL Bill is currently before the Parliament. *[Section 2]*

3.25 Chapter 2, Part 2-1 applies to all relevant conduct occurring in trade or commerce on or after 1 January 2011.

3.26 Conduct occurring prior to 1 January 2011 will remain subject to the repealed (and saved, for those purposes) provisions in the TP Act or the relevant FT Act of a State or Territory. *[Schedule 7, item 6]*

3.27 The TP Act, as in force immediately before the commencement of the ACL, continues to apply to or in relation to any proceedings under or in relation to that Act, which were commenced, but not concluded, before that commencement. *[Schedule 7, item 7]*

3.28 The Governor-General may make regulations prescribing matters of a transitional, application or saving nature in relation to the amendments and repeals made by the Schedules to this Act. *[Schedule 7, item 12]*

## **Consequential amendments**

3.29 References to provisions of the TP Act in other CC Act provisions and provisions of other Acts will be consequentially amended to refer to provisions of the ACL to ensure that the affected provisions continue to apply in the way in which they did under the TP Act. *[Schedules 5 and 6]*

---

## **Chapter 4**

# ***Unconscionable conduct***

---

### **Outline of chapter**

4.1 The Australian Consumer Law (ACL) includes provisions prohibiting persons from engaging in unconscionable conduct towards consumers or businesses.

### **Context of amendments**

4.2 Part IVA of the *Trade Practices Act 1974* (TP Act) prohibits corporations from engaging in unconscionable conduct.

4.3 There are three substantive prohibitions currently in Part IVA:

- section 51AA prohibits unconscionable conduct within the meaning of the unwritten law of the States and Territories;
- section 51AB prohibits conduct in connection with the supply of goods or services to ‘consumers’ that is, in all the circumstances, unconscionable; and
- section 51AC prohibits 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’, that is, in all the circumstances, unconscionable.

4.4 Section 51AB was first inserted into the TP Act in 1986, section 51AA was inserted in 1992 and 51AC was inserted in 1998.

4.5 Every State and Territory has similar provisions to 51AB in their FT Acts. Western Australia, Victoria and Tasmania also have equivalents to section 51AC and Victoria also has an equivalent to section 51AA.

4.6 Since 1988, the TP Act unconscionable conduct provisions have been mirrored in Part 2, Division 2, Subdivision C of the *Australian Securities and Investments Commission Act 2001* (ASIC Act), which applies in respect of financial services.

4.7 Section 51AA defines unconscionable conduct by reference to the unwritten law from time to time of the States and Territories.

4.8 While, the meaning of unconscionable conduct in the current sections 51AB and 51AC of the TP Act is based in the equitable doctrine, statutory guidance is provided to the courts by lists of factors set out in those sections. These factors are not an exhaustive list, but are specific factors to which the court may have regard in making a decision about whether unconscionable conduct has occurred.

4.9 In accordance with the *Intergovernmental Agreement for the Australian Consumer Law* (IGA), the TP Act unconscionable conduct provisions will be included in the ACL.

### **Future changes to statutory unconscionable conduct**

4.10 In December 2008, the Senate Standing Committee on Economics (Senate Committee) released an inquiry report into the need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the TP Act. The Senate Committee recommended:

- a clarifying amendment to ensure that section 51AC applies to the behaviour of parties under a contract, in addition to their behaviour during the process of agreeing the terms of the contract;
- that the Government further consider the need for a guiding statement of principles in the law, with particular regard to the retail tenancy leasing and franchising industries; and
- that the Australian Competition and Consumer Commission (ACCC) should undertake targeted investigation and funding of unconscionable conduct test cases.

4.11 An amendment giving effect to the first recommendation of the Senate Committee is included in section 22(2)(j) of the ACL.

4.12 On 5 November 2009, the Australian Government released its response to the Senate Committee. The Government agreed to a clarifying amendment to the 51AC, along the lines of that recommended by the Senate Committee. The Government also established an expert panel to consider:

- whether a list of examples of unconscionable conduct should be incorporated into the TP Act; and
- the case for amendments to strengthen the Franchising Code of Conduct.

4.13 The expert panel reported to the Government in February 2010 and on 3 March 2010, the Government responded to the expert panel's report. The Government has announced that it will:

- insert a statement of interpretative principles into the provisions; and
- redraft sections 51AB and 51AC to either harmonise or unify them.

4.14 No amendments to implement the Government's response to the expert panel report are included in the ACL Bill. The Government has announced that it will implement its response through separate legislative amendments to be introduced later in 2010 and in cooperation with the States and Territories.

## **Summary of new law**

4.15 Part 2-2 of the ACL includes prohibitions against a person engaging in unconscionable conduct.

4.16 The concept of 'unconscionable conduct' is not defined for the purposes of the ACL. However:

- section 20 provides that conduct that is unconscionable within the unwritten law of the States and Territories, from time to time, is unconscionable for the purposes of the ACL;
- section 21 provides a non-exhaustive list of types of conduct which may be unconscionable in the context of a business's dealings with consumers; and
- section 22 provides two non-exhaustive lists of types of conduct that may be unconscionable in the context of a business's dealings with other businesses, either as a customer or a supplier to those businesses.

4.17 The inclusion of a prohibition on unconscionable conduct within the ACL ensures that consumers and businesses are able to access a range of remedies under the ACL, and that regulatory agencies are able to access penalties under the ACL, in addition to any remedies courts may provide under the common law or the principles of equity.

4.18 The unconscionable conduct provisions also guide the courts' application of the common law and equitable principles of unconscionable

conduct in the context of consumer and business interactions that take place during the course of trade or commerce.

### **Comparison of key features of new law and current law**

<i>New law</i>	<i>Current law</i>
A person must not, in trade or commerce, engage in unconscionable conduct within the meaning of the unwritten law.	<p>Section 51AA of the TP Act prohibits a corporation, in trade or commerce, from engaging in unconscionable conduct within the meaning of the unwritten law of the States and Territories.</p> <p>Section 12CA of the ASIC Act prohibits a person, in trade or commerce, from engaging in conduct in relation to financial services that is unconscionable within the meaning of the unwritten law of the States and Territories.</p> <p>Section 7 of the Vic FT Act prohibits a person, in trade or commerce, from engaging in unconscionable conduct within the unwritten law.</p>



<i>New law</i>	<i>Current law</i>
<p>A person must not, in trade or commerce, in connection with the supply or possible of goods or services to another person, engage in conduct which is in all the circumstances unconscionable.</p>	<p>Section 51AB of the TP Act provides that a corporation, in trade or commerce, must not in relation to the supply or possible supply of goods or services to a person, engage in conduct which is in all the circumstances unconscionable.</p> <p>Section 12CB of the ASIC Act provides that a person must not, in trade or commerce, in connection with the supply or possible supply of financial services to a person, engage in conduct that is, in all the circumstances, unconscionable.</p> <p>Section 43 of the NSW FT Act Section 8 of the Vic. FT Act Section 39 of the Qld FT Act Section 11 of the WA FT Act Section 57 of the SA FT Act Section 15 of the Tas. FT Act Section 13 of the ACT FT Act Section 43 of the NT CAFT Act</p>

<i>New law</i>	<i>Current law</i>
<p>A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services to another person, other than a listed public company, engage in conduct that is in all the circumstances unconscionable.</p>	<p>Subsection 51AC(1) of the TP Act provides that a corporation must not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, other than a listed public company, engage in conduct that is in all the circumstances unconscionable.</p> <p>Subsection 51AC(2) of the TP Act provides that a person must not, in trade or commerce, in connection with the supply or possible supply of goods or services to a corporation, other than a listed public company, engage in conduct that is in all the circumstances unconscionable.</p> <p>Section 12CC of the ASIC provides that a person must not, in trade or commerce, in connection with the supply or possible supply of financial services to another person, other than a listed public company, engage in conduct that is, in all the circumstances, unconscionable.</p> <p>Section 8A of the Vic. FT Act Section 11A of the WA FT Act Section 15A of the Tas. FT Act</p>

<i>New law</i>	<i>Current law</i>
<p>A person must not, in trade or commerce, in connection with the acquisition or possible acquisition of goods or services from another person, other than a listed public company, engage in conduct that is, in all the circumstances, unconscionable.</p>	<p>Subsection 51AC(1) of the TP Act provides that a corporation must not, in trade or commerce, in connection with the acquisition or possible acquisition of goods or services from another person, other than a listed public company, engage in conduct that is, in all the circumstances, unconscionable.</p> <p>Subsection 51AC(2) of the TP Act provides that a person must not, in trade or commerce, in connection with the acquisition or possible acquisition of goods or services from a corporation, other than a listed public company, engage in conduct that is, in all the circumstances, unconscionable.</p> <p>Section 12CC of the ASIC Act provides that a person must not, in trade or commerce, in connection with the acquisition or possible acquisition of financial services from another person, other than a listed public company, engage in conduct that is, in all the circumstances, unconscionable.</p> <p>Section 8A of the Vic. FT Act Section 11A of the WA FT Act Section 15A of the Tas. FT Act</p>

## Detailed explanation of new law

### Unconscionable conduct within the meaning of the unwritten law

4.19 Section 20 of the ACL creates a general prohibition against a person engaging in unconscionable conduct within the meaning of the unwritten law, from time to time, in the course of trade or commerce.  
[Schedule 1, item 1: Chapter 2, Part 2-2, subsection 20(1)]

4.20 **Trade or commerce** is defined for the purposes of the ACL as meaning ‘trade or commerce within Australia, or between Australia and places outside Australia, and includes any business or professional activity (whether or not carried on for profit)’. The ACL applies to conduct engaged in outside of Australia, provided that at least some aspect of the trading

relationship between two or more parties has taken place in Australia.  
*[Schedule 1, item 1: Chapter 1, section 2]*

4.21 The ‘unwritten law, from time to time’ is the array of common law and equitable principles that have developed in the Australian courts over many years as they apply and relate to the concept of unconscionable conduct. Previous jurisprudence developed in the courts of England and Wales prior to the independence of the Australian judicial system, which occurred with the reception of the laws and statutes of England and Wales and the establishment of the colonial Supreme Courts in the nineteenth century, is also relevant, as are the decisions of the Privy Council exercising its now ended appellate jurisdiction over State courts.

4.22 The principal purpose and function of section 20 of the ACL is to allow the penalties and remedies available under Chapter 5 of the ACL to be imposed with respect to conduct that is found to be considered to be unconscionable within the meaning of the unwritten law, from time to time.

4.23 A person contravening section 20 of the ACL is liable to pay a civil pecuniary penalty of up to:

- \$1.1 million for a body corporate;
- \$220,000 for other persons.

*[Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, section 224]*

4.24 The following enforcement powers and remedies apply to section 20 of the ACL:

- undertakings; *[Schedule 1, item 1: Chapter 5, Part 5-1, Division 1]*
- substantiation notices; *[Schedule 1, item 1: Chapter 5, Part 5-1, Division 2]*
- public warning notices; *[Schedule 1, item 1: Chapter 5, Part 5-1, Division 3]*
- injunctions; *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 2]*
- damages; *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 3]*
- compensatory orders; *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision A]*
- redress for non-parties; and *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision B]*

- non-punitive orders. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, section 246]*

4.25 For further information on these powers, remedies and penalties generally see Chapters 14 and 15.

4.26 The ACCC may issue an infringement notice for a contravention of section 20 of the ACL. The amount of the penalty specified in the infringement notice is:

- 600 penalty units for a listed corporation;
- 60 penalty units for a body corporate other than a listed corporation; and
- 12 penalty units for any other person.

*[Schedule 2, item 1: Part XI, Division 5]*

4.27 The prohibition in section 20 applies only to conduct that is not covered by the more specific prohibitions in sections 21 and 22 of the ACL, that is:

- the supply or possible supply of goods or services to consumers or businesses; or
- the acquisition or possible acquisition of goods or services from businesses.

*[Schedule 1, item 1: Chapter 2, Part 2-2, subsection 20(2)]*

## **Unconscionable conduct towards consumers**

4.28 Section 21 of the ACL prohibits a person from engaging in unconscionable conduct towards another person in connection with the supply or possible supply of goods or services. *[Schedule 1, item 1: Chapter 2, Part 2-2, subsection 21(1)]*

4.29 This section does not define ‘unconscionable conduct’, but it also does not limit it to the concept as understood under the ‘unwritten law, from time to time’.

### ***The meaning of ‘consumer’ with respect to unconscionable conduct in the ACL***

4.30 Section 21 only applies in respect of persons who are ‘consumers’. It does not apply the definition of consumer that is contained in section 3 of

the ACL, although the provisions are consistent. The concept of ‘consumer’ used in section 21 limits the application of the section to situations where:

- the goods or services involved in the conduct are goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption; and
- supply is not taken to include supply or possible supply for the purposes of re-supply or for the purpose of using goods up or transforming them in trade or commerce. [*Schedule 1, item 1: Chapter 2, Part 2-2, subsections 21(5) and 21(6)*]

4.31 The concept of ‘ordinarily acquired for personal, domestic or household use or consumption’ is drawn from the definition of consumer in section 3 of the ACL. This is an objective concept that is determined with reference to the nature of the goods or services acquired, rather than the actual purpose for which the goods or services were acquired.

4.32 The concept of ‘supply’ is also drawn from the definition of consumer in section 3 of the ACL. This is a subjective concept that must be determined with reference to the actual purpose for which particular goods were acquired.

***Misleading representations within respect to future matters***

4.33 Section 4 of the ACL, concerning the treatment of misleading representations as to future matters, applies in the same way to Chapter 2, Part 2-2 of the ACL as it does to Chapter 3, Part 3-1, Division 1. [*Schedule 1, item 1: Chapter 2, Part 2-2, subsection 21(7)*]

***Matters to which the court must or may have regard***

4.34 A court must consider allegations of unconscionable conduct in the context of all of the circumstances surrounding the relevant parties’ conduct towards each other. [*Schedule 1, item 1: Chapter 2, Part 2-2, subsection 21(1)*].

4.35 In doing this, the court may have regard to a list of matters specified in subsection 21(2) the ACL, but may also consider any other matter that it thinks relevant. [*Schedule 1, item 1: Chapter 2, Part 2-2, subsection 21(2)*].

4.36 The existence of a legal dispute, manifest in legal proceedings, between two parties is not in itself determinative of unconscionable conduct on behalf of either party. Subsection 21(3) of the ACL provides that a person is not taken to have engaged in unconscionable conduct merely because the person instituted legal proceedings or another arbitration process against another person. [*Schedule 1, item 1: Chapter 2, Part 2-2, subsection 21(3)*]

4.37 In determining whether conduct is unconscionable, the court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention. *[Schedule 1, item 1: Chapter 2, Part 2-2, paragraph 21(4)(a)]*

4.38 In determining whether conduct is unconscionable, the court may have regard to conduct engaged in, or circumstances existing, before the commencement of section 21 of the ACL (that is, before 1 January 2011). *[Schedule 1, item 1: Chapter 2, Part 2-2, paragraph 21(4)(b)]*

### ***Enforcement***

4.39 A person contravening section 21 of the ACL is liable to pay a civil pecuniary penalty of up to:

- \$1.1 million for a body corporate;
- \$220,000 for other persons.

*[Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, section 224]*

4.40 The following enforcement powers and remedies apply to section 21 of the ACL:

- undertakings; *[Schedule 1, item 1: Chapter 5, Part 5-1, Division 1]*
- substantiation notices; *[Schedule 1, item 1: Chapter 5, Part 5-1, Division 2]*
- public warning notices; *[Schedule 1, item 1: Chapter 5, Part 5-1, Division 3]*
- injunctions; *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 2]*
- damages; *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 3]*
- compensatory orders; *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision A]*
- redress for non-parties; and *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision B]*
- non-punitive orders. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, section 246]*

4.41 For further information on these powers, remedies and penalties generally see Chapters 14 and 15.

4.42 The ACCC may issue an infringement notice for a contravention of section 21 of the ACL. The amount of the penalty specified in the infringement notice is:

- 600 penalty units for a listed corporation;
- 60 penalty units for a body corporate other than a listed corporation; and
- 12 penalty units for any other person.

*[Schedule 2, item 1: Part XI, Division 5]*

### **Unconscionable conduct towards businesses**

4.43 Section 22 of the ACL prohibits a person from engaging in unconscionable conduct towards another person in connection with:

- the supply or possible supply of goods or services in trade or commerce to a person, being a ‘business consumer’; or
- the acquisition of or possible acquisition of goods and services in trade or commerce from a person, being a ‘small business supplier’.

*[Schedule 1, item 1: Chapter 2, Part 2-2, subsections 22(1), (6) and (7)]*

4.44 This section does not define ‘unconscionable conduct’, but it also does not limit it to the concept as understood under the ‘unwritten law, from time to time’.

4.45 Section 22 does not apply to conduct relating to the supply or possible supply of goods or services to or from a listed public company. *[Schedule 1, item 1: Chapter 2, Part 2-2, paragraphs 22(1)(a) and (b)]* A **listed public company** is defined in section 2 of the ACL. *[Schedule 1, item 1: section 2]*

#### ***The meaning of ‘business consumer’ with respect to unconscionable conduct in the ACL***

4.46 Section 22(2) of the ACL, which specifies those matters to which the court must have regard in determining whether unconscionable conduct has occurred with respect to the supply of goods and services, applies to persons who are ‘business consumers’. *[Schedule 1, item 1: Chapter 2, Part 2-2, subsection 22(2)]*

4.47 It does not apply the definition of **consumer** that is contained in section 3 of the ACL. The concept of ‘business consumer’ used in



section 22 limits the application of the section to situations where the person to be supplied is not a listed public company.

***The meaning of ‘small business supplier’ with respect to unconscionable conduct in the ACL***

4.48 Section 22(3) of the ACL, which specifies those matters to which the court must have regard in determining whether unconscionable conduct has occurred with respect to the acquisition of goods and services, applies to persons who are ‘small business suppliers’. [*Schedule 1, item 1: Chapter 2, Part 2-2, subsection 22(3)*]

***Misleading representations with respect to future matters***

4.49 Section 4 of the ACL, concerning the treatment of misleading representations as to future matters, applies in the same way to Chapter 2, Part 2-2 of the ACL. [*Schedule 1, item 1: Chapter 2, Part 2-2, subsection 22(8)*]

***Matters to which the court must or may have regard concerning the supply or acquisition of goods and services***

4.50 A court must consider allegations of unconscionable conduct in the context of all of the circumstances surrounding the relevant parties’ conduct towards each other. [*Schedule 1, item 1: Chapter 2, Part 2-2, subsection 22(1)*].

4.51 In doing this, the court, in considering whether there has been unconscionable conduct in a transaction between a supplier for the supply or possible supply of goods and services to a business consumer, may have regard to a list of matters specified in subsection 22(2) the ACL, but may also consider any other matter that it thinks relevant. [*Schedule 1, item 1: Chapter 2, Part 2-2, subsection 22(2)*].

4.52 In doing this, the court, in considering whether there has been unconscionable conduct in a transaction between an acquirer for the acquisition or possible acquisition of goods and services from a small business supplier, may have regard to a list of matters specified in subsection 22(3) the ACL, but may also consider any other matter that it thinks relevant. [*Schedule 1, item 1: Chapter 2, Part 2-2, subsection 22(3)*].

4.53 The existence of a legal dispute, manifest in legal proceedings, between two parties is not in itself determinative of unconscionable conduct on behalf of either party. Subsection 21(3) of the ACL provides that a person is not taken to have engaged in unconscionable conduct merely because the person instituted legal proceedings or other arbitration process against another person. [*Schedule 1, item 1: Chapter 2, Part 2-2, subsection 22(4)*]

4.54 In determining whether conduct is unconscionable, the court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention. *[Schedule 1, item 1: Chapter 2, Part 2-2, paragraph 22(5)(a)]*

4.55 In determining whether conduct is unconscionable, the court may have regard to conduct engaged in, or circumstances existing, before the commencement of section 21 of the ACL (that is, before 1 January 2011). *[Schedule 1, item 1: Chapter 2, Part 2-2, paragraph 22(5)(b)]*

#### ***ASIC Act changes***

4.56 Section 12CC of the ASIC Act is amended to reflect section 22 of the ACL. *[Schedule 3, items 8, 9, 10, 11, 12 and 13]*

#### ***Enforcement***

4.57 A person contravening section 22 of the ACL is liable to pay a civil pecuniary penalty of up to:

- \$1.1 million for a body corporate;
- \$220,000 for other persons.

*[Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, section 224]*

4.58 The following enforcement powers and remedies apply to section 22 of the ACL:

- undertakings; *[Schedule 1, item 1: Chapter 5, Part 5-1, Division 1]*
- substantiation notices; *[Schedule 1, item 1: Chapter 5, Part 5-1, Division 2]*
- public warning notices; *[Schedule 1, item 1: Chapter 5, Part 5-1, Division 3]*
- injunctions; *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 2]*
- damages; *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 3]*
- compensatory orders; *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision A]*
- redress for non-parties; and *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision B]*
- non-punitive orders. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, section 246]*

4.59 For further information on these powers, remedies and penalties generally see Chapters 14 and 15.

4.60 The ACCC may issue an infringement notice for a contravention of section 22 of the ACL. The amount of the penalty specified in the infringement notice is:

- 600 penalty units for a listed corporation;
- 60 penalty units for a body corporate other than a listed corporation; and
- 12 penalty units for any other person.

*[Schedule 2, item 1: Part XI, Division 5]*

## **Application and transitional provisions**

4.61 The ACL will commence on the later of 1 January 2011 or the commencement of Schedule 1 of the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (the first ACL Bill). The first ACL Bill is currently before the Parliament. *[Section 2]*

4.62 Chapter 2, Part 2-2 applies to all relevant conduct occurring in trade or commerce on or after 1 January 2011.

4.63 Conduct occurring prior to 1 January 2011 will remain subject to the repealed (and saved, for those purposes) provisions in the TP Act or the relevant FT Act of a State or Territory. *[Schedule 7, item 6]*

4.64 The TP Act, as in force immediately before the commencement of the ACL, continues to apply to or in relation to any proceedings under or in relation to that Act, which were commenced, but not concluded, before that commencement. *[Schedule 7, item 7]*

4.65 The Governor-General may make regulations prescribing matters of a transitional, application or saving nature in relation to the amendments and repeals made by the Schedules to this Act. *[Schedule 7, item 12]*

## **Consequential amendments**

4.66 References to provisions of the TP Act in other CC Act provisions and provisions of other Acts will be consequentially amended to refer to

provisions of the ACL to ensure that the affected provisions continue to apply in the way in which they did under the TP Act. *[Schedules 5 and 6]*

---

# **Chapter 5**

## **Unfair contract terms**

---

### **Outline of chapter**

5.1 The Australian Consumer Law (ACL) includes provisions that address the use of unfair contract terms in consumer contracts.

### **Context of amendments**

5.2 On 2 October 2008, the Council of Australian Governments (COAG) agreed to establish a national law addressing unfair contract terms, as proposed by the Ministerial Council on Consumer Affairs (MCCA) on 15 August 2008.

5.3 The national unfair contracts law is based on the recommendations made by the Productivity Commission (PC).

5.4 On 15 August 2008, the MCCA considered the PC's recommendations, and agreed to the introduction of a national consumer law, that includes an unfair contract terms provisions. The MCCA-agreed model for an unfair contract terms provision would have the following features:

- the term is unfair when it causes a significant imbalance in the parties' rights and obligations arising under the contract and it is not reasonably necessary to protect the legitimate interests of the supplier;
- a remedy could only be applied where the claimant shows detriment, or a substantial likelihood of detriment, to the consumer (individually or as a class). Detriment is not limited to financial detriment;
- it would relate only to standard form (that is, non-negotiated) contracts. Should a supplier allege that the contract at issue is not a consumer contract, then the onus will be on the supplier to prove that it is not;
- it would exclude the upfront price of the good or service, using the approach currently adopted in Regulation 6(2) of

the United Kingdom's *Unfair Terms in Consumer Contracts Regulations 1999*; and

- it would require all of the circumstances of the contract to be considered, taking into account the broader interests of consumers, as well as the particular consumers affected.

5.5 MCCA further agreed that:

- where these criteria are met, the unfair term will be voided only for the contracts of those consumers or class of consumers subject to detriment (or the substantial likelihood thereof), with suppliers also potentially liable to damages for that detriment, along with other remedies available under the *Trade Practices Act 1974* (TP Act);
- the drafting of any new provision should ensure the potential for private (and regulator-led) representative actions for damages by a class of consumers detrimentally affected by unfair contract terms, in keeping with the PC's recommendation that representative actions be improved;
- the provision should also permit the prescription of certain terms that are, in all circumstances, considered to be unfair. This regulation making power would rest with the Commonwealth Minister, who would prescribe terms in accordance with the national consumer law amendment process set out in the Intergovernmental Agreement (IGA) and the requirements of regulatory impact assessment;
- the provision should be supported by national guidance on its enforcement, developed by the national and State and Territory regulators, in accordance with a process set out in the IGA;
- transitional arrangements should be put in place after enactment, which would give businesses the time to modify their contracts; and
- the operation and effects of the new provision should be reviewed within seven years of its introduction.

The provisions included in the ACL Bill reflect the provisions as the Government proposes that they be amended in the first ACL Bill, presently before the Parliament.

## Summary of new law

5.6 Chapter 2, Part 2–3 of the ACL includes provisions dealing with the use of unfair contract terms in consumer contracts.

5.7 The unfair contract terms provisions apply to consumer contracts only. A consumer contract is defined in the ACL as a contract for a supply of goods or services or a sale or grant of an interest in land to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

5.8 A term in a consumer contract is void if:

- the term is unfair; and
- the contract is in a standard form contract.

5.9 A term in a consumer contract is unfair if the term:

- would cause a significant imbalance in the parties' rights and obligations under the standard form contract; and
- is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and
- would cause financial or non-financial detriment to a party if the term were to be applied or relied on.

5.10 There is a rebuttable presumption that an unfair term is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the application or reliance on that term, unless that party can prove otherwise.

5.11 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 following:

- the extent to which a term is transparent; and
- the contract as a whole.

5.12 Terms that:

- define the main subject matter of the contract;
- set the upfront price payable under the consumer contract; or

- that are required or expressly permitted by a law of the Commonwealth, State or Territory,

are not subject to the unfair contract terms provisions.

5.13 Examples of terms used in consumer contracts that *may* be unfair are listed. The provision setting out the examples does not presume such terms to be unfair.

5.14 The unfair contract terms provisions of the ACL apply to new consumer contracts entered into on or after the commencement of the provisions. The provisions will not apply to contracts entered into before the date on which the provisions commence, unless such a contract is renewed or varied after that date, but then only to the extent of that renewal or variation.

### **Comparison of key features of new law and current law**

<i>New law</i>	<i>Current law</i>
A term in a consumer contract is void: if the term is unfair; and the contract is in a standard form contract.	Part 2 of the ACL as to be applied in the first ACL Bill. Similar provisions exist in Part 2B of the Vic. FT Act.
A consumer contract is defined as a contract for: <ul style="list-style-type: none"><li>• a supply of goods or services; or</li><li>• a sale or grant of an interest in land;</li></ul> to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.	Part 2 of the ACL as to be applied in the first ACL Bill . Similar provisions exist in Part 2B of the Vic. FT Act.



<i>New law</i>	<i>Current law</i>
<p>A term in a consumer contract is unfair if the term: would cause a significant imbalance in the parties' rights and obligations under the consumer contract, and is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and would cause financial or non-financial detriment to a party if the term were to be applied or relied on.</p> <p>There is a presumption that a term is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term, unless that party can prove otherwise.</p>	<p>Part 2 of the ACL as to be applied in the first ACL Bill.</p> <p>Similar provisions exist in Part 2B of the Vic. FT Act.</p>
<p>The court may take account of any consideration it thinks is relevant when determining whether a term in a consumer contract is unfair. However, the court <u>must</u> take into account whether the term is transparent, and the contract as a whole.</p>	<p>Part 2 of the ACL as to be applied in the first ACL Bill.</p> <p>Similar provisions exist in Part 2B of the Vic. FT Act.</p>
<p>Terms in a consumer contract that define the main subject matter of the contract, set out the upfront price payable under the contract, or are required or expressly permitted by a law of the Commonwealth, State or Territory are also excluded from the application of the unfair contract terms provisions in this Bill.</p>	<p>Part 2 of the ACL as to be applied in the first ACL Bill.</p>

## Detailed explanation of new law

### Unfair terms

5.15 The scope of the unfair contract terms provisions in the ACL is restricted to business-to-consumer transactions as the provisions apply only to a consumer contract in which at least one of the parties is an individual.

5.16 Contracts between businesses are excluded from the scope of the unfair contract terms provisions, except in respect of ‘sole traders’.

5.17 A term in a consumer contract is void if the term is unfair and the contract is a standard form contract. A finding by a court that a term is unfair, and therefore void, means that the term is treated as if it never existed. [*Schedule 1, item 1: Chapter 2, Part 2-3, subsections 23(1) and (2)*]

5.18 In the context of the ACL, a consumer contract is defined as a contract entered into for:

- a supply of goods or services; or
- a sale or grant of an interest in land;

to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption. [*Schedule 1, item 1: Chapter 2, Part 2-3, section 2 and subsection 23(3)*]

5.19 This definition does not limit the operation of the unfair contract terms provisions to things of a personal, domestic or household nature, and would include the supply of *any* good, service or interest in land to a consumer provided the acquisition of what is supplied under the contract is *wholly* or *predominantly* for personal, domestic or household use or consumption.

5.20 An *interest* in relation to land, is taken to mean one of the following:

- a legal or equitable estate or interest in the land; or
- a right of occupancy of the land or of a building or part of building erected on the land, arising by virtue of the holding of shares, or by virtue of a contract to purchase shares, in an incorporated company that owns the land or building; or
- a right, power or privilege over, or in connection with, the land. [*Schedule 1, item 1: Chapter 2, Part 2-3, section 2*]

- 5.21 A relevant contract does not include:
- a contract that is a shipping contract; and
  - a contract that is a constitution of a company, managed investment scheme or other kind of body. [*Schedule 1, item 1: Chapter 2, Part 2-3, section 28*]

### Meaning of 'unfair'

- 5.22 A term in a consumer contract is *unfair* if:
- it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
  - the term is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the supplier; and
  - it would cause financial or non-financial detriment to a party if the term were to be applied or relied on. [*Schedule 1, item 1: Chapter 2, Part 2-3, section 2 and subsection 24(1)*]

#### *First element of the test*

5.23 The first element of the test requires the court to consider whether the term would cause a significant imbalance in the parties' rights and obligations arising under the contract. This will involve a factual determination of whether any such significant imbalance would exist. [*Schedule 1, item 1: Chapter 2, Part 2-3, paragraph 24(1)(a)*]

5.24 A claimant in proceedings is required to prove this element of the test on the balance of probabilities.

#### *Second element of the test*

5.25 The second element of the test requires the court to consider whether the term is reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term. [*Schedule 1, item 1: Chapter 2, Part 2-3, section 2, paragraph 24(1)(b)*]

5.26 In respect of the second element of the test, a term of a consumer contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party can prove otherwise in a court. [*Schedule 1, item 1: Chapter 2, Part 2-3, subsection 24(4)*]

5.27 Where a claimant in proceedings has alleged that a term is unfair, it is for the respondent to establish that a term is reasonably necessary to protect its legitimate interests on the balance of probabilities. The respondent may introduce *any* evidence relevant to this element of the test.

5.28 While it is ultimately a matter for the court to determine whether a term is reasonably necessary to protect the legitimate interests of the respondent, the provision will require the respondent to establish, at the very least, that its legitimate interest is sufficiently compelling on the balance of probabilities to overcome any detriment caused to the consumer, or a class of consumers, and that therefore the term was ‘reasonably necessary’.

*Third element of the test*

5.29 The third element of the test requires the court to consider whether the term would cause financial or non-financial detriment to a party if the term were to be applied or relied on. This will involve a factual determination of whether any such detriment does exist or would exist if the term was relied on. [*Schedule 1, item 1: Chapter 2, Part 2-3, paragraph 24(1)(c)*]

5.30 A claimant in proceedings is required to prove this element of the test on the balance of probabilities.

5.31 By requiring evidence of whether detriment has existed or would exist in the future, the provision requires more than a hypothetical case to be made out by the claimant. In this context, a claimant does not need to have proof of having suffered actual detriment, but that detriment would exist in the future as a result of the application of or reliance on the term.

5.32 In this regard, a term does not need to be enforced in order to be unfair, although the possibility of such enforcement may impact on the decisions made by the party that would be disadvantaged by the term’s practical effect, to that party’s detriment.

5.33 Detriment is not limited to financial detriment. This is designed to allow the court to consider situations where there may be other forms of detriment that have affected or would affect the party disadvantaged by the practical effect of the term.

5.34 Where it is found that a term is unfair and that only future detriment would arise from the application of or reliance on that term, then the remedies available would likely be limited to a declaration that the term is an unfair term and an injunction preventing the party advantaged by it applying or relying on it, or purporting to do so. Any form of compensatory remedy would likely be limited to those situations where there is actual detriment proven.

## Considerations the court may take into account

5.35 In determining whether a term in a consumer contract is unfair, the court may take into account any matter which it thinks is relevant, but the court *must* take into account the following matters:

- the extent to which the term is transparent; and
- the contract as a whole. [*Schedule 1, item 1: Chapter 2, Part 2-3, subsection 24(2)*]

### *Transparency*

5.36 The court must have regard to whether a term is transparent in determining whether that term is 'unfair'. [*Schedule 1, item 1: Chapter 2, Part 2-3, paragraph 24(2)(a)*]

5.37 A term is *transparent* if the term is:

- expressed in reasonably plain language;
- legible;
- presented clearly; and
- readily available to any party affected by the term.  
[*Schedule 1, item 1: Chapter 2, Part 2-3, section 1 and subsection 24(3)*]

5.38 A lack of transparency in the terms of a consumer contract may be a strong indication of the existence of a significant imbalance in the rights and obligations of the parties under the contract.

5.39 Transparency, on its own account, cannot overcome underlying unfairness in a contract term. Furthermore, the extent to which a term is not transparent is not, of itself, determinative of the unfairness of a term in a consumer contract and the nature and effect of the term will continue to be relevant.

5.40 The elements set out in paragraphs 24(3)(a)-(c) of the ACL relate to the way in which a term is presented in a consumer contract. The remaining element covers situations where the term is set out by the party who seeks to rely upon it in a document which is not physically available to the other party at or before the time the parties entered into the contract.

### ***Contract as a whole***

5.41 The court must have regard to the contract as a whole in determining whether that term is 'unfair'. [*Schedule 1, item 1: Chapter 2, Part 2-3, paragraph 24(2)(b)*]

### **Examples of unfair terms**

5.42 There is a non-exhaustive, indicative list of examples of the types of terms that may be considered 'unfair'. [*Schedule 1, item 1: Chapter 2, Part 2-3, subsection 25(1)*]

5.43 Without limiting the meaning of 'unfair', the following examples are provided:

- a term that permits, or has effect of permitting, one party (but not another party) to avoid or limit performance of the contract;
- a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;
- a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;
- a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;
- a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;
- a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;
- a term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract;
- a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning;
- a term that limits, or has the effect of limiting, one party's vicarious liability for its agents;

- a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent;
- a term that limits, or has the effect of limiting, one party's right to sue another party;
- a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract; and
- a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract. [*Schedule 1, item 1: Chapter 2, Part 2-3, paragraphs 25(1)(a)-(m)*]

5.44 The examples in subsection 25(1) of the ACL provide statutory guidance on the types of terms which may be regarded as being of concern. They do not prohibit the use of those terms, nor do they create a presumption that those terms are unfair.

5.45 Any consideration of a term of a type listed as an example is subject to the test set out in subsection 24(1) of the ACL. In this context, there may be circumstances in which the use of such a term is reasonably necessary in order to protect a party's reasonable business interests.

5.46 The Minister may prescribe additional examples of terms of a kind, or a term that has an effect of a kind, prescribed by the regulations. [*Schedule 1, item 1: Chapter 2, Part 2-3, paragraph 25(1)(n)*]

5.47 Prior to prescribing additional examples of terms of a kind, or a term that has an effect of a kind, the relevant Minister **must** consider the following factors:

- the detriment that a term of that kind would cause to consumers;
- the impact on business generally of prescribing that kind of term or effect; and
- the public interest. [*Schedule 2, item 1: Part XI, subsection 139G(2)*]

5.48 The requirement of the relevant Minister to consider the three factors in subsection 25(2) of the ACL prior to prescribing additional examples of terms does not change the effect of the regulation-making power. Any terms added to the list would continue to be examples only, and would not be binding on a court.

***Terms permitting unilateral changes by one party to the contract***

5.49 Paragraphs 25(1)(a), (b), (d), (e), (f), (g) and (h) are examples of types of terms that allow a party to make changes to key elements of a contract, including terminating it, on a unilateral basis.

5.50 The inclusion of these examples does not prohibit unilateral variation terms, nor does it create a presumption that such terms are unfair. Indeed, the need for the unilateral variation of contract terms is expressly contemplated by legislation in specific contexts, including for example sections 63 to 107 of the *National Credit Code* (formerly Parts 4 and 5 of the *Uniform Consumer Credit Code*).

***Terms limiting the rights of parties to a consumer contract***

5.51 Paragraphs 25(1)(i), (k), (l) and (m) are examples of types of terms that have the effect of limiting the rights of the party to whom the consumer contract is presented.

5.52 Paragraph 25(1)(i) specifically deals with limitation of liability clauses. There are many instances in which limitations of liability are expressly permitted by national, State or Territory legislation for legitimate public policy reasons.

5.53 In this regard, paragraph 26(1)(c) of the ACL expressly excludes references to terms that are required, or expressly permitted, by a law of the Commonwealth or a State or Territory from the application of the unfair contract terms provisions. However, this exclusion applies only to the extent that such terms are required or expressly permitted.

***Terms which penalise a party for a breach or termination of the contract***

5.54 Paragraph 25(1)(c) refers to terms that penalise, or have the effect of penalising, one party for a breach or termination of the contract.

5.55 This provision reflects the common law concept of 'penalties'. To be valid, a penalty imposed by a contract must be a genuine pre-estimate of the loss likely to be suffered by the party as a result of the breach or early termination, and should not be an arbitrary sum. However, under the unfair contract terms provision the relevant consideration is whether the term is unfair, within the meaning given to that term by the provisions.



***Terms which permit the assignment of a contract to the detriment of the other party without their consent***

5.56 Paragraph 25(1)(j) refers to terms that allow for a party to assign the contract to the detriment of the other party, without the other party's consent.

5.57 This example does not prohibit the use of such clauses. Indeed, assignment of contracts is expressly contemplated by other legislation, for example section 188 of the *National Credit Code* (formerly section 166 of the *Uniform Consumer Credit Code*).

**Terms that define the subject matter etc of consumer contracts are unaffected**

5.58 Certain terms of a consumer contract are unaffected by subsection 23(1) of the ACL, but only to the extent that the term:

- defines the main subject matter of a consumer contract;
- sets the 'upfront price' payable under the contract; or
- is a term required, or expressly permitted, by a law of the Commonwealth or a State or Territory. [*Schedule 1, item 1: Chapter 2, Part 2-3, section 26(1)*]

***Main subject matter of the contract***

5.59 The exclusion of terms that define the main subject matter of a consumer contract ensures that a party cannot challenge a term concerning the basis for the existence of the contract. [*Schedule 1, item 1: Chapter 2, Part 2-3, paragraph 26(1)(a)*]

5.60 Where a party has decided to purchase the goods, services, land, financial services or financial products that are the subject of the contract, that party cannot then challenge the fairness of a term relating to the main subject matter of the contract at a later stage, given that the party had a choice of whether or not to make the purchase on the basis of what was offered.

5.61 The main subject matter of the contract may include the decision to purchase a particular type of good, service, financial service or financial product, or a particular piece of land. It may also encompass a term that is necessary to give effect to the supply or grant, or without which, the supply or grant could not occur.

### *Upfront price*

5.62 The *upfront price* payable under a consumer contract is consideration that is:

- provided, or is to be provided, for the supply, sale or grant under the contract; and
- is disclosed at or before the time the contract is entered into,

but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event. [*Schedule 1, item 1: Chapter 2, Part 2-3, section 2, paragraph 26(1)(b) and subsection 26(2)*]

5.63 Consideration includes any amount or thing provided as consideration for the supply of a good, service, financial service, financial product or a grant of land. It would also include any interest payable under a consumer contract.

5.64 The exclusion of upfront price means that a term concerning the upfront price cannot be challenged on the basis that it is unfair. Having agreed to provide a particular amount of consideration when the contract was made, which was disclosed at or before the time the contract was entered into, a person cannot then argue that that consideration is unfair at a later time. The upfront price is a matter about which the person has a choice and, in many cases, may negotiate.

5.65 The upfront price covers the cash price payable for a good, service, financial service, financial product or land at the time the contract is made. It also covers a future payment or a series of future payments.

5.66 The definition also requires that the upfront price must be disclosed at or before the time the contract was entered into by the parties. In the case of most transactions this is reasonably straightforward, as a key pre-condition of the transaction occurring is an understanding of the price to be paid.

5.67 A key consideration for a court in considering whether a future payment, or a series of future payments, forms the upfront price may be the transparency of the disclosure of such a payment, or the basis on which such payments may be determined, at or before the time the contract is made.

5.68 In the context of non-financial services contracts, another relevant consideration is compliance with section 53C of the TP Act (which commenced on 25 May 2009), which imposes specific obligations in relation to the disclosure of a single price in many cases.

5.69 Other consideration (that is, further forms of consideration which are not part of the upfront price) under the consumer contract that is contingent on the occurrence or non-occurrence of a particular event, is excluded from the determination of the upfront price.

5.70 Terms that require further payments levied as a consequence of something happening or not happening at some point in the duration of the contract are covered by the unfair contract terms provisions. Such payments are additional to the upfront price, and are not necessary for the provision of the basic supply, sale or grant under the contract.

*Terms required as a matter of law*

5.71 The exclusion of terms ‘required, or expressly permitted, by a law of the Commonwealth or a State or Territory’ ensures that a court is not required to determine the fairness of terms that are required to be included, or expressly permitted to be included, in consumer contracts as a matter of public policy. There are many examples of mandated consumer contracts or terms that are required to be used or are expressly permitted to be used in order to ensure the validity of specific transactions, which apply in the laws of the Commonwealth, the States or the Territories. [*Schedule 1, item 1: Chapter 2, Part 2-3, paragraph 26(1)(c)*]

**Meaning of standard form contract**

5.72 To account for circumstances where a question about whether a contract is in a standard form is the subject of dispute between the parties in proceedings, there is a rebuttable presumption that a contract the subject of proceedings is a standard form contract. The respondent in those proceedings must then show that, on the balance of probabilities, the contract is not in a standard form. [*Schedule 1, item 1: Chapter 2, Part 2-3, subsections 27(1) and 27(2)*]

5.73 If a party wishes to argue that the contract has been negotiated and is not in a standard form, then the rebuttable presumption requires the party that presents the contract to show that the contract is not a standard form contract. This reflects that:

- the claimant will usually only have evidence of the existence of one contract — their own; and
- the respondent is best placed to bring evidence regarding the nature of the contracts it uses and the way in which it deals with other parties to such contracts, including whether negotiations have been entered into.

5.74 In determining whether a contract is a standard form contract, the court may consider any matter it thinks relevant. However, it must have regard to certain factors. These include:

- whether one of the parties has all or most of the bargaining power relating to the transaction;
- whether the contract was prepared by one party before any discussion relating to the transaction commenced;
- whether another party was, in effect, required to accept or reject the terms in the contract (other than terms excluded by subsection 26(1) of the ACL) in the form in which they were presented (that is, on a 'take-it-or-leave-it' basis);
- whether another party was given an effective opportunity to negotiate the terms of the contract that were not terms excluded by subsection 26(1) of the ACL;
- whether the terms of the contract (other than terms excluded by subsection 26(1) of the ACL) take into account the specific characteristics of another party or the particular transaction; and
- any other matter prescribed by the regulations. [*Schedule 1, item 1: Chapter 2, Part 2-3, subsection 27(2)*]

5.75 Additional factors may be added to the list of factors by way of regulations made by the relevant Minister. This will permit the expansion of the list in response to changes in markets and the way in which standard form contracts are constructed and used. The making of such regulations will be subject to:

- the Australian Government's best-practice regulation requirements; and
- the voting process for amending the ACL set out in the IGA,

as any regulations will form part of the ACL.

### **Contracts exempted from the unfair contract terms provisions**

5.76 Certain contracts are excluded from the application of the unfair contract terms provisions of the ACL to the extent that:

- the contract relates to certain shipping contracts; and

- the contract is a constitution of a company, managed investment scheme or other kind of body. [*Schedule 1, item 1: Chapter 2, Part 2-3, section 28*]

### ***Shipping contracts***

5.77 The unfair contract terms provisions will not apply to consumer contracts which are ***shipping contracts***. Shipping contracts include:

- contracts of marine salvage or towage;
- a charter party of a ship; or
- a contract for the carriage of goods by ship. [*Schedule 1, item 1: Chapter 2, Part 2-3, subsection 28(1)*]

5.78 A ***ship*** is given the meaning it has under section 3 of the *Admiralty Act 1968* for the purposes of the unfair contract terms provisions in the ACL. [*Schedule 1, item 1: Chapter 2, Part 2-3, section 2*]

5.79 These shipping contracts are already subject to a comprehensive legal framework (nationally and internationally) that deals with contractual terms in a maritime law context.

5.80 The reference to a contract for the carriage of goods by ship includes a reference to any contract covered by a sea carriage document within the meaning of the amended Hague Rules referred to in subsection 7(1) of the *Carriage of Goods by Sea Act 1991*. [*Schedule 1, item 1: Chapter 2, Part 2-3, section 28(2)*]

5.81 The amended Hague Rules consists of the text set out in Schedule 1 of the *Carriage of Goods by Sea Act* which, in its unmodified form, is the English translation of Articles 1 to 10 of the *International Convention for the Unification of Certain Rules of Law* relating to Bills of Lading, done at Brussels on 25 August 1924 (otherwise referred to as the Brussels Convention). The Brussels Convention was amended by Articles 1 to 5 of the Visby Protocol on 23 October 1968, and Article II of the SDR Protocol on 21 December 1979.

### ***Constitutions of companies etc***

5.82 The unfair contract terms provisions will not apply to contracts which are constitutions of companies, managed investment schemes or other kinds of bodies. [*Schedule 1, item 1: Chapter 2, Part 2-3, subsection 28(3)*]

5.83 A ***constitution*** is given the meaning it has under section 9 of the *Corporations Act 2001*. [*Schedule 1, item 1: Chapter 2, Part 2-3, section 2*]

***Effect of the Insurance Contracts Act 1984 on certain consumer contracts***

5.84 Section 15 of the *Insurance Contracts Act 1984* provides that a contract of insurance (as defined by that Act) is not capable of being made the subject of relief under any other Commonwealth Act, a State Act or an Act or Ordinance of a Territory. In this context ‘relief’ means relief in the form of:

- the judicial review of a contract on the ground that it is harsh, oppressive, unconscionable, unjust, unfair or inequitable; or
- relief for insureds from the consequences in law of making a misrepresentation,

but does not include relief in the form of compensatory damages. The effect of section 15 is to mean that the unfair contract terms provisions of either the ACL or the ASIC Act do not apply to contracts of insurance covered by the *Insurance Contracts Act 1984*, to the extent that that Act applies.

**Enforcement and remedies**

5.85 Without limiting any other power of the court to make declarations, the Australian Competition and Consumer Commission (ACCC) may seek a declaration from a court that a term of a standard form consumer contract is an unfair term. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, section 249*]

5.86 Where a court has declared a term in a consumer contract to be an unfair term, it is a contravention of the ACL for a person to apply or rely on, or purport to apply or rely on, that term.

5.87 In such circumstances, the following enforcement powers and remedies apply:

- injunctions; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 2*]
- damages; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 3*]
- compensatory orders and redress for non-parties; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4*]

5.88 For further information on these powers and remedies generally see Chapters 14 and 15.

5.89 A reference to a contravention of a provision of the ACL includes a reference to applying or relying on, or purporting to apply or rely on, a

declared term of a consumer contract for the purposes of the court's power to:

- grant an injunction in such terms as the court determines appropriate;
- make an order to redress non-party consumers (other than an award of damages) as the court thinks appropriate; and
- make any order as the court thinks appropriate, such as specific performance, payment of compensation or exemplary damages. [*Schedule 1, item 1: Chapter 2, Part 2-3, section 2, subsection 232(3), subparagraph 237(1)(a)(ii) and paragraph 238(1)(b)*]

## Application and transitional provisions

5.90 The unfair contract terms provisions set out in the first ACL Bill (which are now contained in Part 2-3 of the ACL) will commence on 1 July 2010 or on a date to be proclaimed by the Governor-General that can not be before 1 July 2010. If the Governor-General has not proclaimed the commencement of the provisions within six months of the date of the Royal Assent, then the provisions will commence on the first day after a day six months after the date of Royal Assent. [*Schedule 7, item 8*]

5.91 The provisions apply to new consumer contracts entered into on or after the date on which the provisions of the first ACL Bill commenced. [*Schedule 7, item 8*]

5.92 The provisions do *not* apply to consumer contracts entered into before the date on which the provisions of the first ACL Bill commenced, unless such a contract is:

- renewed on or after that commencement, in which case the unfair contract terms provisions apply to the contract *as renewed* on and from the day on which the renewal takes effect (the *renewal day*) in relation to conduct that occurs on or after the renewal day; or
- varied on or after that commencement, in which case the unfair contract terms provisions apply to the contract *as varied* on and from that day on which the variation takes effect (the *variation day*), in relation to conduct that occurs on or after the variation day.

5.93 While provisions apply to consumer contracts to the extent that they are renewed or varied after the date on which the provisions of the first ACL Bill commenced, the unfair contract terms provisions do not apply to a consumer contract to the extent that the operation of the provisions would result in an acquisition of property from a person otherwise than on just terms, within the meaning of section 51(xxxi) of the *Australian Constitution*.  
*[Schedule 7, item 8]*



---

## **Chapter 6**

### ***Unfair practices***

---

#### **Outline of chapter**

6.1 The Australian Consumer Law (ACL) includes prohibitions on specific conduct that is generally regarded as being unfair. These prohibitions apply generally to all forms of business activity in all sectors of the economy, rather than to specific industry sectors.

6.2 Unlike the general prohibitions provided for in Chapter 2 of the ACL, the provisions in Chapter 3 are targeted at particular kinds or activities, rather than the effect that more general conduct might have on a consumer.

6.3 Part 3-1 of the ACL includes provisions that are:

- equivalent to all of the existing provisions of Part V, Divisions 1 and 1AAA of the TP Act and their associated criminal offences in Division 2 of Part VC, with some provisions amended to draw on best practice in State and Territory consumer laws; and
- amendments to those provisions which draw on best practice in State and Territory consumer laws, as agreed by the Ministerial Council on Consumer Affairs (MCCA).

6.4 Part 4-1 of the ACL creates associated criminal offences with respect to most of the provisions of Part 3-1.

6.5 The ACL also includes requirements for a proof of transaction and itemised bills at Part 3-2, Division 4.

#### **Context of amendments**

6.6 The Council of Australian Governments (COAG) has agreed that the ACL should be based on the TP Act, drawing on the recommendations of the Productivity Commission in its *Review of Australia's Consumer Policy Framework* and best practice in State and Territory consumer laws.

6.7 At its meeting on 4 December 2009, the Ministerial Council on Consumer Affairs (MCCA) agreed to the ways in which the consumer

provisions of the TP Act will be amended for the purposes of their incorporation in the ACL. In respect of unfair practices, MCCA agreed that the ACL should:

- prohibit false or misleading testimonials about goods or services;
- clarify the operation of the provisions relating to representations as to future matters;
- clarify that, when a business offers a gift or a prize to a consumer, that gift or prize should be provided as described to the consumer within a reasonable time;
- clarify that, when a business agrees to supply goods or services to a consumer, the goods or services should be supplied to the consumer as described and within the specified time, or if no time is specified, within a reasonable time;
- prohibit the assertion of a right to payment for unauthorised advertisements, and that any document seeking payment for unsolicited goods or services, or unauthorised entries or advertisements, must include a statement to the effect that it is not a bill payable by the consumer;
- provide that a consumer is not liable to pay for unsolicited services;
- clarify the operation of the pyramid selling provisions;
- clarify that goods with multiple prices displayed should be sold at the lowest displayed price unless the seller chooses to withdraw them from sale;
- provide consumers with a right to receive a receipt for purchases of \$75 or more where businesses are not already required to provide consumers with a tax invoice under the Commonwealth goods and services tax (GST) legislation; and
- provide consumers with a right to request an itemised bill for the supply of services.

6.8 In addition, all of the provisions of that have been included in Part 3-1 and Part 4-1 of the ACL have been drafted to reflect that:

- the ACL is to be applied by the States and Territories as an application law. Specifically:
  - the provisions refer to ‘a person’ as opposed to ‘a corporation’ in the TP Act (the TP Act drafting reflected a constitutional limitation on the Commonwealth);
  - the penalty amounts for criminal offences and civil pecuniary penalties are expressed as dollar amounts, rather than penalty units, as each jurisdiction has its own definition of how much one penalty unit is worth; and
  - mental elements for offences have been specified.
- much of the TP Act has been in place for over 30 years, so a number of ACL provisions have been redrafted to comply with the requirements of plain English drafting.

***False or misleading representations etc.***

*False or misleading representations about goods or services*

6.9 Section 53 of the TP Act prohibited the making of certain false or misleading representations, in connection with the supply or possible supply of goods or services. These specific prohibitions supplemented the prohibition on conduct that is misleading or deceptive, or likely to mislead to deceive, in trade or commerce in section 52 of the TP Act.

6.10 MCCA agreed that the prohibition on false and/or misleading representations in the TP Act will be expanded for the purposes of the ACL to:

- ensure that specific representations are prohibited on the basis that they are false or misleading; and
- include additional prohibitions relating to:
  - representations that are testimonials and representations about testimonials; and
  - representations concerning consumer guarantees.

6.11 Section 53 of the TP Act proscribed specific representations, some of which are prohibited from being false, some from being false or misleading, and others from being about qualities the goods or services do not have. There appears to be no rationale as to why, through various

amendments, the different forms of wording were used for different elements of section 53 of the TP Act.

6.12 For example, there is little reason to prohibit false or misleading representations concerning the availability of spare parts (section 53(ea) of the TP Act) but only prohibiting false, but not misleading, representations that goods are new (section 53(b) of the TP Act).

6.13 Section 29 of the ACL replaces section 53 of the TP Act and has been drafted to remove this distinction and apply to false or misleading representations and includes the new forms of prohibited representation.

*False or misleading representations about the sale of land etc.*

6.14 Section 53A of the TP Act prohibited the making of certain false or misleading representations in connection with the supply or possible supply of goods or services.

6.15 Dealings in relation to land are neither a good nor a service and, accordingly, this specific prohibition on false or misleading representations about the sale of land and other forms of land transaction was added to the TP Act in 1987. Similar prohibitions exist in the FT Acts of most States and Territories.

6.16 Section 30 of the ACL replaces section 53A of the TP Act.

*Misleading conduct relating to employment*

6.17 Section 53B of the TP Act prohibited the making of certain false or misleading representations in connection with the supply or possible supply of goods or services.

6.18 Section 53B of the TP Act was inserted into the Act in 1988 for two reasons:

- representations in relation to employment are not necessarily made ‘in trade or commerce’, but rather ‘in respect of trade or commerce’, so the other provisions in the TP Act, which are mostly concerned with conduct ‘in trade or commerce’, would not apply; and
- employment is neither a good nor a service.

6.19 A similar provision currently exists in the fair trading Acts of all States and Territories.

6.20 Section 31 of the ACL replaces section 53B of the TP Act.

*Offering rebates, gifts, prizes etc.*

6.21 Section 54 of the TP Act prohibited offering gifts, prizes or other free items without intending to provide them, or not providing them as offered. Section 54 is, among other things, intended to prevent people from being enticed into buying goods or services entirely or partly on the basis of accompanying free items that they are never going to receive.

6.22 MCCA agreed that an equivalent provision will be included in the ACL, as well as a new requirement that the person provide the rebate, gift, prize or other free items in the specified time or, if no time has been specified, within a reasonable time, drawing on the existing similar requirement in section 16(b) of the Victorian FT Act. This is designed to prevent traders from subjecting consumers to unnecessarily long delays in receiving promised gifts, prizes, rebates or other free items.

6.23 Section 32 of the ACL replaces section 54 of the TP Act.

*Certain misleading conduct in relation to goods or services*

6.24 Following Australia's ratification of the *Paris Convention for the Protection of Industrial Property*, section 55 of the TP Act was included as a specific prohibition against conduct that is liable to mislead the public in relation to certain aspects of goods. Section 55A was added to the TP Act in 1987 to cover services in the same way. A similar provision currently exists in the TP Acts of all States and Territories.

6.25 Sections 33 and 34 of the ACL replace section 55 and 55A of the TP Act.

*Bait advertising*

6.26 Bait advertising is the practice of offering goods or services at a particular price to attract consumers, when the advertiser is aware that it will not be able to supply the goods or services at that price in reasonable quantities.

6.27 Section 56 of the TP Act prohibited advertising in this manner if the supplier ought reasonably be aware that there are reasonable grounds for believing that the supplier will not be able to supply the goods or services at reasonable quantities or for a reasonable period. While this practice might have been covered by other provisions in the TP Act, section 56 provided further, specific requirements that the goods or services must be available in reasonable quantities.

6.28 Section 56(2) of the TP Act specified that a corporation that advertised goods or services for supply at a specified price must ensure that such goods or services are available at that price in reasonable quantities for

a reasonable time, having regard to the nature of the market in which the corporation carries on business and the nature of the advertisement.

6.29 A similar provision exists in the fair trading Acts of all States and Territories.

6.30 Section 35 of the ACL replaces section 56 of the TP Act.

*Wrongly accepting payment*

6.31 Section 58 of the TP Act prohibited a supplier from accepting payment for goods or services without intending to supply or where there are reasonable grounds for believing the goods or services will not be able to be provided.

6.32 Section 36 of the ACL replaces section 58 of the TP Act and augments it with a requirement to provide goods or services for which payment has been accepted within the specified time, or if no time is specified, within a reasonable time. MCCA agreed on 4 December 2009 that the ACL should include such a requirement, drawing on section 19 of the Victorian FT Act.

6.33 The expanded scope of section 36 of the ACL is to prevent traders from subjecting people to unnecessarily long delays in receiving goods or services for which they have paid.

6.34 While a person may have remedies available under the law of contract section 36 of the ACL is not intended to impose a contravention for a trader that genuinely endeavours to fulfil its supply agreements. Subsection 36(5) provides an exception to the prohibition if the failure to supply was due to something beyond the trader's control and it had exercised due diligence and took reasonable precautions to avoid the failure.

*Misleading representations about certain business activities*

6.35 Section 53 of the TP Act prohibited the making of certain false or misleading representations in connection with the supply or possible supply of goods or services. However, this prohibition does not necessarily cover representations regarding the profitability, risk or other aspects of particular types of business activity, such as home-based businesses or those that require a person to invest either personal effort or money into a business (such as a franchising arrangement).

6.36 Section 59 of the TP Act prohibited making false or misleading representations about the profitability, risk or other material aspect of any business activity that can be carried on from home. In 1967, section 59 was amended to prohibit the making of false or misleading representations about the profitability, risk or other material aspect of any business activity that

requires work or investment by a person. A similar provision currently exists in the FT Acts of all States and Territories.

6.37 Section 37 of the ACL replaces section 59 of the TP Act.

*Application of provisions of this Division to information providers*

6.38 Section 65A of the TP Act made provision for the application of the provisions in Part V, Division 1 of the TP Act to information providers.

6.39 In *Australian Ocean Line Pty Ltd v West Australian Newspapers Ltd* (1983) 47 ALR 497 and *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 55 ALR 25, the Federal Court found that the publication of news in a newspaper had the potential to constitute a contravention of the misleading or deceptive conduct provisions in section 52 of the TP Act. As a result section 65A was included in the TP Act in 1984 to exclude the application of all of the provisions described above (except for misleading conduct in relation to employment) for prescribed information providers when these providers are carrying on a business of providing information. Such providers include radio stations, television stations, and publishers of newspapers and magazines. A similar provision currently exists in the FT Acts of all States and Territories.

6.40 Section 38 of the ACL replaces section 65A of the TP Act.

*Unsolicited supplies*

6.41 The practice of providing consumers with unsolicited goods, and then demanding payment for those goods, is regarded as sufficiently detrimental to consumers that specific provisions dealing with these practices have been part of the TP Act since its first enactment. Specifically:

- section 64 of the TP Act prohibited a person from asserting a right to payment for unsolicited goods unless the person has a reason to believe he or she is entitled to payment. Section 64 also applied to unauthorised directory entries and also sets out rules for determining when a payment has been solicited and what are reasonable grounds for believing a supplier has a right to payment; and
- section 65 of the TP Act also provided that a consumer is not liable to pay for unsolicited goods, or for loss or damage to those goods, unless the loss or damage is the result of a wilful and unlawful act by the consumer. A similar provision, at subsection 64(4), gave protection to consumers against liability for unauthorised directory entries.

6.42 After the enactment of the TP Act, it emerged that corporations that engage in the practice of sending unsolicited credit cards or debit cards to consumers may not be covered by the TP Act provisions against unsolicited goods or services. As a result, section 63A, prohibiting the sending of unsolicited credit cards or debit cards to a consumer (except at the written request of the consumer), was inserted into the TP Act in 1985.

6.43 Furthermore, a new provision was added to section 64 of the TP Act prohibiting the assertion of a right to payment for unsolicited services was added in 1987, which recognises that it is just as easy for a supplier to demand payment for unsolicited services as it is for unsolicited goods.

6.44 The ACL will retain provisions concerning these prohibitions in sections Chapter 3, Part 3-1, Division 2, and will extend them to cover entries that are like directory entries but are not published in directories.

6.45 While no provision for liability resulting from the supply of unsolicited services existed in the TP Act, Victoria has had such a provision in its FT Act since 1999. This provision is incorporated into section 43 of the ACL.

#### ***Pyramid schemes***

6.46 Provisions regulating pyramid schemes have existed in the TP Act since its enactment in 1974. Part V, Division 1AAA of the TP Act was incorporated in 2002 to present the provisions in plain English. Similar provisions exist in the FT Acts of most States and Territories.

6.47 The prohibition of pyramid schemes is driven by the prevalence of scams that require a person to join a scheme by paying a fee, and the only way to make that money back is by enticing or recruiting others to join the scheme. These schemes inevitably collapse when they fail to attract new members to join, leaving those still in the scheme out of pocket.

6.48 On 4 December 2009, MCCA agreed that the existing pyramid schemes provisions will be retained in the ACL, with some minor changes to clarify the operation of the provisions.

6.49 Chapter 3, Part 3-1, Division 3 of the ACL will replace Part V, Division 1AAA of the TP Act.

#### ***Pricing***

##### ***Multiple pricing***

6.50 Sections 52 (misleading and deceptive conduct) and 53 (false or misleading representations) of the TP Act are applicable to multiple prices



being displayed for the same goods or services. However, these prohibitions often require the interpretation of the court or the intervention of a regulator to be pursued should a dispute arise.

6.51 MCCA agreed on 4 December 2009 that the ACL should include a specific requirement relating to multiple pricing, drawing on the existing similar requirement in section 40 of the NSW FT Act. This requirement will provide a clear rule that people (including traders) can understand if multiple prices are displayed for a product. If multiple prices are displayed at the same time for goods, those goods must not be sold for more than the lowest of the prices. Section 47 of the ACL will not force businesses to sell the goods, businesses have a right to withdraw the goods from sale and correct pricing errors if they occur.

6.52 Section 47 of the ACL will deal with multiple pricing.

*Single price to be specified in certain circumstances*

6.53 Section 53C of the TP Act regulated the practice of component pricing but did not seek to prohibit component pricing. When amended in 2008, it clarified that under the TP Act a corporation must not make a representation as to the partial price of a good or service without also specifying, in a prominent way and as a single figure, the single price.

6.54 Section 48 of the ACL replaces section 53C of the TP Act.

***Other unfair practices***

*Referral selling*

6.55 Section 57 of the TP Act regulated referral selling. Selling by commission is a popular method of attracting custom. However, some suppliers attach conditions to the commissions based on future, unknown events, which may mean that consumers do not actually receive a commission for their efforts if the future event does not occur. Section 57 of the TP Act addressed this issue by prohibiting a corporation from inducing a consumer to buy goods or services by representing that the consumer will receive some benefit for assisting the corporation to supply goods or services to other customers, when the receipt of this benefit is contingent on an event occurring after the contract for the initial sale is made.

6.56 Section 49 of the ACL replaces section 57 of the TP Act.

*Harrassment and coercion*

6.57 Traders have resorted to illegal or inappropriate behaviour in pursuing consumers to either supply goods or services to them or demand payment for such supply. Section 60 of the TP Act prohibited the use of

physical force, undue harassment or coercion by a servant or agent of a corporation at certain locations in connection with the supply of goods or services or payment for those goods or services. Similar provisions exist in the FT Acts of all States and Territories.

6.58 Section 50 of the ACL will replace section 60 of the TP Act, with changes to extend the application of the prohibition to land transactions.

*Proof of transaction and itemised bills*

6.59 No provisions relating to a proof of transaction existed in the TP Act. Since 1999, the Victorian FT Act has had a requirement for a proof of transaction to be given to consumers under certain circumstances.

6.60 Similarly, no provisions relating to an itemised bill existed in the TP Act. Since 1999, the Victorian FT Act has had a requirement for an itemised bill to be provided to a consumer upon request when the consumer has been supplied with services.

6.61 On 4 December 2009, MCCA agreed that requirements for a proof of transaction and an itemised bill will be incorporated into the ACL and these are dealt with in sections 100 and 101 of the ACL.

## Summary of new law

6.62 The ACL has provisions that prohibit a number of unfair practices and ensures that a norm of conduct is established for suppliers in dealing with consumers.

6.63 Part 3-1 deals with:

- **False or misleading representations or conduct.** The ACL prohibits the making of representations that are false or misleading in relation to specific matters, including goods or services, testimonials, sale or grant of interests in land, employment, and certain business activities. Information providers are exempt from these requirements under specified circumstances.
- **Unsolicited supplies.** The ACL prohibits sending unsolicited credit cards or debit cards, and asserting a right to payment for unsolicited goods or services, or unauthorised entries or advertisements.
- **Pyramid schemes.** The ACL prohibits a person from participating in, or inducing another person to participate in,

a pyramid scheme, but excludes legitimate multi-level marketing schemes from the definition of a pyramid scheme.

- **Pricing.** The ACL contains rules addressing the display of multiple prices for goods, as well as a requirement to state a total single price for goods or services where quantifiable.
- **Other unfair practices.** The ACL prohibits practices relating to bait advertising, and harassment and coercion.
- **Miscellaneous.** The ACL also requires that a consumer should be given a proof of transaction or an itemised bill under certain circumstances.

***False or misleading representations etc.***

*False or misleading representations about goods or services*

6.64 Section 29 of the ACL prohibits a person from making false or misleading representations of certain types in connection with the supply, possible supply or promotion by any means of the supply or use of goods or services.

6.65 Section 29 of the ACL covers false or misleading representations of the following types:

- that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use; or
- that services are of a particular standard, quality, value or grade; or
- that goods are new; or
- that a particular person has agreed to acquire goods or services; or
- that purports to be a testimonial by any person relating to goods or services; or
- concerning:
  - testimonial by any person; or
  - a representation that purports to be such a testimonial;

relating to goods or services; or

- that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits; or
- that the person making the representation has a sponsorship, approval or affiliation; or
- with respect to the price of goods or services; or
- concerning the availability of facilities for the repair of goods or of spare parts for goods; or
- concerning the place of origin of goods; or
- concerning the need for any goods or services; or
- concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (including a guarantee under Part 3-2, Division 1); or
- concerning a requirement to pay for a contractual right that:
  - is wholly or partly equivalent to any condition, warranty, guarantee, right or remedy (including a guarantee under Part 3-2, Division 1); and
  - a person has under a law of the Commonwealth, a State or a Territory (other than an unwritten law).

6.66 This provision substantially reflects the section 53 of the TP Act, with the following changes:

- it has been redrafted for ease of use and accessibility;
- all the prescribed types of representations listed in section 29 are prohibited from being either false or misleading;
- it includes a specific prohibition on false or misleading representations concerning testimonials (or representations that purport to be testimonials);
- it includes an evidentiary burden on a respondent to adduce evidence in court that representations concerning testimonials are not false or misleading, as the case may be;
- it includes a reference to consumer guarantees (as set out Part 3-2, Division 1) in the prohibition of false or misleading

representations concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy; and

- it includes a new prohibition of a false or misleading representation as to a requirement to pay for a contractual right that is wholly or partly equivalent to any condition, warranty, guarantee, right or remedy (including a guarantee under Part 3-2, Division 1) or that a person has under a law of the Commonwealth, a State or a Territory.

*False or misleading representations about land*

6.67 Section 30 of the ACL provides that a person must not, in trade or commerce, make certain false or misleading representations in connection with the sale or grant of an interest in land, or the promotion of this sale or grant.

*Misleading conduct relating to employment*

6.68 Section 31 of the ACL provides that a person must not engage in conduct that is liable to mislead persons seeking employment as to matters relating to the employment.

*Offering gifts and prizes etc.*

6.69 Section 32 of the ACL provides that in connection with certain conduct relating to goods, services or land:

- a person must not offer a rebate, gift, prize or other free item with the intention of not providing it, or not providing it as offered; and
- the rebate, gift, prize or other free item must be provided, in accordance with the offer, within the time specified in the offer, or if no time is specified, within a reasonable time of the offer.

6.70 An exception is provided to the new requirement to supply within the specified or a reasonable time — if the failure to provide was due to something beyond the supplier's control and he, she or it had exercised due diligence and took reasonable precautions to ensure that businesses are not dissuaded from offering prizes or other free items.

6.71 The term 'rebates' has been added to the prohibition to make certain that the provision applies to 'cash-back' offers that are by redemption or application.

6.72 Section 32 of the ACL also covers the contents of paragraph 53A(1)(c) of the TP Act in relation to land, but with the additions of specifically mentioning ‘rebates’ and the new requirement to provide the rebate, gift, prize or other free item within the time specified in the offer, or if no time is specified, within a reasonable time. This provides clarity through locating all the prohibitions relating specifically to gifts and prizes in the same section.

*Certain misleading conduct in relation to goods or services*

6.73 Sections 33 and 34 of the ACL provide that a person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any goods or services, or the manufacturing process of any goods.

*Bait advertising*

6.74 Section 35 of the ACL provides that a person must not, in trade or commerce, advertise goods or services at a specified price if there are reasonable grounds, of which the person should be aware, to believe that the person would not be able to supply reasonable quantities of the goods or service at the advertised price for a reasonable period.

6.75 Section 35 also provides that, to advertise goods or services at a specified price, a person must offer such goods or services, in trade or commerce, for a reasonable period at reasonable quantities.

6.76 Section 35 applies having regard to the nature of the advertisement for the goods or services and the market in which the person is carrying on business.

*Wrongly accepting payment*

6.77 Section 36 of the ACL prohibits a person from accepting payment or other consideration for goods or services where, at the time of the acceptance, the corporation:

- intends not to supply the goods or services;
- intends to supply materially different goods or services; or
- there are reasonable grounds, of which the corporation is aware or ought reasonably to be aware, for believing the corporation will not be able to supply the goods in the time specified or, if no time is specified, within a reasonable time.

There is also a new requirement in the section 36 of the ACL — to provide goods or services for which payment has been accepted within the specified time, or if no time is specified, within a reasonable time.

6.78 An exception is provided for the new requirement if the failure to supply was due to something beyond the supplier's control and he, she or it had exercised due diligence and took reasonable precautions to ensure that businesses are not dissuaded from, in appropriate circumstances, accepting payment until goods are able to be delivered.

6.79 Section 36 also allows a consumer to accept different goods or services if he or she agrees to do so. This will ensure that a supplier is not put in an impossible position of being required to supply something he, she or it has genuinely tried to provide but cannot and an equivalent replacement is available.

*Misleading representations about certain business activities*

6.80 Section 37 of the ACL provides that a person must not make, in trade or commerce, false or misleading representations in relation to the profitability, risk or any other material aspect of any business activity that the person:

- has represented as one that can be carried on at or from a person's place of residence; or
- invites other persons to participate by investing in or performing work for the business.

*Information providers*

6.81 Section 38 of the ACL provides that various provisions relating to false or misleading representations do not apply 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:

- an advertisement;
- in connection with the supply of certain goods or services; or
- in connection with the sale or grant of certain interests in land, or the promotion of such a sale or grant.

### ***Unsolicited supplies***

#### *Unsolicited cards*

6.82 Section 39 of the ACL provides that a person must not send a credit card or a debit card to another person except:

- if it is at the written request of the other person; or
- the card is for the renewal, replacement or substitution of a card of the same kind.

6.83 Section 39 also provides that a person cannot enable a credit card to be used as a debit card, or a debit card to be used as a credit card, except at the written request of the cardholder.

#### *Assertion of right to payment*

6.84 Section 40 of the ACL provides that a person must not, in trade or commerce, assert a right to payment for unsolicited goods or services unless the person has reasonable cause to believe that there is a right to payment.

6.85 Section 43 of the ACL provides that a person must not assert a right to payment for unauthorised entries or advertisements, relating to another person or their profession, trade or occupation, unless the person knows, or has reasonable cause to believe, that the other person has authorised the placing of the entry or advertisement in the publication.

6.86 Section 43 also provides that any invoice or similar document that is provided to the consumer with unsolicited goods or services, or unauthorised entries or advertisements, must contain a warning statement to the effect that such a document is not an assertion of a right to payment.

#### *Liability of recipient for unsolicited goods or services*

6.87 Sections 41 and 42 of the ACL provides that a person is not liable to pay for unsolicited goods or services that are supplied to them in trade or commerce.

6.88 Section 41 also provides that a person is not liable to pay for loss or damage to unsolicited goods unless the loss or damage is due to a wilful and unlawful action by the person, as well as the right for the sender of the unsolicited goods to retrieve them from the recipient within a certain period.

6.89 Section 42 also provides that a person is not liable to pay for loss or damage as a result of the supply, in trade or commerce, of unsolicited services to them.



### ***Pyramid schemes***

6.90 Section 44 of the ACL provides that a person must not participate, or induce or attempt to induce another person to participate, in a pyramid scheme.

6.91 Section 46 of the ACL provides that a scheme that involves the marketing of goods or services may or may not be a pyramid scheme, depending on:

- whether the participation payments bear a reasonable relationship to the goods or services offered;
- the emphasis given in the promotion of the scheme to the entitlement of the participants to the goods or services, compared to the emphasis given to recruitment payments; and
- any other matter the court deems to be relevant.

### ***Pricing***

#### ***Multiple pricing***

6.92 Section 47 provides that if more than one selling price is displayed for goods, a supplier must not sell the goods for more than the lowest of those prices.

6.93 Suppliers are not obliged to sell the goods and have the right to withdraw the goods from sale until the prices are corrected. An exception that allows a business to publish retractions for advertising errors is also available.

#### ***Single price to be specified in certain circumstances***

6.94 Section 48 prohibits using a component price when making a representation as to the price of a good or service without also prominently specifying the single figure price a consumer must pay to obtain the product or service, to the extent that a single figure price is quantifiable at the time of making a representation.

### ***Other unfair practices***

#### ***Referral selling***

6.95 Section 49 provides that a person must not, in trade or commerce, induce a consumer to buy goods or services by representing that he or she will receive some benefit for assisting the corporation to supply goods or

services to other customers, when the receipt of this benefit is contingent on an event occurring after the contract for the initial sale is made

*Harassment and coercion*

6.96 Section 50 provides that a person must not use physical force, undue harassment or coercion in connection with the supply of goods or services, payment for goods or services, or the sale or grant, or the possible sale or grant, of an interest in land.

*Proof of transaction and itemised bills*

6.97 Section 100 provides that a proof of transaction must be given to a consumer if he or she is supplied with goods or services with a total price of \$75 or more.

6.98 Section 100 also provides that, if the goods or services supplied to the consumer have a total price of less than \$75, the supplier must provide a proof of transaction to the consumer if the consumer requests.

6.99 Section 101 provides that, if a supplier supplies services to a consumer, the consumer may request an itemised bill from the supplier.

## Comparison of key features of new law and current law

### False or misleading representations or conduct

<i>New law</i>	<i>Current law</i>
All the prescribed types of representations listed in section 29 are prohibited from being either false or misleading.	For the types of listed representations in section 53 of the TP Act, some are prohibited from being false, some from being false or misleading and some from being about qualities the goods or services do not have.  Similar prohibitions exist in section 12DB of the ASIC Act and in all State and Territory FT Acts: Section 44 NSW FT Act Sections 10, 11 and 12 Vic. FT Act Section 40 Qld FT Act Sections 12 and 13 WA FT Act Section 58 SA FT Act Section 16 Tas. FT Act Section 14 ACT FT Act Section 44 NT FT Act
False or misleading representations concerning testimonials will be listed as prohibited in section 29 of the ACL.	False or misleading representations concerning testimonials are not specifically listed in section 53 of the TP Act. However, the section 14 of the Vic. FT Act provides such a prohibition.
In court proceedings, a person accused of making a false or misleading representation concerning a testimonial will be required to adduce evidence to the contrary or the representation will be deemed to be misleading.	Currently, the only burden that is on a person accused of breaching certain parts of section 53 of the TP Act is if a representation as to a future matter is alleged to be misleading (by virtue of section 51A of the TP Act). However, the section 14 of the Vic. FT Act does provide a burden on the representor in relation to testimonials.

<i>New law</i>	<i>Current law</i>
<p>Section 26(1)(m), which prohibits false or misleading representations concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy now includes a specific reference to guarantees under Division 1 of Part 3 2 to ensure the section covers representations about that regime.</p>	<p>Section 53(g) of the TP Act prohibits false or misleading representations concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy. There is no specific mention of Part V, Division 2 of the TP Act (implied warranties and conditions).</p>
<p>A new prohibition has been added regarding a false or misleading representation as to a requirement to pay for a contractual right that is wholly or partly equivalent to any condition, warranty, guarantee, right or remedy (including a guarantee under Division 1 of Part 3-2) or that a person has under a law of the Commonwealth, a State or a Territory (other than the unwritten law).</p>	<p>No explicit equivalent in section 53 of the TP Act.</p>
<p>A person must not make false or misleading representations in connection with the sale, grant, possible sale or grant, or promotion in relation to the sale or grant, of an interest in land.</p>	<p>Similar provisions are currently contained in section 53A of the TP Act, section 12DC of the ASIC Act, and the following State and Territory FT Acts:</p> <ul style="list-style-type: none"> <li>Section 45 NSW FT Act</li> <li>Section 40A Qld FT Act</li> <li>Section 59 SA FT Act</li> <li>Sections 12 and 13 WA FT Act</li> <li>Section 17 Tas. FT Act</li> <li>Section 15 ACT FT Act</li> <li>Section 45 NT FT Act</li> </ul>

<i>New law</i>	<i>Current law</i>
<p>A representation as to a future matter made without reasonable grounds is misleading. Failure to adduce evidence of reasonable grounds will result in the representation being deemed as misleading.</p>	<p>Section 51A of the TP Act provides that a representation as to a future matter made without reasonable grounds is misleading. Failure to adduce evidence of reasonable grounds will result in the representation being deemed as misleading.</p> <p>A similar provision exists in section 12BB of the ASIC Act and in all State and Territory FT Acts:</p> <p>Section 41 NSW FT Act            Section 4 Vic. FT Act            Section 37 Qld FT Act            Section 54 SA FT Act            Section 9 WA FT Act            Subsections 3(7)-(9) Tas. FT Act            Section 11 ACT FT Act            Section 41 NT FT Act</p>
<p>The evidentiary burden is clarified to require only that evidence of reasonable grounds be adduced.</p>	<p>court interpretation has differed and, in some cases, section 51A of the TP Act had been interpreted to impose a persuasive or legal burden requiring the respondent to prove reasonable grounds.</p>
<p>Satisfying the evidentiary burden discharges the onus only and does not provide a defence to an allegation of misleading conduct.</p>	<p>Some court decisions have interpreted section 51A of the TP Act to give respondents a substantive defence to an allegation that a representation was misleading if the onus was discharged.</p>
<p>The evidentiary onus can apply to alleged accessories to contraventions.</p>	<p>The wording of section 51A of the TP Act was held to not permit application to alleged accessories.</p>

<i>New law</i>	<i>Current law</i>
<p>A person must not engage in conduct that is liable to mislead persons seeking employment about matters relating to the employment.</p>	<p>Similar provisions are currently contained in section 53B of the TP Act and the following State and Territory FT Acts:</p> <p>Section 46 NSW FT Act                      Section 13 Vic. FT Act                      Section 41 Qld FT Act                      Section 60 SA FT Act                      Section 14 WA FT Act                      Section 18 Tas. FT Act                      Section 16 ACT FT Act                      Section 46 NT FT Act</p>
<p>Offering a rebate, gift, prize or other free item with the intention of not providing it is prohibited.</p>	<p>The same as the new law (section 54 of the TP Act), but without the reference to ‘rebate’.</p> <p>Similar prohibitions exist in section 12DE of the ASIC Act and in all State and Territory FT Acts:</p> <p>Section 48 NSW FT Act                      Section 16 Vic. FT Act                      Section 43 Qld FT Act                      Section 62 SA FT Act                      Section 16 WA FT Act                      Section 19 Tas. FT Act                      Section 18 ACT FT Act                      Section 51 NT FT Act</p>
<p>Rebates, gifts, prizes or other free items must be provided within the time specified in the offer, or if no time is specified, within a reasonable time.</p> <p>Defences where the failure was beyond the person’s control are also provided for this part of the section.</p>	<p>No such prohibition in the TP Act.</p> <p>A similar prohibition exists in section 16 of the Vic. FT Act.</p>
<p>In addition to goods and services, the section applies to a rebate, gift, prize or other free item offered in connection with the sale, possible sale or promotion by any means of the sale or grant of an interest in land.</p>	<p>Land is dealt with separately from goods and services (section 53A(c) as opposed to section 54) in the TP Act.</p>

<i>New law</i>	<i>Current law</i>
<p>A person must not engage in conduct that is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods.</p>	<p>Similar provisions are currently contained in section 55 of the TP Act and the following State and Territory FT Acts:</p> <p>Section 49 NSW FT Act            Section 10 Vic. FT Act            Section 44 Qld FT Act            Section 63 SA FT Act            Section 17 WA FT Act            Section 20 Tas. FT Act            Section 19 ACT FT Act            Section 47 NT FT Act</p>
<p>A person must not engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any services.</p>	<p>Similar provisions are currently contained in section 55A of the TP Act, section 12DF of the ASIC Act, and the following State and Territory FT Acts:</p> <p>Section 50 NSW FT Act            Section 11 Vic. FT Act            Section 45 Qld FT Act            Section 64 SA FT Act            Section 18 WA FT Act            Section 21 Tas. FT Act            Section 20 ACT FT Act            Section 48 NT FT Act</p>
<p>A person must not advertise goods or services at a specified price if there are reasonable grounds, of which the person should be aware, to believe that the person would not be able to supply reasonable quantities of the goods or service at the advertised price for a reasonable period.</p> <p>To advertise goods or services at a specified price, a person must offer such goods or services for a reasonable period at reasonable quantities, having regard to the nature of the advertisement and the market in which the person is carrying on business.</p>	<p>Similar provisions are currently contained in section 56 of the TP Act, section 12DG of the ASIC Act, and the following State and Territory FT Acts:</p> <p>Section 51 NSW FT Act            Section 17 Vic. FT Act            Section 46 Qld FT Act            Section 65 SA FT Act            Section 19 WA FT Act            Section 22 Tas. FT Act            Section 21 ACT FT Act            Section 52 NT FT Act</p>

<i>New law</i>	<i>Current law</i>
<p>Accepting payment for goods or services with the intention of not providing them as agreed or where there are reasonable grounds for believing the supply will not be possible is prohibited.</p>	<p>Same as the new law (section 58 of the TP Act).</p> <p>Similar prohibitions exist in section 12DI of the ASIC Act and in all State and Territory FT Acts:</p> <p>Section 53 NSW FT Act                      Section 19 Vic. FT Act                      Section 48 Qld FT Act                      Section 67 SA FT Act                      Section 21 WA FT Act                      Section 24 Tas. FT Act                      Section 24 ACT FT Act                      Section 54 NT FT Act</p>
<p>‘Accepting payment’ includes partial payments such as deposits.</p>	<p>Not specifically stated in the law.</p>
<p>Suppliers are required to provide goods or services within the specified time, or if no time is specified, within a reasonable time of accepting payment.</p> <p>This requirement does not apply if the failure to supply is beyond the person’s control and he, she or it has taken reasonable precautions and exercised due diligence.</p> <p>A consumer may agree to accept different goods if the agreed goods cannot be provided.</p>	<p>No such requirement in the TP Act.</p>
<p>A person must not make false or misleading representations in relation to the profitability, risk or any other material aspect of any business activity that the person:</p> <ul style="list-style-type: none"> <li>• has represented as one that can be carried on at or from a person’s place of residence; or</li> <li>• invites other persons to participate by investing in or performing work for the business.</li> </ul>	<p>Similar provisions are currently contained in section 59 of the TP Act and the following State and Territory FT Acts:</p> <p>Section 54 NSW FT Act                      Section 20 Vic. FT Act                      Section 49 Qld FT Act                      Section 68 SA FT Act                      Section 22 WA FT Act                      Section 25 Tas. FT Act                      Section 25 ACT FT Act                      Section 49 NT FT Act</p>



<i>New law</i>	<i>Current law</i>
<p>Various provisions relating to false or misleading representations do not apply to an information provider if the information provider made the publication in the course of carrying on a business of providing information, unless the publication is:</p> <ul style="list-style-type: none"> <li>• an advertisement;</li> <li>• in connection with the supply of certain goods or services; or</li> <li>• in connection with the sale or grant of certain interests in land, or the promotion of such a sale or grant.</li> </ul>	<p>Similar provisions are currently contained in section 65A of the TP Act, section 12DN of the ASIC Act, and the following State and Territory FT Acts:</p> <p>Section 60 NSW FT Act            Section 32 Vic. FT Act            Section 51 Qld FT Act            Section 74 SA FT Act            Section 63 WA FT Act            Section 28 Tas. FT Act            Section 31 ACT FT Act            Section 60 NT FT Act</p>

### Unsolicited supplies

<i>New law</i>	<i>Current law</i>
<p>A person must not send a credit card, a debit card, or an article that may be used as both a credit card and a debit card, to another person unless it is at the written request of the other person, or as a replacement for a similar card previously requested by the other person.</p>	<p>Similar provisions are currently contained in section 63A of the TP Act, section 12DL of the ASIC Act, and the following State and Territory FT Acts:</p> <p>Section 57 NSW FT Act            Section 23 Vic. FT Act            Section 71 SA FT Act            Section 28 WA FT Act            Section 27 Tas. FT Act            Section 28 ACT FT Act            Section 57 NT FT Act</p>

<i>New law</i>	<i>Current law</i>
<p>A person must not assert a right to payment for unsolicited goods or services unless the person has reasonable cause to believe that there is a right to payment.</p>	<p>Similar provisions are currently contained in section 64 of the TP Act, section 12DM of the ASIC Act, and the following State and Territory FT Acts:</p> <p>Section 58 NSW FT Act                      Sections 24 and 28 Vic. FT Act                      Section 52 Qld FT Act                      Section 72 SA FT Act                      Sections 29 and 30 WA FT Act                      Section 28 ACT FT Act                      Section 57 NT FT Act</p>
<p>A person must not assert a right to payment for unauthorised entries or advertisements unless the person knows, or has reasonable cause to believe, that the other person has authorised the placing, in a publication, of the entry or advertisement.</p>	<p>Provisions relating to unauthorised directory entries are currently contained in section 64 of the TP Act and the following State and Territory FT Acts:</p> <p>Section 58 NSW FT Act                      Sections 27 and 28 Vic. FT Act                      Section 52 Qld FT Act                      Section 72 SA FT Act                      Sections 29 and 30 WA FT Act                      Section 29 ACT FT Act                      Section 58 NT FT Act</p> <p>There is no equivalent of the provisions relating to unauthorised advertisements in the TP Act. A similar provision currently exists in the following State and Territory FT Acts:</p> <p>Section 58A NSW FT Act                      Sections 27 and 28 Vic. FT Act                      Section 52 Qld FT Act</p>
<p>Any document that is an invoice or other document that seeks payment for unsolicited goods or services, or the making of unauthorised directory entries or advertisements, must contain a statement to the effect that the document is not a bill.</p>	<p>There is no equivalent provision in the TP Act. There is a similar provision in section 58A of the NSW FT Act.</p>

<i>New law</i>	<i>Current law</i>
A person is not liable to pay for unsolicited goods, nor for any loss or damage to those goods, unless such loss or damage is due to a willful and unlawful act in relation to the goods by the person.	Similar provisions are currently contained in section 65 of the TP Act and the following State and Territory FT Acts: Section 59 NSW FT Act Section 25 Vic. FT Act Section 53 Qld FT Act Section 73 SA FT Act Section 31 WA FT Act Section 30 ACT FT Act Section 59 NT FT Act
A person is not liable to pay for unsolicited services, nor for any loss or damage arising as a result of the supply of those services.	There is no equivalent provision in the TP Act. There is a similar provision in section 26 of the Victorian FT Act.

### Pyramid schemes

<i>New law</i>	<i>Current law</i>
A person must not participate in, or induce or attempt to induce another person to participate in, a pyramid scheme.	Similar provisions are currently contained in section 65AAC of the TP Act, section 12DK of the ASIC Act, and the following State and Territory FT Acts: Section 60U NSW FT Act Section 22 Vic. FT Act Section 55D Qld FT Act Section 70 SA FT Act Section 24 WA FT Act Section Tas. FT Act Section 25B ACT FT Act Section 60D NT FT Act

<i>New law</i>	<i>Current law</i>
<p>In determining whether a scheme is a marketing scheme rather than a pyramid scheme, a court <i>must</i> have regard to:</p> <ul style="list-style-type: none"> <li>• <i>whether</i> the participation payment bear a reasonable relationship to the value of the goods or services that participants are entitled to be supplied under the scheme; and</li> <li>• the emphasis on the entitlement of participants to the goods or services as opposed to their entitlement to recruitment payments.</li> </ul>	<p>Section 65AAE of the TP Act currently provides that a court <i>may</i> have regard to:</p> <ul style="list-style-type: none"> <li>• <i>the extent to which</i> the participation payment bear a reasonable relationship to the value of the goods or services that participants are entitled to be supplied under the scheme; and</li> <li>• the emphasis on the entitlement of participants to the goods or services as opposed to their entitlement to recruitment payments.</li> </ul> <p>Similar provisions to section 65AAE are contained in the following State and Territory FT Acts:</p> <p>Subsection 60T(4) NSW FT Act                      Section 25D ACT FT Act                      Section 60C NT FT Act</p>

## Pricing

<i>New law</i>	<i>Current law</i>
<p>If more than one selling price is displayed for goods, a supplier must not sell the goods for more than the lowest of those prices.</p>	<p>No Commonwealth equivalent.                      A similar requirement exists in section 40 of the NSW FT Act and section 22 of the ACT FT Act.</p>
<p>Suppliers retain the right to withdraw items from sale.</p>	<p>Suppliers retain the right to withdraw items from sale.</p>
<p>The section applies to advertisements such as catalogues.                      Retractions can be published for mistakes in advertising.</p>	
<p>The provision does not apply to wholly obscured prices, prices not in Australian currency, is a partial price such as a unit price, or is not expressed in such a way that it is unlikely to be interpreted to an amount</p>	

<i>New law</i>	<i>Current law</i>
<p>A person must not use a component price when making a representation as to the price of a good or service without also prominently specifying the single figure price a consumer must pay to obtain the product or service, to the extent that a single figure price is quantifiable at the time of making a representation.</p>	<p>Similar provisions are currently contained in section 53C of the TP Act.</p> <p>Similar prohibitions exist in section 12DD of the ASIC Act and in all State and Territory FT Acts:</p> <p>Section 47 NSW FT Act            Section 15 Vic. FT Act            Section 42 Qld FT Act            Section 61 SA FT Act            Section 15 WA FT Act            Section 21A Tas. FT Act            Section 17 ACT FT Act            Section 50 NT FT Act</p> <p>However, it should be noted that these other provisions have not been updated to reflect the amendments made in the <i>Commonwealth Trade Practices Amendment (Clarity in Pricing) Act 2008</i>.</p>

**Other unfair practices**

<i>New law</i>	<i>Current law</i>
<p>A person must not induce a consumer to buy goods or services by representing that he or she will receive some benefit for assisting the corporation to supply goods or services to other customers, when the receipt of this benefit is contingent on an event occurring after the contract for the initial sale is made</p>	<p>Similar provisions are currently contained in section 57 of the TP Act, section 12DH of the ASIC Act, and the following State and Territory FT Acts:</p> <p>Section 52 NSW FT Act            Section 18 Vic. FT Act            Section 47 Qld FT Act            Section 66 SA FT Act            Section 20 WA FT Act            Section 26A Tas. FT Act            Section 23 ACT FT Act            Section 53 NT FT Act</p>

<i>New law</i>	<i>Current law</i>
A person must not use physical force, undue harassment or coercion in connection with either the supply of goods or services to a consumer or payment by a consumer for goods or services.	Similar provisions are currently contained in section 60 of the TP Act, section 12DJ of the ASIC Act, and the following State and Territory FT Acts: Section 55 NSW FT Act Section 21 Vic. FT Act Section 50 Qld FT Act Section 69 SA FT Act Section 23 WA FT Act Section 26 Tas. FT Act Section 26 ACT FT Act Section 55 NT FT Act
A proof of transaction must be given to a consumer if he or she is supplied with goods or services with a total price of \$75 or more.  If the goods or services supplied to the consumer have a total price of less than \$75, the supplier must provide a proof of transaction to the consumer if the consumer requests.	There is no equivalent provision in the TP Act. Similar provisions currently exist in section 160A of the Victorian FT Act.
If a supplier supplies services to a consumer, the consumer may request an itemised bill from the supplier.	There is no equivalent provision in the TP Act. Similar provisions currently exist in section 160A of the Victorian FT Act.

## Detailed explanation of new law

### False or misleading representations etc.

#### *False or misleading representations about goods or services*

6.100 Section 29 of the ACL prohibits a person from making a range of specified false or misleading representations, in trade or commerce and in connection with:

- the supply of goods or services; or
- the possible supply of goods or services; or

- the promotion by any means of the supply or use of goods or services.

6.101 The representations specifically identified in section 29 of the ACL include:

- representations that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(a)]*
- representations that services are of a particular standard, quality, value or grade. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(b)]*
- representations that goods are new. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(c)]*
- representations that a particular person has agreed to acquire goods or services. For example, inducing a sportsperson to buy a new type of sporting goods by asserting that competitors had purchased the items when he or she had not. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(d)]*
- representations that purports to be a testimonial by any person relating to goods or services. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(e)]*
- representations concerning a testimonial by any person or a representation that purports to be such a testimonial relating to goods or services. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, subsection 29(1)(f)]*
- representations that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(g)]*
- representations that the person making the representation has a sponsorship, approval or affiliation. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(h)]*
- representations with respect to the price of goods or services. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(i)]*
- representations concerning the availability of facilities for the repair of goods or of spare parts for goods. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, subsection 29(1)(j)]*

- representations concerning the place of origin of goods. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(k)]*
- representations concerning the need for any goods or services. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(l)]*
- representations concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (including a guarantee under Chapter 3, Part 3-2, Division 1). *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(m)]*
- representations concerning a requirement to pay for a contractual right that:
  - is wholly or partly equivalent to any condition, warranty, guarantee, right or remedy (including a guarantee under Chapter 3, Part 3-2, Division 1); and
  - a person has under a law of the Commonwealth, State or Territory (other than the unwritten law).

*[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(n)]*

6.102 Section 29 applies to any transaction that takes place in trade or commerce. ‘Trade or commerce’ is defined in section 2 of the ACL as meaning ‘trade or commerce within Australia, or between Australia and places outside Australia, and includes any business or professional activity (whether or not carried on for profit)’. The ACL applies to conduct engaged in outside of Australia, provided that at least some aspect of the trading relationship between two or more parties has taken place in Australia. *[Schedule 1, item 1: Chapter 1, section 2]*

6.103 The application of section 29 of the ACL is not limited to transactions involving ‘consumers’ as defined in section 3 of the ACL.

6.104 The concept of ‘supply’ is defined in section 2 of the ACL. *[Schedule 1, item 1: Chapter 1, section 2]*

#### *Representations*

6.105 The representations identified in paragraphs 29(1)(a), (c), (d), (e), (f), (g), (i), (j), (k) and (l) relate to goods.

6.106 The representations identified in paragraphs 29(1)(b), (d), (e), (f), (g), (i) and (l) relate to services.

6.107 The representations identified in paragraphs 29(1)(m) and (n) relate to consumer guarantees and warranties, conditions, rights or remedies.



*Meaning of concepts used in section 29*

6.108 The ACL does not specifically define many of the concepts used in the drafting of section 29 of the ACL. As section 29 is couched in substantially the same form as section 53 of the TP Act, the jurisprudence relating to the concepts applicable to section 53 of the TP Act is relevant to those concepts as they exist in section 29 of the ACL.

*Representations as to goods only*

6.109 A representation that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use could cover, for example and without limitation:

- representations about the nature of the goods, which could include:
  - the way in which the goods were manufactured, including specific methods or processes; or
  - the materials from which the goods were manufactured; or
  - the correspondence of the actual goods, their contents or the way in which those goods were made with a description of those goods, their contents or the way in which they were made;
- representations about the standard, quality or grade of the goods, which could include:
  - the suitability of the goods for the uses to which they might reasonably be put; or
  - the purity, strength, cleanliness, fineness (or otherwise) of the goods, or any other standard, quality or grade by which the goods may be assessed or compared;
- representations about the value of the goods, which could include:
  - the price of the goods; or
  - the cost of the contents of the goods; or
  - the cost of the process by which the goods were manufactured or distributed; or
  - the market value of the goods;

- representations about the style of the goods, which could include:
  - the design or the designer of the goods; or
  - the accuracy of a reproduction of other goods;
- representations about the model of the goods, which could include whether the goods match the characteristics of a particular make or model of the goods;
- representations about the previous history or use of the goods, including:
  - the origin and age of the goods; or
  - the previous ownership of the goods; or
  - the historical uses or associations of the goods either in a specific context or by specified persons.

*[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(a)]*

6.110 A representation that goods are new could cover, for example and without limitation, representations that goods, which are in fact not new, are new. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(c)]*

6.111 A representation concerning the availability of facilities for the repair of goods or of spare parts for goods could cover, for example and without limitation, a representation that spare parts, or specific spare parts, will be available when no such parts are available or a representation that there are facilities for the repair of the goods which are not, in fact, available. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, subsection 29(1)(j)]*

6.112 A representation concerning the place of origin of goods could cover, for example and without limitation:

- a representation that goods were manufactured in a particular place; or
- a representation that the contents of the goods came from a particular place; or
- a representation that the goods were ‘made in’, the ‘product of’ or ‘grown in’ a particular place.

*[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(k)]*

6.113 The country of origin provisions set out in Chapter 5, Part 5-3 provide a series of defences with respect to this provision concerning the use of particular claims on the labels of goods. [*Schedule 1, item 1: Chapter 5, Part 5-3*]

*Representations as to services only*

6.114 A representation that services are of a particular standard, quality, value or grade could cover, for example and without limitation [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(b)*]:

- representations about the nature of the services, which could include:
  - the way in which the services are, have been or might be undertaken, including specific methods or processes; or
  - the persons who will or might undertake the services and whether those persons have undertaken the services previously; or
  - the correspondence of the actual services or the way in which those services are undertaken with a description of those services;
- representations about the standard, quality or grade of the goods, which could include:
  - the suitability of the services for the purposes to which they are to be put or the matter to which they relate; or
  - the qualifications and previous experience of the persons who will undertake the services; or
  - the amount of work to be undertaken as part of the supply of the services and the relationship of that work with the cost of the services.

*Representations as to goods and services*

6.115 A representation that a particular person has agreed to acquire the goods or services could cover, for example and without limitation [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(d)*]:

- that another person has, may or will acquire the goods or services; or

- that that other person has, may or will acquire the goods or services for a particular price or at a particular time; or
- that that other person has, may or will acquire a specific form of the goods or services.

6.116 A representation that the goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits could cover, for example and without limitation:

- representations that the goods or services are, in some way, sponsored by another person or entity. This could include persons or entities not engaged in trade or commerce, such as charities, religious institutions, educational institutions, professional and trades bodies and governments.
- representations that a person or other entity has approved of the goods or services, including representations that such an approval is a formal or informal endorsement, certification or other indication of approval made by a person or entity. This could include persons or entities not engaged in trade or commerce.
- representations that the goods or services will or could:
  - reach specified or non-specified performance standards or levels in their use or provision; or
  - deliver specified or non-specified benefits or enhancements in the use of other goods or the undertaking of other services; or
  - with respect to goods, last for specified or non-specified periods of time or a specified or non-specified number of uses, and with respect to services, be provided or undertaken for a specified or unspecified period of time or a specified or unspecified number of times; or
  - tolerate specified or non-specified physical circumstances (including, for example, pressures or stresses) in their use or undertaking;
- representations that the goods or services come with other accessories, including the provision of additional goods or services either generally or in the event that certain things occur;

- representations that the goods or services have particular uses either generally or in addition to those for which they are to be or have been supplied;
- representations that the goods or services will provide the person acquiring them or other persons with benefits.

*[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(g)]*

6.117 A representation that the person making the representation has sponsorship, approval or affiliation could cover, for example and without limitation:

- representations that the person is, in some way, sponsored by, approved of or affiliated with another person or entity. This could include persons or entities not engaged in trade or commerce, such as charities, religious institutions, educational institutions, professional and trades bodies and governments.
- representations that a person or other entity has sponsored, approved of or extend an affiliation to the person, including representations that such an approval is a formal or informal endorsement, certification, qualification or other indication of approval made by a person or entity. This could include persons or entities not engaged in trade or commerce.

*[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(h)]*

6.118 A representation with respect to the price of goods or services could cover, for example and without limitation:

- a representation that the goods or services:
  - will be supplied for a particular price or at a particular discount; or
  - may be paid for in a particular way or at a particular time or times.

*[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(i)]*

6.119 A representation concerning the need for any goods or services could cover, for example and without limitation:

- a representation that the goods or services are necessary in particular circumstances or at all; or

- a representation that the goods and services are required in the light of a specific event or as a consequence of specific circumstances; or
- a representation that a failure to provide the goods or services will result in specific things occurring or not occurring.

*[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(l)]*

#### *Testimonials*

6.120 Paragraphs 29(1)(e) and (f) of the ACL prohibit false or misleading representations in trade or commerce:

- that purport to be a testimonial by any person relating to goods or services; or *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(e)]*
- concerning:
  - a testimonial by any person; or
  - a representation that purports to be such a testimonial;

relating to goods or services; *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(f)]*

6.121 Paragraphs 29(1)(e) and (f) apply to representations whether or not the testimonial was genuine or not, for example where a genuine testimonial is misrepresented or misquoted or where a fictitious testimonial was published. False or misleading testimonials are not specifically listed as types of false or misleading representations in the section 53 of the TP Act. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraphs 29(e) and (f)]*

6.122 There is a rebuttable presumption that a representation concerning a testimonial as described in paragraphs 29(1)(e) and (f) are misleading and deceptive. Failure to adduce evidence to the contrary when it is alleged that a person has made a false or misleading representation concerning a testimonial will result in the representation being found to be misleading. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraphs 29(2)-(3)]*

6.123 This onus is evidentiary in nature, the person accused does not have to disprove the alleged breach: he or she must put evidence to the contrary of the allegation before the court. Similarly, adducing such evidence does not provide the accused with a defence to any allegation that the representation is false or misleading: it merely discharges the onus on them. A person can discharge the evidentiary onus and still be found to have

made a misleading representation. The evidentiary onus does not apply to any other paragraphs in section 29 other than paragraphs 29(1)(e) and (f).

6.124 To avoid doubt, just because some evidence may be adduced to the contrary, a representation is not, purely on that basis, false or misleading. The evidence must be sufficient to displace the presumption that the representation was false or misleading. [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(3)(a)*]

6.125 Similarly, paragraph 29(2) of the ACL does not place an onus on a person to prove that a representation is not misleading. [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(3)(b)*]

*Representations as to guarantees etc.*

6.126 Paragraph 29(1)(m) of the ACL prohibits false or misleading representations in trade or commerce concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy. The paragraph includes a specific reference to guarantees under Chapter 3, Part 3-2, Division 1 of the ACL to ensure the prohibition covers representations about statutory guarantees provided by the ACL. [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(m)*]

6.127 This could cover representations made by a person (generally a trader) to a person (generally a consumer as defined in section 3 of the ACL) that a condition, warranty, guarantee, right or remedy, including the statutory guarantees provided by the ACL:

- does or does not exist with respect to the goods or services, either at all or in specified circumstances; or
- may or may not be excluded with respect to the goods or services, either at all or in specified circumstances; or
- may or may not have a particular effect with respect to the goods or services, either at all or in specified circumstances.

6.128 Paragraph 29(1)(n) of the ACL prohibits false or misleading representations as to a requirement to pay for a contractual right that is wholly or partly equivalent to any condition, warranty, guarantee, right or remedy or that a person has under a law of the Commonwealth, a State or a Territory (other than the unwritten law). The paragraph includes a specific reference to guarantees under Chapter 3, Part 3-2, Division 1 of the ACL to ensure the prohibition covers representations about statutory guarantees provided by the ACL. [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(n)*]

6.129 This could cover representations made by a person (generally a trader) to a person (generally a consumer as defined in section 3 of the ACL) that a condition, warranty, guarantee, right or remedy, including the statutory guarantees provided by the ACL must be paid for, either at all or in specified circumstances.

*Criminal offence*

6.130 Section 29 of the ACL has an associated criminal offence in section 151 of the ACL. The maximum fine payable for a contravention of section 151 of the ACL is \$1.1 million for a body corporate and \$220,000 for any other person. *[Schedule 1, item 1: Chapter 4, Part 4-1, section 151]*

6.131 The offence in section 151 is one of strict liability so that it is not necessary to consider the intent of the person committing the offence. The strict liability nature of this offence reflects the potential for widespread detriment, both financially for individual consumers and for its effect on the market and consumer confidence more generally, that can be caused by a person that breaches this provision, whether or not he or she intended to engage in the contravention.

6.132 Part 4-6 of the ACL provides defences applicable to criminal proceedings of:

- an honest and reasonable mistake of fact; *[Schedule 1, item 1: Chapter 4, Part 4-6, section 207]*
- where the contravention was caused by the act or default of another person or an accident or cause beyond the person's control, and where the person took reasonable precautions and exercised due diligence to avoid the contravention; and *[Schedule 1, item 1: Chapter 4, Part 4-6, section 208]*
- where an advertiser publishes an advertisement in the ordinary course of business and does not know and had no reason to suspect the advertisement amounted to a contravention. *[Schedule 1, item 1: Chapter 4, Part 4-6, section 209]*

*Enforcement powers, penalties and remedies*

6.133 A person contravening section 29 of the ACL is liable to pay a civil pecuniary penalty of up to:

- \$1.1 million for a body corporate;
- \$220,000 for other persons.

*[Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, section 224]*



6.134 The following enforcement powers and remedies apply to section 29 of the ACL:

- undertakings; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 1*]
- substantiation notices; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 2*]
- public warning notices; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 3*]
- injunctions; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 2*]
- damages; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 3*]
- compensatory orders; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision A*]
- redress for non-parties; and [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision B*]
- non-punitive orders. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, section 246*]

6.135 For further information on these powers, remedies and penalties generally see Chapters 14 and 15.

6.136 The ACCC may issue an infringement notice for a contravention of section 29 of the ACL. The amount of the penalty specified in the infringement notice is:

- 600 penalty units for a listed corporation;
- 60 penalty units for a body corporate other than a listed corporation; and
- 12 penalty units for any other person. [*Schedule 2, item 1: Part XI, Division 5*]

#### *ASIC Act*

6.137 Section 12DB of the ASIC Act is repealed and replaced with a new section 12DB to reflect section 29 of the ACL, with respect to financial products and services. [*Schedule 3, item 14*]

*False or misleading representations etc about sale etc of land*

6.138 Section 30 of the ACL provides that a person must not, in trade or commerce, make specified types of false or misleading representations in relation to:

- the sale or grant, or the possible sale or grant, of an interest in land; or
- the promotion of the sale or grant of an interest in land.

*[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, subsection 30(1)]*

6.139 The types of false or misleading representations specified in section 30 of the ACL include:

- representations that the person making the representation has a sponsorship, approval or affiliation; *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 30(1)(a)]*
- representations concerning the nature of the interest in land; *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 30(1)(b)]*
- representations concerning the price payable for the land; *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 30(1)(c)]*
- representations concerning the location of the land; *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 30(1)(d)]*
- representations concerning the characteristics of the land; *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 30(1)(e)]*
- representations concerning the use to which the land is capable of being put or may lawfully be put; or *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 30(1)(f)]*
- representations concerning the existence or availability of facilities associated with the land. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 30(1)(g)]*

*Sponsorship, approval or affiliation*

6.140 A representation that the person making the representation has sponsorship, approval or affiliation could cover, for example and without limitation:

- representations that the person is, in some way, sponsored by, approved of or affiliated with another person or entity. This could include persons or entities not engaged in trade or

commerce, such as charities, religious institutions, educational institutions, professional and trades bodies and governments.

- representations that a person or other entity has sponsored, approved of or extend an affiliation to the person, including representations that such an approval is a formal or informal endorsement, certification, qualification or other indication of approval made by a person or entity. This could include persons or entities not engaged in trade or commerce.

*[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 30(1)(a)]*

*Interests in land*

6.141 A representation concerning the nature of the interest of the land could cover, for example and without limitation:

- representations that the relevant interest in the land exists when it does not; or
- representations that the relevant interest in the land is different to what it actually is; or
- representations as to the nature of any encumbrances or any other interests in the land which may affect the title or other interest of the acquirer to that land.

*[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 30(1)(b)]*

*Price payable*

6.142 A representation concerning the price payable for the land could cover, for example and without limitation:

- representations that the price is a particular amount or includes certain things, such as taxes, fees and charges; or
- representations that the price for the land is different to what it actually is; or
- representations as to the price for the land is or is not affected by another matter which may affect the price paid, or the ability of the acquirer to that land to pay.

*[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 30(1)(c)]*

*Location*

6.143 A representation concerning the location of the land could cover, for example and without limitation:

- representations about the location of the land; or
- representations about matters relating to the location of the land, including access to it.

*[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 30(1)(d)]*

*Characteristics*

6.144 A representation concerning the characteristics of the land could cover, for example and without limitation:

- representations about the features of the land; or
- representations about matters relating to the topography, geology, hydrology or other physical characteristics of the land; or
- representations about the fertility of the land or the suitability of the land for particular uses.

*[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 30(1)(e)]*

*Uses of the land*

6.145 A representation concerning the uses of the land could cover, for example and without limitation:

- representations about the uses to which the land might be appropriately put, having regard to its location and physical features; or
- representations about relevant administrative approvals, or licences concerning the use of the land.

*[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 30(1)(g)]*

*Facilities*

6.146 A representation concerning the facilities associated with the land could cover, for example and without limitation:

- representations that the land has, or may or may not have, certain facilities or access to such facilities; or

- representations about the nature of those facilities and the uses to which they may be put; or
- representations as any interests or other rights that other persons may have with respect to those facilities.

*[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 30(1)(g)]*

*Interpretation*

6.147 The ACL does not specifically define many of the concepts used in the drafting of section 30 of the ACL. As section 30 is couched in substantially the same form as section 53A of the TP Act the jurisprudence relating to the concepts applicable to section 53A of the TP Act is relevant to those concepts as they exist in section 30 of the ACL.

6.148 Section 30 applies to any land transaction. A land transaction may not be a supply of 'goods' or 'services' and therefore this provision is included to avoid any doubt about the application or scope of section 29 of the ACL.

6.149 The application of section 30 of the ACL is not limited to transactions involving 'consumers' as defined in section 3 of the ACL.

6.150 The types of representations prohibited mainly relate to various aspects of the land in question, including its nature, price, location or characteristics, uses for the land, and the existence or availability of facilities associated with the land. In addition, the person making the representation must not make a false or misleading representation that the person has a sponsorship, approval or affiliation.

6.151 This provision recognises that dealings associated with land are neither a good nor a service, so a separate clause prohibiting false or misleading representations in relation to land is necessary. This provision only applies if the representations are made in connection with transactions involving the sale or grant of interests in land, and not if only in connection with a person's general business activities, even if those business activities involve the selling of land.<sup>8</sup>

6.152 To avoid doubt, it is specified that the references to interests in land in this section does not affect the operation of other provisions such as the misleading or deceptive conduct provisions in Part 2-1 and other provisions in Part 3-1. *[Chapter 3, Part 3-1, Division 1, subsection 30(2)]*

---

8 *Central Equity Limited v Central Corporation Pty Ltd* [1995] FCA 1572 at [34].

*Criminal offence*

6.153 Section 30 of the ACL has an associated criminal offence in section 152 of the ACL. The maximum fine payable for a contravention of section 152 of the ACL is \$1.1 million for a body corporate and \$220,000 for any other person. *[Schedule 1, item 1: Chapter 4, Part 4-1, section 152]*

6.154 The offence in section 152 is one of strict liability so that it is not necessary to consider the intent of the person committing the offence. The strict liability nature of this offence reflects the potential for widespread detriment, both financially for individual consumers and for its effect on the market and consumer confidence more generally, that can be caused by a person that breaches this provision, whether or not he or she intended to engage in the contravention.

6.155 Part 4-6 of the ACL provides defences applicable to criminal proceedings of:

- an honest and reasonable mistake of fact; *[Schedule 1, item 1: Chapter 4, Part 4-6, section 207]*
- where the contravention was caused by the act or default of another person or an accident or cause beyond the person's control, and where the person took reasonable precautions and exercised due diligence to avoid the contravention; and *[Schedule 1, item 1: Chapter 4, Part 4-6, section 208]*
- where an advertiser publishes an advertisement in the ordinary course of business and does not know and had no reason to suspect the advertisement amounted to a contravention. *[Schedule 1, item 1: Chapter 4, Part 4-6, section 209]*

*Enforcement powers, penalties and remedies*

6.156 A person contravening section 30 of the ACL is liable to pay a civil pecuniary penalty of up to:

- \$1.1 million for a body corporate;
- \$220,000 for other persons.

*[Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, section 224]*

6.157 The following enforcement powers and remedies apply to section 30 of the ACL:

- undertakings; *[Schedule 1, item 1: Chapter 5, Part 5-1, Division 1]*

- substantiation notices; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 2*]
- public warning notices; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 3*]
- injunctions; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 2*]
- damages; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 3*]
- compensatory orders; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision A*]
- redress for non-parties; and [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision B*]
- non-punitive orders. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, section 246*]

6.158 For further information on these powers, remedies and penalties generally see Chapters 14 and 15.

6.159 The ACCC may issue an infringement notice for a contravention of section 30 of the ACL. The amount of the penalty specified in the infringement notice is:

- 600 penalty units for a listed corporation;
- 60 penalty units for a body corporate other than a listed corporation; and
- 12 penalty units for any other person.

[*Schedule 2, item 1: Part XI, Division 5*]

#### ***Misleading conduct relating to employment***

6.160 Section 31 of the ACL provides that a person must not engage in conduct that is liable to mislead persons seeking employment about:

- matters relating to the employment, including, but not limited to, the availability, nature, terms or conditions of the employment; or
- any other matter relating to employment.

[*Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, subsection 31*]

*Interpretation*

6.161 Section 31 recognises that representations in relation to employment are not necessarily made ‘in trade or commerce’, but rather ‘in respect of trade or commerce’. Accordingly, sections 19 and 29 of the ACL, which are concerned with conduct in trade or commerce, do not apply.

6.162 Employment, or the ‘performance of work under a contract of service’, is also explicitly excluded from the definition of ‘service’ in section 2 of the ACL.

6.163 The ACL does not specifically define many of the concepts used in the drafting of section 31 of the ACL. As section 31 is couched in substantially the same form as section 53B of the TP Act the jurisprudence relating to the concepts applicable to section 53B of the TP Act is relevant to those concepts as they exist in section 31 of the ACL.

6.164 The application of section 31 of the ACL is not limited to transactions involving ‘consumers’ as defined in section 3 of the ACL.

*Criminal offence*

6.165 Section 31 of the ACL has an associated criminal offence in section 153 of the ACL. The maximum fine payable for a contravention of section 153 of the ACL is \$1.1 million for a body corporate and \$220,000 for any other person. [*Schedule 1, item 1: Chapter 4, Part 4-1, section 153*]

6.166 The offence in section 153 is one of strict liability so that it is not necessary to consider the intent of the person committing the offence. The strict liability nature of this offence reflects the potential for widespread detriment, both financially for individual consumers and for its effect on the market and consumer confidence more generally, that can be caused by a person that breaches this provision, whether or not he or she intended to engage in the contravention.

6.167 Part 4-6 of the ACL provides defences applicable to criminal proceedings of:

- an honest and reasonable mistake of fact; [*Schedule 1, item 1: Chapter 4, Part 4-6, section 207*]
- where the contravention was caused by the act or default of another person or an accident or cause beyond the person’s control, and where the person took reasonable precautions and exercised due diligence to avoid the contravention; and [*Schedule 1, item 1: Chapter 4, Part 4-6, section 208*]



- where an advertiser publishes an advertisement in the ordinary course of business and does not know and had no reason to suspect the advertisement amounted to a contravention. *[Schedule 1, item 1: Chapter 4, Part 4-6, section 209]*

*Enforcement powers, penalties and remedies*

6.168 A person contravening section 31 of the ACL is liable to pay a civil pecuniary penalty of up to:

- \$1.1 million for a body corporate;
- \$220,000 for other persons.

*[Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, section 224]*

6.169 The following enforcement powers and remedies apply to section 31 of the ACL:

- undertakings; *[Schedule 1, item 1: Chapter 5, Part 5-1, Division 1]*
- substantiation notices; *[Schedule 1, item 1: Chapter 5, Part 5-1, Division 2]*
- public warning notices; *[Schedule 1, item 1: Chapter 5, Part 5-1, Division 3]*
- injunctions; *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 2]*
- damages; *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 3]*
- compensatory orders; *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision A]*
- redress for non-parties; and *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision B]*
- non-punitive orders. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, section 246]*

6.170 For further information on these powers, remedies and penalties generally see Chapters 14 and 15.

6.171 The ACCC may issue an infringement notice for a contravention of section 31 of the ACL. The amount of the penalty specified in the infringement notice is:

- 600 penalty units for a listed corporation;

- 60 penalty units for a body corporate other than a listed corporation; and
- 12 penalty units for any other person. [*Schedule 2, item 1: Part XI, Division 5*]

*Offering rebates, gifts, prizes etc*

6.172 Section 32 of the ACL prohibits a supplier offering gifts, prizes and other free items (including services), in trade or commerce, in connection with:

- the supply, or possible supply of goods or services; or
- the promotion by any means of goods or services:

without intending to provide them. [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, subsection 32(1)*]

6.173 Section 32 also provides that the same requirements apply in relation to the:

- sale or grant or possible sale or grant of an interest in land; or
- promotion of a grant or sale of an interest in land. [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, subsections 32(1)(c)-(d)*]

6.174 Section 32 of the ACL refers to ‘rebates’, which were not explicitly included in section 54 of the TP Act. This has been included to specifically include ‘cash-back’ offers within the scope of this provision. While rebates will still be able to be conditional on certain conditions being fulfilled by a consumer, once those obligations have been fulfilled this section will have effect. [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, section 32*]

*Reasonable time*

6.175 Section 32 of the ACL also includes a provision which prohibits a person from not providing gifts, prizes, rebates or other free items offered in connection with:

- the supply, or possible supply, of goods or services;
- the promotion by any means of goods or services;
- the sale or grant or possible sale or grant of an interest in land; or
- the promotion of a grant or sale of an interest in land.

within the time specified in the offer, or, if no time is specified, within a reasonable time of making the offer. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, subsection 32(2)]*

6.176 The specified time requirement requires that if an offer is made, subject to clearly stated terms of delivery, the person making the offer will not be forced to meet a shorter timeframe than that which had been stated. Similarly, the reasonable time requirement also requires that consumers are not subject to unreasonably long delays—for example, where a cash-back offer is made but it takes two years to receive the money.

6.177 Where no time is specified, the determination of a ‘reasonable time’ is a subjective assessment, which will include consideration of such issues as the nature of the gifts and prizes offered and any representations or inferences made about their availability. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, subsection 32(2)]*

6.178 Section 32 of the ACL also provides that the requirement to supply within the specified or reasonable time does not apply where the reason the supplier could not supply was beyond their control, providing he, she or it had taken reasonable precautions and exercised due diligence. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, subsection 32(3)]*

6.179 Section 32 of the ACL also permits a person to accept a different prize, rebate or other free item if he or she agrees to do so. This avoids the situation where a trader is put in an impossible position of being required to supply something it has genuinely tried to provide but cannot, even where an appropriate substitute is available. It allows the trader to offer something in place of the prize that cannot be supplied. The person is not obliged to accept the different item if he or she wishes to retain other rights to compensation he or she may have. If a person accepts the substitute item then the trader should still provide it within a reasonable time. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, subsection 32(4)]*

#### *Interpretation*

6.180 The ACL does not specifically define many of the concepts used in the drafting of section 32 of the ACL. As section 32 is couched in substantially the same form as section 54 of the TP Act the jurisprudence relating to the concepts applicable to section 54 of the TP Act is relevant to those concepts as they exist in section 32 of the ACL.

6.181 The application of section 32 of the ACL is not limited to transactions involving ‘consumers’ as defined in section 3 of the ACL.

6.182 The concept of ‘supply’ is defined in section 2 of the ACL. *[Schedule 1, item 1: Chapter 1, section 2]*

*Criminal offence*

6.183 Section 32 of the ACL has an associated criminal offence in section 154 of the ACL. The maximum fine payable for a contravention of section 154 of the ACL is \$1.1 million for a body corporate and \$220,000 for any other person. *[Schedule 1, item 1: Chapter 4, Part 4-1, section 154]*

6.184 The offence in section 154 is one of strict liability so that it is not necessary to consider the intent of the person committing the offence. The strict liability nature of this offence reflects the potential for widespread detriment, both financially for individual consumers and for its effect on the market and consumer confidence more generally, that can be caused by a person that breaches this provision, whether or not he or she intended to engage in the contravention.

6.185 Part 4-6 of the ACL provides defences applicable to criminal proceedings of:

- an honest and reasonable mistake of fact; *[Schedule 1, item 1: Chapter 4, Part 4-6, section 207]*
- where the contravention was caused by the act or default of another person or an accident or cause beyond the person's control, and where the person took reasonable precautions and exercised due diligence to avoid the contravention; and *[Schedule 1, item 1: Chapter 4, Part 4-6, section 208]*
- where an advertiser publishes an advertisement in the ordinary course of business and does not know and had no reason to suspect the advertisement amounted to a contravention. *[Schedule 1, item 1: Chapter 4, Part 4-6, section 209]*

*Enforcement powers, penalties and remedies*

6.186 A person contravening section 32 of the ACL is liable to pay a civil pecuniary penalty of up to:

- \$1.1 million for a body corporate;
- \$220,000 for other persons.

*[Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, section 224]*

6.187 The following enforcement powers and remedies apply to section 32 of the ACL:

- undertakings; *[Schedule 1, item 1: Chapter 5, Part 5-1, Division 1]*

- substantiation notices; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 2*]
- public warning notices; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 3*]
- injunctions; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 2*]
- damages; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 3*]
- compensatory orders; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision A*]
- redress for non-parties; and [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision B*]
- non-punitive orders. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, section 246*]

6.188 For further information on these powers, remedies and penalties generally see Chapters 14 and 15.

6.189 The ACCC may issue an infringement notice for a contravention of section 32(2) of the ACL. The amount of the penalty specified in the infringement notice is:

- 600 penalty units for a listed corporation;
- 60 penalty units for a body corporate other than a listed corporation; and
- 12 penalty units for any other person. [*Schedule 2, item 1: Part XI, Division 5*]

#### *ASIC Act*

6.190 Section 12DE of the ASIC Act is amended to reflect section 32 of the ACL, with respect to financial products and services. [*Schedule 3, items 18-23*]

#### ***Certain misleading conduct in relation to goods***

6.191 Section 33 of the ACL provides that a person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods. This operates in the same way as the current section 55 of the TP Act. [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, section 33*]

6.192 This provision gives effect to Australia's ratification of the *Paris Convention for the Protection of Industrial Property*; specifically, paragraph (3)(iii) of Article 10<sup>bis</sup> of that Convention. The Convention establishes global rules in relation to 'patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition'.<sup>9</sup> The operation of section 33 is based on Australia's ratification of the Convention.

*Interpretation*

6.193 An important distinction between section 33 of the ACL and most other provisions in Chapter 3 is that it applies to conduct that is liable to mislead the public. This means that the conduct must have a public element — not necessarily applying to the world at large, but involving a general segment of the community that is sufficiently large.<sup>10</sup>

6.194 The ACL does not specifically define many of the concepts used in the drafting of section 33 of the ACL. As section 33 is couched in substantially the same form as section 55 of the TP Act the jurisprudence relating to the concepts applicable to section 55 of the TP Act is relevant to those concepts as they exist in section 33 of the ACL.

6.195 The application of section 33 of the ACL is not limited to transactions involving 'consumers' as defined in section 3 of the ACL.

6.196 The concept of 'supply' is defined in section 2 of the ACL.  
*[Schedule 1, item 1: Chapter 1, section 2]*

*Criminal offence*

6.197 Section 33 of the ACL has an associated criminal offence in section 155 of the ACL. The maximum fine payable for a contravention of section 155 of the ACL is \$1.1 million for a body corporate and \$220,000 for any other person. *[Schedule 1, item 1: Chapter 4, Part 4-1, section 155]*

6.198 The offence in section 155 is one of strict liability so that it is not necessary to consider the intent of the person committing the offence. The strict liability nature of this offence reflects the potential for widespread detriment, both financially for individual consumers and for its effect on the market and consumer confidence more generally, that can be caused by a person that breaches this provision, whether or not he or she intended to engage in the contravention.

---

9 *Paris Convention for the Protection of Industrial Property*, Article 1, paragraph 2.

10 *TPC v J & R Enterprises Pty Ltd* (1991) 99 ALR 325 at [87].

6.199 Part 4-6 of the ACL provides defences applicable to criminal proceedings of:

- an honest and reasonable mistake of fact; [*Schedule 1, item 1: Chapter 4, Part 4-6, section 207*]
- where the contravention was caused by the act or default of another person or an accident or cause beyond the person's control, and where the person took reasonable precautions and exercised due diligence to avoid the contravention; and [*Schedule 1, item 1: Chapter 4, Part 4-6, section 208*]
- where an advertiser publishes an advertisement in the ordinary course of business and does not know and had no reason to suspect the advertisement amounted to a contravention. [*Schedule 1, item 1: Chapter 4, Part 4-6, section 209*]

*Enforcement powers, penalties and remedies*

6.200 A person contravening section 33 of the ACL is liable to pay a civil pecuniary penalty of up to:

- \$1.1 million for a body corporate;
- \$220,000 for other persons.

[*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, section 224*]

6.201 The following enforcement powers and remedies apply to section 33 of the ACL:

- undertakings; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 1*]
- substantiation notices; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 2*]
- public warning notices; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 3*]
- injunctions; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 2*]
- damages; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 3*]
- compensatory orders; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision A*]
- redress for non-parties; and [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision B*]

- non-punitive orders. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, section 246*]

6.202 For further information on these powers, remedies and penalties generally see Chapters 14 and 15.

6.203 The ACCC may issue an infringement notice for a contravention of section 33 of the ACL. The amount of the penalty specified in the infringement notice is:

- 600 penalty units for a listed corporation;
- 60 penalty units for a body corporate other than a listed corporation; and
- 12 penalty units for any other person. [*Schedule 2, item 1: Part XI, Division 5*]

#### *Certain misleading conduct in relation to services*

6.204 Section 34 of the ACL provides that a person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any services. [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, section 34*]

6.205 This provision largely follows the same form as section 33, except that this relates to services and the *Industrial Property Convention* relates to goods. The reference to manufacturing process has also been removed from this provision as it is not relevant to services.

#### *Interpretation*

6.206 An important distinction between section 34 of the ACL and most other provisions in Chapter 3 of the ACL is that it applies to conduct that is liable to mislead the public. This means that the conduct must have a public element — not necessarily applying to the world at large, but involving a general segment of the community that is sufficiently large.<sup>11</sup>

6.207 The ACL does not specifically define many of the concepts used in the drafting of section 34 of the ACL. As section 34 is couched in substantially the same form as section 55A of the TP Act the jurisprudence relating to the concepts applicable to section 55A of the TP Act is relevant to those concepts as they exist in section 34 of the ACL.

---

11 *TPC v J & R Enterprises Pty Ltd* (1981) 99 ALR 325 at [87].



6.208 The application of section 34 of the ACL is not limited to transactions involving ‘consumers’ as defined in section 3 of the ACL.

6.209 The concept of ‘supply’ is defined in section 2 of the ACL.  
*[Schedule 1, item 1: Chapter 1, section 2]*

*Criminal offence*

6.210 Section 34 of the ACL has an associated criminal offence in section 156 of the ACL. The maximum fine payable for a contravention of section 156 of the ACL is \$1.1 million for a body corporate and \$220,000 for any other person. *[Schedule 1, item 1: Chapter 4, Part 4-1, section 156]*

6.211 The offence in section 156 is one of strict liability so that it is not necessary to consider the intent of the person committing the offence. The strict liability nature of this offence reflects the potential for widespread detriment, both financially for individual consumers and for its effect on the market and consumer confidence more generally, that can be caused by a person that breaches this provision, whether or not he or she intended to engage in the contravention.

6.212 Part 4-6 of the ACL provides defences applicable to criminal proceedings of:

- an honest and reasonable mistake of fact; *[Schedule 1, item 1: Chapter 4, Part 4-6, section 207]*
- where the contravention was caused by the act or default of another person or an accident or cause beyond the person’s control, and where the person took reasonable precautions and exercised due diligence to avoid the contravention; and *[Schedule 1, item 1: Chapter 4, Part 4-6, section 208]*
- where an advertiser publishes an advertisement in the ordinary course of business and does not know and had no reason to suspect the advertisement amounted to a contravention. *[Schedule 1, item 1: Chapter 4, Part 4-6, section 209]*

*Enforcement powers, penalties and remedies*

6.213 A person contravening section 34 of the ACL is liable to pay a civil pecuniary penalty of up to:

- \$1.1 million for a body corporate;
- \$220,000 for other persons.

*[Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, section 224]*

6.214 The following enforcement powers and remedies apply to section 34 of the ACL:

- undertakings; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 1*]
- substantiation notices; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 2*]
- public warning notices; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 3*]
- injunctions; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 2*]
- damages; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 3*]
- compensatory orders; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision A*]
- redress for non-parties; and [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision B*]
- non-punitive orders. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, section 246*]

6.215 For further information on these powers, remedies and penalties generally see Chapters 14 and 15.

6.216 The ACCC may issue an infringement notice for a contravention of section 34 of the ACL. The amount of the penalty specified in the infringement notice is:

- 600 penalty units for a listed corporation;
- 60 penalty units for a body corporate other than a listed corporation; and
- 12 penalty units for any other person. [*Schedule 2, item 1: Part XI, Division 5*]

### ***Bait advertising***

6.217 Section 35 of the ACL provides that a person must not, in trade or commerce, advertise goods or services at a specified price when there are reasonable grounds for believing that the person will not be able to supply those goods or services at that price for a reasonable period at reasonable quantities, having regard to the nature of the advertisement and the market in which the person carries on the business, and the person ought reasonably be aware of those grounds. [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, subsection 35(1)*]

6.218 A person who, in trade or commerce, advertises goods or services at a specified price must offer such goods or services for supply at that price for a reasonable period at reasonable quantities, having regard to the nature of the advertisement and the market in which the person carries on the business. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, subsection 35(2)]*

*Interpretation*

6.219 The ACL does not specifically define many of the concepts used in the drafting of section 35 of the ACL. As section 35 is couched in substantially the same form as section 56 of the TP Act the jurisprudence relating to the concepts applicable to section 56 of the TP Act is relevant to those concepts as they exist in section 35 of the ACL.

6.220 The application of section 35 of the ACL is not limited to transactions involving ‘consumers’ as defined in section 3 of the ACL.

6.221 The concept of supply is defined in section 2 of the ACL. *[Schedule 1, item 1: Chapter 1, section 2]*

*Criminal offence*

6.222 Section 35 of the ACL has an associated criminal offence in section 157 of the ACL. The maximum fine payable for a contravention of section 157 of the ACL is \$1.1 million for a body corporate and \$220,000 for any other person. *[Schedule 1, item 1: Chapter 4, Part 4-1, section 157]*

6.223 The offence in section 157 is one of strict liability so that it is not necessary to consider the intent of the person committing the offence. The strict liability nature of this offence reflects the potential for widespread detriment, both financially for individual consumers and for its effect on the market and consumer confidence more generally, that can be caused by a person that breaches this provision, whether or not he or she intended to engage in the contravention.

6.224 Part 4-6 of the ACL provides defences applicable to criminal proceedings of:

- an honest and reasonable mistake of fact; *[Schedule 1, item 1: Chapter 4, Part 4-6, section 207]*
- where the contravention was caused by the act or default of another person or an accident or cause beyond the person’s control, and where the person took reasonable precautions and exercised due diligence to avoid the contravention; and *[Schedule 1, item 1: Chapter 4, Part 4-6, section 208]*

- where an advertiser publishes an advertisement in the ordinary course of business and does not know and had no reason to suspect the advertisement amounted to a contravention. *[Schedule 1, item 1: Chapter 4, Part 4-6, section 209]*

*Enforcement powers, penalties and remedies*

6.225 A person contravening section 35 of the ACL is liable to pay a civil pecuniary penalty of up to:

- \$1.1 million for a body corporate;
- \$220,000 for other persons.

*[Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, section 224]*

6.226 The following enforcement powers and remedies apply to section 35 of the ACL:

- undertakings; *[Schedule 1, item 1: Chapter 5, Part 5-1, Division 1]*
- substantiation notices; *[Schedule 1, item 1: Chapter 5, Part 5-1, Division 2]*
- public warning notices; *[Schedule 1, item 1: Chapter 5, Part 5-1, Division 3]*
- injunctions; *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 2]*
- damages; *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 3]*
- compensatory orders; *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision A]*
- redress for non-parties; and *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision B]*
- non-punitive orders. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, section 246]*

6.227 For further information on these powers, remedies and penalties generally see Chapters 14 and 15.

6.228 The ACCC may issue an infringement notice for a contravention of section 35(2) of the ACL. The amount of the penalty specified in the infringement notice is:

- 600 penalty units for a listed corporation;

- 60 penalty units for a body corporate other than a listed corporation; and
- 12 penalty units for any other person. *[Schedule 2, item 1: Part XI, Division 5]*

### ***Wrongly accepting payment***

6.229 Subsections 36(1)-(3) of the ACL provide that a person is prohibited from accepting payment, in trade or commerce, where the supplier:

- intends not to supply the goods or services;
- intends to supply materially different goods or services; or
- there are reasonable grounds, of which the corporation is aware or ought reasonably to be aware, for believing the corporation will not be able to supply the goods in the time specified or, if no time is specified, within a reasonable time.

*[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, subsections 36(1)-(3)]*

6.230 Section 36 of the ACL further provides that a person must provide goods or services within the specified time, or if no time is specified, within a reasonable time of accepting payment for them. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, subsection 36(4)]*

6.231 Paragraph 36(4)(a) provides that a specified time for provision of the goods or services will be considered a reasonable time, if communicated to the person at or before the time the consumer made payment. If an offer is made, subject to clearly stated terms of delivery, the person supplying the goods or services will not be forced to deliver the goods or services within a shorter timeframe than that which has been stated. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 36(4)(a)]*

6.232 Where no time is specified, the determination of a 'reasonable time' is a subjective assessment, which will include consideration of such issues as the nature of the goods or services and any representations or inferences made about their availability. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, paragraph 36(4)(b)]*

6.233 Section 36 also provides that the requirement to supply within the specified or reasonable time does not apply where the reason the trader could not supply was beyond its control, providing it had taken reasonable precautions and exercised due diligence. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, subsection 36(5)]*

6.234 Subsection 36(6) of the ACL also permits a person to accept a different good or service if he or she agrees to do so. This avoids the situation where a trader is put in an impossible position of being required to supply something it has genuinely tried to provide but cannot, even where an appropriate substitute is available. It allows the trader to offer something in place of the good or service that cannot be supplied. The person is not obliged to accept the different good or service if he or she wishes to retain other rights to compensation that he or she may have. If a person accepts the substitute good or service then the trader should still provide it within a reasonable time. [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, subsection 36(6)*]

6.235 Section 36 also provides that the intent or knowledge-based requirements in subsections 36(1), (2) and (3) apply whether or not full consideration has been paid. This ensures that a trader could not accept deposits with no intention of providing the goods or services. [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, subsection 36(7)*]

#### *Interpretation*

6.236 The ACL does not specifically define many of the concepts used in the drafting of section 36 of the ACL. As section 36 is couched in substantially the same form as section 58 of the TP Act the jurisprudence relating to the concepts applicable to section 58 of the TP Act is relevant to those concepts as they exist in section 36 of the ACL.

6.237 The application of section 36 of the ACL is not limited to transactions involving consumers as defined in section 3 of the ACL.

6.238 The concept of supply is defined in section 2 of the ACL. [*Schedule 1, item 1: Chapter 1, section 2*]

#### *Criminal offence*

6.239 Section 36 of the ACL has an associated criminal offence in section 158 of the ACL. The maximum fine payable for a contravention of section 158 of the ACL is \$1.1 million for a body corporate and \$220,000 for any other person. [*Schedule 1, item 1: Chapter 4, Part 4-1, section 158*]

6.240 The offence in section 158 is one of strict liability so that it is not necessary to consider the intent of the person committing the offence. The strict liability nature of this offence reflects the potential for widespread detriment, both financially for individual consumers and for its effect on the market and consumer confidence more generally, that can be caused by a person that breaches this provision, whether or not he or she intended to engage in the contravention.

6.241 Part 4-6 of the ACL provides defences applicable to criminal proceedings of:

- an honest and reasonable mistake of fact; [*Schedule 1, item 1: Chapter 4, Part 4-6, section 207*]
- where the contravention was caused by the act or default of another person or an accident or cause beyond the person's control, and where the person took reasonable precautions and exercised due diligence to avoid the contravention; and [*Schedule 1, item 1: Chapter 4, Part 4-6, section 208*]
- where an advertiser publishes an advertisement in the ordinary course of business and does not know and had no reason to suspect the advertisement amounted to a contravention. [*Schedule 1, item 1: Chapter 4, Part 4-6, section 209*]

*Enforcement powers, penalties and remedies*

6.242 A person contravening section 36 of the ACL is liable to pay a civil pecuniary penalty of up to:

- \$1.1 million for a body corporate;
- \$220,000 for other persons.

[*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, section 224*]

6.243 The following enforcement powers and remedies apply to section 36 of the ACL:

- undertakings; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 1*]
- substantiation notices; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 2*]
- public warning notices; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 3*]
- injunctions; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 2*]
- damages; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 3*]
- compensatory orders; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision A*]
- redress for non-parties; and [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision B*]
- non-punitive orders. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, section 246*]

6.244 For further information on these powers, remedies and penalties generally see Chapters 14 and 15.

6.245 The ACCC may issue an infringement notice for a contravention of section 36(4) of the ACL. The amount of the penalty specified in the infringement notice is:

- 600 penalty units for a listed corporation;
- 60 penalty units for a body corporate other than a listed corporation; and
- 12 penalty units for any other person. [*Schedule 2, item 1: Part XI, Division 5*]

#### ***Misleading representations about certain business activities***

6.246 Section 37 of the ACL provides that a person must not, in trade or commerce, make false or misleading representations in relation to the profitability, risk or any other material aspect of any business activity that the person has represented as one that can be carried on at or from a person's place of residence. [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, subsection 37(1)*]

6.247 A person must not, in trade or commerce, make false or misleading representations in relation to the profitability, risk or any other material aspect of any business activity that a person invites other persons to participate by performing work for or investing in the business. [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, subsection 37(2)*]

#### ***Interpretation***

6.248 Section 37 recognises that a general prohibition on the making of certain false or misleading representations in connection with the supply or possible supply of goods or services does not necessarily cover representations regarding the profitability, risk or other aspects of particular types of business activity, such as home-based businesses or those that require a person to invest either personal effort or money into a business (such as a franchising arrangement).

6.249 The ACL does not specifically define many of the concepts used in the drafting of section 37 of the ACL. As section 37 is couched in substantially the same form as section 59 of the TP Act the jurisprudence relating to the concepts applicable to section 59 of the TP Act is relevant to those concepts as they exist in section 37 of the ACL.

6.250 The application of section 37 of the ACL is not limited to transactions involving 'consumers' as defined in section 3 of the ACL.



*Criminal offence*

6.251 Section 37 of the ACL has an associated criminal offence in section 159 of the ACL. The maximum fine payable for a contravention of section 159 of the ACL is \$1.1 million for a body corporate and \$220,000 for any other person. *[Schedule 1, item 1: Chapter 4, Part 4-1, section 159]*

6.252 The offence in section 159 is one of strict liability so that it is not necessary to consider the intent of the person committing the offence. The strict liability nature of this offence reflects the potential for widespread detriment, both financially for individual consumers and for its effect on the market and consumer confidence more generally, that can be caused by a person that breaches this provision, whether or not he or she intended to engage in the contravention.

6.253 Part 4-6 of the ACL provides defences applicable to criminal proceedings of:

- an honest and reasonable mistake of fact; *[Schedule 1, item 1: Chapter 4, Part 4-6, section 207]*
- where the contravention was caused by the act or default of another person or an accident or cause beyond the person's control, and where the person took reasonable precautions and exercised due diligence to avoid the contravention; and *[Schedule 1, item 1: Chapter 4, Part 4-6, section 208]*
- where an advertiser publishes an advertisement in the ordinary course of business and does not know and had no reason to suspect the advertisement amounted to a contravention. *[Schedule 1, item 1: Chapter 4, Part 4-6, section 209]*

*Enforcement powers, penalties and remedies*

6.254 A person contravening section 37 of the ACL is liable to pay a civil pecuniary penalty of up to:

- \$1.1 million for a body corporate;
- \$220,000 for other persons.

*[Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, section 224]*

6.255 The following enforcement powers and remedies apply to section 37 of the ACL:

- undertakings; *[Schedule 1, item 1: Chapter 5, Part 5-1, Division 1]*

- substantiation notices; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 2*]
- public warning notices; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 3*]
- injunctions; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 2*]
- damages; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 3*]
- compensatory orders; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision A*]
- redress for non-parties; and [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision B*]
- non-punitive orders. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, section 246*]

6.256 For further information on these powers, remedies and penalties generally see Chapters 14 and 15.

6.257 The ACCC may issue an infringement notice for a contravention of section 37 of the ACL. The amount of the penalty specified in the infringement notice is:

- 600 penalty units for a listed corporation;
- 60 penalty units for a body corporate other than a listed corporation; and
- 12 penalty units for any other person. [*Schedule 2, item 1: Part XI, Division 5*]

### ***Information providers***

6.258 The provisions of Chapter 3, Part 3-1, Division 1 which prohibit the making of false or misleading representations in different contexts do not apply to publications by an information provider, where the information provider made the publication in the course of carrying on a business of providing information or, in the case of a radio or television broadcaster, the publication was by radio or television broadcast by the information provider. [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, subsection 38(1)*]

6.259 This exemption does not apply to:

- advertisements;

- a publication in connection with the supply (or promotion of the supply) of goods or services by the information provider; or
- a publication in connection with the sale or grant (or promotion of the sale or grant) of an interest in land by the information provider.

These exceptions operate in the same way as those outlined in the repealed paragraphs 65A(1)(a) and (b) of the TP Act. In particular, subsections 38(3) and (4) have been constructed to maintain the High Court's interpretation in *ACCC v Channel Seven Brisbane Pty Limited*.<sup>12</sup> In that case, the High Court held that the second exception applies for publications made on behalf of, or pursuant to a contract, arrangement or understanding with a person who supplies goods or services, rather than for publications made in connection with relevant goods or services in relation to the information provider. This supports the view that the exceptions have a wide application rather than a narrow one. [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, subsections 38(2)-(4)*]

6.260 An 'information provider' is a defined term in the ACL, and includes media organisations such as radio and television stations (including the Australian Broadcasting Corporation and the Special Broadcasting Service Corporation), as well as publishers of newspapers and magazines. [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 1, subsections 20(5) and (6)*]

6.261 Similarly, information providers are also exempt from the related criminal offences provisions in sections 151, 152, 155, 156 and 159 of the ACL. [*Schedule 1, item 1: Chapter 4, Part 4-1, Division 2, section 160*]

#### *ASIC Act*

6.262 The ASIC Act includes a provision in the same terms as section 38 of the ACL, which replaces the current section 12DN of the ASIC Act. This gives a similar exclusion to information providers in relation to publications made by these providers in the course of carrying on a business of providing information, has been replaced with an updated version reflecting current drafting practices. [*Schedule 3, item 29, section 12DN*]

---

12 [2009] HCA 19.

## Unsolicited supplies

### *Unsolicited cards*

6.263 Section 39 of the ACL provides that a person must not send a credit card, a debit card, or an article that may be used as both a credit card and a debit card, to another person unless it is at the written request of the other person, or as a replacement for a similar card previously requested by the other person. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 2, subsection 39(1)]*

6.264 However, the prohibition in subsection 39(1) of the ACL does not apply unless the card or article is sent by or on behalf of the issuer of the card or article. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 2, subsection 39(2)]*

6.265 A person is prohibited from taking any action to enable another person (that is, the person in receipt of the card) a credit card to be used as a debit card, or a debit card to be used as a credit card, except at the written request of the cardholder. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 2, subsections 39(3) and (4)]*

### *Interpretation*

6.266 For the purposes of section 39 of the ACL a ‘credit card’ is an article that is one or more of the following:

- an article of a kind commonly known as a credit card;
- a similar article intended for use in obtaining cash, goods or services on credit; or
- an article of a kind that persons carrying on business commonly issue to their customers, or their prospective customers, for use in obtaining goods or services from those persons on credit,

and it includes an article that may be used as one of these things.  
*[Schedule 1, item 1: Chapter 3, Part 3-1, Division 2, subsection 39(5)]*

6.267 For the purposes of section 39 of the ACL, a ‘debit card’ is an article intended for use by a person in obtaining access to an account that is held by the person for the purpose of withdrawing or depositing cash or obtaining goods or services, or an article that may be used for these purposes. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 2, subsection 39(6)]*

6.268 ‘Article’ is defined in section 2 of the ACL, and includes, for example, items such as cards, microchips or other devices embedded in cards, and any other token or document that can be used as a credit card or a debit card. *[Schedule 1, item 1: Chapter 1, section 2]*

6.269 The ACL does not specifically define many of the other concepts used in the drafting of section 39 of the ACL. As section 39 is couched in substantially the same form as section 63A of the TP Act the jurisprudence relating to the concepts applicable to section 63A of the TP Act is relevant to those concepts as they exist in section 39 of the ACL.

6.270 The application of section 39 of the ACL is not limited to transactions involving ‘consumers’ as defined in section 3 of the ACL.

*Criminal offence*

6.271 Section 39 of the ACL has an associated criminal offence in section 161 of the ACL. The maximum fine payable for a contravention of section 161 of the ACL is \$1.1 million for a body corporate and \$220,000 for any other person. *[Schedule 1, item 1: Chapter 4, Part 4-1, section 161]*

6.272 The offence in section 161 is one of strict liability so that it is not necessary to consider the intent of the person committing the offence. The strict liability nature of this offence reflects the potential for widespread detriment, both financially for individual consumers and for its effect on the market and consumer confidence more generally, that can be caused by a person that breaches this provision, whether or not he or she intended to engage in the contravention.

6.273 Part 4-6 of the ACL provides defences applicable to criminal proceedings of:

- an honest and reasonable mistake of fact; *[Schedule 1, item 1: Chapter 4, Part 4-6, section 207]*
- where the contravention was caused by the act or default of another person or an accident or cause beyond the person’s control, and where the person took reasonable precautions and exercised due diligence to avoid the contravention; and *[Schedule 1, item 1: Chapter 4, Part 4-6, section 208]*
- where an advertiser publishes an advertisement in the ordinary course of business and does not know and had no reason to suspect the advertisement amounted to a contravention. *[Schedule 1, item 1: Chapter 4, Part 4-6, section 209]*

*Enforcement powers, penalties and remedies*

6.274 A person contravening section 39 of the ACL is liable to pay a civil pecuniary penalty of up to:

- \$1.1 million for a body corporate;

- \$220,000 for other persons.

*[Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, section 224]*

6.275 The following enforcement powers and remedies apply to section 39 of the ACL:

- undertakings; *[Schedule 1, item 1: Chapter 5, Part 5-1, Division 1]*
- substantiation notices; *[Schedule 1, item 1: Chapter 5, Part 5-1, Division 2]*
- public warning notices; *[Schedule 1, item 1: Chapter 5, Part 5-1, Division 3]*
- injunctions; *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 2]*
- damages; *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 3]*
- compensatory orders; *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision A]*
- redress for non-parties; and *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision B]*
- non-punitive orders. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, section 246]*

6.276 For further information on these powers, remedies and penalties generally see Chapters 14 and 15.

6.277 The ACCC may issue an infringement notice for a contravention of section 39 of the ACL. The amount of the penalty specified in the infringement notice is:

- 600 penalty units for a listed corporation;
- 60 penalty units for a body corporate other than a listed corporation; and
- 12 penalty units for any other person. *[Schedule 2, item 1: Part XI, Division 5]*

***Asserting a right to payment for unsolicited goods or services***

6.278 Section 40 of the ACL provides that a person must not, in trade or commerce, assert a right to payment from another person for unsolicited goods or services, unless the first person has reasonable cause to believe that

there is a right to the payment. [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 2, subsections 40(1) and (2)*]

6.279 Section 40 further provides that a person must not, in trade or commerce, send an invoice or other document to another person that states the amount due or sets out the charge for unsolicited goods or services without a warning statement that complies with the requirements set out in regulations. This provision establishes a specific prohibition for the use of an invoice in this way to complement the rules about the use of an invoice set out in section 10 of the ACL, which defines the meaning of ‘assert a right to payment’. [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 2, subsection 40(3)*]

6.280 In any proceedings under section 40 of the ACL, the onus is on the person asserting their right to payment from the other person to prove that he or she knew or had reasonable cause to believe that there was a right to payment for the unsolicited goods or services. [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 2, subsection 40(4)*]

#### *Interpretation*

6.281 ‘Assert a right to payment’ is a defined concept for the purposes of the ACL and is dealt with in section 10. It deems certain conduct, such as taking steps to demand payment or to collect a debt, to be asserting a right to payment. Section 10 is in substantially the same form as subsections 64(5) and (7) of the TP Act. [*Schedule 1, item 1: Chapter 1, section 10*]

6.282 The ACL does not specifically define many of the other concepts used in the drafting of section 40 of the ACL. As section 40 is couched in substantially the same form as section 64 of the TP Act the jurisprudence relating to the concepts applicable to section 64 of the TP Act is relevant to those concepts as they exist in section 40 of the ACL.

6.283 The application of section 40 of the ACL is not limited to transactions involving ‘consumers’ as defined in section 3 of the ACL.

#### *Criminal offence*

6.284 Section 40 of the ACL has an associated criminal offence in section 162 of the ACL. The maximum fine payable for a contravention of section 162 of the ACL is \$1.1 million for a body corporate and \$220,000 for any other person. [*Schedule 1, item 1: Chapter 4, Part 4-1, section 162*]

6.285 The offence in section 162 is one of strict liability so that it is not necessary to consider the intent of the person committing the offence. The strict liability nature of this offence reflects the potential for widespread detriment, both financially for individual consumers and for its effect on the market and consumer confidence more generally, that can be caused by a

person that breaches this provision, whether or not he or she intended to engage in the contravention.

6.286 Part 4-6 of the ACL provides defences applicable to criminal proceedings of:

- an honest and reasonable mistake of fact; [*Schedule 1, item 1: Chapter 4, Part 4-6, section 207*]
- where the contravention was caused by the act or default of another person or an accident or cause beyond the person's control, and where the person took reasonable precautions and exercised due diligence to avoid the contravention; and [*Schedule 1, item 1: Chapter 4, Part 4-6, section 208*]
- where an advertiser publishes an advertisement in the ordinary course of business and does not know and had no reason to suspect the advertisement amounted to a contravention. [*Schedule 1, item 1: Chapter 4, Part 4-6, section 209*]

*Enforcement powers, penalties and remedies*

6.287 A person contravening section 40 of the ACL is liable to pay a civil pecuniary penalty of up to:

- \$1.1 million for a body corporate;
- \$220,000 for other persons.

[*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, section 224*]

6.288 The following enforcement powers and remedies apply to section 40 of the ACL:

- undertakings; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 1*]
- substantiation notices; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 2*]
- public warning notices; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 3*]
- injunctions; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 2*]
- damages; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 3*]
- compensatory orders; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision A*]



- redress for non-parties; and [Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision B]
- non-punitive orders. [Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, section 246]

6.289 For further information on these powers, remedies and penalties generally see Chapters 14 and 15.

6.290 The ACCC may not issue an infringement notice for a contravention of section 40 of the ACL.

*ASIC Act*

6.291 Section 12DM of the ASIC Act is amended to reflect section 40 of the ACL, with respect to financial products and services. [Schedule 3, items 24-28]

*Liability etc. of recipient for unsolicited goods or services*

*Unsolicited goods*

6.292 If a person, in trade or commerce, supplies unsolicited goods to another person, the other person:

- is not liable to make any payment for those unsolicited goods; or
- is not liable for any loss or damage to those goods, unless the loss or damage resulted from the person receiving the good's wilful and unlawful act during the recovery period.  
[Schedule 1, item 1: Chapter 3, Part 3-1, Division 2, subsection 41(1)]

6.293 The 'recovery period' is defined in subsection 41(4) of the ACL as being whichever of the following periods ends first:

- a period of 3 months starting on the day after the day on which the person received the goods;
- if the person who receives the unsolicited goods gives notice with respect to the goods to the supplier or sender in accordance with subsection 41(5), a period of 1 month starting on the day on which the notice is given. [Schedule 1, item 1: Chapter 3, Part 3-1, Division 2, subsection 41(4)]

6.294 A notice under section 41 must be in writing, state the name and address of the person who received the unsolicited goods, state the address of the place at which the goods may be recovered by the owner or sender and

contain a statement to the effect that the goods are unsolicited goods.  
*[Schedule 1, item 1: Chapter 3, Part 3-1, Division 2, subsection 41(5)]*

6.295 The 'recovery period' is relevant to the ability of the person supplying unsolicited goods to retain title to those goods:

- a person who supplies unsolicited goods is not entitled to take action to recover the goods after the end of the recovery period; and
- the goods become the property of the person who has received them at the end of the recovery period, free of any lien or charge on those goods which might be asserted by the person who supplied them or any other person.

*[Schedule 1, item 1: Chapter 3, Part 3-1, Division 2, subsection 41(2)]*

6.296 The provisions governing the ownership of the goods set out in subsection 41(2) of the ACL are subject to caveats relating to the conduct of the person who has received the goods. Subsection 41(2) will not apply when:

- the person who received unsolicited goods has, at any time during the recovery period, unreasonably refused to permit the sender or the owner of the goods to take possession of them; or
- the sender or owner of the goods has within the recovery period taken possession of the goods; or
- the goods were received by the person in circumstances in which the person knew, or might reasonably have been expected to have known, that the goods were not intended for him or her. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 2, subsection 41(3)]*

6.297 Section 12DMA is included in the ASIC Act in relation to liability for unsolicited financial products. This specifies that a person is not liable to make any payment for unsolicited financial products and is not liable for loss or damage as a result of the supply of the financial products. *[Schedule 3, item 28, section 12DMA]*

#### *Unsolicited services*

6.298 A person is not liable to make any payment for unsolicited services, or for loss or damage arising as a result of the supply of such services. This is intended to exclude a person from liability for not just the unsolicited services themselves, but other loss or damage arising from the

supply of such services. Unlike unsolicited goods, there is no provision for traders to retrieve unwanted unsolicited services as it is not possible for unsolicited services to be 'retrieved'. [*Chapter 3, Part 3-1, Division 2, section 42*]

6.299 Section 12DMA is included in the ASIC Act in relation to liability for unsolicited financial services. This specifies that a person is not liable to make any payment for unsolicited financial services and is not liable for loss or damage as a result of the supply of the financial services. [*Schedule 3, item 28, section 12DMA*]

6.300 As with the provision in the ACL, no enforcement or remedies apply to the ASIC Act provision.

#### *Interpretation*

6.301 The ACL does not specifically define many of the other concepts used in the drafting of sections 41 and 42 of the ACL. As sections 41 and 42 are couched in substantially the same form as section 64 of the TP Act the jurisprudence relating to the concepts applicable to section 64 of the TP Act is relevant to those concepts as they exist in sections 41 and 42 of the ACL.

6.302 The application of sections 41 and 42 of the ACL is not limited to transactions involving 'consumers' as defined in section 3 of the ACL.

#### *Enforcement and remedies*

6.303 Sections 41 and 42 of the ACL establish rules about the liability of persons who receive unsolicited goods or services. As such, no enforcement or remedies apply to either of these provisions as any 'breach' will be covered under the section 40, which relates to asserting a right to payment for unsolicited goods or services.

#### *Asserting a right to payment for unauthorised entries or advertisements*

6.304 Subsection 43(1) of the ACL provides that a person must not, in trade or commerce, assert a right to payment from another person for placing, in a publication, an entry or advertisement relating to that person or their profession, business, trade or occupation. [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 2, subsection 43(1)*]

6.305 Section 43 operates in a similar way to the repealed subsection 64(3) of the TP Act, except it has been expanded to include entries that are like 'directory entries' but are not included in directories.

6.306 Subsection 12DMB(1) is included in the ASIC Act, which treats assertions for payment for unauthorised entries or advertisements for financial services or financial products in the same way as section 43 of the ACL. [*Schedule 3, item 28, subsection 12DMB(1)*]

6.307 Subsection 43(2) of the ACL provides that a person must not, in trade or commerce, send an invoice or other document to another person that states the amount due or sets out the charge for placing, in a publication, an entry or advertisement in relation to the other person or their profession, trade or occupation, without a warning statement that complies with the requirements set out in regulations. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 2, subsection 43(2)]*

6.308 Subsection 12DMB(2) is included in the ASIC Act, which treats documents asserting a right to payment for unauthorised entries or advertisements for financial services or financial products in the same way as section 43 of the ACL. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 2, subsections 43(2)][Schedule 3, item 28, subsection 12DMB(2)]*

6.309 Subsection 43(2) of the ACL and subsection 12DMB(2) establish a specific prohibition for the use of an invoice in this way to complement the rule about the use of an invoice set out in section 10 of the ACL and section 12BF of the ASIC Act. *[Schedule 1, item 1: Chapter 1, section 10]*

6.310 Under section 43(4) a person is not liable to make any payment to another person for placing an entry or advertisement in a publication, and can recover any such payment made through court action. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 2, subsections 43(4)]*

6.311 Subsection 12DMB(4) is included in the ASIC Act, which treats liability for payment for unauthorised entries or advertisements for financial services or financial products in the same way as section 43 of the ACL. *[Schedule 3, item 28, subsection 12DMB(4)]*

6.312 Section 43(4) of the ACL operates in a similar way to the repealed subsection 64(4) of the TP Act, except that it has been expanded to include entries that are like 'directory entries' but are not included in directories.

6.313 Subsections 43(1) and (2) of the ACL and subsections 12DMB(1) and (2) of the ASIC Act do not apply if the person asserting their right to payment knows, or has reasonable cause to believe, that the other person authorised the placing of the entry or advertisement. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 2, subsections 43(1) and (2)][Schedule 3, item 28, subsections 12DMB(1) and (2)]*

#### *Interpretation*

6.314 Section 43 of the ACL and section 12 DMB of the ASIC Act do not apply to:

- publications with an audited circulation of 10,000 copies or more a week;

- a body corporate related to the publisher of such a publication;
- the Commonwealth, a State, a Territory, or an authority of the Commonwealth, State or Territory; or
- a person specified in the regulations.

*[Schedule 1, item 1: Chapter 3, Part 3-1, Division 2, subsection 43(3)] [Schedule 3, item 28, subsection 12DMB(3)]*

6.315 In relation to the audited circulation of a publication referred to in paragraph 43(3)(a) of the ACL or paragraph 12DMB(3)(a) of the ASIC Act, the audit is to be performed by a body as specified in regulations. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 2, subsection 43(3)] [Schedule 3, item 28, subsection 12DMB(3)]*

6.316 An ‘advertisement’ is not a defined term for the purposes of the ACL.

6.317 For clarity, the subsection 43(5) of the ACL and section 12DMB(5) of the ASIC Act specifies that a person has not authorised the placing, in a publication, of an entry or advertisement unless certain conditions, based around ensuring that the person has taken positive, documented steps to authorise such actions, are met. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 2, subsection 43(5)] [Schedule 3, item 28, subsection 12DMB(5)]*

6.318 In proceedings relating to section 43 of the ACL and 12DMB of the ASIC Act the onus is on the person asserting their right to payment from another person to prove that he or she knew or had reasonable cause to believe that the other person had authorised the placing, in a publication, of the entry or advertisement. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 2, subsection 43(6)] [Schedule 3, item 28, subsection 12DMB(6)]*

6.319 The ACL does not specifically define many of the other concepts used in the drafting of section 43 of the ACL. As section 43 is couched in substantially the same form as parts of section 64 of the TP Act the jurisprudence relating to the concepts applicable to section 64 of the TP Act is relevant to those concepts as they exist in section 43 of the ACL.

6.320 The application of section 43 of the ACL is not limited to transactions involving ‘consumers’ as defined in section 3 of the ACL.

#### *Criminal offence*

6.321 Section 43 of the ACL has associated criminal offences in section 163 of the ACL. The maximum fine payable for a contravention of a

provision of section 163 of the ACL is \$1.1 million for a body corporate and \$220,000 for any other person. *[Schedule 1, item 1: Chapter 4, Part 4-1, section 163]*

6.322 The offence in section 163 is one of strict liability so that it is not necessary to consider the intent of the person committing the offence. The strict liability nature of this offence reflects the potential for widespread detriment, both financially for individual consumers and for its effect on the market and consumer confidence more generally, that can be caused by a person that breaches this provision, whether or not he or she intended to engage in the contravention.

6.323 Part 4-6 of the ACL provides defences applicable to criminal proceedings of:

- an honest and reasonable mistake of fact; *[Schedule 1, item 1: Chapter 4, Part 4-6, section 207]*
- where the contravention was caused by the act or default of another person or an accident or cause beyond the person's control, and where the person took reasonable precautions and exercised due diligence to avoid the contravention; and *[Schedule 1, item 1: Chapter 4, Part 4-6, section 208]*
- where an advertiser publishes an advertisement in the ordinary course of business and does not know and had no reason to suspect the advertisement amounted to a contravention. *[Schedule 1, item 1: Chapter 4, Part 4-6, section 209]*

*Enforcement powers, penalties and remedies*

6.324 A person contravening section 43 of the ACL is liable to pay a civil pecuniary penalty of up to:

- \$1.1 million for a body corporate;
- \$220,000 for other persons.

*[Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, section 224]*

6.325 The following enforcement powers and remedies apply to section 43 of the ACL:

- undertakings; *[Schedule 1, item 1: Chapter 5, Part 5-1, Division 1]*
- substantiation notices; *[Schedule 1, item 1: Chapter 5, Part 5-1, Division 2]*

- public warning notices; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 3*]
- injunctions; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 2*]
- damages; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 3*]
- compensatory orders; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision A*]
- redress for non-parties; and [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision B*]
- non-punitive orders. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, section 246*]

6.326 For further information on these powers, remedies and penalties generally see Chapters 14 and 15.

6.327 The ACCC may not issue an infringement notice for a contravention of section 43 of the ACL.

6.328 For breaches of the new ASIC Act provisions, the existing enforcement and remedies in Part 2, Subdivision 2G of the ASIC Act apply.

## Pyramid schemes

### *Participation in pyramid schemes*

6.329 A person must not [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 3, subsections 44(1) and (2)*]:

- participate in a pyramid scheme, or
- induce, or attempt to induce, another person to participate in a pyramid scheme.

6.330 The meaning of ‘participate’ in a pyramid scheme is [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 3, subsection 44(3)*]:

- to establish or promote the scheme (whether alone or together with another person). This covers both those who create the scheme and those who propagate it, whether those persons are connected directly with the creators of the scheme or not.
- to take part in the scheme in any capacity (whether or not as an employee or agent of a person who establishes or

promotes the scheme, or who otherwise takes part in the scheme). This covers any person who is part of the scheme, including persons who agree to join the scheme and who may become its victims when it collapses.

#### ***Meaning of a pyramid scheme***

6.331 The meaning of ‘pyramid scheme’ is defined in section 45 of the ACL. It describes a scheme where [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 3, section 45*]:

- new participants in the scheme must provide a participation payment, which is a benefit (of either a financial or non-financial nature) to the participant or participants in the scheme and or, in some cases, partly to other persons; and
- the main incentive for new participants to participate in the scheme is the prospect of receiving a recruitment payment, which includes benefits (of either a financial or non-financial nature) from new participants who join the scheme after them.

#### ***Marketing schemes as pyramid schemes***

6.332 A scheme that involves the marketing of goods or services as its primary purpose is not a pyramid scheme. To clarify how the courts interpret this provision, a court may have regard to any matter it considers relevant in working out whether participation payments paid by new entrants to a scheme are entirely or substantially induced by the prospect of entitlement to future recruitment payments, but the court must have regard to [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 3, section 46*]:

- whether the participation payments bear a reasonable relationship to the value of the goods or services that participants are entitled to be supplied under the scheme; and
- the emphasis given in the promotion of the scheme to the entitlement of participants to the supply of goods or services by comparison with the emphasis given to their entitlement to recruitment payments.

#### ***Interpretation***

6.333 The ACL does not specifically define many of the other concepts used in the drafting of sections 44, 45 and 46 of the ACL. As sections 44, 45 and 46 are couched in substantially the same form as parts of Part V, Division 1AAA of the TP Act the jurisprudence relating to the concepts



applicable to that Division of the TP Act is relevant to those concepts as they exist in sections 44, 45 and 46 of the ACL.

6.334 The application of sections 44, 45 and 46 of the ACL is not limited to transactions involving ‘consumers’ as defined in section 3 of the ACL.

*Criminal offence*

6.335 Subsections 44(1) and (2) of the ACL has associated criminal offences in section 164 of the ACL. The maximum fine payable for a contravention of a provision of section 164 of the ACL is \$1.1 million for a body corporate and \$220,000 for any other person. [*Schedule 1, item 1: Chapter 4, Part 4-1, section 164*]

6.336 The offence in section 164 is one of strict liability so that it is not necessary to consider the intent of the person committing the offence. The strict liability nature of this offence reflects the potential for widespread detriment, both financially for individual consumers and for its effect on the market and consumer confidence more generally, that can be caused by a person that breaches this provision, whether or not he or she intended to engage in the contravention.

6.337 Part 4-6 of the ACL provides the following defences applicable to criminal proceedings:

- an honest and reasonable mistake of fact; [*Schedule 1, item 1: Chapter 4, Part 4-6, section 207*]
- where the contravention was caused by the act or default of another person, or an accident or cause beyond the person’s control, and where the person took reasonable precautions and exercised due diligence to avoid the contravention; [*Schedule 1, item 1: Chapter 4, Part 4-6, section 208*]
- where an advertiser publishes an advertisement in the ordinary course of business and does not know and had no reason to suspect the advertisement amounted to a contravention. [*Schedule 1, item 1: Chapter 4, Part 4-6, section 209*]

*Enforcement powers, penalties and remedies*

6.338 A person contravening subsections 44(1) and (2) of the ACL is liable to pay a civil pecuniary penalty of up to [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, section 224*]:

- \$1.1 million for a body corporate;
- \$220,000 for other persons.

6.339 The following enforcement powers and remedies apply to subsections 44(1) and (2) of the ACL:

- undertakings; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 1*]
- substantiation notices; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 2*]
- public warning notices; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 3*]
- injunctions; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 2*]
- damages; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 3*]
- compensatory orders; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision A*]
- redress for non-parties; and [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision B*]
- non-punitive orders. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, section 246*]

6.340 For further information on these powers, remedies and penalties generally see Chapters 14 and 15.

6.341 The ACCC may issue an infringement notice for a contravention of subsections 44(1) and (2) of the ACL. The amount of the penalty specified in the infringement notice is:

- 600 penalty units for a listed corporation;
- 60 penalty units for a body corporate other than a listed corporation; and
- 12 penalty units for any other person. [*Schedule 2, item 1: Part XI, Division 5*]

## Pricing

### *Multiple pricing*

6.342 Subsection 47(1) of the ACL prohibits a person who, in trade or commerce, from supplying goods where [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 4, subsection 47(1)*]:

- the goods have more than one displayed price; and

- the supply takes place for a price which is not the lower, or not the lowest, of the displayed prices.

6.343 Section 47 of the ACL does not exclude a person's right to withdraw an item from sale, for example, where a pricing error has occurred. The person is not obliged by section 47 to sell a mislabelled item, but if the person does choose to sell it without withdrawing it from sale and correcting the pricing, then he, she or it must not sell it for more than the lowest price.

*Interpretation*

6.344 Subsection 47(2) provides that a displayed price includes a price for the goods, or any representation that may reasonably be inferred to be a representation of a price for the goods:

- that is annexed or affixed to, or is written, printed, stamped or located on, or otherwise applied to, the goods or any covering, label, reel or thing used in connection with the goods;
- that is used in connection with the goods or anything on which the goods are mounted for display or exposed for supply;
- that is determined on the basis of anything encoded on or in relation to the goods;
- that is published in relation to the goods in a catalogue available to the public if:
  - a time is specified in the catalogue as the time after which the goods will not be sold at that price and that time has not passed;
  - in any other case—the catalogue may reasonably be regarded as not out of date; or
- that is in any other way represented in a manner from which it may reasonably be inferred that the price or representation is applicable to the goods;

and includes such a price or representation that is partly obscured by another such price or representation that is written, stamped or located partly over that price or representation. [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 4, subsection 47(2)*]

6.345 If prices are displayed in a catalogue, and that catalogue is only applicable to certain sales (such as in NSW), the price is taken to be a

displayed price in NSW but not, for instance, in Victoria. [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 4, subsection 47(3)*]

6.346 If a price is completely obscured, such as where a new label is placed completely over an old one, it is not a displayed price. [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 4, paragraph 47(4)(a)*]

6.347 If a price is not the total selling price, such as a unit price per kilogram; then that is not a displayed price. Unit price information required to be provided under the *Trade Practices (Industry Code — Unit Pricing) Regulations 2009* is an example of price information that is not to be considered a ‘displayed price’ for the purposes of section 45. [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 4, paragraph 47(4)(b)*]

6.348 Prices that are not in Australian currency, or that are expressed in a way not likely to be interpreted as being in Australian currency, are not displayed prices. If a product has a foreign price printed on it and it is not clear that it is not the amount in Australian currency, that price may need to be covered if it is incorrect. [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 4, paragraphs 47(4)(c)-(d)*]

6.349 To recognise that pricing is easier to correct for prices affixed to goods than in broader advertisements, where a pricing error is made in a catalogue or advertisement, a supplier can publish a retraction of at least a similar circulation or audience and the retracted price will no longer be considered a displayed price from that point on. For example, if a national catalogue incorrectly stated \$10 instead of \$100, a notice could be placed in newspapers, provided the circulation is at least similar to that of the catalogue. [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 4, subsection 47(5)*]

#### *Criminal offence*

6.350 Subsection 47(1) of the ACL has an associated criminal offence in section 165 of the ACL. The maximum fine payable for a contravention of a provision of section 165 of the ACL is \$1.1 million for a body corporate and \$220,000 for any other person. [*Schedule 1, item 1: Chapter 4, Part 4-1, section 165*]

6.351 The offence in section 165 is one of strict liability so that it is not necessary to consider the intent of the person committing the offence. The strict liability nature of this offence reflects the potential for widespread detriment, both financially for individual consumers and for its effect on the market and consumer confidence more generally, that can be caused by a person that breaches this provision, whether or not he or she intended to engage in the contravention.

6.352 Part 4-6 of the ACL provides the following defences to criminal proceedings:

- an honest and reasonable mistake of fact; [*Schedule 1, item 1: Chapter 4, Part 4-6, section 207*]
- where the contravention was caused by the act or default of another person, or an accident or cause beyond the person's control, and where the person took reasonable precautions and exercised due diligence to avoid the contravention; and [*Schedule 1, item 1: Chapter 4, Part 4-6, section 208*]
- where an advertiser publishes an advertisement in the ordinary course of business and does not know and had no reason to suspect the advertisement amounted to a contravention. [*Schedule 1, item 1: Chapter 4, Part 4-6, section 209*]

*Enforcement powers, penalties and remedies*

6.353 A person contravening subsection 47(1) of the ACL is liable to pay a civil pecuniary penalty of up to [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, section 224*]:

- \$5,000 for a body corporate;
- \$1,000 for other persons.

6.354 The following enforcement powers and remedies apply to subsection 47(1) of the ACL:

- undertakings; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 1*]
- substantiation notices; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 2*]
- public warning notices; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 3*]
- injunctions; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 2*]
- damages; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 3*]
- compensatory orders; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision A*]
- redress for non-parties; and [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision B*]
- non-punitive orders. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, section 246*]

6.355 For further information on these powers, remedies and penalties generally see Chapters 14 and 15.

6.356 The ACCC may issue an infringement notice for a contravention of subsection 47(1) of the ACL. The amount of the penalty specified in the infringement notice is *[Schedule 2, item 1: Part XI, Division 5]*:

- 10 penalty units for a body corporate ; and
- 2 penalty units for any other person.

***Single price to be specified in certain circumstances***

6.357 If an amount that is part of the price for goods or services is stated in connection with their promotion or supply in trade or commerce, a single price for the supply of those goods or services must be stated at least as prominently as the part price. This operates in the same way as the current section 53C of the TP Act. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 4, subsection 48(1)]*

6.358 A person is not prohibited from using component pricing. However, if a component price is used (that is, a partial price representation is made), the person should also prominently specify, as a single figure, the price a consumer will be required to pay to obtain the product or service.

**Example 6.1**

A person could continue to represent prices as:

- \$299 + \$29.90 GST for a total price of \$328.90; or
- \$79 + \$35 taxes fees and charges for a total price of \$114.

6.359 There is an exception to the general requirement for all components of price to be included in the single price; for charges relating to sending goods from the supplier to a customer. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 4, subsection 48(2)]*

6.360 However, where a person does not include charges relating to sending goods from the supplier to a customer in the single price, but such charges must be paid by a customer and that amount is known, the corporation must disclose the minimum amount of those charges as a separate component of price. A person may also choose to include the minimum amount of such charges in the single price. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 4, subsection 48(3)]*

6.361 The scope of ‘charges relating to sending the goods from the supplier to the customer’ is not defined. However, these provisions create an

exemption for costs that are necessary in order to send goods from a supplier to a consumer. This includes charges such as postage, courier fees and packaging that is appropriate for the goods being sent. For example, it would be equally acceptable for a product to be advertised as:

- \$30.00 + \$5 postage and handling; or alternatively as
- \$35.00 including postage and handling.

6.362 This provision does not apply to representations that are made only to bodies corporate. In effect, this provision applies only to representations to persons that are not engaged in business or other activities through a corporate structure (that is, consumers). Where a representation is made to consumers as well as businesses or governments, this provision applies. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 4, subsection 48(4)]*

*‘at least as prominently’*

6.363 A consumer should be able to easily identify the single price in a price representation. The single price must be specified at least as prominently as the most prominent of the other components of the price. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 4, subsection 48(5)]*

6.364 The ‘at least as prominently’ disclosure requirement does not apply to contracts that provide for the supply of services for the term of the contract, which also provide for periodic payments, and if goods are also supplied under the contract — they are directly related to the services in question. This allows for disclosure of the periodic component of the single price for the services to be displayed more prominently than the single price over the life of the contract. *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 4, paragraphs 48(6)(a) and (b)]*

6.365 The single price for the supply of services includes any set-up costs or costs for hardware which must be bought from the supplier to obtain those services. For example *[Schedule 1, item 1: Chapter 3, Part 3-1, Division 4, paragraph 48(6)(c)]*:

- the cost of company-specific pay television connection equipment would be required to be included in the single price; but
- the cost of a broadband modem where the purchaser could either buy their own or purchase one from the service supplier would not need to be included.

*‘single price’*

6.366 The *single price* is a defined term in the ACL, and only includes amounts that are quantifiable at the time of the representation concerned. The total price is not quantifiable if, at the time of the representation concerned, it cannot be readily converted into a dollar amount. [Schedule 1, item 1: Chapter 3, Part 3-1, Division 4, subsection 48(7)]

6.367 The single price includes each of the amounts listed in the subsection if they are quantifiable. Consequently, where the final price will be a mixture of quantifiable and non-quantifiable charges, the charges that are quantifiable should be represented as a single price. In such circumstances, to comply with other provisions of the ACL, the representation may need to indicate that not all components are included in the single price.

6.368 Where a total price is not quantifiable but a minimum total price is known, that minimum price must be disclosed as a single price.

6.369 The term ‘minimum quantifiable consideration’ is not intended to preclude negotiation of a lower price between the customer and the corporation making the representation.

### **Example 6.2**

A motor vehicle dealer may advertise the price of a vehicle as \$32,990. However a customer may negotiate with the dealer to pay only \$31,500. The representation of \$32,990 would not be in breach of the provision provided that it includes all elements of the price that are quantifiable at the time of making the representation. The fact that a lower price has been negotiated and a subsequent representation about that lower price has been made to the consumer does not cause the dealer’s earlier representation to be in breach.

6.370 Certain elements of a price do not need to be included in the ‘single price’ disclosure where they represent costs that are payable only at the option of the consumer.

### **Example 6.3**

Where a consumer can only purchase a service by using a credit card, and a compulsory surcharge is imposed for the use of a credit card, that charge should be included in the single price; but

### **Example 6.4**

Where a consumer can purchase a service through means other than a credit card, and those other means do not attract a compulsory



surcharge, the credit card surcharge does not need to be included in the single price.

6.371 The definition of ‘single price’ provides that the single price should also include all amounts imposed on the selling corporation in relation to the supply concerned. This amount, comprising part of the single price, need only be included if it forms part of the consideration for the supply of the goods or services in question. That is, if it is passed on to the purchaser in the price he or she must pay.

6.372 The definition of single price provides all amounts paid or payable by the person in relation to the supply concerned that would have otherwise been payable by the purchaser should be included.

6.373 Where the total price will depend on the quantity purchased by a consumer, the ‘single price’ should continue to be specified as a per quantity amount.

#### *Interpretation*

6.374 The ACL does not specifically define many of the other concepts used in the drafting of section 48 of the ACL. As section 48 is couched in substantially the same form as section 53C of the TP Act the jurisprudence relating to the concepts applicable to section 53C of the TP Act is relevant to those concepts as they exist in section 48 of the ACL.

6.375 The application of section 48 of the ACL is not limited to transactions involving ‘consumers’ as defined in section 3 of the ACL.

#### *Criminal offence*

6.376 Subsection 48(1) of the ACL has an associated criminal offence in section 166 of the ACL. The maximum fine payable for a contravention of a provision of section 166 of the ACL is \$1.1 million for a body corporate and \$220,000 for any other person. [*Schedule 1, item 1: Chapter 4, Part 4-1, section 166*]

6.377 The offence in section 166 is one of strict liability so that it is not necessary to consider the intent of the person committing the offence. The strict liability nature of this offence reflects the potential for widespread detriment, both financially for individual consumers and for its effect on the market and consumer confidence more generally, that can be caused by a person that breaches this provision, whether or not he or she intended to engage in the contravention.

6.378 Part 4-6 of the ACL provides defences applicable to criminal proceedings of:

- an honest and reasonable mistake of fact; [*Schedule 1, item 1: Chapter 4, Part 4-6, section 207*]
- where the contravention was caused by the act or default of another person or an accident or cause beyond the person's control, and where the person took reasonable precautions and exercised due diligence to avoid the contravention; and [*Schedule 1, item 1: Chapter 4, Part 4-6, section 208*]
- where an advertiser publishes an advertisement in the ordinary course of business and does not know and had no reason to suspect the advertisement amounted to a contravention. [*Schedule 1, item 1: Chapter 4, Part 4-6, section 209*]

*Enforcement powers, penalties and remedies*

6.379 A person contravening subsection 48(1) of the ACL is liable to pay a civil pecuniary penalty of up to [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, section 224*]:

- \$1.1 million for a body corporate;
- \$220,000 for other persons.

6.380 The following enforcement powers and remedies apply to subsection 48(1) of the ACL:

- undertakings; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 1*]
- substantiation notices; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 2*]
- public warning notices; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 3*]
- injunctions; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 2*]
- damages; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 3*]
- compensatory orders; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision A*]
- redress for non-parties; and [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision B*]
- non-punitive orders. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, section 246*]

6.381 For further information on these powers, remedies and penalties generally see Chapters 14 and 15.

6.382 The ACCC may issue an infringement notice for a contravention of subsection 48(1) of the ACL. The amount of the penalty specified in the infringement notice is:

- 600 penalty units for a listed corporation;
- 60 penalty units for a body corporate other than a listed corporation; and
- 12 penalty units for any other person. [*Schedule 2, item 1: Part XI, Division 5*]

## Other unfair practices

### *Referral selling*

6.383 Section 49 of the ACL provides that a person must not, in trade or commerce, induce a consumer to buy goods or services by representing that he, she or it will, after the contract effecting that sale is made, receive a rebate, commission or other benefit in return for:

- giving the person the names of prospective customers; or
- otherwise assisting the corporation to supply goods or services to other consumers,

when the receipt of this rebate, commission or other benefit is contingent on an event occurring after the contract for the initial contract of sale is made. [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 5, section 49*]

6.384 Section 49 is directed to preventing the practice of inducing consumers to buy goods or services with the promise of a rebate, commission or other benefit in return for the consumer assisting the supplier sell goods or services to other consumers, when there is, in fact, no assurance that such a rebate, commission or other benefit will be provided by the supplier, because it depends on something else occurring or not occurring.

### *Interpretation*

6.385 The ACL does not specifically define many of the other concepts used in the drafting of section 49 of the ACL. As section 49 is couched in substantially the same form as section 57 of the TP Act, the jurisprudence relating to the concepts applicable to section 57 of the TP Act is relevant to those concepts as they exist in section 49 of the ACL.

*Criminal offence*

6.386 Section 49 of the ACL has an associated criminal offence in section 167 of the ACL. The maximum fine payable for a contravention of a provision of section 167 of the ACL is \$1.1 million for a body corporate and \$220,000 for any other person. *[Schedule 1, item 1: Chapter 4, Part 4-1, section 167]*

6.387 The offence in section 167 is one of strict liability so that it is not necessary to consider the intent of the person committing the offence. The strict liability nature of this offence reflects the potential for widespread detriment, both financially for individual consumers and for its effect on the market and consumer confidence more generally, that can be caused by a person breaching this provision, whether or not he or she intended to engage in the contravention.

6.388 Part 4-6 of the ACL provides the following defences applicable to criminal proceedings:

- an honest and reasonable mistake of fact; *[Schedule 1, item 1: Chapter 4, Part 4-6, section 207]*
- where the contravention was caused by the act or default of another person, or an accident or cause beyond the person's control, and where the person took reasonable precautions and exercised due diligence to avoid the contravention; *[Schedule 1, item 1: Chapter 4, Part 4-6, section 208]*
- where an advertiser publishes an advertisement in the ordinary course of business and does not know and had no reason to suspect the advertisement amounted to a contravention. *[Schedule 1, item 1: Chapter 4, Part 4-6, section 209]*

*Enforcement powers, penalties and remedies*

6.389 A person contravening section 49 of the ACL is liable to pay a civil pecuniary penalty of up to *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, section 224]*:

- \$1.1 million for a body corporate;
- \$220,000 for other persons.

6.390 The following enforcement powers and remedies apply to section 49 of the ACL:

- undertakings; *[Schedule 1, item 1: Chapter 5, Part 5-1, Division 1]*

- substantiation notices; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 2*]
- public warning notices; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 3*]
- injunctions; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 2*]
- damages; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 3*]
- compensatory orders; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision A*]
- redress for non-parties; and [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision B*]
- non-punitive orders. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, section 246*]

6.391 For further information on these powers, remedies and penalties generally see Chapters 14 and 15.

6.392 The ACCC may issue an infringement notice for a contravention of section 49 of the ACL. The amount of the penalty specified in the infringement notice is:

- 600 penalty units for a listed corporation;
- 60 penalty units for a body corporate other than a listed corporation; and
- 12 penalty units for any other person. [*Schedule 2, item 1: Part XI, Division 5*]

### ***Harassment and coercion***

6.393 Section 50 of the ACL provides that a person must not use physical force, undue harassment or coercion in connection with [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 5, subsection 50(1)*]:

- the supply of goods or services;
- payment for goods, services or an interest in land;
- the sale or grant, or the possible sale or grant, of an interest in land.

6.394 This provision sets a norm of conduct in which the use of physical force, undue harassment or coercion is deemed to be unacceptable.

Generally, a person will be harassed by another when the former is troubled repeatedly by the latter. Whether such harassment is undue will depend on the reasonableness of the conduct and whether the harassment is unwarranted or excessive. Coercion indicates the presence of force or compulsion, or threats of force or compulsion, which negates the choice or freedom for a person to act.<sup>13</sup>

6.395 References to an interest in land in sections 50 and 168 of the ACL do not affect the operation of other provisions in Part 2-1 or in Part 3-1 of the ACL. [*Schedule 1, item 1: Chapter 3, Part 3-1, Division 5, subsection 50(2)*][*Chapter 4, Part 4-1, Division 5, subsection 169(3)*]

#### *Interpretation*

6.396 The ACL does not specifically define the concepts used in the drafting of section 50 of the ACL. As section 50 is couched in substantially the same form as section 60 of the TP Act, in relation to goods or services, and subsection 53A(2) of the TP Act, in relation to interests in land, the jurisprudence relating to the concepts applicable to sections 60 and 53A of the TP Act is relevant to those concepts as they exist in section 50 of the ACL.

#### *Criminal offence*

6.397 Section 50 of the ACL has an associated criminal offence in section 168 of the ACL. The maximum fine payable for a contravention of a provision of section 168 of the ACL is \$1.1 million for a body corporate and \$220,000 for any other person. [*Schedule 1, item 1: Chapter 4, Part 4-1, section 168*]

6.398 The offence in section 168 is one of strict liability so that it is not necessary to consider the intent of the person committing the offence. The strict liability nature of this offence reflects the potential for widespread detriment, both financially for individual consumers and for its effect on the market and consumer confidence more generally, that can be caused by a person that breaches this provision, whether or not he or she intended to engage in the contravention.

6.399 Part 4-6 of the ACL provides the following defences to criminal proceedings:

- an honest and reasonable mistake of fact; [*Schedule 1, item 1: Chapter 4, Part 4-6, section 207*]
- where the contravention was caused by the act or default of another person or an accident or cause beyond the person's

---

13 *ACCC v Maritime Union of Australia* (2001) 186 ALR 487.

control, and where the person took reasonable precautions and exercised due diligence to avoid the contravention; and [Schedule 1, item 1: Chapter 4, Part 4-6, section 208]

- where an advertiser publishes an advertisement in the ordinary course of business and does not know and had no reason to suspect the advertisement amounted to a contravention. [Schedule 1, item 1: Chapter 4, Part 4-6, section 209]

*Enforcement powers, penalties and remedies*

6.400 A person contravening section 50 of the ACL is liable to pay a civil pecuniary penalty of up to [Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, section 224]:

- \$1.1 million for a body corporate;
- \$220,000 for other persons.

6.401 The following enforcement powers and remedies apply to section 50 of the ACL:

- undertakings; [Schedule 1, item 1: Chapter 5, Part 5-1, Division 1]
- substantiation notices; [Schedule 1, item 1: Chapter 5, Part 5-1, Division 2]
- public warning notices; [Schedule 1, item 1: Chapter 5, Part 5-1, Division 3]
- injunctions; [Schedule 1, item 1: Chapter 5, Part 5-2, Division 2]
- damages; [Schedule 1, item 1: Chapter 5, Part 5-2, Division 3]
- compensatory orders; [Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision A]
- redress for non-parties; and [Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision B]
- non-punitive orders. [Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, section 246]

6.402 For further information on these powers, remedies and penalties generally see Chapters 14 and 15.

6.403 The ACCC may issue an infringement notice for a contravention of section 50 of the ACL. The amount of the penalty specified in the infringement notice is:

- 600 penalty units for a listed corporation;
- 60 penalty units for a body corporate other than a listed corporation; and
- 12 penalty units for any other person. *[Schedule 2, item 1: Part XI, Division 5]*

## **Proof of transaction and itemised bills**

### *Supplier must provide proof of transaction etc.*

6.404 Subsection 100(1) of the ACL provides that, if a person (being the supplier), in trade or commerce, supplies goods or services to a consumer, and the total price (excluding any liability for payment of the Goods and Services Tax) is \$75 or more, then the supplier must give the consumer a proof of transaction as soon as practicable after the goods or services are supplied. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 4, subsection 100(1)]*

6.405 Subsection 100(2) of the ACL provides that, where a consumer that has been supplied with goods or services with a total price of less than \$75, then that consumer may request a proof of transaction from the supplier. Upon such a request, the supplier must give the proof of transaction to the consumer within seven days after the request is made. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 4, subsections 100(2) and (3)]*

6.406 A 'proof of transaction' is defined in subsection 100(4) of the ACL. It details certain information that needs to be included in the proof of transaction, and also deems certain documents, such as a tax invoice (for the purposes of transactions in respect of which GST is payable) and a lay-by agreement, to satisfy the requirements for a proof of transaction. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 4, subsection 100(4)]*

6.407 The requirements of section 100 of the ACL do not impose any greater requirement than those imposed on any person currently complying with the requirements of the GST. The threshold of \$75 aligns with the current low value transactions threshold for a tax invoice under the Commonwealth GST law.

6.408 A proof of transaction provided to a consumer under this provision must be transparent *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 4, subsection 100(5)]*. Transparent is defined in section 2 of the ACL as being, in relation to a document, expressed in reasonably plain language, legible and presented clearly. *[Schedule 1, item 1: Chapter 1, section 2]*



*Enforcement powers, penalties and remedies*

6.409 A person contravening section 100 of the ACL is liable to pay a civil pecuniary penalty of up to *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, section 224]*:

- \$15,000 for a body corporate;
- \$3,000 for other persons.

6.410 The following enforcement powers and remedies apply to section 100 of the ACL:

- undertakings; *[Schedule 1, item 1: Chapter 5, Part 5-1, Division 1]*
- substantiation notices; *[Schedule 1, item 1: Chapter 5, Part 5-1, Division 2]*
- public warning notices; *[Schedule 1, item 1: Chapter 5, Part 5-1, Division 3]*
- injunctions; *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 2]*
- damages; *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 3]*
- compensatory orders; *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision A]*
- redress for non-parties; and *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision B]*
- non-punitive orders. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, section 246]*

6.411 For further information on these powers, remedies and penalties generally see Chapters 15 and 15.

6.412 The ACCC may issue an infringement notice for a contravention of section 100 of the ACL. The amount of the penalty specified in the infringement notice is:

- 20 penalty units for a body corporate; and
- 4 penalty units for any other person. *[Schedule 2, item 1: Part XI, Division 5]*

***Consumer may request an itemised bill***

6.413 Section 101 of the ACL provides that a consumer is entitled to ask for an itemised bill from a supplier if they are supplied with services by that supplier. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 4, subsection 101(1)]*

6.414 The itemised bill must include certain information, namely *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 4, subsection 101(1)]*:

- specifying how the price of the services was calculated;
- including, if applicable, the number of hours of labour that related to the supply of the services and the hourly rate for that labour; and
- including, if applicable, a list of materials used to supply the services and the amount charged for those materials.

6.415 A request for an itemised bill must be made within 30 days after the consumer receives a bill or account from the supplier for the supply of the services, or within 30 days after the services have been supplied, whichever is the later. Upon such a request, the supplier must give the itemised bill to the consumer within seven days. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 4, subsections 101(2) and (3)]*

6.416 A supplier cannot charge the consumer for an itemised bill. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 4, subsection 101(4)]*

6.417 An itemised bill provided to a consumer under this provision must be transparent. Transparent is defined in section 2 of the ACL as being, in relation to a document, expressed in reasonably plain language, legible and presented clearly. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 4, subsections 101(5)]*

***Enforcement powers, penalties and remedies***

6.418 A person contravening section 101 of the ACL is liable to pay a civil pecuniary penalty of up to *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, section 224]* :

- \$15,000 for a body corporate;
- \$3,000 for other persons.

6.419 The following enforcement powers and remedies apply to section 101 of the ACL:

- undertakings; *[Schedule 1, item 1: Chapter 5, Part 5-1, Division 1]*

- substantiation notices; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 2*]
- public warning notices; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 3*]
- injunctions; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 2*]
- damages; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 3*]
- compensatory orders; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision A*]
- redress for non-parties; and [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision B*]
- non-punitive orders. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, section 246*]

6.420 For further information on these powers, remedies and penalties generally see Chapters 14 and 15.

6.421 The ACCC may issue an infringement notice for a contravention of section 101 of the ACL. The amount of the penalty specified in the infringement notice is:

- 20 penalty units for a body corporate; and
- 4 penalty units for any other person. [*Schedule 2, item 1: Part XI, Division 5*]

## Application and transitional provisions

6.422 The ACL will commence on the later of 1 January 2011 or the commencement of Schedule 1 of the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (the first ACL Bill). The first ACL Bill is currently before the Parliament. [*Section 2*]

6.423 Part 3-1, Divisions 1, 2, 3 and 4, and Part 3-2, Division 4 will commence on 1 January 2011 and apply to conduct on or after that date.

6.424 Conduct occurring prior to 1 January 2011 will remain subject to the repealed (and saved, for those purposes) provisions in the TP Act or the relevant FT Act of a State or Territory. [*Schedule 7, item 6*]

6.425 The TP Act, as in force immediately before the commencement of the ACL, continues to apply to or in relation to any proceedings under or in

relation to that Act, which were commenced, but not concluded, before that commencement. *[Schedule 7, item 7]*

6.426 The Governor-General may make regulations prescribing matters of a transitional, application or saving nature in relation to the amendments and repeals made by the Schedules to this Act. *[Schedule 7, item 12]*

## **Consequential amendments**

6.427 References to provisions of the TP Act in other CC Act provisions and provisions of other Acts will be consequentially amended to refer to provisions of the ACL to ensure that the affected provisions continue to apply in the way in which they did under the TP Act. *[Schedules 5 and 6]*

---

# **Chapter 7**

## **Consumer Guarantees**

---

### **Outline of chapter**

- 7.1 The Australian Consumer Law (ACL) contains provisions that form the basis for the national law on consumer guarantees.
- 7.2 This national law on consumer guarantees replaces provisions that imply conditions and warranties into consumer contracts that are currently within Part V, Division 2 of the TP Act and equivalent State and Territory FT Acts and related Acts.

### **Context of amendments**

- 7.3 The States and Territories each have laws in their FT Acts and related laws which include provisions that imply conditions and warranties into contracts entered into by consumers. The TP Act also implies conditions and warranties into such contracts.
- 7.4 The Productivity Commission's 2008 *Review of Australia's Consumer Policy Framework* noted that many minor differences exist between the laws of Australian jurisdictions that imply conditions and warranties into consumer contracts. It also noted that these differences create additional costs for business and create confusion for consumers. The PC recommended that the adequacy of existing legislation related to implied warranties and conditions be examined as part of the development of a national consumer law.
- 7.5 In March 2009 the Australian Government announced that the Commonwealth Consumer Affairs Advisory Council (CCAAC) would undertake a review of the current laws on implied conditions and warranties in the TP Act and State and Territory fair trading and sale of goods laws.
- 7.6 CCAAC considered the adequacy of the current laws on implied conditions and warranties, the need for a 'lemon law' in Australia to protect consumers who purchase goods that repeatedly fail, and extended warranties.
- 7.7 On 30 October 2009, CCAAC reported to the Australian Government. CCAAC found that:

- Australia should adopt a system of statutory consumer guarantees to replace existing laws that imply conditions and warranties into consumer contracts;
- Australia does not need special ‘lemon laws’ for motor vehicles or other goods. CCAAC considered that consumer guarantees will adequately deal with goods that repeatedly fail; and
- Australia does not need special laws dealing with extended warranties. CCAAC considered that improved awareness of statutory consumer guarantees will enhance the ability of consumers to make informed decisions regarding extended warranties.

7.8 On 4 December 2009, the Ministerial Council on Consumer Affairs (MCCA) agreed that the ACL should include a single national law providing for statutory consumer guarantees. The consumer guarantees provisions in the ACL replace the current State and Territory laws dealing with implied conditions and warranties in consumer contracts.

## **Summary of new law**

7.9 Chapter 3, Part 3-2, Division 1, Subdivision A of the ACL sets out consumer guarantees that provide consumers with a statutory basis for seeking remedies when:

- goods are not of acceptable quality;
- goods are not fit for a purpose that the consumer made known to the supplier or manufacturer;
- goods are not fit for a purpose that the supplier told the consumer that they will meet;
- goods do not match their description;
- goods sold by reference to a sample or demonstration model do not correspond to the sample or demonstration model;
- the consumer does not acquire proper title to the goods;
- other people claim to have a right to the goods, for example, under a charge or a security agreement;

- spare parts and facilities for repair of the goods are not available for a reasonable period; or
- a person does not comply with an express warranty in relation to the goods.

Chapter 3, Part 3-2, Division 1, Subdivision B of the ACL sets out consumer guarantees that provide consumers with a statutory basis for seeking remedies when:

- services are not rendered with due care and skill;
- services, and any product resulting from the services, are not fit for a purpose that the consumer made known to the supplier; or
- services are not supplied within a reasonable time.

The provisions set out in Part 3-2, Division 1 of the ACL are couched in terms broadly similar to those used in the New Zealand *Consumer Guarantees Act 1993* and the jurisprudence applicable to that Act is of relevance to those provisions.

7.10 Chapter 3, Part 3-2, Division 1, Subdivision C of the ACL provides that consumer guarantees cannot be excluded by contract. This ensures that a supplier or manufacturer cannot avoid obligations under consumer guarantees by reaching an agreement with a consumer to the effect that consumer guarantees do not apply. Section 64 of the ACL also provides that it is not possible for a contract to displace consumer guarantees by specifying that some other law, such as the law of the country where the supplier resides, applies to the contract.

7.11 Part 5-4 of the ACL sets out the remedies that are available when consumer guarantees are not complied with. In general terms, consumers are entitled to have a supplier offer a refund, replacement or repairs if the standards required by a guarantee are not met. The applicable remedy depends on which guarantee has not been complied with and the nature of the failure to comply.

7.12 Consumers will be able to seek damages from a manufacturer if goods are not of acceptable quality, do not match their description or if spare parts and repair facilities are not made available for a reasonable period. As is the case under existing law, 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.

7.13 Part 5-4 of the ACL also provides that suppliers of goods and services must provide remedies to consumers within a reasonable time. If a remedy is not provided within a reasonable time a consumer may have the failure remedied elsewhere and have the supplier pay for the remedy.

7.14 Consumers have the right to reject goods that are subject to a major failure, if a supplier refuses to provide a remedy and when a remedy is not provided within a reasonable time. If goods are rejected, the consumer has the right to choose whether a refund or replacement should be provided.



## Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<p>If a person supplies goods to a consumer, the following guarantees apply:</p> <ul style="list-style-type: none"> <li>• a guarantee as to title;</li> <li>• a guarantee as to undisturbed possession;</li> <li>• a guarantee as to undisclosed securities;</li> <li>• a guarantee as to acceptable quality;</li> <li>• a guarantee of fitness for a disclosed purpose;</li> <li>• a guarantee that goods match their description;</li> <li>• a guarantee that goods match a sample or demonstration model;</li> <li>• a guarantee as to the availability of repairs and spare parts; and</li> <li>• a guarantee that any express warranty is complied with.</li> </ul> <p>Notable differences compared to the current law include the replacement of an implied condition of ‘merchantable quality’ with a guarantee of ‘acceptable quality’. The former term is used undefined in TP Act and the FT Acts, whereas the new law defines acceptable quality.</p>	<p>The TP Act implies the following into contracts entered into by consumers:</p> <ul style="list-style-type: none"> <li>• A condition that the supplier has the right to sell the goods;</li> <li>• A warranty that the consumer enjoys quiet possession of the goods;</li> <li>• A warranty that goods are free from any charge or encumbrance not disclosed to the consumer;</li> <li>• A condition that goods are of merchantable quality;</li> <li>• A condition that goods are fit for purpose;</li> <li>• A condition that goods will correspond with their description; and</li> <li>• A condition that goods correspond to a sample.</li> </ul> <p>The laws of each of the States and Territories include provisions that imply conditions and warranties into contracts for the supply of goods that are similar, but often not identical, to those in the TP Act.</p> <p>The TP Act and FT Acts also provide consumers with a right to compensation if facilities for repairs or spare parts are not reasonably available.</p>

<i>New law</i>	<i>Current law</i>
<p>If a person supplies services to a consumer, the following guarantees apply:</p> <ul style="list-style-type: none"> <li>• A guarantee that services will be provided with due care and skill;</li> <li>• A guarantee that services will be fit for a purpose that the person makes known to the supplier; and</li> <li>• A guarantee that services will be provided within a reasonable time.</li> </ul>	<p>The TP Act implies the following into contracts entered into by consumers:</p> <ul style="list-style-type: none"> <li>• A warranty that services will be rendered with due care and skill; and</li> <li>• A warranty that services will be fit for a purpose that the consumer makes known to the supplier.</li> </ul> <p>To the extent that they provide for implied terms and conditions that apply to supplies of services, the FT Acts are broadly similar to the TP Act.</p> <p>The FT Acts of Queensland, Tasmania and the Australian Capital Territory do not imply conditions into contracts for the supply of services.</p>
<p>Remedies for breaches of consumer guarantees are set out in the Bill. Consumers are generally entitled to a repair, refund or replacement if guarantee is not complied with.</p> <p>When a failure to comply with a guarantee is a ‘major failure’, the consumer can reject the goods and choose between a refund and a replacement.</p>	<p>Under current law, consumers must pursue the applicable contract law remedies for breaches of conditions or warranties. A breach of a condition allows a consumer to cancel a contract and seek a refund, whereas a breach of a warranty allows a consumer to seek to have the relevant breach addressed — usually by seeking to have goods repaired.</p>
<p>The new law specifically provides that guarantees cannot be excluded by contract. Only the guarantees as to title, undisturbed possession and undisclosed securities apply to private sales.</p>	<p>The TP Act and the FT Acts of New South Wales, Victoria, Western Australia, South Australia and the Northern Territory specifically provide that implied conditions and warranties cannot be excluded by contract.</p>

<i>New law</i>	<i>Current law</i>
Only the guarantees as to title, undisturbed possession and undisclosed securities apply to private sales.	Implied conditions and warranties, other than those related to title, undisturbed possession and undisclosed securities, generally do not apply to private sales in the TP Act or the laws of the States or Territories. The Qld Sale of Goods Act applies a condition that goods match their description to private sales.
Consumer guarantees will not apply to auctions where an auctioneer is acting as an agent for the seller of goods. Businesses that sell goods directly to consumers via auction websites will be required to provide consumers with the same guarantees that apply if goods were sold in a shop.	Implied conditions and warranties, apart from those related to title, undisturbed possession and undisclosed securities, do not apply to auctions. This includes online auctions whereby businesses sell goods directly to consumers without the intervention of an auctioneer acting as their agent.
Consumer guarantees apply to all occupations, including architects and engineers.	The implied warranty that services are fit for a purpose that the consumer makes known to the supplier does not apply to services provided by architects and engineers.

## Detailed explanation of new law

### Guarantees relating to the supply of goods

7.15 Part 3-2, Division 1, Subdivision A of the ACL provides a basic set of protections for consumers who acquire goods from Australian suppliers, importers or manufacturers. They provide consumers with a statutory basis for seeking remedies when:

- the goods are not of acceptable quality;
- they are not acquiring proper title to the goods;
- other people claim to have a right to the goods;
- the goods are not fit for a purpose that the consumer makes known to the supplier;
- the goods are not fit for a purpose that the supplier says that that will suit;

- they do not match any description, sample or demonstration model used by the supplier;
- repairs and spare parts have not been made available for a reasonable period; or
- any express warranty has not been complied with.

7.16 These guarantees apply if goods are supplied in trade or commerce. With the exception of the guarantees as to title, undisturbed possession and undisclosed securities, they do not apply to sales by individuals outside of the business context. They also do not apply to sales made by way of a traditional auction where an auctioneer acts as an agent for a person to sell goods. They do apply to sales made by businesses on the internet by way of online ‘auction’ websites when the website operator does not act as an agent for the seller.

7.17 The guarantees cannot be excluded by contract [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, section 64*]. This ensures that consumers cannot be pressured or tricked into surrendering their rights by agreeing that the guarantees do not apply. It is also not possible to avoid providing consumer guarantees by agreeing that the law of another country applies. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, section 67*]

#### ***Guarantee as to title***

7.18 The ACL provides a consumer with a guarantee that the supplier has the right to sell the goods. This section seeks to ensure that consumers are not disadvantaged by claims (for example, those seeking repossession) that might be made against goods when the seller has no right to sell the goods. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, subsection 51(1)*]

7.19 If a supply is of limited title, the guarantee as to title does not apply. A supply of limited title occurs when a supplier tells prospective purchasers of goods that they do not know whether there are any claims over particular goods and that, in the event of a sale, they will be transferring only the title that they have. Supplies of limited title occur most often in the context of deceased estates. In such cases, other persons might still seek to repossess the goods, for example, if they were owed money by the deceased and the goods were pledged as security for the amount owing. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, subsection 51(2)*]

7.20 The guarantee as to title does not apply to a hire or lease of goods. In those circumstances, the hirer or lessee acquires a right to use goods for a certain period of time and does not acquire title to goods. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, subsection 51(3)*]

### ***Guarantee as to undisturbed possession***

7.21 The ACL provides a consumer with a guarantee of undisturbed possession of goods. This ensures that consumers who buy goods are not inconvenienced by others seeking to reclaim the goods, for example, because the goods have been pledged as security for a loan. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, subsection 52(1)]*

7.22 If the consumer is told about securities, charges or encumbrances that relate to goods, the guarantee as to undisturbed possession does not apply if possession of goods is disturbed by a person under a security, charge or encumbrance that he or she was told about prior to purchasing the relevant goods. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, subsection 52(2)]*

7.23 If a supply is of limited title, the guarantee as to undisturbed possession only applies to prevent the supplier, or a person whose title the supplier is transferring (a deceased estate, for example), from interfering with the goods. Other persons might still seek to repossess the goods, for example, if they were owed money by the deceased and the goods were pledged as security for the amount owing. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, subsection 52(3)]*

### ***Guarantee as to undisclosed securities***

7.24 The ACL provides consumers with a guarantee that goods are free from any security, charge or encumbrance that was not disclosed to the consumer or created with their consent. This ensures that a consumer is not inconvenienced by other persons, such as financiers claiming to be owed money secured by the goods, seeking to repossess the goods or seeking the payment of money in relation to securities over the goods. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, subsection 53(1)]*

7.25 Subsection 53(1) requires that goods are free from any security, charge or encumbrance until the time when property in the goods passes to the consumer. A floating charge is technically a security interest in goods.

7.26 Subsection 53(2) alleviates the technical breach of subsection 53(1) that would occur due to a floating charge over the assets of a supplier.

7.27 Unless a floating charge has crystallised, the lender has no right over the goods that are the subject of the charge after the goods leave the possession of the chargor. Accordingly, whilst subsection 53(2) is required to remove what would be a technical breach of subsection 53(1), floating charges do not pose any threat to the right of a consumer to possess goods free of any charge. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, subsection 53(2)]*

### ***Guarantee as to acceptable quality***

#### *Meaning of acceptable quality*

7.28 The ACL provides a guarantee that goods are of ‘acceptable quality’ [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, subsection 54(1)*]. Acceptable quality is defined in the ACL such that goods are of acceptable quality if they are:

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

7.29 This definition will be subject to a ‘reasonable consumer’ test, such that goods are considered to meet those standards if a reasonable consumer, who is fully acquainted with the state and condition of the goods, would regard them as acceptable. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, subsection 54(2)*]

7.30 To determine whether goods are of acceptable quality, a number of matters must be taken into account. These include, the nature of the goods, the price of the goods (if relevant), any statement 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 supply of the goods. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, subsection 54(3)*]

7.31 What a reasonable consumer can expect from goods in terms of acceptable quality varies based on the factors set out in subsection 54(3).

#### **Example 7.1**

The appearance and durability that a reasonable consumer would expect of a 10 year-old motor vehicle would be of a much lower standard than would apply to new vehicle. The age of the goods is relevant under subsection 54(3) under the heading of ‘the nature of the goods’. On the other hand, the price and nature of the goods are relevant considerations under subsection 54(3), as the appearance expected of a vintage motor vehicle purchased for a large sum might be of a relatively high standard, irrespective of its age.

*Drawing problems with goods to the attention of a consumer*

7.32 Some goods may not be of acceptable quality due to problems that are known to the supplier. In many circumstances it is wasteful to require suppliers to dispose of such goods when consumers otherwise derive benefits from their use despite these problems. A common example is white goods with cosmetic defects that are sold as 'seconds'. These goods should be able to be sold to consumers, usually for lower prices, as long as the defects are drawn to their attention before the sale.

7.33 The ACL deals with this issue by providing that goods are of acceptable quality as long as any reason that would otherwise render them not of acceptable quality is specifically drawn to the attention of the consumer [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, subsection 54(4)*]. This might be achieved by telling the consumer orally before selling the goods. It may also be achieved by displaying a notice with the goods. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, subsection 54(5)*]

*Abnormal use of goods*

7.34 The guarantee of acceptable quality includes a requirement that goods are as durable as a reasonable consumer fully acquainted with the state and condition of the goods would regard as acceptable. The use to which goods are put may have an impact on their durability.

7.35 The guarantee of acceptable quality is not intended to impose a requirement that goods sold to consumers are indestructible. Such a requirement will have an adverse impact on prices and the range of goods available to consumers.

7.36 The ACL deals with this issue by providing that goods do not fail to be of acceptable quality if the consumer causes them to become of unacceptable quality or fails to take reasonable steps to avoid that outcome and the use to which the goods were put was abnormal. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, subsection 54(6)*]

7.37 The exemption from the guarantee of acceptable quality that applies when goods are damaged by abnormal use is intended to provide suppliers with an excuse for avoiding their guarantee obligations only in exceptional circumstances.

**Example 7.2**

Examples to which the exemption applies are where a mobile telephone is dropped into a bathtub full of water or a television is broken by an object hitting the screen.

*Examination of goods*

7.38 If a consumer is provided with an opportunity to examine goods before purchasing them and the examination should have revealed the reason that the goods are not of acceptable quality, the guarantee of acceptable quality does not apply to the extent that the examination should have revealed the relevant defect or defects. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, subsection 54(7)*]

7.39 This exemption may be particularly relevant to second-hand goods and antiques. Such goods are often sold on an ‘as-is’ basis. In such circumstances, suppliers are not required to remedy defects that a consumer should have noticed when examining the goods. The amount of effort that a consumer should take examining goods depends on the nature of the goods. For example, in the case of new goods sold by commercial retailers, very limited or no examination will be required in almost all cases.

*Guarantee as to fitness for any disclosed purpose*

7.40 The guarantee as to acceptable quality provides a general standard of quality that all goods must satisfy. In certain circumstances consumers might want goods to achieve a particular purpose that they have in mind. If a consumer tells a supplier that he or she wants goods to achieve a particular purpose and the supplier proceeds to sell goods to the consumer, the supplier is held to guarantee that the goods will be fit for that purpose. Goods must also be reasonably fit for any purpose that the supplier tells a consumer that they will be fit. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, subsection 55(1)*]

**Example 7.3**

An example of a use of this subsection is a consumer asking for “a pair of walking shoes”<sup>14</sup>. Such a request would be sufficient to give the consumer the benefit of a guarantee that any shoes subsequently supplied are fit for that purpose.

7.41 The ACL provides a definition of ‘disclosed purpose’ that allows a consumer to make a purpose known to either the supplier, a person whom negotiations are conducted in relation to the goods or to a manufacturer of the goods. This is intended to cover the categories of people that a consumer most often deals with when purchasing goods. In any of these cases, the consumer will receive the benefit of the guarantee if he or she makes their purpose known to the relevant person.

7.42 The guarantee of fitness for a disclosed purpose is subject to an exception if the consumer does not, or it would be unreasonable for the

---

14 For a case dealing with similar facts, see *David Jones Ltd v Willis* (1934) 52 CLR 110.



consumer to, rely on the skill or judgment of the person to whom the purpose is made known.

**Example 7.4**

An example of the application of this exception is where a consumer tells a checkout operator at a discount department store that he or she wants goods to achieve a particular purpose. In such circumstances, a court might find that it was not reasonable for the consumer to rely on the skill or judgment of the supplier and the guarantee of fitness for purpose would not apply.

7.43 This guarantee will ordinarily require a higher standard of quality than the guarantee of acceptable quality.

**Example 7.5**

A lawnmower that is sold to a consumer who does not mention the purpose for which it is to be used might be expected to mow the lawn of an ordinary suburban house once per week for several years without any significant problems to satisfy the guarantee of acceptable quality. If a consumer indicates to a supplier that he or she wants a lawnmower to mow a 4 hectare block of land each week, the standard that the lawnmower would need to meet to be fit for that disclosed purpose would be higher than required by the guarantee of acceptable quality for a domestic lawnmower.

***Guarantee relating to the supply of goods by description***

7.44 If goods are described by their supplier any goods subsequently supplied should match that description. This guarantee provides consumers with a basis for seeking redress if goods do not match their description. This guarantee applies if goods supplied are a different colour to their description, a different size or of a different kind from those that the consumer had agreed to buy. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, subsection 56(1)*]

7.45 The guarantee relating to supply of goods by description applies irrespective of whether or not the consumer selected the goods. This ensures that suppliers cannot supply goods that are different to their description simply because the consumer inspected the goods prior to agreeing to buy them. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, subsection 56(2)*]

7.46 Section 57 of the ACL explains the guarantee relating to supply of goods by sample or demonstration model. If a description is applied to goods and a consumer is also shown a sample or demonstration model, the goods must correspond to their description as well as the sample or demonstration model. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, subsection 56(3)*]

***Guarantee relating to the supply of goods by sample or demonstration model***

7.47 This guarantee provides that goods sold by reference to a sample or demonstration model must correspond to that sample or demonstration model [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, paragraph 57(1)(c)*]. This ensures that a consumer has a right of action if goods do not match a sample or demonstration model that was shown to him or her by a supplier before he or she agreed to make the relevant purchase.

**Example 7.6**

An example of a failure to comply with this guarantee is where a sample of fabric is used to sell a couch and the couch supplied to a consumer is a different colour to the sample.

7.48 If goods are sold by reference to a sample, it is difficult for a consumer to enforce their rights unless he or she is provided with an opportunity to compare the goods to the sample. The ACL provides for this by giving the consumer the benefit of a guarantee that he or she will have an reasonable opportunity to compare the goods to the sample [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, paragraph 57(1)(d)*]. This guarantee does not apply to demonstration models as, in most cases, it is not reasonable to expect suppliers to retain demonstration models, for example demonstration models of cars, to allow consumers the opportunity of comparison.

7.49 Goods sold by reference to a sample or demonstration model must be free from any defect that would not be apparent on examination of the sample or demonstration model in order to be considered to be of acceptable quality [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, paragraph 57(1)(e)*].

7.50 If goods are sold by showing a consumer a sample or demonstration model and are also described by the supplier, the goods must correspond to both their description and the sample or demonstration model. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, subsection 57(2)*]

***Guarantee as to repairs and spare parts***

7.51 When consumers buy goods they expect that spare parts and repair facilities will be available for a reasonable time after they make the purchase. This is particularly the case for expensive goods, such as cars. The ACL provides consumers with a guarantee that spare parts and repair facilities will be reasonably available for a reasonable period. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, section 58*]

7.52 The tests of reasonability that apply to this guarantee allow for the fact that what is reasonable will depend on the nature of the goods supplied. For example, it would be reasonable to expect that tyres for a new car will be

available for many years after its purchase. It may not be reasonable to expect that spare parts for an inexpensive children's toy are available at all.

***Express warranties***

7.53 Suppliers and manufacturers often provide express warranties, when they sell goods to consumers. The ACL includes a guarantee that any such guarantees are complied with. This ensures that the full suite of remedies available for breaches of consumer guarantees are available when a person fails to comply with an express warranty. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, section 59*]

**Guarantees relating to the supply of services**

7.54 Part 3-2, Division 1, Subdivision B of the ACL provides a basic set of protections for consumers who acquire services from Australian suppliers. They provide consumers with a statutory basis for seeking remedies when:

- services are not rendered with due care and skill;
- services are not fit for a purpose that the consumer makes known to the supplier; or
- services are not supplied within a reasonable time.

7.55 The guarantees relating to the supply of services apply to supplies made in trade or commerce. Accordingly, they do not apply to any supplies of services that are provided by individuals outside of a business context.

7.56 For the avoidance of doubt, guarantees relating to services do not apply to transportation or storage of goods for the purposes of a business, trade, profession or occupation carried on by the person for whom the goods are transported or stored [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, paragraph 63(a)*].

7.57 It is necessary to clarify the application of guarantees to these services since it might otherwise be thought that they fall within the definition of consumer within section 2 of the ACL. This is because such services are often acquired for personal, domestic or household use or consumption.

7.58 Guarantees relating to the supply of services do not apply to contracts of insurance as these contracts are covered by legislation that applies specifically to insurance markets. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, paragraph 63(b)*]

### ***Guarantee as to due care and skill***

7.59 The ACL provides consumers with the benefit of a guarantee that services will be rendered with due care and skill. This guarantee requires that the provider of services must have an acceptable level of skill in the particular area of activity involved in the supply of services. The provider must also exercise due care in providing the services. These requirements ensure that services are provided in accordance with the specifications agreed and also provide the consumer with a basis for seeking redress if a service provider causes damage to other property belonging to the consumer in the course of providing services. [Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, section 60]

#### **Example 7.7**

Examples of the application of this guarantee include where a supplier installs a burglar alarm that is easily bypassed by burglars<sup>15</sup> and loss or damage to personal luggage in the course of transportation of passengers by an airline or cruise ship operator<sup>16</sup>. Whilst the cases cited here were heard under the comparable implied warranty provision of the TP Act, the intention is that the guarantee applies to such services in a similar way. The guarantee would also apply to services commonly acquired by consumers; such as those provided by plumbers, electricians, gardeners and landscapers, to require that those services are rendered with due care and skill.

### ***Guarantee as to fitness for a particular purpose***

7.60 In certain circumstances a consumer might want services to achieve a particular purpose that he or she has in mind. If a consumer tells a supplier that they want services to achieve a particular purpose and the supplier proceeds to supply services to the consumer, the supplier is held to guarantee that the services will be fit for that purpose. [Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, subsection 61(1)]

#### **Example 7.8**

An example of a use of this subsection is a consumer asking an electrician to install lighting that will allow a room to be used as a home office. If the electrician installs lighting that is too dull to allow reading of documents and books in that room, the guarantee as to fitness for a particular purpose has not been complied with.

---

15 For a case involving similar factual scenario, see *Mayne Nickless v Crawford* (1992) 59 SASR 490.

16 For a case involving a similar factual scenario, see *Dillon v Baltic Shipping Co* (1989) 21 NSWLR 614.

7.61 The ACL allows a consumer to make results that he or she wants services to achieve known to either the supplier or a person whom negotiations are conducted in relation to the services. As results to be achieved are less subjective than a 'purpose', it is appropriate that the person can make these known to either of these categories of person. In either of these cases, the consumer will receive the benefit of the guarantee if he or she makes the desired results known to the relevant person. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, subsection 61(2)]*

7.62 The guarantees of fitness for a particular purpose and fitness to achieve a desired result are subject to an exception if the consumer does not, or it would be unreasonable for the consumer to, rely on the skill or judgment of the person to whom the purpose or result is made known. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, subsection 61(3)]*

#### ***Guarantee as to reasonable time for supply***

7.63 It is usual practice for a contract or agreement for the supply of services to stipulate the time for providing those services. On occasion, a contract or agreement will not stipulate when services are to be provided. In that case, a consumer may experience significant inconvenience if there is a long wait for services to be provided. The guarantee as to reasonable time for supply provides consumers with a right to approach a court or tribunal to seek appropriate orders when services are not provided within a reasonable time. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, section 62]*

7.64 In general, best practice is to ensure that the time for supply of services is included in a contract or agreement to avoid disputes about what is a 'reasonable time'. The time period that is reasonable will vary significantly depending on the nature of the services to be provided. The reasonable time to build a house will obviously be much longer than what is reasonable for providing a tree-logging service. Accordingly, it is not possible to set out in the ACL what is reasonable and the courts and tribunals will need to consider all of the circumstances that apply to a particular case to determine the time period that is reasonable.

### **Application of consumer guarantees to supplies of gas, electricity and telecommunications**

7.65 Special policy considerations apply to supplies of gas, electricity and telecommunications. Since these goods and services are usually supplied via an interconnected system of wires or pipes, a disruption to supply can affect many consumers. These services are also crucial to many areas of human activity such that the consequential losses experienced by consumers can in some instances be substantial. Further, disruptions to supply can be the result of factors beyond the control of the supplier.

7.66 Due to the existence of the aforementioned special policy considerations, legislation has been developed at both the Commonwealth and State and Territory levels to deal with consumer issues in relation to these supplies.

7.67 The ACL provides for the relevant Commonwealth Minister disapplying consumer guarantees in respect of supplies of electricity, gas and telecommunications if he or she is satisfied that other laws make adequate provision for consumer protection in relation to the relevant supplies. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, section 65]*

## **Display notices and other information to be provided to consumers**

### *Display notices*

7.68 A common practice in New Zealand is for traders to display a sign at the point of sale that alerts consumers to their rights under the relevant consumer protection legislation. CCAAC found that similar signage in Australian shops will enhance the awareness of Australian consumers in relation to their rights. CCAAC further found that consumer agencies should distribute a sign that can be used for that purpose with suppliers initially being asked to voluntarily comply with a request that it be displayed at the point of sale.

7.69 In the event that widespread voluntary compliance with a request to display signs at the point of sale is not forthcoming, the ACL provides for the relevant Minister determining that a notice must be displayed *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, subsection 66(1)]*.

7.70 The determination may set out what information is to be included on the notice, where the notice must be displayed, how the notice must be drawn to the attention of consumers and requirements (such as size of the notice itself and the size of font used on the notice) for the form of the notice.

7.71 In the event that the Minister chooses to prescribe a notice, the ACL requires that the notice is displayed at the premises where a consumer takes delivery of goods or services or that the notice is drawn to the attention at the time the consumer agrees to acquire the goods *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 1, subsection 66(2)]*.

7.72 This is intended to cover both shops that have a physical presence and those that trade via electronic means.

***Prescribed requirements for warranties against defects***

7.73 Suppliers and manufacturers often provide promises to consumers that goods or services supplied will be free from defects for a certain period of time. Consumers may experience difficulties seeking to have suppliers or manufacturers fulfil such promises if they lack access to basic details, such as the name and address of the supplier. The ACL provides for regulations to be made prescribing requirements relating to the content and form of such warranties against defects. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 4, section 102*]

7.74 A **warranty against defects** is a narrower concept than an express warranty. A warranty against defects applies only if a person has promised to repair or replace goods or services, or provide other compensation to a consumer if goods or services are defective. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 4, subsection 102(3)*]

***Prescribed requirements for repairs of consumer goods***

7.75 Consumers often complain that a repairer of goods did not warn them that electronic data on mobile telephones, computers and other electronic goods would be deleted in the process of effecting a repair.

7.76 The ACL provides that a repairer of goods must provide a consumer with prescribed information before accepting the goods for the purpose of repairing them. This provision allows the relevant Minister to make regulations requiring repairers of electronic or other goods notices warning that electronic data may be deleted in the course of effecting a repair. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 4, section 103*]

***Penalties for failing to display a notice or provide prescribed information***

*Display notices*

7.77 If a Minister determines that suppliers must display notices under section 66(2) of the ACL and a person supplies goods to a consumer without displaying the notice at the relevant premises or drawing the notice to the consumer's attention, that person is guilty of an offence. The offence is one of strict liability and the maximum penalty is:

- \$30,000 for a body corporate; and
- \$6,000 for a person who is not a body corporate.

[*Schedule 1, item 1: Chapter 4, Part 4-2, Division 1, section 169*]

7.78 A civil pecuniary penalty also applies to a failure to display a notice in the required form. The maximum penalty is:

- \$30,000 for a body corporate; and
- \$6,000 for a person who is not a body corporate

*[Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, section 224].*

7.79 The ACCC may also issue a person with an infringement notice in relation to a contravention of section 66(2). The amount of the penalty under an infringement notice is:

- 55 penalty units for a body corporate; and
- 11 penalty units for a person who is not a body corporate.

*[Schedule 2, Item 1: Part XI, Division 5]*

7.80 The offence of failing to display a notice is one of strict liability since the question of intention is not relevant to whether or not a sign is displayed. A consumer will be denied access to the information on the notice irrespective of whether the supplier deliberately failed to display the notice. Accordingly, a prosecution for an offence under section 170 of the ACL does not need to establish the reasons for the failure of a supplier to display a notice in the required form. It is enough for a regulator to prove that there was an obligation on the supplier to display a notice and that the notice was not displayed.

*Warranties against defects*

7.81 If requirements are prescribed for warranties against defects under section 102 of the ACL and a person does not provide the prescribed information, or does not provide it in the prescribed form, the person is guilty of an offence. The offence is one of strict liability and the maximum penalty is:

- \$50,000 for a body corporate; and
- \$10,000 for a person who is not a body corporate.

*[Schedule 1, item 1: Chapter 4, Part 4-2, Division 4, section 191]*

7.82 A civil pecuniary penalty also applies to a failure to display a notice in the required form. The maximum penalty is:

- \$50,000 for a body corporate; and



- \$10,000 for a person who is not a body corporate [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, section 224*].

7.83 The ACCC may also issue a person with an infringement notice in relation to a contravention of section 102. The amount of the penalty under an infringement notice is:

- 60 penalty units for a body corporate; and
- 12 penalty units for a person who is not a body corporate.

*[Schedule 2, Item 1: Part XI, Division 5]*

*Prescribed requirements for repairs*

7.84 If a person does not comply with requirements for providing prescribed information related to the repair of goods to consumers under section 103 the person is guilty of an offence. The offence is one of strict liability and the maximum penalty is:

- \$50,000 for a body corporate; and
- \$10,000 for a person who is not a body corporate.

*[Schedule 1, item 1: Chapter 4, Part 4-2, Division 1, section 193]*

7.85 A civil pecuniary penalty also applies to a failure to provide the prescribed information. The maximum penalty is:

- \$50,000 for a body corporate; and
- \$10,000 for a person who is not a body corporate.

*[Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, section 224]*.

7.86 The ACCC may also issue a person with an infringement notice in relation to a contravention of section 103. The maximum penalty under an infringement notice is:

- 60 penalty units for a body corporate; and
- 12 penalty units for a person who is not a body corporate.

*[Schedule 2, Item 1: Part XI, Division 5]*

## Convention on Contracts for the International Sale of Goods

7.87 The *Vienna Sales Convention* (VSC) provides uniform rules that govern contracts for the sale of goods between people located in different countries.

7.88 The terms of the VSC are set out in the uniform Sale of Goods (Vienna Convention) Acts passed in each State and Territory of Australia. At the time of passage of the ACL, 74 countries were parties to the VSC.

## Remedies relating to guarantees

### *Action against suppliers of goods*

7.89 The ACL provides for a consumer taking action against a supplier of goods if goods are supplied in trade or commerce and there is a breach of any of the guarantees that relate to goods. [*Schedule 1, item 1: Chapter 5, Part 5-4, Division 1, section 258*]

7.90 The remedies available to consumers depend on the severity of a failure to comply with a guarantee. The ACL classifies failures into those that are major and those that are not major. A major failure occurs if:

- a reasonable consumer would not have acquired the goods if he or she knew about the nature and extent of the problem. In other words, the problem with the goods is so severe that such a person would not have purchased the goods if he or she knew about the problem. [*Schedule 1, item 1: Chapter 5, Part 5-4, Division 1, paragraph 260(a)*];
- goods depart significantly from their description or a sample or demonstration model that was used when selling the goods. For example, if a consumer orders a red bicycle from a catalogue and the bicycle actually delivered is green [*Schedule 1, item 1: Chapter 5, Part 5-4, Division 1, paragraph 260(b)*];
- goods cannot be remedied to make them fit for purpose within a reasonable time. For example, a consumer tells a retailer that he or she wants a computer to connect to the internet and it does not have that function and cannot be modified to provide that function [*Schedule 1, item 1: Chapter 5, Part 5-4, Division 1, paragraphs 260(c) and (d)*]; or
- goods are unsafe [*Schedule 1, item 1: Chapter 5, Part 5-4, Division 1, paragraph 260(e)*].

7.91 Whether or not goods are in their original packaging is irrelevant to whether or not a supplier is liable to provide a remedy to a consumer in relation to a failure to comply with a guarantee. *[Schedule 1, item 1: Chapter 5, Part 5-4, Division 1, subsection 258(7)]*

*Remedies available when a failure is not major*

7.92 If a failure is not major, the usual remedy will be for a consumer to require the supplier to address the problem. If a consumer asks a supplier to remedy a problem with goods, the Bill provides that the remedy must be made available within a reasonable time. What is reasonable will vary depending on the circumstances. For example, reasonable time to remedy a problem with an essential good such as a hot water system would be much shorter than for a games console. *[Schedule 1, item 1: Chapter 5, Part 5-4, Division 1, paragraph 258(2)(a)]*

7.93 If a consumer asks a supplier to provide a remedy the supplier may choose between providing a refund, a replacement or a repair. If a failure relates to the title to goods, the supplier may remedy the failure by addressing the problem with the title. For example, this might involve paying money owed to another person if that person has a security interest in the goods. *[Schedule 1, item 1: Chapter 5, Part 5-4, Division 1, section 261]*

7.94 If a supplier fails to provide a remedy within a reasonable time, a consumer may have the goods repaired and have the supplier pay for the repair. In some circumstances, it may be appropriate for the consumer to purchase a replacement and have the supplier pay for the replacement. The consumer also has a right to have the supplier pay other costs incurred in having goods remedied elsewhere. In certain circumstances, these costs might include transportation costs and costs of having an alternative repairer inspect the goods. *[Schedule 1, item 1: Chapter 5, Part 5-4, Division 1, subparagraph 258(2)(b)(i)]*

7.95 If a consumer suffers losses as a result of a failure of a supplier to comply with guarantees, the consumer can recover those losses from the supplier. This type of loss is often known as ‘consequential loss’. The losses that are recoverable are limited to those that are “reasonably foreseeable” to result from the failure. In other words, the consumer can recover those losses that are a probable consequence of the failure. An example is water damage to a carpet that is the result of a failure of a washing machine to be of acceptable quality. *[Schedule 1, item 1: Chapter 5, Part 5-4, Division 1, subsection 258(4)]*

7.96 A consumer cannot recover consequential losses from a supplier if they were caused by something independent of human control that occurred after the goods left the control of the supplier. This ensures that suppliers are not required to pay money to consumers for problems unrelated to their

own conduct or the goods that they have supplied. [*Schedule 1, item 1: Chapter 5, Part 5-4, Division 1, subsection 258(5)*]

7.97 *Remedies available when a failure is major*

7.98 If a failure to comply with a guarantee is a major failure, a consumer may reject goods and choose between a refund and replacement goods. If a consumer rejects goods, he or she must notify the supplier of the rejection. After a consumer returns goods to a supplier, or the goods are collected by the supplier, the supplier must provide the remedy that the consumer has chosen. [*Schedule 1, item 1: Chapter 5, Part 5-4, Division 1, section 258*]

7.99 If the consumer chooses a refund after rejecting goods, the supplier is specifically precluded from providing replacement goods to satisfy the requirement for a refund. [*Schedule 1, item 1: Chapter 5, Part 5-4, Division 1, section 263(5)*]

7.100 The property in goods rejected reverts in the supplier as soon as the consumer notifies the supplier of the rejection. This ensures that any risk to the goods from that time onwards is borne by the supplier. For example, if the goods are uninsured and are damaged by a fire after the notification, the loss will be that of the supplier and not the consumer.

*Responsibility for returning goods to a supplier if goods are rejected*

7.101 The consumer is responsible for returning rejected goods to a supplier unless the cost of returning, removing or transporting them is significant because of the size or height of the goods, because they are attached to something else or due to the nature of the failure. If goods cannot be returned without significant costs, the supplier must collect the goods at their own expense and within a reasonable time. [*Schedule 1, item 1: Chapter 5, Part 5-4, Division 1, Section 263*]

**Example 7.9**

Examples of circumstances in which a supplier would be responsible for collecting goods include:

- A 127 centimetre LCD television that is the subject of a major failure. The supplier would be responsible for collecting the television as its size would make it costly for the consumer to return it to the supplier;
- A swimming pool filter that is connected to a swimming pool by fixed pipes is the subject of a major failure. The supplier would be responsible for collecting the swimming pool filter as its method of attachment would make it costly for the consumer to return the goods; and

- An extension ladder that is stuck in the extended position. The supplier would be responsible for collecting the ladder as the nature of the failure in this case would make it costly for the consumer to return it, so the supplier would be responsible for organising its collection.

*Guarantees apply to replaced goods*

7.102 If goods are replaced, either at the choice of a supplier under section 261(c), or at the choice of the consumer after goods have been rejected under section 263(4)(b), the same guarantees apply to the replaced goods as applied to the goods originally supplied. [*Schedule 1, item 1: Chapter 5, Part 5-4, Division 1, section 264*]

7.103 As replaced goods must be identical to the goods originally supplied, the guarantees that apply are identical to those that applied to the original goods.

**Example 7.10**

If a consumer purchased a new mobile telephone from a supplier and it was replaced by the supplier due to a major failure six months after its purchase, the guarantees that apply would be exactly the same as would apply to a new mobile telephone. It is not the case that, for example, the guarantee as to acceptable quality would extend for six months less than would apply to a new mobile telephone because the consumer had the use of the original telephone for six months.

*Termination of contracts for services connected with rejected goods*

7.104 Consumers often purchase goods in connection with services that are necessary to effectively utilise the relevant goods. An example is mobile telephones and associated contracts for network services. In such cases, the right to reject goods and receive a refund provided for by sections 261 and 263(4)(a) would often be illusory if the consumer continued to be bound to make payments under a connected service contract.

7.105 When a consumer exercises the right to reject goods under section 262 and services are connected with the rejected goods, the contract for services is automatically terminated when the consumer elects that a refund be given under section 263(4)(a). Whether goods are automatically rejected or not depends on how closely the goods are connected to the services. There is scope for many different degrees of 'connection' in arrangements between consumers and suppliers and each case would need to be considered on its merits.

7.106 If a consumer rejects goods, elects to seek a refund and a contract for connected services has been terminated, he or she may also seek a refund of money or other consideration paid for services. Where services are

provided on a time basis, a consumer might seek a refund of money or consideration paid for services that were not yet consumed, or not consumed because the connected goods failed to allow the services to be used.

*[Schedule 1, item 1: Chapter 5, Part 5-4, Division 1, section 265]*

#### **Example 7.11**

A refund might include money paid for access to a mobile telephone network from the time that a mobile telephone failed to function.

#### *Rights of donees*

7.107 Consumers often purchase goods and give them to others prior to using them. In such circumstances any failures related to guarantees may not be apparent until the goods are in the possession of that other person.

#### **Example 7.12**

Christmas and birthday presents given to family members.

7.108 In many cases it is inconvenient that the original purchaser, rather than the recipient of a gift, is required to exercise any rights or remedies under consumer guarantees. Accordingly, the ACL provides for recipients of gifts having access to the same rights and remedies as would have been available to the consumer who acquired the goods from the supplier.

*[Schedule 1, item 1: Chapter 5, Part 5-4, Division 1, section 266]*

#### *Actions against suppliers of services*

7.109 The ACL provides for a consumer taking action against a supplier of services if services are supplied in trade or commerce and there is a failure to comply with any of the guarantees that relate to services. *[Schedule 1, item 1: Chapter 5, Part 5-4, Division 1, section 267]*

7.110 The remedies available to consumers depend on the severity of a failure to comply with a guarantee. The ACL classifies failures into those that are major and those that are not major. A major failure occurs if:

- a reasonable consumer would not have acquired the services if he or she knew about the nature and extent of the failure. In other words, the problem with the services is so severe that such a person would not have purchased them if he or she knew about the problem *[Schedule 1, item 1: Chapter 5, Part 5-4, Division 1, paragraph 268(a)]*;
- the services cannot be remedied within a reasonable time to make them fit for a purpose that services of that kind are

commonly supplied [*Schedule 1, item 1: Chapter 5, Part 5-4, Division 1, paragraph 268(b)*];

- the services, and any product resulting from those services, cannot be remedied within a reasonable time to make them fit for a purpose that the consumer made known to the supplier [*Schedule 1, item 1: Chapter 5, Part 5-4, Division 1, paragraph 268(c)*];
- the services, and any goods supplied in connection with the services, cannot be remedied within a reasonable time to make them achieve a result that the consumer wants them to achieve and that was made known to the supplier [*Schedule 1, item 1: Chapter 5, Part 5-4, Division 1, paragraph 268(d)*]; or
- the services create an unsafe situation [*Schedule 1, item 1: Chapter 5, Part 5-4, Division 1, paragraph 268(e)*].

*Remedies available when a failure is not major*

7.111 If a failure is not major, the usual remedy will be for a consumer to require the supplier to address the problem. If a consumer asks a supplier to remedy a problem with services, the remedy must be made available within a reasonable time. What is reasonable will vary depending on the circumstances. [*Schedule 1, item 1: Chapter 5, Part 5-4, Division 1, paragraph 267(2)(a)*]

**Example 7.13**

Reasonable time to remedy a problem with a haircut would be much shorter than the reasonable time to remedy a problem with a landscaping project.

7.112 If a supplier fails to provide a remedy within a reasonable time, a consumer can choose between seeking a remedy elsewhere and having the supplier pay all costs reasonably incurred in seeking that remedy, and terminating the contract [*Schedule 1, item 1: Chapter 5, Part 5-4, Division 1, paragraph 267(2)(b)(i)*]. If the contract is terminated, the consumer can seek a refund of money or other consideration paid for the services. [*Schedule 1, item 1: Chapter 5, Part 5-4, Division 1, subsection 270(3)*]

7.113 If the consumer terminates the contract, the termination takes effect from the time the consumer tells the supplier that he or she wants to terminate. In some circumstances, the consumer may have difficulty contacting a supplier. In this case the termination would take effect from the time when he or she indicates to the supplier that he or she wants to terminate. [*Schedule 1, item 1: Chapter 5, Part 5-4, Division 1, section 269*]

#### **Example 7.14**

An example of this type of termination might involve the consumer sending a letter to the supplier's last known address.

7.114 If a consumer suffers losses as a result of a failure of a supplier of services to comply with guarantees, the consumer can recover those losses from the supplier. This type of loss is often known as 'consequential loss'. The losses that are recoverable are limited to those that are "reasonably foreseeable" to result from the failure. In other words, the consumer can recover those losses that are a probable consequence of the failure. [*Schedule 1, item 1: Chapter 5, Part 5-4, Division 1, subsection 268(4)*]

#### **Example 7.15**

An example of this type of loss is a house fire caused by incorrect installation of electric lighting in the home of a consumer.

7.115 *Remedies available when a failure is major*

7.116 If a failure to comply with a guarantee relating to services is a major failure, a consumer can choose between terminating the contract for supply of the services or recover compensation for any difference in the value of the services compared to the price paid [*Schedule 1, item 1: Chapter 5, Part 5-4, Division 1, subsection 268(3)*]. If the contract is terminated, the consumer can seek a refund of money or other consideration paid for the services. [*Schedule 1, item 1: Chapter 5, Part 5-4, Division 1, subsection 269(3)*]

#### **Example 7.16**

An example of seeking to recover compensation for the difference in the value of services compared to the price paid would involve the services of a builder who constructs a house that is not of the quality required by the contract. In those circumstances, the consumer would be entitled to compensation for the difference between the value of the house actually constructed and the value of the house that would have resulted if the contract had been properly performed.

*Termination of contracts for the supply of goods that are connected to terminated services*

7.117 Consumers often purchase services in connection with goods that are necessary to effectively utilise the relevant services. An example is contracts for network services that relate to a purchase of a mobile telephone. In such cases, the right to terminate a contract for services and receive a refund provided for by section 268 would often be illusory if the consumer could not also reject the goods and receive a refund.



7.118 When a consumer exercises the right to terminate a contract for services under section 268 and goods are connected with the services, the goods are automatically rejected when the consumer terminates the contract. Whether goods are automatically rejected or not depends on how closely the goods are connected to the services. There is scope for many different degrees of ‘connection’ in arrangements between consumers and suppliers and each case would need to be considered on its merits. [*Schedule 1, item 1: Chapter 5, Part 5-4, Division 1, section 270*]

7.119 If a consumer terminates a contract for services, he or she may also seek a refund of money or other consideration paid for goods that were connected to the services. In order to receive a refund, the consumer must return the goods to the supplier or, if the goods cannot be returned without significant cost to the consumer, have the supplier collect the goods. [*Schedule 1, item 1: Chapter 5, Part 5-4, Division 1, section 270*]

### ***Actions for damages against manufacturers of goods***

#### *Damages that may be recovered from manufacturers of goods*

7.120 The primary contact point for consumers when they buy goods is the supplier. Consumers usually have less direct contact with the manufacturer of goods. Accordingly, the primary source of remedies for consumers when goods fail to meet the standard required by guarantees is the person who supplied the goods. Nevertheless, in certain circumstances consumers may wish to seek remedies directly from manufacturers.

### **Example 7.17**

An example of such circumstances is where the supplier of particular goods is difficult to locate.

7.121 The ACL provides that a consumer may recover damages from manufacturers in respect of failures that relate to acceptable quality, correspondence with description (if a description was applied by or on behalf of the manufacturer), availability of repairs and spare parts, and compliance with express warranties [*Schedule 1, item 1: Chapter 5, Part 5-4, Division 2, subsections 271(1), 271(2), 271(3) and 271(5)*]. For detailed explanation of the content of each of these guarantees, see the relevant sections of this Chapter, above.

7.122 The damages that are recoverable from a manufacturer of goods include the reduction in value of goods below the lower of the price paid or the average retail price of the goods at the time of the supply. This approach ensures that manufacturers are not required to provide excessive compensation to consumers if suppliers charge high prices for goods. [*Schedule 1, item 1: Chapter 5, Part 5-4, Division 2, paragraph 272(1)(a)*]

### **Example 7.18**

If goods were purchased for \$30, the average retail price at the time of the supply was \$28 and the goods are worth only \$10 as a result of a failure to comply with a guarantee, the manufacturer would be required to pay the consumer \$18.

7.123 The damages payable by a manufacturer to a consumer also cover losses that were ‘reasonably foreseeable’ as a result of the failure. This type of loss is often known as ‘consequential loss’. The losses that are recoverable are limited to those that are “reasonably foreseeable” to result from the failure. In other words, the consumer can recover those losses that are a probable consequence of the failure. *[Schedule 1, item 1: Chapter 5, Part 5-4, Division 2, paragraph 272(1)(b)]*

### **Example 7.19**

An example of this type of loss is a house fire caused by a faulty light fitting in a consumer’s home.

7.124 To avoid doubt, the cost of returning goods or inspecting them to determine the cause of a failure is to be considered reasonably foreseeable as a result of failing to comply with a guarantee *[Schedule 1, item 1: Chapter 5, Part 5-4, Division 2, Subsection 272(2)]*. Also to avoid doubt, a reduction in value of goods is not recoverable only under Paragraph 272(1)(a). *[Schedule 1, item 1: Chapter 5, Part 5-4, Division 2, Subsection 272(3)]*

7.125 A manufacturer is not required to pay damages to a consumer if the consumer has required the manufacturer to provide a repair or replacement under an express warranty unless the manufacturer has refused to provide a repair or replacement, or has failed to do so within a reasonable time. *[Schedule 1, item 1: Chapter 5, Part 5-4, Division 2, subsection 271(6)]*

7.126 A manufacturer is not required to pay damages to a consumer if an act, default or omission or representation made by some other person, not being an employee or agent of the manufacturer, resulted in caused goods to be of less than acceptable quality. This ensures that manufacturers are not held liable for issues with goods that are beyond their control. *[Schedule 1, item 1: Chapter 5, Part 5-4, Division 2, paragraph 271(2)(a)]*

### **Example 7.20**

An example of the application of this exception is where a mechanic (not associated with the manufacturer) uses the wrong engine oil in a car and engine damage occurs as a result of that error. In that case, the mechanic, and not the manufacturer, would be responsible for providing the consumer with the necessary redress.

7.127 A manufacturer is also not liable to provide damages if a failure to comply with the guarantee as to acceptable quality results from a cause independent of human control that occurs after the goods left the control of the manufacturer [*Schedule 1, item 1: Chapter 5, Part 5-4, Division 2, subsection 271(2)(b)*]. This ensures that manufacturers are not liable for damage that occurs due to natural disasters, lightning strikes, and other events over which the manufacturer has no control. On the other hand, if goods are damaged by such events before goods leave the control of the manufacturer, it will be responsible for providing damages if goods subsequently make their way into the hands of consumers.

7.128 A manufacturer is not liable to provide consumers with damages if the only reason that the goods fail to be of acceptable quality is because the price charged by the supplier is higher than the recommended retail price or the average retail price for the goods [*Schedule 1, item 1: Chapter 5, Part 5-4, Division 2, paragraph 271(2)(c)*]. This is intended to deal with situations where goods are sold for a relatively high price and paragraph 54(3)(b) has the effect of imposing a higher standard of acceptable quality on those goods due to their price. In such cases, manufacturers should be held only to the standard that would be required if the goods were sold at the recommended retail price or the average retail price.

*Time limit for actions against manufacturers of goods*

7.129 An action against the manufacturer of goods to recover damages can only be commenced within 3 years after the consumer becomes aware, or reasonably should have become aware, of a failure to comply with a guarantee [*Schedule 1, item 1: Chapter 5, Part 5-4, Division 2, section 273*]. This is intended to provide manufacturers with some degree of certainty about their potential liability to consumers for damages. Without this limitation, manufacturers may experience difficulties obtaining finance or insurance coverage as their long-term contingent liabilities might be indeterminate.

### **Indemnification of suppliers by manufacturers**

7.130 Suppliers have the primary responsibility of providing remedies to consumers in respect of any failures to comply with guarantees, other than those that relate to spare parts and repair facilities and express warranties offered by manufacturers. Accordingly, suppliers will often be liable to provide consumers with remedies in circumstances whereby fault more properly lies with a manufacturer or importer.

7.131 The ACL provides for an indemnity in favour of the supplier of goods subject to the guarantees within Chapter 3, Part 3-2, Division 1, Subdivision A of the ACL.

7.132 If goods are not of acceptable quality, do not match a description applied by their manufacturer or are not fit for a purpose made known to their manufacturer, and a supplier provides a remedy in respect of those failures, the supplier can recover the costs incurred from the manufacturer. *[Schedule 1, item 1: Chapter 5, Part 5-4, Division 3, subsection 274(2)]*

7.133 The indemnity also extends to consequential loss if the manufacturer would otherwise be liable if the action were brought by a consumer against the manufacturer under section 271 and the supplier is similarly liable. *[Schedule 1, item 1: Chapter 5, Part 5-4, Division 3, subsection 274(1)]*

7.134 Some manufacturers seek to apply undue pressure on suppliers to limit remedies provided to consumers in respect of faulty goods. When this occurs, some suppliers respond by, in turn, attempting to limit the redress that they provide to consumers in respect of faulty goods. The indemnity in favour of suppliers is intended to provide them with a strong legal basis for requiring manufacturers to comply with their obligations in respect of goods that they manufacture. Accordingly, the indemnity is not capable of being excluded or modified by contract. *[Schedule 1, item 1: Chapter 5, Part 5-4, Division 3, section 274]*

7.135 A supplier must bring an action against a manufacturer within 3 years of providing a consumer with a remedy or within 3 years of the day on which proceedings were first commenced by a consumer against the supplier. *[Schedule 1, item 1: Chapter 5, Part 5-4, Division 3, subsection 274(4)]*

### **Limitation of liability for recreational services**

7.136 The States and Territories currently have laws that allow providers of recreational services to exclude or limit their liabilities in respect of implied conditions and warranties in consumer contracts. It is expected that the States and Territories that currently have such laws in place will choose to have similar laws that exclude liability in respect of consumer guarantees.

7.137 The ACL provides for such laws to have effect to limit the guarantees provided for in Chapter 3, Part 3-2, Division 1, Subdivision B of the ACL. *[Schedule 1, item 1: Chapter 5, Part 5-4, Division 3, section 275]*

7.138 Part XI of the CC Act provides for suppliers of recreational services excluding, restricting or modifying their liability to consumers for death or personal injury of an individual.

7.139 **Recreational services** are defined in the CC Act as services that consist of participation in a sporting activity or similar leisure-time pursuit or any other activity that involves a significant degree of physical exertion or physical risk undertaken for purposes of recreation, enjoyment or leisure.

This definition is intended to encompass activities that involve significant risk or exertion by the participant.

**Example 7.21**

Examples of activities that are within the scope of this definition are all forms of sport and other activities such as hiking, bungee jumping and paintball. Activities that are not captured include bus tours, shopping and theatregoing.

**Representative actions by regulators**

7.140 Some suppliers and manufacturers may engage in repeated and systemic conduct that results in failures to comply with guarantees. In such cases it may be more efficient and effective for a regulator to take action on behalf of a group of consumers to seek remedies for failures to comply with guarantees.

7.141 The ACL provides for regulators to take action, in respect of failures to comply with guarantees, on behalf of one or more persons named in an application. The relevant regulator must obtain the written consent of each person named in an application. *[Schedule 1, item 1: Chapter 5, Part 5-4, Division 3, section 277]*

**Application and transitional provisions**

7.142 The ACL will commence on the later of 1 January 2011 or the commencement of Schedule 1 of the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (the first ACL Bill). The first ACL Bill is currently before the Parliament. *[Section 2]*

7.143 Chapter 3, Part 3-2 applies to all relevant conduct occurring in trade or commerce on or after 1 January 2011.

7.144 Conduct occurring prior to 1 January 2011 will remain subject to the repealed (and saved, for those purposes) provisions in the TP Act or the relevant FT Act of a State or Territory. *[Schedule 7, item 6]*

7.145 The TP Act, as in force immediately before the commencement of the ACL, continues to apply to or in relation to any proceedings under or in relation to that Act, which were commenced, but not concluded, before that commencement. *[Schedule 7, item 7]*

7.146 The Governor-General may make regulations prescribing matters of a transitional, application or saving nature in relation to the amendments and repeals made by the Schedules to this Act. *[Schedule 7, item 12]*

## **Consequential amendments**

7.147 References to provisions of the TP Act in other CC Act provisions and provisions of other Acts will be consequentially amended to refer to provisions of the ACL to ensure that the affected provisions continue to apply in the way in which they did under the TP Act. *[Schedules 5 and 6]*

---

## **Chapter 8**

### ***Unsolicited selling***

---

#### **Outline of chapter**

8.1 The Australian Consumer Law (ACL) includes provisions dealing with unsolicited sales practices and the formation of unsolicited selling agreements.

#### **Context of amendments**

8.2 Unsolicited direct selling (often referred to as door-to-door sales) is currently regulated through State and Territory legislation.

8.3 The *Do Not Call Register Act 2006* (DNCR Act) and other Commonwealth legislation applies expressly in respect of telephone sales practices. In addition, industry specific regulation for telephone sales practices exists or is being developed — such as the *National Energy Customer Framework* (NECF) — and will exist alongside the ACL.

8.4 Victoria, NSW and South Australia have express provisions in respect of telephone sales.

8.5 On 4 December 2009, the Ministerial Council on Consumer Affairs (MCCA) agreed that the ACL will include a single national law covering unsolicited sales practices, including door-to-door selling, telephone sales — to the extent not already covered by the DNCR Act — and other forms of direct selling which do not take place in a retail context. The unsolicited selling provisions in the ACL will replace the current State and Territory regulatory regimes that apply to unsolicited sales.

#### **Summary of new law**

8.6 Chapter 3, Part 3–2, Division 2 of the ACL will regulate the making of unsolicited offers to supply goods and services to a consumer and the agreements arising from such offers. The ACL unsolicited selling provisions consist of four types.

- In respect of face-to-face marketing approaches, express supplier obligations about the way in which consumers are approached and about the making of agreements, including:
  - permitted hours of visiting consumers;
  - the duty to clearly advise the consumer at the outset of an approach of their purpose and to display or produce identification containing certain prescribed information; and
  - the duty to leave a consumer's premises on request.
- In respect of face-to-face and telephone marketing approaches, express supplier disclosure obligations about the making of agreements, including:
  - the duty to inform the consumer prior to making the agreement of their rights to terminate the agreement; and
  - formal requirements for valid agreements arising from suppliers approaching consumers by telephone or otherwise. A valid agreement must include, for instance, the terms of the agreement, a termination notice (containing prescribed information), supplier information; will need to comply with clarity requirements; and will need to be given to the consumer.
- In respect of face-to-face and telephone sales, express consumer rights and obligations, including:
  - a 10 day termination right, exercisable by providing the supplier with a termination notice (containing prescribed information) via a wide range of delivery methods;
  - provisions specifying that the consumer can also terminate an agreement after the termination period in various circumstances related to breaches by the supplier of certain supplier obligations specified in the regime;
  - provisions specifying the effect of termination under the termination right and after the termination period; and
  - provisions specifying the entitlement of a consumer to goods and services on termination.



- In respect of face-to-face and telephone sales, express supplier obligations about post-contractual behaviour, including:
  - prohibitions during the termination period against a supplier supplying goods or services, or accepting trade-in goods; and requiring or 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, including for the purpose of recovering amounts allegedly payable; and
  - prohibitions against a supplier from seeking to avoid provisions concerning a termination right or operation of the regime.

8.7 Part 4-2, Division 2 of the ACL creates equivalent criminal offences for specified provisions of Part 3-2.

## Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<p>Subdivision A will establish the scope of the unsolicited selling provisions, which will regulate unsolicited offers to supply goods and services where negotiations take place in person — in all places other than a retail context — or over the telephone, and the agreements arising from such offers. A regulation-making power will provide for the addition or exemption of particular offers, agreements or industries from the scope of the regime or certain provisions of the regime.</p>	<p>Sections 736, 992A and 992AA of the <i>Corporations Act 2001</i> (Cth) prohibit the hawking of securities, certain financial products and managed investment products.</p> <p>All State and Territory laws regulate door-to-door selling:</p> <p>Part 4, Division 3 (Direct commerce) NSW FT Act</p> <p>Part 4, Division 2 (Contact sales agreements) Vic. FT Act</p> <p>Part 3, Division 4 (Door-to-door sales) Qld FT Act</p> <p>Part 3 (Door-to-door trading) SA FT Act</p> <p><i>Door to Door Trading Act 1987</i> (WA) (DTDTA)</p> <p>DTDTA 1986 (Tas)</p> <p>DTDTA 1991 (ACT)</p> <p>Part 7 (Door-to-door trading) <i>Consumer Affairs and Fair Trading Act 1990</i> (NT)</p> <p>Some State and Territory laws also regulate telemarketing and agreements made face-to-face in other contexts:</p> <p>Part 4, Division 2A (Telephone marketing agreements) and Division 3 (Non-contact sales agreements) Vic. FT Act</p> <p>Part 4, Division 3 (Direct commerce) NSW FT Act ('direct commerce' refers to both door-to-door sales and telemarketing)</p> <p>Part 3 (Door-to-door trading) SA FT Act. The <i>SA Fair Trading (Telemarketing) Amendment Act 2009</i> extended the operation of Part 3 to regulate telemarketing in the same manner.</p>

<i>New law</i>	<i>Current law</i>
<p>Subdivision B will provide for express supplier obligations about the way in which consumers are approached, including provisions regulating permitted visiting hours; disclosing purpose and identity; and duties to leave premises on request and inform a consumer of their rights to terminate the agreement.</p>	<p>The <i>Telecommunications (Do Not Call Register) (Telemarketing and Research Calls) Industry Standard 2007</i> establishes standards in respect of calling hours, specific information a telemarketer must provide during a call, and the termination of calls.</p> <p>Most State and Territory laws have provisions with similar effect:</p> <p>Sections 40D, 40I and 40J NSW FT Act</p> <p>Sections 62A, 62B, 62C, 67B, 67C and 62D Vic. FT Act</p> <p>Sections 63 and 64 Qld FT Act</p> <p>Sections 19 and 20 SA FT Act</p> <p>Sections 9, 10 and 11 DTDTA (WA)</p> <p>Sections 9, 10 and 11 DTDTA (Tas)</p> <p>Sections 9 and 10 DTDTA(ACT)</p> <p>Sections 103, 104 and 105 <i>Consumer Affairs and Fair Trading Act 1990</i> (NT)</p>
<p>Subdivision C will provide for express supplier obligations about the making of agreements, including formal requirements for valid agreements and the duty to give the agreement to the consumer.</p>	<p>No equivalent.</p> <p>Most State and Territory laws have provisions with similar effect:</p> <p>Section 40D NSW FT Act</p> <p>Sections 61 and 67E Vic. FT Act</p> <p>Section 61 Qld FT Act</p> <p>Section 17 SA FT Act</p> <p>Section 7 DTDTA (WA)</p> <p>Section 7 DTDTA (Tas)</p> <p>Section 7 DTDTA (ACT)</p> <p>Section 101 <i>Consumer Affairs and Fair Trading Act 1990</i> (NT)</p>

<i>New law</i>	<i>Current law</i>
<p>Subdivision D will contain express consumer rights, including a 10 day termination right, grounds for termination after the termination period; provisions specifying the effect of termination; consumer and supplier rights and obligations on termination of the agreement; and termination period prohibitions against the supplier supplying goods and services, and accepting payment.</p>	<p>No equivalent.</p> <p>Most State and Territory laws have provisions with similar effect.</p> <p>Sections 40E, 40F and 40H NSW FT Act</p> <p>Sections 63-67, 67H-67L and 80 Vic FT Act</p> <p>Sections 61, 62 and 66-69 Qld FT Act</p> <p>Sections 17, 18, and 22-25 SA FT Act</p> <p>Sections 3, 8 and 13-16 DTDTA (WA)</p> <p>Sections 3, 8 and 13-16 DTDTA (Tas)</p> <p>Section 2, 8 and 12-15 DTDTA (ACT).</p> <p>Sections 97, 102, 107, 109 and 110 <i>Consumer Affairs and Fair Trading Act 1990</i> (NT)</p>
<p>Subdivision E will provide for express supplier obligations about post-contractual behaviour, including a requirement to repay consumers money received upon termination; supplier prohibitions against taking action against a consumer under a terminated agreement, and seeking to avoid provisions concerning a termination right or operation of the unsolicited selling regime; and waiving rights provisions.</p>	<p>No equivalent.</p> <p>Most State and Territory laws have provisions with similar effect:</p> <p>Sections 40C, 40F and 40K NSW FT Act</p> <p>Sections 65 and 81 Vic. FT Act</p> <p>Sections 59, 68, 70 and 71 Qld FT Act</p> <p>Sections 15, 24, 26 and 27 SA FT Act</p> <p>Sections 5, 15, 17 and 18 DTDTA (WA)</p> <p>Sections 5, 15, 17 and 18 DTDTA (Tas)</p> <p>Sections 5, 14, 16 and 17 DTDTA1 (ACT)</p> <p>Sections 99, 109, 111 and 112 <i>Consumer Affairs and Fair Trading Act 1990</i> (NT)</p>

## Detailed explanation of new law

### Meaning of ‘unsolicited consumer agreement’

8.8 The ACL defines *unsolicited consumer agreement*. Four elements need to be satisfied. [Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, subsection 69(1)]

8.9 If an agreement meets this definition, the negotiations around the formation of that agreement, as well as the agreement itself, are covered by Part 3-2 and Part 4-2, Division 2 of the ACL.

#### *First element of the test*

8.10 The first element of the test requires the agreement to be for the supply, in trade or commerce, of goods or services to a consumer. The terms supply, trade or commerce, goods, services and consumer are defined in the ACL. [Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, paragraph 69(1)(a)] [Schedule 1, item 1: Chapter 1, sections 2 and 3]

#### *Second element of the test*

8.11 The second element of the test requires the agreement to have resulted from negotiations between a dealer and the consumer either in person (at a place other than the business or trade premises of the supplier) or by telephone, regardless of whether other negotiations preceded the making of the agreement. This provision is designed to prevent dealers from avoiding the unsolicited selling provisions by, for example, making an uninvited telephone call and persuading the consumer to make an appointment to carry out the negotiations at home. [Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, paragraph 69(1)(b)]

8.12 The provisions apply to all forms of unsolicited direct selling which take place in a non-retail context, regardless of whether a supplier has a traditional ‘bricks and mortar’ business or trade premises. The provisions apply to suppliers who do not have an established place of business but whose business models involve, for example, selling from trucks or the back of car boots, or trading in public places.

#### *Third element of the test*

8.13 The third element of the test requires that the consumer did not invite the dealer to approach or telephone them for the purpose of entering into negotiations to supply goods or services. [Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, paragraph 69(1)(c)]

8.14 Circumstances may arise where a consumer initially solicits a supplier for the purpose and expectation of providing a particular product or service, or quoting for such a good or service (whether free of charge or for a fee), and when the supplier subsequently comes to the consumer's home or otherwise approaches the consumer, the supplier makes an unsolicited offer of a related or unrelated product or service.

8.15 The provisions regulate the making of such unanticipated offers to supply goods and services to a consumer and the agreements arising from such offers.

### **Example 8.1**

Examples of solicited sales that are captured by the draft provisions include:

- where a consumer agrees to attend a seminar on the basis that the seminar is advice-based or marketing-based and does not anticipate sales to take place (as opposed to seminars where sales are anticipated or made explicit beforehand); and
- sales that relate to, or follow on from, an assessment or quote.

8.16 The provisions clarify that, for the purposes of the third element of the test, an invitation to quote a price for a good or service is not taken to be an invitation to enter into negotiations to supply that good or service. [Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, paragraph 69(2)]

### ***Fourth element of the test***

8.17 The fourth element of the test requires that the total price paid or to be paid under the agreement is over \$100 or cannot be determined at the time the agreement is made. [Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, paragraph 69(1)(d)]

8.18 This element contains a regulation-making power to change the monetary threshold of agreements that will be captured by provisions. [Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, paragraph 69(1)(d)(ii)]

8.19 The ACL contains a regulation-making power to provide that a certain kind of agreement is, or is not, an ***unsolicited consumer agreement***. [Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, subsections 69(3) and (4)]

8.20 There is a rebuttable presumption that an agreement (or a proposed agreement) is presumed to be an unsolicited consumer agreement (or would be one if it were made). The presumption applies only to civil proceedings relating to the contravention or possible contravention of the express supplier obligations included in the unsolicited selling provisions. [Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, section 70]

8.21 The rebuttable presumption operates if a party to the proceeding alleged that the (proposed) agreement is one to which the unsolicited selling provisions apply, and no other party to the proceedings proves that this is not the case.

8.22 The effect of the presumption is that, once the issue has been raised by a claimant in proceedings (a consumer or an enforcer), the respondent must show, on the balance of probabilities, that the agreement is not an unsolicited consumer agreement (or would not be one if it were made).

8.23 Questions about whether an agreement falls within the scope of the unsolicited selling provisions, which are likely to focus on the issue of solicitation, may be the subject of potential dispute between the parties to a proceeding. This will place claimants at a significant disadvantage should they be required to prove that this is the case. The rebuttable presumption has been included to ensure that the potential for a successful action by a claimant under this provision is not impeded.

### **Meaning of other terms**

8.24 The ACL defines *dealer*, which refers to whether the person who enters into negotiations with, or who contacts, a consumer intends to make an agreement to supply goods or services to the consumer. A dealer does not need to be the supplier of the goods and services. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, section 71*]

8.25 The ACL defines *negotiation*, which includes any discussion or dealing between a dealer and a consumer directed towards making the agreement or proposed agreement. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, section 72*]

### **Express supplier obligations about the way in which consumers are approached and about the negotiation of agreements**

8.26 The ACL sets out express supplier obligations about the way in which consumers are approached by dealers for the purpose of negotiating an agreement (or for an incidental or related purpose) and about the negotiation of agreements. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, sections 73, 74, 75 and 76*]

8.27 The express supplier obligations relating to permitted calling hours, disclosing purpose and identity, and ceasing to negotiate on request do not apply to telemarketing as these areas are regulated under the *Telecommunications (Do Not Call Register) (Telemarketing and Research Calls) Industry Standard 2007* (Telecommunications Industry Standard). All other express supplier obligations in the unsolicited selling provisions apply to telemarketing to the extent that they are not inconsistent with and do not

duplicate the requirements of the Telemarketing Industry Standard, as these areas are not covered by the Telemarketing Industry Standard. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, sections 73, 74 and 75]*

***Permitted hours for negotiating an unsolicited consumer agreement***

8.28 The permitted hours for dealers approaching a person face-to-face are:

- Monday to Friday — from 9am to 6pm; and
- Saturday — from 9am to 5pm. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, paragraphs 73(1)(b) and (c)]*

8.29 These are default calling hours only and may be varied by State and Territory legislation applying the ACL. *Schedule 2, item 1: Division 2, subsection 131C(2)]*

8.30 Dealers are prohibited from approaching a person face-to-face at any time on a Sunday or a public holiday. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, paragraph 73(1)(a)]*

8.31 If a person wishes a dealer to approach them outside of these times, the person will need to give the dealer (or a person acting on the dealer's behalf) prior consent. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, subsection 73(2)]*

8.32 Consent given in accordance with this provision will only exempt the dealer from the provisions relating to permitted visiting hours, not from the unsolicited selling provisions generally. A dealer will need to obtain consent within the permitted visiting hours to be able to visit a person outside the permitted visiting hours.

***Disclosing purpose and identity***

8.33 A dealer who approaches a person face-to-face must, prior to commencing negotiations:

- clearly advise the person of their purpose of approaching the person and that the dealer must leave immediately on request; and
- provide information about their identity that will be specified in the regulations. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, section 74]*



*Ceasing to negotiate on request*

8.34 A dealer who approaches a person face-to-face at any premises must leave immediately if so requested by the occupier, any person acting with the occupier's authority, or the prospective consumer. This provision is intended to eliminate any margin for dealers to delay their departure for reasons they may later argue were reasonable. [Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, subsection 75(1)]

8.35 If such a request is made by the prospective consumer, that consumer must not be contacted for a similar purpose for at least 30 days after the request was made by:

- the dealer (if the dealer is the also the supplier of the goods and services); or
- the dealer, the supplier and any other person acting on the supplier's behalf (if the dealer is not the supplier of the goods and services). [Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, subsection 75(2) and paragraph 75(3)(a)]

8.36 If the dealer is employed by more than one supplier, the prohibition against contacting that consumer only applies in relation to that supplier. The dealer will still be permitted to contact that consumer in relation to a different supplier. [Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, paragraph 73(3)(b)]

*Informing of termination period etc*

8.37 A **termination period** refers to a single specified timeframe immediately after a consumer has entered into a contract or agreement, which gives the consumer an opportunity to reverse their decision, cancel the contract and legally withdraw from it. A consumer's right to terminate on their decision to enter into a contract is generally distinct from a consumer's right to terminate the contract outside the termination period.

8.38 Paragraphs 82(3)(a) and (b) of the ACL provide for a termination period (as the term is usually used) of 10 business days. For the purposes of the unsolicited selling provisions generally, the definition of **termination period** includes the periods outside the 10 day termination period within which a consumer is entitled to terminate the agreement in various circumstances. [Schedule 1, item 1: Chapter 1, section 2] [Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, section 82]

8.39 A dealer must comply with a number of obligations prior to making an agreement with a person. These obligations relate to informing the person of their termination rights and the way in which that information is given. A dealer must give the person information about:

- the person's right to terminate the agreement during the termination periods;
- the way in which the person can exercise that right; and
- other matters specified in the regulations. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, subsection 76(a)*]

8.40 How this information must be given depends on how the agreement is made. If the agreement is made in person, the information must be given in writing. If the agreement is made by telephone, the information must first be given verbally and subsequently in writing. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, subsections 76(b) and (c)*]

8.41 Both the form and way in which the person is given the information by the dealer must also comply with any other requirements specified in the regulations. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, subsections 76(d)*]

#### *Liability of suppliers for contraventions by dealers*

8.42 To prevent suppliers who enter into an agency relationship with a dealer from relying on the existence of a 'middle man' to avoid liability for certain conduct, the ACL imposes liability upon a supplier for breaches by a dealer of the express dealer obligations in sections 73, 74, 75 and 76 of the ACL. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, section 77*]

### **Express supplier disclosure obligations about the making of agreements**

#### *Requirement to give document to the consumer*

8.43 A supplier under the agreement must give the consumer either:

- if the agreement was made in person — a copy of the agreement after the agreement has been signed by the consumer; or
- if the agreement was made by telephone — a document evidencing the agreement within 5 business days after the agreement was made (or a longer period agreed by the parties). This document can be given personally, by post or, with the consumer's consent, by email. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, subsections 78(1) and (2)*]

8.44 For the purpose of determining which document the supplier must give to the consumer, where a combination of face-to-face and telephone

negotiations took place the agreement is taken to have been made by telephone. [Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, subsection 78(3)]

***Requirements for a valid agreement***

8.45 The ACL sets out the formal requirements for a valid agreement. [Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, sections 79, 80 and 81]

***Requirements for all agreements***

8.46 The document that must be given to the consumer under either subsection 78(1) or (2) must comply with all of the following requirements:

- Terms of the agreement — these must be set out in full, including the total consideration to be paid (or how it is to be calculated) and any postal or delivery charges.
- Cooling off notice — the front page of the agreement must include a notice that conspicuously and prominently: informs the consumer of their right to terminate the agreement under the termination periods; and sets out other information specified in the regulations. This notice must comply with any requirements specified in the regulations.
- Termination notice — the agreement must also include a notice that the consumer can use to terminate the agreement. This notice must also comply with any requirements specified in the regulations.
- Supplier information — the agreement must conspicuously and prominently set out in full the supplier's name; business address (not being a post box) or residential address; and, if it has one, email address, fax number and registration number (ABN or ACN).
- Clarity requirements — the agreement must be printed clearly or typewritten, and transparent.
- Amendments — any amendments to the agreement, which may be handwritten, must be signed by both parties to the agreement. [Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, sections 79 and 81]

***Additional requirements for agreements made in person***

8.47 If an agreement was made in person, the agreement given to the consumer must comply with all of the following, additional, requirements:

- Consumer signature — the agreement must be signed by the consumer.
- Agreements signed by a person on the supplier's behalf — the agreement must set out in full that person's name, business address (not being a post box) or residential address, and email address if it has one. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, section 80*]

## Express consumer rights and obligations

### *Right to terminate the agreement*

8.48 The ACL provides for a consumer to terminate the agreement during whichever is the longest of four separate periods of time by giving the supplier notice indicating an intention to terminate the agreement. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, subsection 82(1)*]

8.49 The consumer has the right to terminate the agreement (in other words, to cool off on their decision to enter into the agreement) during 10 business days. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, paragraphs 82(3)(a) and (b)*]

8.50 The day on which the 10 day period commences depends on how the agreement was made:

- If the agreement was made in person, the 10 day period starts on the first business day after the day on which the agreement was made.
- If the agreement was made by telephone, the 10 day period starts on the first business day after the day on which the consumer was given the agreement document. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, paragraphs 82(3)(a) and (b)*]

8.51 The consumer has the right to terminate the agreement within 3 months if one or more of the provisions relating to permitted visiting hours, disclosing purpose and identity, and leaving premises on request, were contravened. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, paragraph 82(3)(c)*]

8.52 The grounds for termination in paragraph 82(3)(c) are intended to deter dealers and suppliers from not complying with the obligations in sections 73, 74 and 75.

8.53 The consumer has the right to terminate the agreement within 6 months if one or more of the provisions that relate to informing the consumer of their termination rights; specify formal requirements for valid

agreements; and prohibit a supplier from certain conduct during the 10 day termination period, were contravened. [Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, paragraph 82(3)(d)]

8.54 The grounds for termination in paragraph 82(3)(d) are intended to compensate consumers for the effective loss of their 10 day termination right in the event that any of these obligations are contravened.

8.55 The day on which the 3 month and 6 month periods commence is the same as for the 10 day termination period under paragraphs 82(3)(a) and (b). [Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, paragraphs 82(3)(c) and (d)]

8.56 The consumer can terminate the agreement within a period stated by the agreement. [Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, paragraph 82(3)(e)]

#### *Method of terminating an agreement*

8.57 The consumer can terminate the agreement in each of the four time periods outlined above by giving notice of termination to the supplier either:

- verbally;
- by using the termination notice that the consumer must be given as part of the agreement or the agreement document (under paragraph 79(c)); or
- otherwise in writing, regardless of its form and content.  
[Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, subsections 82(1) and (6)]

8.58 The methods by which the consumer can give the supplier written notice of termination are intended to be broad and include personal delivery and delivery by post, fax or email to the address or number referred to in the termination notice that the consumer must be given as part of the agreement or the agreement document (under paragraph 79(c)). [Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, subsection 82(4)]

8.59 To preserve the consumer's 10 day termination period, where the consumer sends the notice of termination by post, the notice is deemed to have been given to the supplier at the time of posting. In the absence of this provision, section 29 of the *Acts Interpretation Act 1891* (Cth) provides that such service is deemed to have been effected at the time at which the letter would be delivered in the ordinary course of post. [Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, subsection 82(5)]

8.60 A consumer can exercise their right to terminate the agreement even though the agreement itself was made legally, although in

circumstances where unlawful conduct has occurred. [Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, subsection 82(2)]

*The effect of terminating the agreement*

8.61 If a consumer terminates the agreement by giving the supplier notice of termination in accordance with section 82, the agreement is deemed to have been rescinded by mutual consent and any related contract or instrument is void. [Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, subsection 83(1)]

8.62 The ACL defines *related contract or instrument*, which in the context of an unsolicited consumer agreement is likely to relate to the financing of the goods or services supplied under the agreement. The term includes any related contract of guarantee or indemnity; any related instrument that creates a mortgage or charge in favour of the supplier or the dealer; and any related or collateral contract or instrument. [Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, subsection 83(2)]

8.63 A *tied continuing credit contract* and *tied loan contract* is excluded from the definition of *related contract or instrument* because the *National Consumer Credit Protection Act 2009* (Cth) contains provisions that govern the effect on such contracts in circumstances where the related sale contract is terminated. [Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, subsection 83(2)]

8.64 The agreement is terminated even if the supplier has not received the notice of termination, or the consumer has used or consumed the goods and services. [Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, subsection 83(3)]

8.65 If the supplier does not receive the notice of termination, a consumer will need to prove, according to the relevant standard of proof, that he or she had exercised their right to terminate the agreement by sending written notice of termination. The consumer may introduce any evidence to support their contention that they had sent the notice.

*Obligations and rights of consumers on termination*

8.66 The ACL sets out additional rights and obligations of consumers upon the termination of an agreement, relating to the entitlement of a supplier and consumer to the goods or services up to the termination date. The intention of these provisions is to minimise the potential for consumers to game the unsolicited selling provisions and ensure that consumers pay for the goods and services that he or she use prior to terminating the agreement. [Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, section 85]

8.67 If the agreement relates to goods and is terminated by the consumer for any reason, the consumer must return to the supplier the goods, or

portion of goods remaining, within a reasonable time or inform the supplier where the goods can be collected from. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, subsection 85(1)]*

8.68 If the consumer notifies the supplier of a place where the goods may be collected and the supplier does not collect the goods within 30 days, the goods become the property of the consumer. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, subsection 85(2)]*

8.69 If the agreement relates to goods and is terminated outside the 10 day termination period, and the consumer has not taken reasonable care of those goods, the consumer is liable to compensate the supplier for the damage caused, or loss of value, to the goods. The compensation is recoverable in a court of competent jurisdiction. If the damage or depreciation resulted from either the consumer using the goods normally or circumstances beyond the consumer's control, the consumer is not liable. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, subsection 85(3), (4) and (5)]*

8.70 If the agreement relates to services and is terminated outside the 10 day termination period by the consumer, the consumer is liable for the value of the service supplied prior to the termination and after the end of that period. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, subsection 85(6)]*

## **Express supplier obligations about post-contractual behaviour**

### *Prohibitions during the 10 day cooling-off period*

8.71 After an agreement has been made, a supplier is prohibited from supplying goods or services to the consumer, or requiring or accepting any payment or any other consideration for goods or services to be supplied, during the 10 day termination period in relation to the agreement. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, section 86(1)]*

8.72 The day on which the 10 day period commences is the same as for the 10 day termination period under paragraphs 82(3)(a) and (b). *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, subsections 86(1)(d) and (e)]*

8.73 To preserve the consumer's 10 day termination right, the prohibition on requiring or accepting 'any other consideration' is intended to include accepting trade-in goods, as this conduct is likely to make it less practical for the consumer to exercise this right for logistical reasons. If an agreement was made for the supply of goods that involved a trade-in, the supplier and consumer will need to arrange for the delivery and the trade-in of the goods to take place outside the 10 day termination period.

8.74 If goods or services are supplied to the consumer during the 10 day termination period, the consumer's rights in respect of those goods or services, which are governed by sections 41 and 42 of the ACL, respectively,

are the same as if the goods or services were unsolicited. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, subsection 86(2) and (3)]*

***Repayment of payments received prior to and after termination***

8.75 If the agreement is terminated for any reason, the supplier must return or refund to the consumer:

- any consideration (or the value thereof) given to the supplier under the agreement or a related contract or instrument; and
- any payment made by the consumer or a person acting on the consumer's behalf to the supplier after the termination; and that purports to be made under the agreement or a related contract or instrument. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, sections 84 and 87]*

***Prohibition on certain actions***

8.76 A person is prohibited from taking certain actions against a consumer who has terminated the agreement for any reason, including:

- bringing legal proceedings, or taking any other action, against the consumer; and
- for the purpose of attempting to recover an amount allegedly payable by that consumer, placing the consumer's name on a list of defaulters or debtors — if this is done, a person responsible for keeping such a list may be required to remove the consumer's name from the list. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, section 88]*

***Anti-avoidance provisions***

8.77 Provisions in an agreement that attempt to change the operation of the unsolicited selling provisions or to change the law of the agreement are deemed void. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, subsection 89(1)]*

8.78 The supplier under the agreement must ensure that the agreement does not contain, and must not attempt to enforce or rely on, such a provision. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, subsections 89(2) and (3)]*

***Waiver of rights***

8.79 A consumer can not waive any of his or her rights under the unsolicited selling provisions and a supplier is prohibited from attempting to induce a consumer to do so. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, section 90]*



## Miscellaneous

8.80 If the rights of a consumer or a supplier under a contract for the supply of goods and services are transferred or pass to another person, the unsolicited selling regime applies to that person as if that person were the original consumer or supplier. The regime also applies to contracts for the supply of goods and services to third parties. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, sections 91 and 92]*

8.81 A supplier cannot enforce the agreement if one of the dealer or supplier obligations of the unsolicited selling provisions has been contravened. This provision does not prevent any action being taken by anyone else in relation to the contravention. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, section 93]*

8.82 The ACL contains a broad regulation-making power to exempt certain kinds of circumstances, agreements or conduct of businesses from the scope of the unsolicited selling regime or certain provisions of the regime. This regulation-making power does not apply to the permitted calling hours provisions. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, section 94]*

8.83 Sections 736, 992A and 992AA of the *Corporations Act 2001* (Cth) prohibit the hawking of securities, certain financial products and managed investment products. The ACL excludes the unsolicited selling of these financial services and products from the operation of the unsolicited selling provisions. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 2, section 95]*

## Criminal offences

8.84 Sections 73 to 76, 78 to 81, 84, 86 to 95 of the ACL, which set out the express obligations in relation to unsolicited consumer agreements, have associated criminal offences in sections 170 to 186 of the ACL. The maximum fine payable for a contravention of sections 170 to 186 of the ACL is:

- \$50,000 for a body corporate; and
- \$10,000 for any other person.

*[Schedule 1, item 1: Chapter 4, Part 4-1, sections 170-186]*

8.85 The offences in sections 170 to 186 of the ACL are ones of strict liability so that it is not necessary to consider the intent of the person committing the offences. The strict liability nature of these offences reflects the potential for widespread detriment, both financially for individual consumers and for its effect on the market and consumer confidence more

generally, that can be caused by a person that breaches these provisions, whether or not they intended to engage in the contravention.

8.86 Part 4-6 of the ACL provides defences applicable to criminal proceedings of:

- an honest and reasonable mistake of fact; [*Schedule 1, item 1: Chapter 4, Part 4-6, section 207*]
- where the contravention was caused by the act or default of another person or an accident or cause beyond the person's control, and where the person took reasonable precautions and exercised due diligence to avoid the contravention; and [*Schedule 1, item 1: Chapter 4, Part 4-6, section 208*]
- where an advertiser publishes an advertisement in the ordinary course of business and does not know and had no reason to suspect the advertisement amounted to a contravention. [*Schedule 1, item 1: Chapter 4, Part 4-6, section 209*]

### **Enforcement and remedies**

8.87 A person contravening sections 73 to 76, 78 to 81, 84, 86 to 95 of the ACL, which set out the express obligations in relation to unsolicited consumer agreements, is liable to pay a civil pecuniary penalty of up to:

- \$50,000 for a body corporate;
- \$10,000 for other persons.

[*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, section 224*]

8.88 The following enforcement powers and remedies apply to section 75 of the ACL:

- undertakings; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 1*]
- substantiation notices; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 2*]
- public warning notices; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 3*]
- injunctions; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 2*]
- damages; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 3*]

- compensatory orders; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision A*]
- redress for non-parties; and [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision B*]
- non-punitive orders. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, section 246*]

8.89 For further information on these powers, remedies and penalties generally see Chapters 14 and 15.

8.90 The ACCC may issue an infringement notice for a contravention of sections 73 to 76, 78 to 81, 84, 86 to 95 of the ACL, which set out the express obligations in relation to unsolicited consumer agreements. The amount of the penalty specified in the infringement notice is [*Schedule 3, item 1: Part XI, Division 5*]:

- 60 penalty units for a body corporate; and
- 12 penalty units for any other person.

## Application and transitional provisions

8.91 The ACL will commence on the later of 1 January 2011 or the commencement of Schedule 1 of the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (the first ACL Bill). The first ACL Bill is currently before the Parliament. [*Section 2*]

8.92 Chapter 3, Part 3-2, Division 2 applies to all relevant conduct occurring in trade or commerce on or after 1 January 2011.

8.93 Conduct occurring prior to 1 January 2011 will remain subject to the repealed (and saved, for those purposes) provisions in the TP Act or the relevant FT Act of a State or Territory. [*Schedule 7, item 6*]

8.94 The TP Act, as in force immediately before the commencement of the ACL, continues to apply to or in relation to any proceedings under or in relation to that Act, which were commenced, but not concluded, before that commencement. [*Schedule 7, item 7*]

8.95 The Governor-General may make regulations prescribing matters of a transitional, application or saving nature in relation to the amendments and repeals made by the Schedules to this Act. [*Schedule 7, item 12*]

## **Consequential amendments**

8.96 References to provisions of the TP Act in other CC Act provisions and provisions of other Acts will be consequentially amended to refer to provisions of the ACL to ensure that the affected provisions continue to apply in the way in which they did under the TP Act. *[Schedules 5 and 6]*

---

# Chapter 9

## Lay-by sales

---

### Outline of chapter

9.1 The Australian Consumer Law (ACL) includes fundamental rules that apply to lay-by sales transactions.

### Context of amendments

9.2 The ACT's *Lay-by Sales Agreement Act 1953*, Part 5B of the NSW FT Act and Part 5 of the Victorian FT Act regulate the operation of lay-by agreements in those jurisdictions. The ACT's provisions are based on the repealed *Lay-by Sales Act 1943* (NSW), which regulated lay-by sales in NSW before the provisions were moved to their current location in the FT Act.

9.3 The ACT, NSW and Victorian approaches all generally provide for:

- specific requirements on what should be included in a lay-by agreement, and how the information should be presented;
- situations where a consumer can cancel a lay-by agreement;
- situations where a supplier can cancel a lay-by agreement;
- the effect of cancellation by either party;
- cancellation charges and what costs those should cover;
- limits on remedies for suppliers;
- a specific exclusion on the right of a supplier to contract out of the requirements for a lay-by agreement; and
- a prohibition on a supplier demanding early payment from a consumer.

9.4 In other jurisdictions, lay-by sales are not specifically regulated, but are subject to more general consumer protections. All State and

Territory offices of fair trading currently provide specific guidance to consumers concerning lay-by agreements.

9.5 On 4 December 2009, the Ministerial Council on Consumer Affairs (MCCA) agreed that the ACL will include provisions relating to the formation of lay-by agreements. The ACL provisions draw on the the ACT, NSW and Victorian approaches, but are expressed in principles-based form, in keeping with the remainder of the ACL.

9.6 Lay-by agreements will also be covered by the unfair contract terms provisions in Part 2-3 of the ACL, to the extent that they are standard form consumer contracts.

## **Summary of new law**

9.7 A lay-by agreement is an agreement between a supplier and a consumer for the supply of consumer goods after payment in three or more instalments.

9.8 The ACL sets out five key terms or characteristics that are to be included in lay-by agreements:

- A lay-by agreement must be in writing and be transparent.
- A consumer may terminate a lay-by agreement at any time prior to the delivery of the goods to the consumer.
- A supplier may only terminate a lay-by agreement under specified circumstances before final payment is received.
- In the event of cancellation by either party, the consumer is entitled to a full refund of amounts paid.
- In the event of cancellation by the consumer, the consumer may be required to pay a cancellation charge reflecting the business's reasonable costs.

## Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
A lay-by agreement must be in writing and be transparent, and a copy of such an agreement must be given to the consumer.	<p>There is no equivalent provision in the TP Act.</p> <p>A requirement that lay-by agreements are to be in writing is found in:</p> <p>Section 60F NSW FT Act Subsection 83(1) Vic. FT Act Section 5 <i>Lay-by Sales Agreement Act 1953 (ACT)</i></p> <p>A requirement that consumer documents, including lay-by agreements, are to be clear and legible is found in section 162 Vic. FTA</p>
A consumer may terminate a lay-by agreement at any time before the relevant goods are delivered to the consumer.	<p>There is no equivalent provision in the TP Act.</p> <p>Some elements of this provision exist in:</p> <p>Section 60G NSW FT Act Section 85 Vic. FT Act Section 16 <i>Lay-by Sales Agreement Act 1953 (ACT)</i></p>
Upon termination of a lay-by agreement by a consumer, the agreement may require the consumer to pay a reasonable termination charge to the supplier.	<p>There is no equivalent provision in the TP Act.</p> <p>Some elements of this provision exist in:</p> <p>Sections 60F and 60L NSW FT Act Sections 83 and 90 Vic. FT Act Sections 16 and 17 <i>Lay-by Sales Agreement Act 1953 (ACT)</i></p>
<p>A supplier may terminate a lay-by agreement only if:</p> <ul style="list-style-type: none"> <li>• a consumer breaches the agreement;</li> <li>• the supplier stops trading; or</li> <li>• the goods are no longer available.</li> </ul>	<p>There is no equivalent provision in the TP Act.</p> <p>Some elements of this provision exist in:</p> <p>Section 60H NSW FT Act Sections 86, 87 and 88 Vic. FT Act Section 15 <i>Lay-by Sales Agreement Act 1953 (ACT)</i></p>

<i>New law</i>	<i>Current law</i>
Upon termination of a lay-by agreement by either party, the supplier must refund any money paid by the consumer, less any applicable termination charge.	There is no equivalent provision in the TP Act. Some elements of this provision exist in: Section 60I NSW FT Act Section 89 Vic. FT Act Section 17 <i>Lay-by Sales Agreement Act 1953 (ACT)</i>

## Detailed explanation of new law

### *Lay-by agreements must be in writing, etc*

9.9 A **lay-by agreement** is a defined term in the ACL, and such an agreement is one which satisfies the following conditions:

- The consumer goods will not be delivered to the consumer until the total price of the goods have been paid; and
- the price of the consumer goods is to be paid by three or more instalments, with any deposit paid by the consumer to count as one instalment, unless both the consumer and supplier agree that an agreement involving only two instalments is a lay-by agreement. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 3, subsections 96(3) and (4)*]

9.10 A lay-by agreement must be in writing and be transparent. A copy of such an agreement must be given to the consumer to whom the goods are, or are to be, supplied. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 3, subsections 96(1) and (2)*]

9.11 A lay-by agreement is **transparent** if it is expressed in reasonably plain language, legible and presented clearly. [*Chapter 1, section 2*]

### *Termination of a lay-by agreement by consumers*

9.12 A consumer may terminate a lay-by agreement at any time prior to the goods being delivered to them. [*Schedule 1, item 1: Chapter 3, Part 3-2, Division 3, subsection 97(1)*]

9.13 There are many reasons that a consumer may have for terminating a lay-by agreement, but the merits of those reasons are not relevant for the purposes of these provisions. The detriment this causes to suppliers is offset



by the termination charge that they can charge a consumer for terminating the agreement.

***Termination of a lay-by agreement by suppliers***

9.14 There are specific circumstances under which a supplier can terminate a lay-by agreement. These circumstances include:

- the consumer breaches a term of the agreement;
- the supplier stops engaging in trade or commerce, due to, for example, the supplier closing down his business; and
- the consumer goods are no longer available for sale.

*[Schedule 1, item 1: Chapter 3, Part 3-2, Division 3, section 98]*

9.15 A supplier may terminate a lay-by agreement due to a breach of the terms and conditions of the agreement by the consumer. This could include a situation where the consumer fails to make a scheduled payment on time.

9.16 A supplier may wish to terminate a lay-by agreement because its business is closing, or is being closed, down, whether it be through bankruptcy, retirement or the supplier's desire to move into another area of business.

9.17 In the case where the supplier terminates a lay-by agreement because the consumer goods are no longer available, this can only occur where the goods became unavailable due to circumstances outside of the supplier's control, rather than a decision by the supplier to withdraw those goods from sale.

***Effect of termination***

9.18 If a lay-by agreement is terminated, the supplier must refund all monies paid by the consumer, except for amounts required to pay for a termination charge where applicable. If the monies already paid by the consumer are insufficient to cover the termination charge, the supplier can recover the outstanding amount from the consumer as a debt. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 3, subsections 99(1) and (2)]*

9.19 A supplier is not entitled to damages or any other remedy for the termination of a lay-by agreement except as provided by section 97. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 3, subsection 99(3)]*

### ***Termination charge***

9.20 A lay-by agreement may require a consumer who terminates the agreement to pay a termination charge. This charge must not be more than the reasonable costs incurred by the supplier in relation to the lay-by agreement, such as storage and administration costs, and the loss in value of the goods between the time when the lay-by agreement was entered into and when it was terminated. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 3, subsection 97(3)]*

9.21 The determination of the reasonableness of a termination charge is a subjective assessment. Such a determination could, for example, include a consideration of whether it is directly related to actual costs incurred by the supplier in managing the lay-by agreement and the associated goods.

9.22 A termination charge is only payable by a consumer if the consumer terminates the lay-by agreement. Such a charge is not payable if the consumer terminates the agreement due to a breach by the supplier. *[Schedule 1, item 1: Chapter 3, Part 3-2, Division 3, subsection 97(2)]*

### **Criminal offences**

9.23 Sections 96 to 99 of the ACL, which set out the express obligations in relation to lay-by sales agreements, have associated criminal offences in 188(1), 189(1), 189(3), 190(1) or 191(1) of the ACL. The maximum fine payable for a contravention of sections 188 to 191 of the ACL is:

- \$30,000 for a body corporate; and
- \$6,000 for any other person.

*[Schedule 1, item 1: Chapter 4, Part 4-2, Division 3, subsections 188(1), 189(1), 189(3), 190(1) and 191(1)]*

9.24 The offences in sections 188 to 191 of the ACL are ones of strict liability so that it is not necessary to consider the intent of the person committing the offences. The strict liability nature of these offences reflects the potential for widespread detriment, both financially for individual consumers and for its effect on the market and consumer confidence more generally, that can be caused by a person that breaches these provisions, whether or not he, she or it intended to engage in the contravention.

9.25 Part 4-6 of the ACL provides defences applicable to criminal proceedings of:

- an honest and reasonable mistake of fact; *[Schedule 1, item 1: Chapter 4, Part 4-6, section 207]*

- where the contravention was caused by the act or default of another person or an accident or cause beyond the person's control, and where the person took reasonable precautions and exercised due diligence to avoid the contravention; and *[Schedule 1, item 1: Chapter 4, Part 4-6, section 208]*
- where an advertiser publishes an advertisement in the ordinary course of business and does not know and had no reason to suspect the advertisement amounted to a contravention. *[Schedule 1, item 1: Chapter 4, Part 4-6, section 209]*

## Enforcement and remedies

9.26 A person contravening sections 96 to 99 of the ACL, which set out the express obligations in relation to lay-by sales agreements, is liable to pay a civil pecuniary penalty of up to:

- \$30,000 for a body corporate;
- \$6,000 for other persons.

*[Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, section 224]*

9.27 The following enforcement powers and remedies apply to section 96 to 99 of the ACL:

- undertakings; *[Schedule 1, item 1: Chapter 5, Part 5-1, Division 1]*
- substantiation notices; *[Schedule 1, item 1: Chapter 5, Part 5-1, Division 2]*
- public warning notices; *[Schedule 1, item 1: Chapter 5, Part 5-1, Division 3]*
- injunctions; *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 2]*
- damages; *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 3]*
- compensatory orders; *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision A]*
- redress for non-parties; and *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision B]*
- non-punitive orders. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, section 246]*

9.28 For further information on these powers, remedies and penalties generally see Chapters 14 and 15.

9.29 The ACCC may issue an infringement notice for a contravention of sections 96 to 99 of the ACL, which set out the express obligations in relation to lay-by sales agreements. The amount of the penalty specified in the infringement notice is:

- 55 penalty units for a body corporate; and
- 11 penalty units for any other person.

*[Schedule 2, item 1: Part XI, Division 5]*

## **Application and transitional provisions**

9.30 The ACL will commence on the later of 1 January 2011 or the commencement of Schedule 1 of the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (the first ACL Bill). The first ACL Bill is currently before the Parliament. *[Section 2]*

9.31 Chapter 3, Part 3-2, Division 3 applies to all relevant conduct occurring in trade or commerce on or after 1 January 2011.

9.32 Conduct occurring prior to 1 January 2011 will remain subject to the repealed (and saved, for those purposes) provisions in the TP Act or the relevant FT Act of a State or Territory. *[Schedule 7, item 6]*

9.33 The TP Act, as in force immediately before the commencement of the ACL, continues to apply to or in relation to any proceedings under or in relation to that Act, which were commenced, but not concluded, before that commencement. *[Schedule 7, item 7]*

9.34 The Governor-General may make regulations prescribing matters of a transitional, application or saving nature in relation to the amendments and repeals made by the Schedules to this Act. *[Schedule 7, item 12]*

## **Consequential amendments**

9.35 References to provisions of the TP Act in other CC Act provisions and provisions of other Acts will be consequentially amended to refer to provisions of the ACL to ensure that the affected provisions continue to apply in the way in which they did under the TP Act. *[Schedules 5 and 6]*

---

## **Chapter 10**

# ***Safety of consumer goods and product related services***

---

### **Outline of chapter**

10.1 The ACL contains provisions that form the basis for a national law on consumer safety for consumer goods and product related services.

10.2 Under the national consumer safety law, the following types of safety orders and requirements apply to suppliers of consumer goods or product related services:

- standards for the performance, design, manufacture or packaging, as appropriate, of consumer goods or product related services;
- bans relating to the supply of consumer goods or product related services;
- voluntary or mandatory recalls of consumer goods; and
- mandatory reporting of voluntary recalls and products associated with serious injuries or deaths.

### **Context of amendments**

10.3 In May 2008, at the request of the Council of Australian Governments (COAG), the Ministerial Council on Consumer Affairs (MCCA) developed a model for product safety reform, which in part responded to the Productivity Commission's (PC) 2006 *Review of the Australian Consumer Product Safety System* (2006 Review). MCCA agreed in principle to implement the majority of the PC's recommendations as part of the reform process.

10.4 In July 2008, COAG, through the Business Regulation and Competition Working Group (BRCWG), endorsed the model agreed by MCCA for product safety reform. The reforms enable consumer product safety to be regulated in a nationally consistent manner. The amendments include a single national law, based on the TP Act, to regulate consumer

product safety in Australia, with the Commonwealth taking lead role, supported by joint enforcement by the Australian Competition and Consumer Commission (ACCC) and State and Territory regulators.

10.5 Following public consultations, in December 2009, MCCA agreed to further specific product safety measures to be incorporated into the ACL, to enable governments to act proactively on consumer safety.

10.6 Currently, consumer product safety in Australia is regulated by the Commonwealth, States and Territories. The TP Act provides for a post-market approach to consumer product safety regulation in Australia. Under this approach, suppliers are generally free to supply goods into the market without first obtaining approval from a regulatory agency to do so. However, the Government reserves the power, under the TP Act, to require that goods are to be withdrawn from the market if they are discovered to pose a safety hazard. The Government also has the power to require goods to comply with mandatory standards or to ban the supply of certain goods *per se*.

10.7 Through their fair trading legislation (FT Acts), the States and Territories all have similar regulatory regimes that apply in their respective jurisdictions in respect of consumer product safety.

10.8 The TP Act and FT Acts product safety provisions apply generally to all goods, although with respect to certain products, such as therapeutic goods, industry-specific regulation may also apply, and will continue to apply following commencement of the ACL.

10.9 The product safety provisions of the TP Act have not been comprehensively updated since their introduction in 1986. The PC noted in its 2006 *Review of the Australian Consumer Product Safety System* that there is considerable scope for improving the existing product safety regulatory system to make it more efficient, effective and responsive. MCCA agreed to implement specific recommendations made by the PC as part of the national consumer safety regime under the ACL, by:

- incorporating into the threshold test for making new safety bans and recalls, the concept of reasonably foreseeable use (including misuse) of goods;
- extending consumer product safety provisions to those services which are related to the supply, maintenance or installation of consumer goods;
- empowering governments to directly recall goods where no supplier can be found to undertake the recall;

- introducing a mandatory requirement for suppliers to report incidents where their products have been associated with a death, serious injury or illness; and
- implementing a number of non-legislative arrangements to support the administration and enforcement of the national consumer safety framework (such as a national ‘one-stop shop’ website on consumer safety).

## **Summary of new law**

10.10 The ACL makes administrative powers available to the responsible Commonwealth and State and Territory Ministers, where appropriate, to remove consumer goods or product related services from the market. These administrative powers may only be exercised where a Minister believes that the goods or services in question pose a risk of injury to any person, either through their normal use or a reasonably foreseeable misuse.

10.11 These administrative powers include the power to:

- make standards for particular consumer goods or product related services;
- ban the supply of particular consumer goods or product related services;
- require a supplier to recall particular consumer goods; and
- issue warning notices to the public about consumer goods or product related services;

10.12 The ACL provides for civil and criminal remedies and penalties for persons who supply consumer goods or product related services in contravention of requirements imposed by the exercise of an administrative power. The ACL also provides for additional procedural requirements (such as suppliers notifying persons outside of Australia or recalls), which must be complied with.

10.13 The ACL further requires suppliers to report to the ACCC or appropriate regulator where the supplier:

- is undertaking a voluntary recall; or
- becomes aware that consumer goods or product related services that they supply have been associated with a death, serious injury or serious illness.

## Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
The Commonwealth Minister can prescribe safety standards in respect of consumer goods or product related services.	The Commonwealth Minister can prescribe safety standard in respect of goods under sections 65C and 65E of the TP Act.  A similar power exists in all State and Territory FT Acts.
The Commonwealth Minister or a responsible State or Territory Minister may impose an interim ban, which lasts for 60 days, on consumer goods or product related services.  An interim ban imposed by the Commonwealth Minister applies in all jurisdictions. An interim ban imposed by a State or Territory Minister applies in the jurisdiction in which it was made.	Subsection 65C(5) of the TP Act allows the Commonwealth Minister to impose an interim ban on goods. The interim ban may last for up to 18 months.  State and Territory FT Acts allow the responsible State and Territory Ministers to issue similar interim bans. The duration of interim bans vary between jurisdictions.
The Commonwealth Minister may impose a permanent ban on consumer goods or product related services.  A permanent ban applies in all jurisdictions and remains in force until revoked.	Subsection 65C(7) of the TP Act allows the Commonwealth Minister to impose a permanent ban on specified goods.  A similar power exists in all State and Territory FT Acts.
The Commonwealth Minister or a responsible State or Territory Minister may require a supplier to recall particular consumer goods.  Suppliers must also comply with notification requirements where the goods have been exported.	Section 65F of the TP Act allows the Commonwealth Minister to require suppliers to recall particular goods. Suppliers must also comply with notification requirements where those goods have been exported.  A similar power exists in most State and Territory FT Acts.
Suppliers must notify the Commonwealth Minister if they undertake a voluntary recall of goods they have supplied.	Section 65R of the TP Act requires suppliers who undertake a voluntary recall to notify the Commonwealth Minister.  A similar power exists in some State and Territory FT Acts.



<i>New law</i>	<i>Current law</i>
The Commonwealth Minister or a responsible State or Territory Minister can publish a safety warning notice about particular consumer goods or product related services where their reasonable foreseeable use or misuse poses a safety risk.	Section 65B of the TP Act allows the Commonwealth Minister to publish safety warning notices about particular goods. A similar power exists in some State and Territory FT Acts.
Suppliers must report to the Commonwealth incidents where consumer goods or product related services have been associated with a death, serious injury or illness.	No equivalent Commonwealth law or State or Territory law.

### **Detailed explanation of new law**

10.14 The consumer safety provisions of the ACL provide the legislative basis for a single national law on consumer safety for goods and services, based on Part V, Division 1A of the TP Act and equivalent provisions in State and Territory FT Acts.

10.15 The national consumer safety law under the ACL applies in all jurisdictions and is generic in nature, applying to all consumer goods and product related services. Commonwealth and State and Territory industry-specific consumer laws will continue to apply in addition to the generic goods and services regime in the ACL.

### **Safety standards**

10.16 The ACL empowers the Commonwealth Minister to prescribe safety standards for consumer goods and product related services. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, subsection 104(1)*]

10.17 A new safety standard can be prescribed through one of two ways:

- by *making* a new safety standard; or
- by *declaring* an earlier standard to be a new safety standard.

#### ***Making new safety standards***

10.18 The ACL empowers the Commonwealth Minister to make a safety standard in respect of consumer goods and/or product related services. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, subsection 104(1)*]

10.19 **Consumer goods** are defined as goods that are intended, or are of a kind likely, to be used for personal, domestic or household purposes. This includes goods which are a subject of a recall and have become fixtures since being supplied. [*Schedule 1, item 1: Chapter 1, section 2*]

10.20 **Product related services** are defined as services that relate to the installation, maintenance, repair, cleaning, assembly or delivery of 'consumer goods' of a particular kind. This is not an exhaustive definition of 'product related service' but an inclusive one, and includes other types of services where they relate to the supply of consumer goods of a particular kind. [*Schedule 1, item 1: Chapter 1, section 2*] A 'service' is not a 'product related service' if it is not related, connected or associated in some way to the supply of a 'consumer good'.

10.21 A safety standard must be in writing and must be published on the internet. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, subsections 104(1) and (2)*]

10.22 Publication on the internet provides an effective and timely means for standards to be disclosed nationally to the public.

10.23 As part of the non-legislative reforms to product safety administration being implemented by MCCA, the ACCC is currently developing a 'one-stop shop' website on consumer safety. The website will provide amongst other things, details of all safety standards that are in force from time to time. The website will allow for a single and central location for members of the public to find details of a safety standard for particular goods and services.

10.24 Safety standards are legislative instruments for the purposes of the LI Act.

*Grounds for making safety standards*

10.25 The Commonwealth Minister does not need to be satisfied of any particular criteria before making a safety standard. However, a standard may consist of such requirements as are reasonably necessary to prevent or reduce the risk of injury to any person. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, subsections 104(2) and 104(3)*]

*Content of safety standards*

10.26 Safety standards may only consist of requirements relating to the matters set out in section 104 of the ACL. Different matters are specified in relation to consumer goods and product related services.

10.27 In relation to goods, safety standards may specify matters relating to:

- the performance, composition, contents, methods of manufacture, processing, design, construction, finishing or packaging of particular consumer goods;
- the testing of particular consumer goods during or after its manufacture or processing; and/or
- the form and content of markings, warnings or instructions to accompany particular consumer goods. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, subsection 104(2)*]

10.28 In relation to product related services, safety standards may specify matters relating to:

- the manner in which particular product related services are supplied;
- the skills or qualifications of those who supply particular product related services;
- the materials to be used when supplying particular product related services;
- the testing of particular product related services; and/or
- the form and content of warnings, instructions or other information relating to particular product related services. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, subsection 104(3)*]

#### ***Declaring safety standards***

10.29 The Commonwealth Minister may prescribe an existing standard that has been prepared by Standards Australia Limited or a prescribed association to be a safety standard for the purposes of the ACL. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, paragraph 105*]

10.30 The Government does not propose to prescribe any associations from commencement of the ACL. This declaration power exists currently in the TP Act and provides a mechanism for the Minister to draw on approaches to setting standards that may develop over time through other expert organisations. A number of existing TP Act safety standards are declared standards developed by Standards Australia Limited.

10.31 The Commonwealth Minister, when making a declared safety standard, may make additions to or variations to an earlier standard prepared or approved by Standards Australia or a prescribed body. The nature of any addition or variation must be specified in writing. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, paragraph 105(1)(b)*]

10.32 However, the Commonwealth Minister cannot make a declared safety standard if any part of it is inconsistent with a safety standard that it has previously made, and which is still in force, for the same kinds of consumer goods or product related services. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, subsection 105(2)]*

10.33 Written notice of a declared safety standard is a legislative instrument for the purposes of the LI Act.

#### *Compliance with safety standards*

10.34 A person must not, in trade or commerce, supply or offer to supply consumer goods or product related services that do not comply with an applicable safety standard that is in force for goods or services of that kind *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, sections 106 and 107]*.

10.35 In relation to consumer goods, a person also must not possess, manufacture or be in control of the goods for the purpose of supplying the goods. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, subsections 106(3) and (4)]*

#### *Exported goods*

10.36 A supplier is allowed to export consumer goods of a particular kind without first having to comply with a safety standard in force for the goods, where the supplier has obtained Commonwealth approval. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, subsection 106(4)]*

10.37 The supplier is required to apply in writing to the Commonwealth Minister for approval to export the particular goods in question. Approval from the Minister must also be in writing. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, subsection 106(5)]*

10.38 In particular circumstances, a safety standard may contain requirements which are either inappropriate or irrelevant to the overseas market (such as a requirement that a warning be included with the goods in English). Alternatively, overseas markets may be subject to different domestic regulatory requirements and to impose additional or inconsistent requirements under a safety standard may not be appropriate.

10.39 Where Commonwealth approval to export is granted, details of the approval is required to be tabled by the Commonwealth Minister in both Houses of Parliament within seven sitting days of granting approval. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, subsection 106(6)]*

#### *Loss or damage deemed to be suffered*

10.40 A person is deemed to have suffered a loss or damage because consumer goods of product related services have been supplied in

contravention of a safety standard, where: [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, subsections 106(7) and 107(3)*]:

- the person suffered a loss or damage because of:
  - a defect or dangerous characteristic in the goods, including a defect of characteristic that result from the supply of product related services;
  - a reasonably foreseeable use (including a misuse) of the goods, including one that results from the supply of product related services; or
  - the person was not provided with particular information about the goods as required by the safety standard; and
- the person would not have suffered the loss or damage if the goods had complied with the safety standard.

10.41 A reasonably foreseeable use of a good includes using the goods for its primary, normal or intended purpose, using the goods for its unintended purpose, or misusing the goods. Use (or misuse) of the goods can be by the person who suffered the loss or damage in question, or by another person.

10.42 Where a person is deemed to have suffered a loss or damage because of the supply of particular consumer goods contrary to a safety standard, the person can seek to recover compensation for the amount of their loss or damage. For instance, the person may commence a defective goods action against the manufacturer to recover compensation (see Chapter 12 of this Explanatory Memorandum).

10.43 This deeming provision assists those who have suffered a loss or damage as a result of non-compliance with the requirements of a relevant safety standard to recover for their suffering.

#### ***Nominating a safety standard***

10.44 Where a safety standard is in force for consumer goods or product related services of a particular kind and the standard contains more than one set of requirements which suppliers can follow for the purpose of complying with the standard, then suppliers are required to nominate which set of requirements it intends to follow. However, a supplier is only required to nominate a set of requirements once it has received a written request from an inspector to do so. The supplier's nomination must be in writing and be provided to the inspector within the time frame specified in the written request. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, subsection 108*]

## **Bans on consumer goods and product related services**

10.45 The ACL empowers governments to ban the supply of consumer goods and product related services where they pose a safety risk of injury to any person. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 2*]

10.46 Two types of bans can be made — interim bans and permanent bans. Interim bans can be made by any responsible Minister, while permanent bans can be made only by the Commonwealth Minister.

### *Interim bans*

10.47 Responsible Ministers are empowered to impose interim bans on the supply of particular consumer goods and product related services.

10.48 **Responsible Minister** is defined to mean the Commonwealth Minister, a State Minister responsible for administering the application law in that State, and a Territory Minister responsible for administering the application law in that Territory. [*Schedule 1, item 1: Chapter 1, section 3*]

### *Interim bans on consumer goods*

10.49 A responsible Minister can make an interim ban on the supply of consumer goods of a particular kind where it appears that goods of that kind will or may cause injury to any person. An interim ban can also be imposed if it appears a reasonably foreseeable use (including a misuse) of the goods will or may cause injury to any person. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, paragraph 109(1)(a)*]

10.50 A reasonably foreseeable use of a good includes using the good for its primary, normal or intended purpose, using the good for its unintended purpose, or misusing the good.

10.51 Interim bans can only be made with respect to consumer goods of a particular kind, and not more broadly to ‘goods’ or to ‘consumer goods’ in general. Interim bans are required to be in writing and published on the internet. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, subsection 109(1)*]

10.52 Commonwealth interim bans are legislative instruments for the purposes of the LI Act.

10.53 An interim ban may also be made with respect to the supply of particular consumer goods by a responsible Minister (the first responsible Minister) if another responsible Minister (the second responsible Minister) has imposed an interim ban on goods of the same kind, or on goods which includes those same kinds of goods. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, paragraph 109(1)(b)*]

10.54 The interim ban imposed by the second responsible Minister must still be in force at the time the first responsible Minister is imposing an interim ban in respect of those same kinds of goods. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, paragraph 109(1)(b)*]

10.55 The interim ban imposed by the second responsible Minister can be from the same or from a different jurisdiction to the first responsible Minister.

*Interim bans on product related services*

10.56 A responsible Minister can impose an interim ban on the supply of product related services of a particular kind if it appears to the Minister that particular consumer goods will or may cause injury to any person as a result of the services being supplied. An interim ban can also be imposed where it appears to the Minister that a reasonably foreseeable use (including misuse) of particular consumer goods will or may cause injury to any person as a result of the services being supplied. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, paragraph 109(2)(a)*]

10.57 A reasonably foreseeable use of a consumer good includes using the good for its primary, normal or intended purpose, using the good for its unintended purpose, or misusing the good.

10.58 An interim ban on product related services must be with respect to product related services that are of a particular kind, and not more broadly to 'services' or to 'product related services' in general. Interim bans are also required to be in writing and published on the internet. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, subsection 109(2)*]

10.59 Commonwealth interim bans are legislative instruments for the purposes of the LI Act.

10.60 A responsible Minister (the first responsible Minister) can make an interim ban on the supply of particular product related services where another responsible Minister (the second responsible Minister) has imposed an interim ban on services of that kind or on services which include that same kind of services. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, paragraph 109(2)(b)*]

10.61 The interim ban imposed by the second responsible Minister must still be in force at the time the first responsible has imposed an interim ban with respect to the same kind of services. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, paragraph 109(2)(b)*]

10.62 The interim ban made by the second responsible Minister can be from the same or from a different jurisdiction to the first responsible Minister.

*Application of interim bans*

10.63 A Commonwealth interim ban in force applies in all States and Territories to ban the supply of particular kinds of consumer goods or product related services. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, subsection 110(1)]*

10.64 A State interim ban in force applies only in that State, to ban the supply of particular kinds of consumer goods or product related services, and does not apply in other jurisdictions. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, subsection 110(2)]*

10.65 A Territory interim ban in force applies only in that Territory, to ban the supply of particular kinds of consumer goods or product related services, and does not apply in other jurisdictions. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, subsection 110(3)]*

*Ban period for interim bans*

10.66 An interim ban lasts for a period starting from the day after the day the ban was published on the internet (the start day), and ends 60 days after the start day (the end day). *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, subsection 111(1)]*

*Extensions*

10.67 Before the end day of an interim ban, the responsible Minister of the jurisdiction where the interim ban originates from, may extend the ban for a period of up to 30 days. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, subsection 111(2)]*

10.68 The extension must be in writing and published on the internet. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, subsection 111(2)]*

10.69 Extensions by a Commonwealth Minister are legislative instruments for the purposes of the LI Act.

10.70 *Further extensions*

10.71 Where an interim ban has been extended by a State or Territory Minister (an extended ban), a responsible Minister from that State or Territory can request the Commonwealth Minister to grant a further extension on the ban. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, subsection 111(3)]*

10.72 The request for a further extension must be in writing from the relevant State or Territory Minister, to the Commonwealth Minister, and at the time of the request the extended ban must not have ended. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, subsection 111(3)]*



10.73 The Commonwealth Minister may further extend an extended ban for a period of up to 30 days. Further extensions are to be in writing and be published on the internet. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, subsection 111(4)]*

10.74 Further extensions are legislative instruments for the purposes of the LI Act.

10.75 Upon receiving a request for a further extension and the Commonwealth Minister has not decided whether to grant the extension before the extended Commonwealth ban period has ended, the Commonwealth Minister is deemed to have decided to grant a further extension. The extended ban is extended for a period of 30 days. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, subsection 111(5)]*

10.76 A Commonwealth Minister can decide to further extend an extended ban for a period of up to 30 days, provided the extended ban period has not ended. A further extension must be published on the internet. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, subsection 111(6)]*

10.77 That further extension is a legislative instrument for the purposes of the LI Act.

*Interaction of multiple interim bans*

10.78 A Commonwealth interim ban in force with respect to particular kinds of consumer goods will override a State or Territory interim ban in force on those same kinds of goods or on goods which include those kinds of goods. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, subsection 112(1)]*

10.79 The State or Territory interim ban will cease to be in force immediately before the Commonwealth interim ban comes into force. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, subsection 112(1)]*

10.80 A State or Territory interim ban will only be overridden and cease to be in force to the extent that it relates to goods which are the subject of the Commonwealth interim ban. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, subsection 112(1)]*

10.81 Similarly, a Commonwealth interim ban on particular kinds of product related services will override a State or Territory interim ban on services of the same kind or on services which include those kinds of services. The State or Territory interim ban will cease to be in force to the extent that it relates to services which are the subject of the Commonwealth interim ban, and it will end immediately before the Commonwealth ban comes into force. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, subsection 112(2)]*

*Revoking an interim ban*

10.82 An interim ban can be revoked at any time by a responsible Minister of the jurisdiction from which the ban originated. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, subsection 113]*

10.83 The revocation must be in writing and published on the internet. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, paragraph 113(a)]*

10.84 Commonwealth revocation notices are legislative instruments for the purposes of the LI Act.

10.85 A revocation takes effect so that the interim ban ceases to be in force from the date specified in the revocation notice. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 1, paragraph 113(b)]*

*Permanent bans*

10.86 The ACL empowers the Commonwealth Minister to impose a permanent ban on the supply of consumer goods and product related services. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 2, section 114]*

10.87 Permanent bans made must be in writing and published on the internet. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 2, subsections 114(1) & (2)]*

10.88 Permanent bans are also legislative instruments for the purposes of the LI Act.

*Permanent bans on consumer goods*

10.89 The Commonwealth Minister can impose a permanent ban on the supply of particular kinds of consumer goods. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 2, subsection 114(1)]*

10.90 A permanent ban on particular kinds of consumer goods can only be made where any of the following circumstances exist *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 2, subsection 114(1)]*:

- there is an interim ban in force (in any jurisdiction) for those goods or for goods which includes those kinds of goods;
- it appears goods of that kind will or may cause injury to any person; or
- it appears that a reasonably foreseeable use (including a misuse) of goods of that kind will or may cause injury to any person.

*Permanent bans on product related services*

10.91 The Commonwealth may impose a permanent ban on the supply of particular kinds of product related services. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 2, subsection 114(2)*]

10.92 A permanent ban on particular kinds of product related services can only be made where any of the following circumstances exist [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 2, subsection 114(2)*]:

- there is an interim ban in force (in any jurisdiction) for those services or for services which include those kinds of services;
- it appears that as a result of supplying those services, particular consumer goods will or may cause injury to any person; or
- it appears that as a result of supplying those services, a reasonably foreseeable use (including a misuse) of particular consumer goods will or may cause injury to any person.

*Application of permanent bans*

10.93 A permanent ban in force applies nationally in all jurisdictions, to ban the supply of particular kinds of consumer goods or product related services. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 2, section 115*]

10.94 A permanent ban comes into force from the day specified in the permanent ban notice. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 2, subsection 116*]

*Revoking a permanent ban*

10.95 A Commonwealth Minister can revoke a permanent ban at any time. The revocation must be in writing and published on the internet. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 2, paragraph 117(a)*]

10.96 A revoked permanent ban ceases to be in force (to ban the supply of particular consumer goods or product related services) from the day specified in the permanent ban notice. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 2, paragraph 117(b)*]

*Supplying consumer goods etc. covered by a ban*

10.97 The ACL prohibits the supply of particular kinds of consumer goods where there is an interim ban or permanent ban in force for goods of that kind. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 2, subsection 118(1)*]

10.98 Suppliers are prohibited, with respect to particular kinds of consumer goods, from engaging in any of the following activities where an interim ban or a permanent ban is in force for those goods:

- supplying the goods to a jurisdiction where the ban applies [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 2, subsection 118(1)*];
- offering to supply the goods to a jurisdiction where the ban applies [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 2, subsection 118(2)*]; and/or
- possessing, manufacturing or being in control of the goods for the purpose of supplying the goods to a jurisdiction where the ban applies. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 2, subsection 118(3)*]

10.99 A permanent ban or an interim ban issued by the Commonwealth Minister applies nationally in all jurisdictions, while an interim ban issued by a State or Territory Minister applies only in the jurisdiction from which it originated. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 2, sections 110 and 115*]

*Exported goods*

10.100 A supplier is permitted to export consumer goods of a particular kind without having to comply with an interim ban or permanent ban in force for such goods, if the supplier has first obtained approval from the Commonwealth. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 2, subsection 118(4)*]

10.101 The supplier must apply in writing to the Commonwealth Minister for approval to export the goods in question. Approval from the Minister must also be in writing. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 2, subsection 118(5)*]

10.102 Where export approval is granted, details of the approval must be tabled by the Commonwealth Minister in both Houses of the Australian Parliament within seven sitting days of the approval being granted. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 2, subsection 118(6)*]

10.103 In certain circumstances, a ban on the supply of particular goods may not be relevant where the goods are intended for the overseas market but any safety risks posed by the goods are localised. Alternatively, overseas markets may be subject to different domestic regulatory requirements.

*Loss or damage deemed to be suffered*

10.104 A person is deemed to have suffered a loss or damage because particular kinds of consumer goods have been supplied contrary to an

interim ban or permanent ban in force for goods of that kind, if [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 2, subsection 118(7)*]:

- the goods were supplied despite an interim ban or permanent ban existing for those goods (and no export approval has been granted by the Commonwealth); and
- the person suffered a loss or damage because of:
  - a defect or dangerous characteristic in the goods; or
  - a reasonably foreseeable use (including a misuse) of those goods.

10.105 A reasonably foreseeable use of a good includes using the goods for its primary, normal or intended purpose, using the goods for an unintended purpose, or misusing the goods. Use (or misuse) of the goods can be by the person who suffered the loss or damage or by a different person.

***Supplying etc. product related services covered by a ban***

10.106 The ACL prohibits the supply of, or offering to supply, particular kinds of product related services in the jurisdiction which an interim ban or permanent ban is in force with respect to those kinds of services. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 2, subsections 119(1) and (2)*]

10.107 A permanent ban applies nationally in all jurisdictions, while an interim ban applies only in the jurisdiction from which it originated. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 2, sections 110 and 115*]

***Loss or damage deemed to be suffered***

10.108 A person is deemed to have suffered a loss or damage because of the supply of particular kinds of product related services contrary to an interim ban or permanent ban in force for those services, if

- the services were supplied despite an interim ban or permanent ban existing with respect to services of that kind; and
- the person suffered a loss or damage because of:
  - a defect or dangerous characteristic in consumer goods as a result of those services being supplied; or

- a reasonably foreseeable use (including a misuse) of consumer goods as a result of those services being supplied.

*[Schedule 1, item 1: Chapter 3, Part 3-3, Division 2, subsection 119(2)]:*

### **Mutual recognition arrangements**

#### *Trans-Tasman temporary exemptions*

10.109 Mutual recognition arrangements exist between Australia and New Zealand with respect to the supply of goods, under the *Trans-Tasman Mutual Recognition Act 1997* (TTMR Act).

10.110 Where a Commonwealth, State or Territory interim ban or a Commonwealth permanent ban is in force for consumer goods of a particular kind, a temporary exemption applies with respect to those kinds of goods under section 46 of the TTMR Act. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 2, section 120]*

#### *Domestic temporary exemptions*

10.111 Where a State or Territory interim ban is imposed on consumer goods of a particular kind, a temporary exemption applies in Australia with respect to those kinds of goods, under the *Mutual Recognition Act 1982* (MR Act). *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 2, section 121]*

10.112 Broadly, the MR Act operates so that particular goods which can be lawfully supplied in one Australian jurisdiction are mutually recognised in other jurisdictions and can be supplied in other jurisdictions without having to meet any additional requirements. However, in certain circumstances, such as for health or safety reasons, certain goods can be temporarily exempted from the mutual recognition arrangements so that despite those goods being lawfully supplied in one jurisdiction, they cannot be supplied in another jurisdiction without first meeting additional requirements. A temporary exemption lasts for 12 months.

10.113 Under the ACL, an interim ban in one jurisdiction on consumer goods of a particular kind, automatically invokes a temporary exemption for those same kinds of goods under section 15 of the MR Act. The maximum duration of the interim ban is up to 120 days. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 2, subsection 121(2)]*

## **Safety Recalls**

10.114 The ACL empowers Commonwealth, State and Territory ministers to recall consumer goods which pose a risk of injury to any person. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 3]*

### ***Compulsory recalls***

10.115 A responsible Minister can issue a compulsory recall notice for particular consumer goods. The recall notice must relate to consumer goods of a particular kind, and not more broadly to 'goods' or to 'consumer goods' in general. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 3, section 122]*

10.116 A recall notice can be issued for particular consumer goods where any of the following circumstances exist:

- it appears goods of that kind will or may cause injury to any person;
- it appears that a reasonable foreseeable use (including a misuse) of goods of that kind will or may cause injury to any person;
- a safety standard in force for goods of that kind has not been complied with;
- there is an interim or permanent ban in force for goods of that kind.

*[Schedule 1, item 1: Chapter 3, Part 3-3, Division 3, paragraph 122(1)(b)]*

10.117 It must also appear to the responsible Minister that no supplier of the goods in question (such as a retailer, dealer, distributor, importer, exporter, manufacturer) has taken satisfactory action to prevent the goods from causing injury to any person. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 3, paragraph 122(1)(c)]*

10.118 However, the responsible Minister does not need to know the identity of any of the suppliers. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 3, subsection 122(2)]*

10.119 A reasonably foreseeable use of a good includes using the goods for its primary, normal or intended purpose, using the goods for an unintended purpose, or misusing the goods. Use (or misuse) of the goods can be by the person who suffered the loss or damage in question, or by a different person.

10.120 A recall notice can be issued for consumer goods despite the goods becoming fixtures since the time they were supplied. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 3, subsection 122(3)]*

10.121 Recall notices must be in writing and published on the internet. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 3, subsection 122(1)]*

10.122 Commonwealth recall notices are legislative instruments for the purposes of the LI Act.

*Contents of a recall notice*

10.123 A recall notice for consumer goods can require one or more suppliers (or a regulator where no supplier is known to the responsible Minister who issues the notice) to carry out certain actions. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 3, subsection 123(1)]*

10.124 Such actions which a recall notice can require a supplier(s) or a regulator to take, are *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 3, subsection 123(1)]*:

- to recall (remove) particular kinds of consumer goods from the market;
- to disclose to the public, or to a specified class of persons, any of the following information:
  - any defect or dangerous characteristic in the goods, as identified in the recall notice;
  - the circumstances in which a reasonably foreseeable use (including a misuse) of the goods is dangerous, as identified in the recall notice; and/or
  - the procedures for disposing the goods, as identified in the recall notice; and/or
- where the identity of any supplier of the goods is known to the relevant Minister, the recall notice can require a supplier(s) to inform the public, or a specified class of persons, that it will undertake to do any of the following which it considers is appropriate:
  - to repair the goods (if no dangerous characteristic has been identified in the goods);
  - to replace the goods; and/or
  - to refund the price of the goods to the person whom the goods were supplied to (irrespective of whether the goods were supplied by the supplier or by another person).

10.125 A recall notice can only require a supplier to repair, refund or replace consumer goods, and not a regulator. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 3, subsection 123(1)(c)]*



10.126 A recall notice can specify the manner in which action(s) which the notice requires to be taken and the time frame for taking such action(s), are to be taken. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 3, subsection 123(2)*]

10.127 A recall notice can require a regulator to retain, destroy or dispose of recalled consumer goods. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 3, subsection 123(3)*]

10.128 Where a supplier undertakes to refund recalled goods, the recall notice may permit the refund amount to be reduced by the supplier if more than 12 months has passed since the goods were acquired from that supplier. The refund can be reduced by an amount calculated in the manner specified in the recall notice. This is to take into account use of the goods since they were supplied. The person who acquired the goods does not have to be the same person to whom the refund is provided to. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 3, subsection 123(4)*]

*Obligations of a supplier in relation to a recall notice*

10.129 Where a supplier undertakes to repair recalled goods, the goods must be repaired so that any identified defect in the goods is remedied and any safety standard in force for such goods is complied with. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 3, subsection 124(2)*]

10.130 Where a supplier undertakes to replace recalled goods, the goods must be replaced with similar goods which do not contain any defect or dangerous characteristic that have been identified in the recall notice, and those similar goods must comply with any safety standard in force for the replaced goods. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 3, subsection 124(3)*]

10.131 Any costs, including transportation costs, associated with repairing or replacing recalled goods are to be paid by the supplier. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 3, subsection 124(4)*]

*Notification by persons who supply consumer goods outside of Australia if there is a compulsory recall*

10.132 A supplier is required to notify each overseas person whom the supplier has supplied a recalled consumer good to, about the recall. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 3, subsection 125(1)*]

10.133 The notification must be in writing and be given as soon as practicable after the recalled good was supplied to the person. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 3, subsections 125(1) & (3)*]

10.134 A notification provided to a person overseas must contain the following information:

- the consumer goods which have been recalled;

- the nature of any defect or dangerous characteristic in the recalled goods;
- any circumstances where reasonably foreseeable use or misuse of the recalled goods is dangerous;
- the nature of any non-compliance with a safety standard in force for the recalled goods; and
- whether any interim or permanent ban is in force for the recalled goods.

*[Schedule 1, item 1: Chapter 3, Part 3-3, Division 3, subsection 125(2)]*

10.135 Where a supplier is required to notify a person overseas about a recall, a copy of the notification must be given to the responsible Minister who issued the relevant recall notice, within 10 days of sending the notification to the person outside of Australia. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 3, subsection 125(4)]*

*Interaction of multiple recall notices*

10.136 A State or Territory recall notice in force for consumer goods of a particular kind will be overridden by a Commonwealth recall notice in force for goods of the same kind or for goods which include those kinds of goods. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 3, section 126]*

10.137 The State or Territory recall notice will cease to be in force immediately before the Commonwealth recall notice is issued. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 3, section 126]*

10.138 A State or Territory recall notice will only be overridden and cease to be in force to the extent that it relates to goods which are the subject of the Commonwealth notice. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 3, section 126]*

*Compliance with recall notices*

10.139 Suppliers who are required to undertake one or more actions under a recall notice in force must comply with such notice. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 3, subsections 127(1) and (2)]*

10.140 Suppliers are prohibited from supplying particular kinds of consumer goods where *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 3, subsection 127(3)]*:

- there is a recall notice is in force for goods of that kind; or

- goods of that kind contain a defect or dangerous characteristic that has been identified in a recall notice.

10.141 Suppliers are only prohibited from engaging in these activities in trade or commerce and not, for instance, in a personal or private capacity. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 3, subsection 127(3)]*

10.142 A person is deemed to have suffered a loss or damage as a result of a contravention of a recall notice, because *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 3, subsection 127(4)]*:

- the recalled goods contains a defect or dangerous characteristic;
- of a reasonably foreseeable use (including a misuse) of the recalled goods; or
- the person was not provided with particular information about the recalled goods as required under the recall notice.

10.143 A reasonably foreseeable use of a good includes using the goods for its primary, normal or intended purpose, using the goods for its unintended purpose, or misusing the goods. Use (or misuse) of the goods can be by the person who suffered the loss or damage in question, or by another person.

#### ***Voluntary recalls***

10.144 The ACL requires a supplier who has voluntarily undertaken to recall consumer goods, to notify the Commonwealth Minister of the voluntary recall. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 3, Subdivision B]*

10.145 A supplier who has voluntarily recalled particular kinds of consumer goods is required to notify the Commonwealth Minister about the recall within two days of undertaking the recall. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 3, subsection 128(2)]* The Commonwealth Minister may publish a copy of the notice on the internet. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 3, subsection 128(3)]*

10.146 A supplier is only required to notify the Commonwealth Minister about a voluntarily recall if the recall was undertaken for any of the following reasons:

- the goods will or may cause injury to any person;
- a reasonably foreseeable use (including a misuse) of the goods will or may cause injury to any person;

- the goods do not comply with a safety standard in force for goods of that kind;
- an interim ban or permanent ban is in force for goods of that kind.

*[Schedule 1, item 1: Chapter 3, Part 3-3, Division 3, subsection 128(1)]*

The voluntarily recalled goods can include consumer goods that have become fixtures since being supplied. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 3, subsection 128(1)]*

#### *Exported goods*

10.147 Suppliers of goods which have been voluntarily recalled must notify every person outside of Australia to whom the goods were supplied to, about the recall.

10.148 The notice must be given to each overseas person as soon as practicable of the goods being supplied to them. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 3, subsection 128(5)].*

10.149 Within 10 days of the notice being given to an overseas person, the supplier is required to provide a copy of the notice to the Commonwealth Minister. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 3, subsection 128(6)]*

#### *Content of notices*

10.150 Notices about voluntarily recalled goods from a supplier to the Commonwealth Minister and to a person overseas, must contain the following information:

- the voluntarily recalled consumer goods;
- the nature of any defect or dangerous characteristic in the voluntarily recalled goods;
- the circumstances where a reasonable foreseeable use or misuse of the voluntarily recalled goods is dangerous;
- the nature of any non-compliance or likely non-compliance with a safety standard in force for the voluntarily recalled goods; and
- whether there is an interim or permanent ban in force on the voluntarily recalled goods.

*[Schedule 1, item 1: Chapter 3, Part 3-3, Division 3, subsections 128(4) & (7)]*

## **Safety Warning Notices**

10.151 The ACL empowers Commonwealth, State and Territory ministers to publish warning notices about particular consumer goods or product related services that are a safety risk.

### *Safety warning notices for consumer goods or product related services*

10.152 Responsible Ministers can publish safety warning notices for consumer goods or product related services of a particular kind. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 4, section 129]*

10.153 Safety warning notices must be in writing and published on the internet. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 4, subsections 129(1) and (2)]*

### *Warning notices for consumer goods*

10.154 A responsible Minister can publish a safety warning notice about consumer goods of a particular kind. The notice can contain any of the following information:

- a statement that consumer goods of the kind specified in the notice are being investigated to determine whether:
  - those goods will or may cause injury to any person; or
  - a reasonably foreseeable use (including a misuse) of the goods will or may cause injury to any person; and/or
- a warning of the possible risks with using consumer goods of the kind specified in the notice.

*[Schedule 1, item 1: Chapter 3, Part 3-3, Division 4, subsection 129(1)]*

### *Warning notices for product related services*

10.155 Similarly, a responsible Minister can publish a safety warning notice about product related services of a particular kind. The notice can contain any of the following information:

- a statement that product related services of the kind specified in the notice is being investigated to determine whether, as a result of the services being supplied:
  - particular kinds of consumer goods will or may cause injury; or

- a reasonable foreseeable use (including a misuse) of particular consumer goods will or may cause injury; and/or
- a warning of the possible risks with supplying product related services of the kind specified in the notice.

*[Schedule 1, item 1: Chapter 3, Part 3-3, Division 4, subsection 129(2)]*

### ***Results of an investigation***

#### *Announcement of results*

10.156 Where a safety warning notice states that consumer goods or product related services of a particular kind are being investigated, and the investigation has been completed, the responsible Minister who published the warning notice must announce the results of the investigation if the following conditions exist *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 4, subsection 130(1)]*:

- no urgent interim ban or recall notice (under section 132J of the CC Act) has been issued with respect to those kinds of consumer goods or product related services;
- no proposed safety ban has been imposed with respect to those kinds of consumer goods or product related services; and
- no proposed recall notice has been issued with respect to those kinds of consumer goods.

10.157 A proposed safety ban or recall notice can be imposed by a responsible Minister where the Minister proposes to make a ban or order a recall with respect to particular kinds of consumer goods or product related services. *[Schedule 2, item 1: Division 3, sections 132 and 132A]*

10.158 Where a responsible Minister is required to announce the results of an investigation, the results must be announced as soon as practicable after the investigation is completed and published on the internet. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 4, subsection 130(1)]*

10.159 Together with announcing the results of an investigation, the responsible Minister may publish any action which the Minister proposes to take with respect to the particular consumer goods or product related services which are the subject of the safety warning notice. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 4, subsection 130(2)]*

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

10.160 The ACL contains a reporting requirement for suppliers of consumer goods or product related services that have been associated with the death, serious injury or illness of any person. [Schedule 1, item 1: Chapter 3, Part 3-3, Division 5]

### *Suppliers to report consumer goods associated with the death or serious injury or illness of any person*

10.161 A supplier of consumer goods of a particular kind is required to notify the Commonwealth Minister when it becomes aware that goods of that kind have been associated with the death, serious injury or illness of any person. [Schedule 1, item 1: Chapter 3, Part 3-3, Division 5, subsection 131(1)]

10.162 Broadly, there are three triggers to the reporting requirement for suppliers:

- the goods in question are consumer goods which are of a particular kind;
- the goods in question have been associated with the death, serious injury or illness of any person; and
- a supplier of those kinds of goods has become aware of the incident.

### *Serious injury or illness*

10.163 A trigger for the reporting requirement is that the particular consumer goods in question have been associated with a death, serious injury or illness.

10.164 *Serious injury or illness* is defined to mean an acute physical injury or illness requiring medical or surgical treatment by or under the supervision of a qualified doctor or nurse. The medical or surgical treatment can be provided in a hospital or clinic, or in such similar place like a regional or rural clinic where in the circumstances hospitalisation may not always be possible. [Schedule 1, item 1: Chapter 1, section 1]

10.165 The injury or illness in question must be acute in nature arising through sudden onset rather than after gradual development over time. The injury or illness must also be serious rather than minor in nature. Lastly, the injury or illness must not be a *disease*, which is defined to include an ailment, disorder or morbid condition which arises through sudden onset or gradual development. [Schedule 1, item 1: Chapter 1, section 2]

10.166 For the purposes of the reporting requirement, a *serious injury or illness* can include:

- an external physical injury, such as a serious burn, deep cut, broken bone, choking or serious fracture;
- an internal injury, such as internal bleeding;
- an illness, such as poisoning;

*Associated with a death, serious injury or illness*

10.167 Suppliers are only required to report incidences to the Commonwealth Minister where consumer goods have been associated with the death, serious injury or illness of any person.

10.168 The various circumstances whereby a good can be associated with a death, serious injury or illness, includes:

- the good was being used either before or at the time of the accident occurring, whereby the goods could have been used for its primary, normal or intended purpose, for an unintended purpose or being misused; [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 5, subsection 131(3)*]
- the good was in the vicinity or close proximity of the occurrence of an accident, irrespective of whether the good was in fact being used (or misused) at the time of the accident;
- the good was a cause or a possible cause (and not necessarily the sole cause) of an accident;
- the good contributed to or possibly contributed to an accident;
- the good was somehow related to, or involved with, an accident.

10.169 However, where it is clear that the consumer goods were not associated with the death, serious injury or illness, then the supplier is not required to report the incident to the Commonwealth Minister. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 5, paragraph 131(2)(a)*] In other words, where it is certain that the goods were not related, involved, a cause or possible cause, a contributor or possible contributor to the accident.

10.170 A supplier is also not required to comply with the reporting requirement where it is very unlikely that the consumer good was associated



with the death, serious injury or illness. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 5, paragraph 131 (2)(b)*]

10.171 In other words, where it is highly unlikely that the goods was related, involved, a cause or possible cause, a contributor or possible contributor to the accident.

10.172 Consumer behaviour, operator error, external influences and environmental factors, such as alcohol, weather conditions or other people's behaviour, are common contributing factors to product related injuries.

10.173 However, if it is possible that the consumer goods could somehow be associated with a death, serious injury or illness, and it is not clear that the goods were *not* associated with the accident — then supplier should report the incident to the Commonwealth Minister.

*Supplier becomes aware*

10.174 The reporting requirement is triggered when a supplier of the consumer goods in question has become aware that the goods was associated with a death, serious injury or illness. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 5, paragraph 131(1)(b)*]

10.175 A supplier 'becomes aware' of information upon receiving information from any source. This includes receiving information from a consumer, a re-supplier of the goods, a repairer, insurer, industry organisation or consumer organisation [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 5, subsection 131(4)*]. It also includes receiving the relevant information through any means, like being told, hearing or reading about the information.

*Circumstances for non-reporting*

10.176 The reporting requirement does not apply, even where the triggers for reporting exist, where the supplier is already required to report the death, serious injury or illness in question under a Commonwealth, State or Territory law specified in the regulations. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 5, paragraph 131(2)(c)*]

10.177 The reporting requirement also does not apply, despite the triggers for reporting existing, where the supplier is already required to report about the death, serious injury or illness under an industry code specified in the regulations. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 5, paragraph 131(2)(d)*]

*Necessary information to report*

10.178 Where all of the above triggers for the reporting requirement exist and the circumstances for non-reporting do not apply, the supplier is required

to report the following information to the Commonwealth Minister [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 5, paragraph 131(5)*]:

- the consumer goods in question; and
- the following details, to the extent that they are known by the supplier at the time of reporting:
  - when and the amount the goods were manufactured, supplied or imported in Australia or exported from Australia;
  - the circumstances surrounding how the death, serious injury or illness in question occurred;
  - the nature of any serious injury or illness suffered;
  - any action the supplier has taken or intends to take in relation to the goods.

10.179 There is no additional requirement for a supplier to have to substantiate information it has become aware of prior to making a report. There is also no additional requirement for suppliers to monitor the safety of the consumer goods in question or to conduct any follow up investigation on the information reported.

*Suppliers to report*

10.180 All participants in the supply chain of a consumer good which has been associated with a death, serious injury or illness, are required to comply with the reporting requirement upon becoming aware of the accident. This includes a retailer, dealer, distributor, repairer, importer, manufacturer and/or exporter of the consumer good in question.

10.181 Subjecting all participants in the supply chain to the reporting requirement assists to ensure that information about potentially unsafe goods is being communicated to regulators to help prevent similar accidents from occurring in the future. To help avoid similar accidents from arising it is important that adequate information about accidents is communicated to regulators even if it may involve the same information being reported more than once from different sources. This is particularly important where, for instance, the original supplier of an unsafe good has ceased operation and does not report the necessary information.

10.182 Information reported to the Commonwealth Minister under the reporting requirement will be shared amongst Australian regulators, on a confidential basis and in accordance with privacy requirements, to ensure

there are national coordinated efforts amongst regulators to protect consumer safety. Multiple reporting and the duplication of information is a relatively minor compliance cost associated with ensuring timely information about unsafe (as well as potentially unsafe) goods are passed onto regulators.

10.183 However, accidents which are already required to be reported to a regulator under a specific regulation or industry code, does not have to also be reported by suppliers under the reporting requirement in the consumer safety provisions of the ACL. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 5, subsections 131(1) and (2)*]

*Time to report*

10.184 Where the reporting requirement applies, a supplier is required to report the necessary information to the Commonwealth Minister in writing and within two days of becoming aware that the consumer goods in question have been associated with a death, serious injury or illness. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 5, subsection 131(1)*]

10.185 Where the reporting requirement applies, a supplier is only required to report the necessary information to the Commonwealth Minister upon becoming aware the consumer goods in question have been associated with a death, serious injury or illness. The supplier is not required to report each and every time of becoming aware of the same incident, even if the information comes from a different source each time.

*Non-admission of liability*

10.186 Reporting information under the reporting requirement does not constitute as an admission by the supplier of any liability in relation to the consumer goods or to a death, serious injury or illness. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 5, subsection 131(6)*]

***Suppliers to report product related services associated with the death or serious injury or illness of any person***

10.187 A supplier of product related services of a particular kind who becomes aware that consumer goods which those services relate to, has been associated with a death, serious injury or illness of any person, is required to report this information to the Commonwealth Minister. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 5, section 132*]

10.188 The operation of the reporting requirement for product related services is essentially the same as the requirement which applies to consumer goods, as described above. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 5, section 131*]

*Product related services of a particular kind*

10.189 The reporting requirement only applies with respect to product related services that are of a particular kind, and not more broadly to ‘services’ or to ‘consumer services’. In addition, the product related service must be related to the particular kind of consumer goods which have been associated with a death, serious injury or illness.

*Serious injury or illness*

10.190 The reporting requirement for suppliers of product related services is only triggered where the services in question are related to particular consumer goods which have been associated with a death, serious injury or illness.

10.191 The reporting requirement applies irrespective of whether the goods which the services relate to, were being used before or at the time of the accident. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 5, subsection 132(3)]*

10.192 However, the reporting requirement does not apply under any of the following circumstances:

- where it is clear (that is certain) that the goods which the services relate to, were not associated with the death, serious injury or illness; *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 5, paragraph 132(2)(a)]*
- where it is very unlikely (that is highly unlikely) that the goods which the services relate to, were associated with the death, serious injury or illness; *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 5, paragraph 132(2)(b)]*
- where the supplier is already required to report the death, serious injury or illness under a Commonwealth, State or Territory law specified in the regulations. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 5, paragraph 132(2)(c)]*; or
- where the supplier is already required to report the death, serious injury or illness under an industry code specified in the regulations. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 5, paragraph 132(2)(d)]*

*Supplier becomes aware*

10.193 The reporting requirement is triggered once the supplier of a product related service becomes aware that consumer goods which the service relates to has been associated with a death, serious injury or illness. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 5, subsection 132(1)]*

*Necessary information to report*

10.194 Where the reporting requirement is triggered for a product related service, and the circumstances for non-reporting do not apply, the following information must be reported to the Commonwealth Minister:

- the particular product related service in question, as well as the particular consumer good which the service relates to; and
- the following details, to the extent they are known by the supplier at the time of reporting:
  - when the service in question was supplied;
  - the circumstances as to how the death, serious injury or illness occurred;
  - the nature of any serious injury or illness suffered;
  - any action which the supplier has taken or is intending to take in relation to the service *Schedule 2, item 1: Chapter 3, Part 3-3, Division 5, subsection 131(5)*.

*Suppliers required to report*

10.195 Similar to the reporting requirement for consumer goods, all participants in the supply chain for the particular product related services in question, are required to comply with the reporting requirement once all the triggers exist. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 5, subsection 132(4)*]

*Time to report*

10.196 Where the reporting requirement applies, the supplier of a product related service is required to report the necessary information to the Commonwealth Minister within two days of becoming aware that a consumer good which the service relates to, has been associated with a death, serious injury or illness. The report must also be in writing. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 5, subsection 132(1)*]

*Non-admission of liability*

10.197 The reporting of information under the reporting requirement does not constitute as an admission by the supplier of any liability in relation to the product related services in question, the consumer goods in question which the services relates to, or to the death, serious injury or illness. [*Schedule 1, item 1: Chapter 3, Part 3-3, Division 5, subsection 132(5)*]

## Liability under an insurance contract

10.198 The liability of an insurer under a contract of insurance between the insurer and a supplier is not affected because the supplier has provided information relating to consumer goods it has supplied to a responsible Minister, a regulator, a person appointed or engaged under the *Public Service Act 1999* (Cth) or an equivalent Act of a state or territory or an officer of an authority of the Commonwealth or of a state or territory. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 5, paragraph 133(b)]*

10.199 The insurance contract must relate to the recall of consumer goods supplied by the supplier or to the supplier's liability with respect to a possible defect in the goods. *[Schedule 1, item 1: Chapter 3, Part 3-3, Division 5, paragraph 133(a)]*

## Penalties and remedies

### *Criminal offence*

10.200 Contraventions of requirements imposed by provisions in Part 3-3 of the ACL have an associated criminal offence in Part 4-3 of the ACL. The maximum fine payable for a contravention of sections 194, 195, 197, 198 and 199 of the ACL is:

- \$1.1 million for a body corporate; and
- \$220,000 for any other person.

*[Schedule 1, item 1: Chapter 4, Part 4-3, sections 194, 195 197, 198 and 199]*

10.201 The maximum fine payable for a contravention of section 196 of the ACL is:

- \$22,000 for a body corporate; and
- \$4,400 for any other person.

*[Schedule 1, item 1: Chapter 4, Part 4-3, section 196]*

10.202 The maximum fine payable for a contravention of sections 200, 201 and 202 of the ACL is:

- \$16,650 for a body corporate; and
- \$3,300 for any other person.

*[Schedule 1, item 1: Chapter 4, Part 4-3, sections 200, 201 and 202]*

10.203 The offences listed in Part 4-3 are of strict liability so that it is not necessary to consider the intent of the person committing the offence. The strict liability nature of these offences reflects the potential for widespread detriment, both financially for individual consumers and for its effect on the market and consumer confidence more generally, that can be caused by a person that breaches this provision, whether or not it intended to engage in the contravention.

10.204 Part 4-6 of the ACL provides defences applicable to criminal proceedings of:

- an honest and reasonable mistake of fact; [*Schedule 1, item 1: Chapter 4, Part 4-6, section 207*]
- where the contravention was caused by the act or default of another person or an accident or cause beyond the person's control, and where the person took reasonable precautions and exercised due diligence to avoid the contravention; and [*Schedule 1, item 1: Chapter 4, Part 4-6, section 208*]
- where an advertiser publishes an advertisement in the ordinary course of business and does not know and had no reason to suspect the advertisement amounted to a contravention. [*Schedule 1, item 1: Chapter 4, Part 4-6, section 209*]

*Enforcement powers, penalties and remedies*

10.205 Civil pecuniary penalties do not apply with respect to Part 3-3 of the ACL.

10.206 The following enforcement powers and remedies apply to Part 3-3 of the ACL:

- undertakings; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 1*]
- substantiation notices; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 2*]
- public warning notices; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 3*]
- injunctions; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 2*]
- damages; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 3*]
- compensatory orders; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision A*]

- redress for non-parties; and *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision B]*
- non-punitive orders. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, section 246]*

10.207 For further information on these powers, remedies and penalties generally see Chapters 14 and 15.

10.208 The ACCC may not issue an infringement notice for a contravention of Part 3-3 of the ACL.

## **Application and transitional provisions**

10.209 The ACL will commence on the later of 1 January 2011 or the commencement of Schedule 1 of the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (the first ACL Bill). The first ACL Bill is currently before the Parliament. *[Section 2]*

10.210 Chapter 3, Part 3-3 applies to all relevant conduct occurring in trade or commerce on or after 1 January 2011.

10.211 Conduct occurring prior to 1 January 2011 will remain subject to the repealed (and saved, for those purposes) provisions in the TP Act or the relevant FT Act of a State or Territory. *[Schedule 7, item 6]*

10.212 Commonwealth safety standards which were in force at the time of the commencement of the ACL, are saved and continue to apply after the ACL commences. The standards are treated as having been made by the Commonwealth Minister under the ACL upon commencement of the ACL. *[Schedule 7, item 4]*

10.213 Commonwealth interim bans and permanent bans in force at the time the ACL commences are saved and continue to apply after the ACL commences. The bans are treated as having been made by the Commonwealth Minister under the ACL upon commencement of the ACL. *[Schedule 7, items 2 and 3]*

10.214 The TP Act, as in force immediately before the commencement of the ACL, continues to apply to or in relation to any proceedings under or in relation to that Act, which were commenced, but not concluded, before that commencement. *[Schedule 7, item 7]*

10.215 The Governor-General may make regulations prescribing matters of a transitional, application or saving nature in relation to the amendments and repeals made by the Schedules to this Act. *[Schedule 7, item 12]*



## **Consequential amendments**

10.216 References to provisions of the TP Act in other CC Act provisions and provisions of other Acts will be consequentially amended to refer to provisions of the ACL to ensure that the affected provisions continue to apply in the way in which they did under the TP Act. [*Schedules 5 and 6*]



---

# **Chapter 11**

## ***Information standards***

---

### **Outline of chapter**

11.1 The Australian Consumer Law (ACL) empowers the Commonwealth Minister to prescribe information standards for goods and services. Information standards may require:

- certain information be provided and/or to be provided in a certain manner or form;
- certain information not be provided and/or to not be provided in a certain manner or form; or
- certain information to have an assigned meaning.

### **Context of amendments**

11.2 Following public consultations on the ACL, in December 2009 the Ministerial Council on Consumer Affairs (MCCA) announced that the ACL will include a power for information standards to be made for goods and services.

11.3 Information standards provide a legislative basis for the responsible Minister to require suppliers or specified products to provide information related to those products. Information standards are used where the Government considers the characteristics of a good or service are such that the mandated provision of information will facilitate effective trade in that good or service.

11.4 A power to prescribe information standards was inserted into the TP Act in 1986. Under the TP Act, the Commonwealth Minister can prescribe information standards with respect to goods. That power does not extend to prescribing information standards for services.

11.5 State and Territory consumer protection laws currently contain similar powers and in some jurisdictions these powers relate to both goods and services. Some services are also subject to industry-specific regulation.

11.6 There are currently around 25 different information standards in Australia — 23 which relate to goods (such as fibre content labelling and footwear) and two which relate to services (employment placement services and funeral services). The two standards which relate to services were prescribed in NSW under industry-specific provisions of their fair trading law.

11.7 MCCA has agreed that the ACL will include an information standards making power that is broad enough to accommodate the range of matters covered by information standards which exist under State and Territory consumer protection laws, including matters which relate to services.

11.8 Prior to commencement of the ACL, MCCA will consider which existing State and Territory information standards will continue to apply under the ACL.

## **Summary of new law**

11.9 The ACL empowers the Commonwealth Minister to prescribe information requirements when supplying particular goods or services by making information standards and prohibiting, in certain circumstances, the supply of goods or services that do not comply with a relevant standard which is in force.

11.10 The Commonwealth Minister can prescribe information requirements for goods or services through one of two ways:

- by *making* a new information standard; or
- by *declaring* a standard made by Standards Australia or another prescribed organisation a new information standard.

11.11 Suppliers are prohibited from supplying particular kinds of goods or services that fail to comply with information requirements in an information standard for goods or services of that kind.

## Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
The Commonwealth Minister can make information standards for goods and/or services.	Section 65D of the TP Act provides that the Commonwealth Minister can prescribe information standards relating to goods. State and Territory FT Acts have similar provisions.
An information standard can contain requirements for specified information to be provided about goods or services, the form or manner which such information is to be provided, that specified information must not be provided, that specified information must not be provided in a certain manner or form, or to assign a certain meaning to information.	Section 65D of the TP Act provides that an information standard can require information to be disclosed about goods (such as performance, contents, packaging), and the form and manner which such information is to be disclosed, to the extent that such information is reasonably necessary to give persons using the goods information about the quantity, quality, nature or value of the goods. State and Territory FT Acts have similar provisions.
The Commonwealth Minister can declare that a particular standard (or part of a standard, with additions or variations) prepared or approved by Standards Australia International Limited (or a prescribed association), is an information standard for goods or services.	Section 65E of the TP Act provides that the Commonwealth Minister may declare that a particular standard (or part of a standard, with additions or variations) prepared or approved by Standards Australia International limited (or a prescribed association), is an information standard for goods. State and Territory FT Acts have similar provisions.
Suppliers must not supply goods or services that fail to comply with an information standard in force for such goods or services.	Section 65D provides that suppliers must not supply goods which do not comply with an information standard in force for such goods. State and Territory FT Acts have similar provisions.

## Detailed explanation of new law

11.12 The ACL contains a general power for the Commonwealth Minister to prescribe information standards which set out information requirements for goods and/or services. The Commonwealth Minister can:

- require certain information to be provided or to be provided in a certain manner or form;
- require certain information to not be provided or not be provided in a certain manner or form; or
- assign a meaning to certain information.

## Power to make information standards

11.13 The Commonwealth Minister is empowered to make information standards for goods and services. [*Schedule 1, item 1: Chapter 3, Part 3-4, section 134*]

11.14 Information standards can be made with respect to goods or services which are of a particular kind.

11.15 An information standard can relate to goods of a particular kind, services of a particular kind or to both goods and services that are of a particular kind. [*Schedule 1, item 1: Chapter 3, Part 3-4, subsection 134(1)*]

11.16 An information standard can be made in relation to any subject matter, and not just with respect to consumer health or safety matters. Separately, the Commonwealth Minister may prescribe safety standards, including warnings and instructions, with respect to certain types of goods and services (see Chapter 10 of this Explanatory Memorandum).

11.17 Information standards that are made by the Commonwealth under the ACL apply nationally in all jurisdictions.

11.18 New information standards made are to be published on the internet. [*Schedule 1, item 1: Chapter 3, Part 3-4, subsection 134(1)*] This allows for a single and central location for stakeholders (such as suppliers, consumers and enforcement agencies) to find details of an information standard for particular goods and services. Publication on the internet also provides an effective and timely means for information standards to be disclosed nationally to the public.

### ***Requirements under an information standard***

11.19 An information standard for goods or services of a particular kind, may [*Schedule 1, item 1: Chapter 3, Part 3-4, subsection 134(1)*]:

- provide for the content of information about goods or services of that kind;
- require the provision of specified information about goods or services of that kind;
- set out the manner or form in which the specified information about the goods or services is to be provided;
- not allow for the provision of specified information about goods or services of that kind;
- provide the manner in which the specified information about the goods or services must not be provided; and/or
- assign a meaning to specified information about goods or services of that kind.

### **Power to declare information standards**

11.20 Apart from the power to make new information standards, the Commonwealth Minister is also empowered to declare an earlier standard as an information standard under the ACL. [*Schedule 1, item 1: Chapter 3, Part 3-4, section 135*]

11.21 The Commonwealth Minister can declare a particular standard, or part of a particular standard, that has been prepared or approved by Standards Australia International Limited or by another prescribed association, is an information standard (a declared information standard). [*Schedule 1, item 1: Chapter 3, Part 3-4, paragraph 135(1)(a)*]

11.22 In declaring an information standard, the Commonwealth Minister can make additions or variations to the earlier prepared or approved standard (or to part of it). [*Schedule 1, item 1: Chapter 3, Part 3-4, paragraph 135(1)(b)*]

11.23 A declared standard must specify the particular kind of goods or services to which it relates. The standard must also specify the particular earlier standard (or part of it), with any additions or variations to it, which is being adopted. [*Schedule 1, item 1: Chapter 3, Part 3-4, subsection 135(1)*]

11.24 A declared standard cannot be made if it is inconsistent with an existing information standard in force and made by the Commonwealth

relating to the same kind of goods or services. *[Schedule 1, item 1: Chapter 3, Part 3-4, subsection 135(2)]*

11.25 A declared information standard applies nationally in all jurisdictions.

11.26 A declared information standard must be published on the internet. *[Schedule 1, item 1: Chapter 3, Part 3-4, subsection 135(1)]* Declared information standards are also legislative instruments for the purposes of the Legislative Instruments Act 2003 (LI Act).

### **Compliance with information standards**

11.27 The ACL prohibits the supply of goods or services that do not comply with the requirements of an information standard in force for those goods or services. *[Schedule 1, item 1: Chapter 3, Part 3-4, section 136 and 137]*

11.28 Suppliers are prohibited from engaging in any of the following activities with respect to goods or services of a particular kind, without first complying with an information standard in force for goods or services of that kind:

- supplying those goods or services; *[Schedule 1, item 1: Chapter 3, Part 3-4, subsections 136(1) and 137(1)]*
- offering to supply those goods or services; *[Schedule 1, item 1: Chapter 3, Part 3-4, subsections 136(2) and 137(2)]* and/or
- possessing, manufacturing or being in control of such goods for the purpose of supplying them. *[Schedule 1, item 1: Chapter 3, Part 3-4, subsection 136(2)]*

A supplier is only prohibited from engaging in any of the above activities in trade or commerce and not, for instance, in a personal or private capacity. *[Schedule 1, item 1: Chapter 3, Part 3-4, subsections 136(1), (2) and (2) and 137(1) and (2)]*

#### ***Exported goods***

11.29 A supplier can supply goods without having to first comply with an information standard in force for goods of that kind, if the goods are intended to be used outside of Australia. *[Schedule 1, item 1: Chapter 3, Part 3-4, subsection 136(5)]*

11.30 There is a presumption that a good is intended to be used outside of Australia if a statement has been applied to the good indicating either that the good is for export only, or that the good is intended to be used outside of Australia. *[Schedule 1, item 1: Chapter 3, Part 3-4, subsection 136(6)]*



11.31 The ways in which a statement can be applied to a good include the statement being woven, impressed, worked into, affixed or annexed to the good, or being applied to the covering, label, reel or thing which accompanies the good. [*Schedule 1, item 1: Chapter 3, Part 3-4, subsection 136(7)*]

11.32 **Covering** is defined to include a stopper, class, bottle, vessel, box, capsule, case, frame or wrapper. [*Schedule 1, item 1: Chapter 1, section 2*]

11.33 In certain circumstances, an information standard may impose information requirements which are not relevant to overseas markets, such as language requirements. Alternatively, overseas markets may be subject to different domestic regulatory requirements, and to impose additional or inconsistent information requirements may not be appropriate.

#### ***Loss or damage suffered***

11.34 A person is deemed to have suffered a loss or damage because of a contravention of an information standard, where [*Schedule 1, item 1: Chapter 3, Part 3-4, subsections 136(8) and 137(3)*]:

- a good or service has been supplied in contravention of an information standard in force for goods or services of that kind; and
- the loss or damage would not have been suffered had the information standard been complied with.

#### ***Penalties and remedies***

11.35 The following enforcement powers, remedies and penalties apply to the information standards provisions of the ACL under sections 136 and 137:

- undertakings; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 1*]
- substantiation notices; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 2*]
- public warning notices; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 3*]
- injunctions; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 2*]
- damages; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 3*]
- compensatory orders; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision A*]

- redress for non-parties; and *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, Subdivision B]*
- non-punitive orders. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, section 246]*

11.36 For further information on these powers, remedies and penalties generally see Chapters 14 and 15.

11.37 The ACCC may not issue an infringement notice for a contravention of Part 3-4 of the ACL.

## **Application and transitional provisions**

11.38 The ACL will commence on the later of 1 January 2011 or the commencement of Schedule 1 of the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (the first ACL Bill). The first ACL Bill is currently before the Parliament. *[Section 2]*

11.39 Chapter 3, Part 3-4 of the ACL will commence on 1 January 2011 and apply to conduct on or after that date.

11.40 Conduct occurring prior to 1 January 2011 will remain subject to the repealed (and saved, for those purposes) provisions in the TP Act or the relevant FT Act of a State or Territory. *[Schedule 7, item 6]*

11.41 The information standard provisions in the Bill commence from the date the ACL commences, and apply to goods and services supplied from that date.

11.42 Commonwealth information standards in force at the time the ACL commences are saved and continue to apply nationally. Saved information standards are treated as having been made by the Commonwealth under the ACL from commencement of the ACL. *[Schedule 7, item 5]*

11.43 The TP Act, as in force immediately before the commencement of the ACL, continues to apply to or in relation to any proceedings under or in relation to that Act, which were commenced, but not concluded, before that commencement. *[Schedule 7, item 7]*

11.44 Regulations made for the purposes of section 87AB of the TP Act that were in force immediately before the commencement of section 137 of the CC Act have effect, after the commencement of this item, as if they had been made for the purposes of section 137 of the CC Act as amended by this Bill. *[Schedule 7, item 11]*

11.45 The Governor-General may make regulations prescribing matters of a transitional, application or saving nature in relation to the amendments and repeals made by the Schedules to this Act. [*Schedule 7, item 12*]

### **Consequential amendments**

11.46 References to provisions of the TP Act in other CC Act provisions and provisions of other Acts will be consequentially amended to refer to provisions of the ACL to ensure that the affected provisions continue to apply in the way in which they did under the TP Act. [*Schedules 5 and 6*]



---

## **Chapter 12**

# ***Liability of manufacturers for goods with safety defects***

---

### **Outline of chapter**

12.1 The Australian Consumer Law (ACL) contains a statutory liability regime for manufacturers of goods with a safety defect. The manufacturers' liability provisions in the Bill continue the operation of the current Part VA of the TP Act. However the drafting of the provisions has been amended to reflect the drafting style used for other provisions of the ACL.

12.2 The ACL imposes liability on a manufacturer of a safety defective good, and provides for an action to be brought against the manufacturer, where:

- loss or damage has been suffered because of injuries sustained from the safety defect;
- loss or damage has been suffered because another good has been destroyed or damaged as a result of the safety defect; or
- loss or damage has been suffered because a land, building or fixture has been destroyed or damaged as a result of the safety defect.

### **Context of amendments**

12.3 The ACL imposes liability on manufacturers of safety defective goods and allows an action to be brought against such manufacturer to recover for the amount of the loss or damage suffered as a result of supplying the goods.

12.4 Currently, Part VA of the TP Act provides a statutory liability regime against manufacturers and importers of defective goods. The TP Act provides a means for those who suffered a loss or damage as a result of the supply of a defective good, to recover damages or other redress for their loss.

## **Summary of new law**

12.5 The ACL imposes liability on manufacturers to compensate for loss or damage suffered as a result of supplying defective goods. Liability is imposed on, and an action can be brought against, the manufacturer in any of the following situations:

- an individual has suffered loss or damage because of injuries arising from the safety defect;
- a person has suffered loss or damage because another person has been injured as a result of the safety defect;
- a person has suffered loss or damage because another good has been destroyed or damaged as a result of the safety defect;
- a person has suffered loss or damage because a land, building or fixture has been destroyed or damaged as a result of the safety defect.

12.6 The ACL provides a number of defences to manufacturers against a defective goods action under certain circumstances.

12.7 The amount of loss or damage which the manufacturer is liable for may also be reduced as a result of contributory actions or omissions on the part of the plaintiff.

12.8 Further, an action to recover for the loss or damage suffered could be brought against one or more supplier of the defective good where the manufacturer cannot be identified.

12.9 Regulators may also bring a defective goods action on behalf of a person.

12.10 The manufacturers' liability provisions of the ACL serve a distinct although complementary purpose to the consumer safety provisions.

12.11 While the manufacturers' liability provisions are designed to respond to loss or damage that arise from safety defective goods, the consumer safety provisions are designed to reduce the likelihood of a loss or damage arising in the first place by trying to prevent unsafe goods from entering or remaining in the market.

## Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Manufacturers are liable to compensate injured individuals for loss or damage suffered as a result of supplying goods which contain a safety defect.	Section 75AD of the TP Act provides that manufacturers are liable to compensate injured individuals for loss or damage suffered as a result of safety defects in goods manufactured by it.
Manufacturers are liable to compensate a person for loss or damage suffered because of injuries to another individual as a result of supplying goods which contain a safety defect.	Section 75AE of the TP Act provides that manufacturers are liable to compensate persons for loss or damage suffered because of injuries to other individuals as a result of safety defects in goods manufactured by it.
Manufacturers are liable to compensate a person for loss or damage suffered because other goods have been destroyed or damaged as a result of supplying goods which contain a safety defect.	Section 75AF of the TP Act provides that manufacturers are liable to compensate persons for loss or damage suffered because other goods have been damaged or destroyed as a result of safety defects in goods manufactured by it.
Manufacturers are liable to compensate a person for loss or damage suffered because a land, building or fixture has been destroyed or damaged as a result of supplying goods which contain a safety defect.	Section 75AG of the TP Act provides that manufacturers are liable to compensate persons for loss or damage suffered because land, buildings or fixtures have been damaged or destroyed as a result of safety defects in goods manufactured by it.
Statutory defences are available to manufacturers in safety defective goods actions.	Section 75AK of the TP Act provides statutory defences that are available to manufacturers in defective goods actions.

## Detailed explanation of new law

12.12 The manufacturers' liability provisions of the ACL provide a statutory regime for manufacturers' liability to compensate for loss or damage suffered as a result of supplying goods which safety defects, by allowing those who have suffered loss or damage because of a defect, to bring an action against the manufacturer responsible.

## Manufacturers' liability in safety defective goods actions

12.13 The ACL imposes a statutory liability on a manufacturer of goods which contain a safety defect and allows a person who suffered a loss or damage because of the defect to bring an action against the manufacturer to recover for the amount of the loss or damage. [*Schedule 1, item 1: Chapter 3, Part 3-5, Division 1*]

12.14 An action can be brought by a person against a manufacturer of a safety defective good, to recover for the amount of loss or damage suffered as a result of the good containing a safety defect, in any of the following circumstances [*Schedule 1, item 1: Chapter 3, Part 3-5, Division 1*]:

- where the individual suffered the loss or damage because of injuries arising from the safety defect;
- where the person suffered the loss or damage because another individual has sustained an injury or has died as a result of the safety defect;
- where the person suffered the loss or damage because a different good has been destroyed or damaged as a result of the safety defect; and/or
- where the person suffered the loss or damage because a land, building or fixture has been destroyed or damaged as a result of the safety defect.

### 'Safety defect'

12.15 A good has a **safety defect** if the safety of the good is not such as persons generally are entitled to expect of a good of that kind. [*Schedule 1, item 1: Chapter 1, subsection 9(1)*] The manufacturers' liability provisions apply to 'goods' in general and not limited to 'consumer goods' only.

12.16 To determine whether a particular good has a **safety defect**, all relevant circumstances must be considered. This includes the following matters [*Schedule 1, item 1: Chapter 1, subsection 9(2)*]:

- how the good was marketed;
- what purpose the good has been marketed for;
- the packaging of the good;
- the use of any mark in relation to the good;



- any instructions or warnings for doing or not doing anything in relation to the good (for instance, instructions or warnings as to how the good should be used or not used);
- what might reasonably be expected to be done with the good (including using the good for its unintended purpose or misusing the good); and
- the time the good was supplied by the manufacturer (to the market, including to the person who suffered the loss, damage or injury).

12.17 After the supply of a good, an inference cannot be drawn that the good has a safety defect by the fact a safer good has been later supplied by the manufacturer. [*Schedule 1, item 1: Chapter 1, subsection 9(3)*]

12.18 Similarly, a good does not have a safety defect only because it had complied with a Commonwealth mandatory standard for goods of that kind, and the standard was not the safest possible standard in light of the latest scientific or technical knowledge existing at the time the good was supplied by the manufacturer. [*Schedule 1, item 1: Chapter 1, subsection 9*]

12.19 **Mandatory standard** is defined to mean a standard that has been made under a Commonwealth, State or Territory law, which must be complied with at the time the good is supplied by the manufacturer, and where non-compliance could result in an offence or liability. [*Schedule 1, item 1: Chapter 1, section 2*]

*'Manufacturer'*

12.20 A **manufacturer** of a safety defective good is defined in section 7 of the ACL. [*Schedule 1, item 1: Chapter 1, section 7*]:

#### ***Liability for injuring an individual***

12.21 The manufacturer of a good which has a **safety defect** is liable to compensate an individual who has suffered an injury because of the safety defect. [*Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, subsection 138(1)*]  
However, the manufacturer is only liable if it supplied the good in trade or commerce and not, for instance, in a private or personal capacity. [*Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, paragraph 138(1)(a)*]

12.22 The injured individual can recover for the amount of loss or damage suffered by bringing an action against the manufacturer. [*Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, subsection 138(2)*] It does not affect the ability of the person to bring a recovery action that the safety defective good had not been directly supplied to or acquired by them.

12.23 Where the individual has died as a result of an injury sustained from the safety defect in the good, a State or Territory law on liability in respect of death to individuals applies as if their action were an action under that law on liability and the safety defect were the manufacturer's wrongful act, neglect or default. [Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, subsection 138(3)]:

- an action to recover damages for injuries was brought under the relevant State or Territory law; and
- the safety defect was a wrongful act, neglect or default of the manufacturer.

#### ***Liability for injuring another individual***

12.24 The manufacturer of a good which contains a **safety defect** is liable to compensate a person who has suffered loss or damage as a result of another individual being injured because of the safety defect. [Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, subsection 139(1)] The manufacturer must have supplied the goods in trade or commerce and not, for instance, in a private or personal capacity. [Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, paragraph 139(1)(a)]

12.25 The person suffering the loss or damage can recover for the amount of their loss or damage by bringing an action against the manufacturer. [Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, subsection 139(2)] It does not affect the ability of the person to bring a recovery action if the safety defective good had not been directly supplied to or acquired by them.

12.26 Further, a manufacturer's liability is not affected by the death of an injured individual from injuries sustained as a result of a safety defective good being supplied. [Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, subparagraph 139(1)(d)(ii)]

12.27 However, the loss or damage must not have arisen because of a business or professional relationship between the person suffering the loss or damage, and the individual who has been injured as a result of the safety defective good. [Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, subparagraph 139(1)(e)]

#### ***Liability for damaging or destroying other goods***

12.28 The manufacturer of a good which has a safety defect is liable to compensate a person who has suffered loss or damage as a result of another good being damaged or destroyed because of the safety defect. [Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, subparagraph 140(1)] The manufacturer must have supplied the good in trade or commerce and not, for instance, in a

private or personal capacity. [*Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, paragraph 140(1)(a)*]

12.29 The person suffering the loss or damage can recover for the amount of their loss or damage by bringing an action against the manufacturer. [*Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, subsection 140(2)*] It does not affect the ability of the person to bring a recovery action if the safety defective good had not been directly supplied to or acquired by them.

12.30 However, the good which has been damaged or destroyed because of a safety defect, must be one that is ordinarily acquired for personal, domestic or household use or consumption, and not, for instance, one that is ordinarily acquired for a business or commercial purpose. [*Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, paragraph 140(1)(c)*]

12.31 Further, the person suffering the loss or damage must have used or consumed the destroyed or damaged good (or intended to do so) for personal, domestic or household purposes. [*Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, paragraph 140(1)(d)*]

#### ***Liability for damaging or destroying land, buildings or fixtures***

12.32 The manufacturer of a good that has a ***safety defect*** is liable to compensate a person who suffered loss or damage as a result of a land, building or fixture being destroyed or damaged because of the safety defect. [*Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, subsection 141(1)*] The manufacturer must have supplied the good in trade or commerce and not, for instance, in a private or personal capacity. [*Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, paragraph 141(1)(a)*]

12.33 The person suffering the loss or damage can recover for the amount of their loss or damage by bringing an action against the manufacturer. [*Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, subsection 141(2)*] It does not affect the ability of the person to bring a recovery action if the safety defective good had not been directly supplied to or acquired by them.

12.34 The damaged or destroyed land, building or fixture must have been ordinarily acquired for private use and not, for instance, acquired for a professional, business or commercial purpose. [*Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, paragraph 141(1)(d)*]

12.35 The person suffering the loss or damage must have used (or intended to use) the land, building or fixture for a private purpose and not, for instance, a professional, business or commercial purpose. [*Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, paragraph 141(1)(e)*]

## Defences to safety defective goods actions

12.36 There are four types of defences available to manufacturers in safety defective goods actions. [*Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, section 142*] Each of these are outlined below.

### *No safety defect exists*

12.37 It is a defence to a safety defective goods action if the manufacturer can establish that the good alleged to have caused the loss or damage in question, did not contain a safety defect at the time they were supplied by the actual manufacturer. [*Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, paragraph 142(a)*]

12.38 An actual manufacturer of a good is a person who was involved in the actual manufacture of the goods, such as growing, extracting, producing, processing or assembling the good. It does not include a person who holds themselves out (or is held out) to be the manufacturer of the good nor does it include an importer of the good, where the person has not been actually involved in manufacturing the good (for instance, not involved in growing, extracting, producing, processing or assembling the good).

12.39 Where the good alleged to have caused the loss or damage suffered is electricity, it is a defence if the manufacturer can establish that no safety defect existed at the time the electricity was generated (being a time before the electricity was transmitted or distributed). [*Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, subparagraph 142(a)(i)*]

### *Compliance with a mandatory standard*

12.40 It is a defence to a safety defective goods action where the manufacturer can establish that the good alleged to have caused the loss or damage in question, was only defective after complying with a 'mandatory standard' in force for goods of that kind at the time the good was supplied, such as a safety standard or information standard. [*Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, paragraph 148(1)(b)*]

12.41 Where a manufacturer intends to rely on this defence, it must give the Commonwealth as soon as possible, the following information: [*Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, subsection 148(1)*]

- notice about the safety defective goods action being brought against them;
- notice about the defence it is proposing to rely on; and
- a copy of the defence it is proposing to rely on.

12.42 The giving of the above notices makes the Commonwealth a defendant in the safety defective goods action. [*Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, subsection 148(2)*] Accordingly, if, but for this defence, the action is successful, then it is the Commonwealth (and not the manufacturer) who is liable to pay for the amount of loss or damage suffered as a result of the safety defect. In addition, the court may make cost orders against the Commonwealth where it is considered just to do so. [*Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, subsection 148(3)*]

***Scientific or technical knowledge***

12.43 It is a defence to a safety defective goods action if the manufacturer can establish that the good alleged to have caused the loss or damage in question, could not be discovered given the state of scientific or technical knowledge existing at the time the good was supplied by them. [*Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, paragraph 142(c)*]

12.44 The time to assess whether the state of scientific and technical knowledge was such as to enable the safety defect to be discovered, is the time when the relevant good in question was supplied by the manufacturer. This may not necessarily be the first time that goods of that kind were supplied by that manufacturer. Further, the good in question does not have to be directly supplied to or acquired by the person who suffered the loss or damage.

***The good was comprised in another good***

12.45 It is a defence to a safety defective goods action where the manufacturer can establish that the good alleged to have caused the loss or damage in question was comprised in another good, and the safety defect only existed because of: [*Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, paragraph 142(d)*]

- the design of that other good;
- a marking on or which accompanied that other good; or
- an instruction or warning given by the manufacturer of that other good.

12.46 A good can be ‘comprised in’ another good if, for instance, it is part of, an ingredient of or component of, another good.

## Bringing a safety defective goods actions

### *Time for commencing an action*

12.47 A safety defective goods action is required to be commenced within three years from the time when the person bringing the action (the plaintiff) was aware, or should have become aware, of the following matters [*Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, subsection 143(1)*]:

- the loss or damage alleged to have been suffered;
- the safety defect in the good in question; and
- the identity of the manufacturer of the good in question.

12.48 The plaintiff includes the person who suffered the loss or damage in question or the individual who sustained injuries as a result of the safety defect.

12.49 However, a safety defective goods action must be brought within 10 years of the particular good in question which is alleged to have a safety defect, being supplied by its manufacturer. [*Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, subsection 143(2)*] The 10 year time limit starts from the time when the particular good in question was supplied by the manufacturer, and not when goods of that kind were first supplied. It does not matter to whom the good in question had been supplied to or acquired by.

### *Joint and several liability*

12.50 Where two or more persons (the defendants) are liable in a safety defective goods action with respect to the same loss or damage, then a court can find [*Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, section 144*] :

- all defendants to be jointly liable for the loss or damage (that is all defendants to share in compensating for the amount of the loss or damage); or
- only one or a few of the defendants, and not all of the defendants, are severally liable for the loss or damage (that is one of the defendants or a few of the defendants are required to compensate for the entire loss or damage).

### *Survival of actions*

12.51 A State or Territory law about the survival of causes of actions vested in persons who die, applies to safety defective goods actions. [*Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, section 145*]

***No action can be brought***

12.52 A safety defective goods action cannot be brought if the amount of the loss or damage could be or has been recovered under a Commonwealth, State or Territory law either relating to workers' compensation or giving effect to an international agreement. *[Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, section 146]*

***Unidentified manufacturer***

12.53 A person (the plaintiff) wishing to bring a safety defective goods action but does not know who the manufacturer of the alleged safety defective good was, can request one or more suppliers of the good who is known to the plaintiff (like a distributor or importer) to provide details identifying the manufacturer of the good. The plaintiff can also request a supplier to provide details that identifies the supplier. *[Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, subsection 147(1)]*

12.54 The plaintiff is required to put their request in writing to each supplier. *[Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, subsection 147(1)]*

12.55 A plaintiff can only request information which goes towards identifying the manufacturer of the good in question, or which identifies the supplier to whom the request has been given; the plaintiff cannot request information unrelated to identifying the manufacturer or the supplier. Upon receiving a written request, the supplier is only required to provide information which helps to identify the manufacturer of the good in question or which relates to the supplier's identity.

12.56 The ability to request identifying information about a manufacturer or supplier of safety defective goods, could assist those who have suffered loss or damage as a result of safety defects, to recover compensation from the manufacturer of such good in situations where the manufacturer's identity is unknown.

12.57 If a supplier does not provide the requested information and within 30 days of the request being made, and the identify of the manufacturer of the good in question is still unknown to the plaintiff — then that supplier will be deemed to be the manufacturer for the purposes of bringing a safety defective goods action. *[Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, subsection 147(2)]* However, a supplier will not be deemed to be the manufacturer of the good where the plaintiff is proposing to rely on the defence that the state of scientific or technical knowledge could not enable the safety defect to be discovered.

12.58 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.

***Representative actions***

12.59 A regulator can apply to bring a safety defective goods action (a representative action) against a manufacturer of a good alleged to contain a safety defect, on behalf of a person who has suffered loss or damage in relation to the action. *[Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, subsection 149(1)]*

12.60 An application to bring a representative action can only be made after written consent has been obtained from each person whom the action is being brought on behalf of. *[Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, subsection 149(2)]*

***No exclusions or modifications***

12.61 A term of a contract which has any of the following effects, or purports to do so, is void and cannot apply: *[Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, subsection 150(1)]*:

- to exclude, restrict or modify the application of any of the manufacturers' liability provision of the ACL;
- to exclude, restrict or modify the exercise of a right conferred by any of the manufacturers' liability provision of the ACL;  
or
- to exclude, restrict or modify any liability under any of the manufacturers' liability provision of the ACL.

12.62 A contract term does not exclude, restrict or modify a manufacturers' liability provision unless it expressly states so, or the term operates so that it is inconsistent with a provision. *[Schedule 1, item 1: Chapter 3, Part 3-5, Division 1, subsection 150(2)]*

## **Application and transitional provisions**

12.63 The ACL will commence on the later of 1 January 2011 or the commencement of Schedule 1 of the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (the first ACL Bill). The first ACL Bill is currently before the Parliament. *[Section 2]*



12.64 Chapter 3, Part 3-5 applies to all relevant conduct occurring in trade or commerce on or after 1 January 2011.

12.65 Conduct occurring prior to 1 January 2011 will remain subject to the repealed (and saved, for those purposes) provisions in the TP Act or the relevant FT Act of a State or Territory. *[Schedule 7, item 6]*

12.66 The TP Act, as in force immediately before the commencement of the ACL, continues to apply to or in relation to any proceedings under or in relation to that Act, which were commenced, but not concluded, before that commencement. *[Schedule 7, item 7]*

12.67 The Governor-General may make regulations prescribing matters of a transitional, application or saving nature in relation to the amendments and repeals made by the Schedules to this Act. *[Schedule 7, item 12]*

## **Consequential amendments**

12.68 References to provisions of the TP Act in other CC Act provisions and provisions of other Acts will be consequentially amended to refer to provisions of the ACL to ensure that the affected provisions continue to apply in the way in which they did under the TP Act. *[Schedules 5 and 6]*



---

# Chapter 13

## Offences

---

### Outline of chapter

13.1 Certain contraventions of the Australian Consumer Law (ACL) attract criminal penalties.

13.2 Chapter 4 of the ACL sets out the criminal elements of these offences as well as provides for specific and general defences in prosecutions against these provisions.

### Context of amendments

13.3 Prior to 2001, section 79 of the TP Act provided that contraventions of the consumer protection provisions in Part V of that Act were criminal offences.

13.4 In 2001, the *Treasury Legislation Amendment (Application of Criminal Code) Act (No.1) 2001* inserted Part VC into the TP Act. The provisions of Part VC mirrored certain consumer protection provisions in Divisions 1 and 1A of Part V of the TP Act. This approach was adopted to make the offence provisions within Part VC consistent with the criminal liability regime in the *Criminal Code Act 1995*.

13.5 The *Intergovernmental Agreement for the Australian Consumer Law* (IGA) provides that the relevant criminal offence provisions of Part VC of the TP Act will be incorporated into the ACL. In addition, the State and Territory fair trading legislation, on which some provisions of the ACL are based, provide for criminal prosecution for breaches of those provisions.

13.6 It is the Government's intention that criminal prosecutions should be available for serious breaches of certain provisions of the ACL.

### Summary of new law

13.7 Chapter 4 of the ACL creates a framework of defences and procedural requirements for criminal prosecution of contraventions of certain provisions of the ACL. Chapter 4 also includes mirror contraventions of

certain provisions of the ACL for the purposes of facilitating criminal prosecutions.

### **Comparison of key features of new law and current law**

<i>New law</i>	<i>Current law</i>
Chapter 4 of the ACL provides for offences that replicate most, but not all, of the conduct obligations in Chapter 3 of the ACL.	Part VC of the TP Act provides for offences that replicate most, but not all, of the conduct obligations under Division 1 of Part V of the TP Act.  The State and Territory FT Acts generally provide for criminal offences, but do not separate conduct obligations from criminal offences.
Section 160 of the ACL provides an exemption for prescribed information providers in respect of certain types of false or misleading representations or conduct.	Section 75AZR of the TP Act provides an exemption for prescribed information providers in respect of certain types of false or misleading representations or conduct.
Section 207 of the ACL provides for a defence to a criminal prosecution of reasonable mistake of fact.	Subsection 85(1) of the TP Act provides a defence of reasonable mistake of fact.  The FT Acts generally also provide for defences of reasonable mistake of fact.
Section 208 of the ACL provides a defence to a criminal prosecution if a contravention is due to an act or default of another person or some other cause beyond the defendant's control.	Section 85(1) of the TP Act provides a defence if a contravention is due to an act or default of another person or some other cause beyond the defendant's control.  The FT Acts generally also provide for defences if a contravention is due to an act or default of another person or some other cause beyond the defendant's control.
Section 209 of the ACL provides a defence to a criminal prosecution for publication of advertisements by a person whose business it is to publish or arrange the publication of advertisements if the person did not know, and had no reason to suspect, that a contravention would result from the publication.	Subsection 85(3) of the TP Act provides a defence for publication of advertisements by a person whose business it is to publish or arrange the publication of advertisements.  The FT Acts generally provide for a similar defence.

<i>New law</i>	<i>Current law</i>
Section 210 of the ACL provides a defence to prohibitions on the supply of goods that do not comply with safety standards and information standards, in certain circumstances, if goods were acquired by the defendant for the purpose of re-supply.	Section 85(4) of the TP Act provides a defence to prohibitions on the supply of goods that do not comply with safety standards and information standards, in certain circumstances, if goods were acquired by the defendant for the purpose of re-supply.
Section 211 of the ACL provides a defence to prohibitions on the supply of services that do not comply with safety standards and information standards, in certain circumstances, if goods were acquired by the defendant for the purpose of re-supply.	The TP Act does not provide for a similar defence, as safety standards and information standards do not apply to services.
Section 213 of the ACL provides that prosecutions must be commenced within 3 years of the commission of an offence.	Section 79(6) of the TP Act provides that prosecutions must be commenced within 3 years of the commission of an offence against a provision of Part VC of Act.
Section 214 of the ACL provides that compensation for victims of contraventions of the ACL must be given preference over the imposition of a fine under Chapter 4 of the ACL.	Section 79B of the TP Act provides that compensation to victims is to receive preference over pecuniary penalties or fines.
Section 215 of the ACL provides that a court must not apply multiple fines in respect of the same conduct that exceed the maximum penalty for an offence. Section 216 has similar effect to section, but applies when fines are applied in separate proceedings.	Section 76(3) of the TP Act provides that a person is not liable for more than one pecuniary penalty in respect of the same conduct.
Section 217 of the ACL provides that a court may grant an injunction or make a non-punitive or adverse publicity order in the same proceedings as those for a contravention of a Chapter 4.	Section 79(4) of the TP Act provides that a court may grant an injunction or make a non-punitive or adverse publicity order in proceedings against a person for contravening a provision of Part VC.

## Detailed explanation of new law

13.8 In this Explanatory Memorandum the individual offences are determined in accordance with the provisions with which they are associated.

## **Offences relating to unfair practices**

13.9 Part 4-1 of the ACL provides for criminal offences which take, essentially the same form as certain prohibitions in Chapter 3, Part 3-1 of the ACL. The substantive operation of those provisions is discussed where the substantive prohibitions are discussed in Chapter 5 in this explanatory memorandum. Criminal offences are provided in respect of contraventions of the following provisions:

- False or misleading representations about goods or services [*Schedule 1, item 1: Chapter 4, Part 4-1, Division 1, section 151*];
- False or misleading representations about the sale of land [*Schedule 1, item 1: Chapter 4, Part 4-1, Division 1, section 152*];
- Misleading conduct relating to employment [*Schedule 1, item 1: Chapter 4, Part 4-1, Division 1, section 153*];
- Offering rebates, gifts or prizes [*Schedule 1, item 1: Chapter 4, Part 4-1, Division 1, section 154*];
- Misleading conduct as to the nature of goods [*Schedule 1, item 1: Chapter 4, Part 4-1, Division 1, section 155*];
- Certain misleading conduct in relation to services [*Schedule 1, item 1: Chapter 4, Part 4-1, Division 1, section 156*];
- Bait advertising [*Schedule 1, item 1: Chapter 4, Part 4-1, Division 1, section 157*];
- Wrongly accepting payment [*Schedule 1, item 1: Chapter 4, Part 4-1, Division 1, section 158*];
- Misleading representations about certain business activities [*Schedule 1, item 1: Chapter 4, Part 4-1, Division 1, section 159*];
- Unsolicited cards [*Schedule 1, item 1: Chapter 4, Part 4-1, Division 2, section 161*];
- Assertion of a right to payment for unsolicited goods or services [*Schedule 1, item 1: Chapter 4, Part 4-1, Division 2, section 162*];
- Assertion of a right to payment for unauthorised entries or advertisements [*Schedule 1, item 1: Chapter 4, Part 4-1, Division 2, section 163*];

- Participation in pyramid schemes [*Schedule 1, item 1: Chapter 4, Part 4-1, Division 2, section 164*];
- Multiple pricing [*Schedule 1, item 1: Chapter 4, Part 4-1, Division 2, section 165*];
- Single price to be specified in certain circumstances [*Schedule 1, item 1: Chapter 4, Part 4-1, Division 2, section 166*];
- Referral selling [*Schedule 1, item 1: Chapter 4, Part 4-1, Division 2, section 167*]; and
- Harassment and coercion [*Schedule 1, item 1: Chapter 4, Part 4-1, Division 2, section 168*].

### *Defences relating to false or misleading representations*

13.10 A person has a defence against criminal prosecution for a contravention of the false or misleading representation offences (sections 151, 152, 155, 156, and 159) if he or she publishes it in the course of carrying on a business as an information provider [*Schedule 1, item 1: Chapter 4, Part 4-1, Division 1, paragraph 160(1)(a)*]. This defence also expressly applies to the Australian Broadcasting Corporation, the Special Broadcasting Service Corporation or the holder of a licence granted under the *Broadcasting Services Act 1992* [*Schedule 1, item 1: paragraph 160(1)(b)*].

13.11 **Information provider** is a defined term in the ACL, and includes media organisations such as radio and television stations (including the Australian Broadcasting Corporation and the Special Broadcasting Service Corporation), as well as publishers of newspapers and magazines. This definition operates in the same way as the one in the current section 75AZR of the TP Act. [*Chapter 2, Part 2-1, subsections 20(5) and (6)*]

13.12 This exemption does not apply to:

- advertisements;
- a publication in connection with the supply (or promotion of the supply) of goods or services by the information provider; or
- a publication in connection with the sale or grant (or promotion of the sale or grant) of an interest in land by the information provider. [*Schedule 1, item 1: subsections 160(2) to (4)*]

13.13 These exceptions operate in the same way as those currently outlined in paragraphs 75AZR of the TP Act.

## **Offences relating to consumer transactions**

13.14 Part 4-2 of the ACL provides for criminal offences which take, essentially the same form as certain prohibitions in Chapter 3, Part 3-2 of the ACL. The substantive operation of those provisions is discussed where the substantive prohibitions are discussed in Chapter 5 in this explanatory memorandum. Criminal offences are provided in respect of contraventions of the following provisions:

- Display notices under the consumer guarantees regime in Part 3-2, Division 1 of the ACL [*Schedule 1, item 1: Chapter 4, Part 4-2, Division 1, section 169*];
- Permitted hours for negotiating unsolicited selling agreements [*Schedule 1, item 1: Chapter 4, Part 4-2, Division 2, section 170*];
- Disclosing purpose and identity when making unsolicited approaches to consumers [*Schedule 1, item 1: Chapter 4, Part 4-2, Division 2, section 172*];
- Ceasing to negotiate an unsolicited consumer agreement on request [*Schedule 1, item 1: Chapter 4, Part 4-2, Division 2, section 173*];
- Informing a person of their right to terminate an unsolicited consumer agreement [*Schedule 1, item 1: Chapter 4, Part 4-2, Division 2, section 174*];
- Providing certain documents when negotiating an unsolicited consumer agreement [*Schedule 1, item 1: Chapter 4, Part 4-2, Division 2, section 175*];
- Requirements for the content of an unsolicited consumer agreement [*Schedule 1, item 1: Chapter 4, Part 4-2, Division 2, section 176*];
- Additional requirements for unsolicited consumer agreements not negotiated by telephone [*Schedule 1, item 1: Chapter 4, Part 4-2, Division 2, section 177*];
- Requirements for amendments of unsolicited consumer agreements [*Schedule 1, item 1: Chapter 4, Part 4-2, Division 2, section 178*];



- 
- Obligation of suppliers on termination of an unsolicited consumer agreement [*Schedule 1, item 1: Chapter 4, Part 4-2, Division 2, section 179*];
  - Prohibition on supplying goods or services under an unsolicited consumer agreement within the first 10 days [*Schedule 1, item 1: Chapter 4, Part 4-2, Division 2, section 180*];
  - Repayment of payments received after termination of an unsolicited consumer agreement [*Schedule 1, item 1: Chapter 4, Part 4-2, Division 2, section 181*];
  - Prohibition on recovering amounts after termination of an unsolicited consumer agreement [*Schedule 1, item 1: Chapter 4, Part 4-2, Division 2, section 182*];
  - Voiding of certain provisions of unsolicited consumer agreements [*Schedule 1, item 1: Chapter 4, Part 4-2, Division 2, section 183*];
  - Waiver of rights [*Schedule 1, item 1: Chapter 4, Part 4-2, Division 2, section 184*];
  - Lay-by agreements must be in writing [*Schedule 1, item 1: Chapter 4, Part 4-2, Division 3, section 188*];
  - Termination charges [*Schedule 1, item 1: Chapter 4, Part 4-2, Division 3, section 189*];
  - Termination of lay-by agreements by suppliers [*Schedule 1, item 1: Chapter 4, Part 4-2, Division 3, section 190*];
  - Refund of amounts paid under a lay-by agreement [*Schedule 1, item 1: Chapter 4, Part 4-2, Division 3, section 191*];
  - Prescribed requirements for warranties against defects [*Schedule 1, item 1: Chapter 4, Part 4-2, Division 4, section 192*]; and
  - Compliance by repairers with prescribed requirements for warranties against defects [*Schedule 1, item 1: Chapter 4, Part 4-2, Division 4, section 193*].

#### *Application of provisions on unsolicited selling agreements*

13.15 In the event that the rights under a contract for the supply of goods or services that has arisen from an unsolicited selling agreement are assigned or otherwise transfer from one person to another, Part 4-2, Division 2 of the

ACL applies to that other person as if he or she was the original person.  
*[Schedule 1, item 1: Chapter 4, Part 4-2, Division 2, section 184]*

13.16 Part 4-2, Division 2 also applies in relation to a contract for the supply of goods or services to a consumer on the order of another person, as if that other person was the original consumer. *[Schedule 1, item 1: Chapter 4, Part 4-2, Division 2, section 185]*

*Conduct to which the unsolicited selling provisions do not apply*

13.17 Regulations may exempt particular types of unsolicited selling agreements, business activities or circumstances from the operation of the unsolicited selling provisions of the ACL. However, the regulations may not exempt any agreements, activities or circumstances, from the permitted calling hours requirement in section 73 of the ACL. *[Schedule 1, item 1: Chapter 4, Part 4-2, Division 2, section 186]*

13.18 The unsolicited selling provisions of the ACL do not apply to conduct or agreements that are governed by the anti-hawking provisions of the Corporations Act. *[Schedule 1, item 1: Chapter 4, Part 4-2, Division 2, section 187]*

### **Offences relating to the safety of consumer goods and product related services**

13.19 Part 4-3 of the ACL provides for criminal offences which take, essentially the same form as certain prohibitions in Chapter 3, Part 3-3 of the ACL. The substantive operation of those provisions is discussed where the substantive prohibitions are discussed in Chapter 10 in this explanatory memorandum. Criminal offences are provided in respect of contraventions of the following provisions:

- Supplying consumer goods that do not comply with safety standards *[Schedule 1, item 1: Chapter 4, Part 4-3, Division 1, section 194];*
- Supplying product related services that do not comply with safety standards *[Schedule 1, item 1: Chapter 4, Part 4-3, Division 1, section 195];*
- Requirement to nominate a safety standard *[Schedule 1, item 1: Chapter 4, Part 4-3, Division 1, section 196];*
- Supplying consumer goods covered by a ban *[Schedule 1, item 1: Chapter 4, Part 4-3, Division 2, section 196];*
- Supplying product related services covered by a ban *[Schedule 1, item 1: Chapter 4, Part 4-3, Division 2, section 198];*

- Compliance with recall orders [*Schedule 1, item 1: Chapter 4, Part 4-3, Division 3, section 199*];
- Notification of persons outside Australia if there is a compulsory recall [*Schedule 1, item 1: Chapter 4, Part 4-3, Division 3, section 200*];
- Notification requirements for a voluntary recall of consumer goods [*Schedule 1, item 1: Chapter 4, Part 4-3, Division 3, section 201*]; and
- Suppliers to report consumer goods associated with the death or serious injury or illness of any person [*Schedule 1, item 1: Chapter 4, Part 4-3, Division 4, section 202*].

### **Offences relating to information standards**

13.20 Part 4-4 of the ACL provides for criminal offences which take, essentially the same form as certain prohibitions in Chapter 3, Part 3-4 of the ACL. The substantive operation of those provisions is discussed where the substantive prohibitions are discussed in Chapter 11 in this explanatory memorandum. Criminal offences are provided in respect of contraventions of the following provisions:

- Supplying goods that do not comply with information standards [*Schedule 1, item 1: Chapter 4, Part 4-4, section 203*];
- Supplying services that do not comply with information standards [*Schedule 1, item 1: Chapter 4, Part 4-4, section 204*];

### **Offences relating to enforcement**

13.21 Part 4-5 of the ACL provides for criminal offences which take, essentially the same form as certain prohibitions in Chapter 5, Part 5-1 of the ACL. The substantive operation of those provisions is discussed where the substantive prohibitions are discussed in Chapter 14 in this explanatory memorandum. Criminal offences are provided in respect of contraventions of the following provisions:

- Compliance with substantiation notices [*Schedule 1, item 1: Chapter 4, Part 4-5, section 205*]; and
- Providing false or misleading information in response to a substantiation notice [*Schedule 1, item 1: Chapter 4, Part 4-5, section 206*].

## Defences

13.22 Part 4-6 of the ACL provides for general defences that apply to criminal prosecutions under the ACL.

### *Reasonable mistake of fact*

13.23 Section 207 of the ACL provides that it is a defence in a prosecution for a contravention of Chapter 4 of the ACL if 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 provided by another person.

### **Example 13.1 — reasonable mistake of fact**

The case of *Adams v ETA Foods* (1967)<sup>17</sup> is an example of successful reliance on the defence of reasonable mistake of fact. ETA sold pies and represented that they were ‘beef pies’. The pies contained a significant proportion of meat that was not beef. ETA had purchased the meat from a reputable supplier and had examined and tested the meat after it was delivered, but did not ascertain that substitution had taken place. ETA successfully relied on a defence of reasonable mistake of fact.

### *Act or default of another person*

13.24 Subsection 208(1) of the ACL provides a defence to a prosecution for a contravention of a provision within Chapter 4 if the defendant proves that:

- the contravention was due to the act or default of another person, to an accident or to some other cause beyond the defendant’s control; and
- the defendant took reasonable precautions and exercised due diligence to avoid the contravention.

13.25 Section 208(2) provides that the defence in section 208(1) does not apply to excuse conduct if the ‘other person’ was an employee or agent of the defendant or a director of a defendant that is a body corporate. [*Schedule 1, item 1: Chapter 4, Part 4-6, section 208*]

---

17 (1967) FCR 93.

---

***Publication of advertisements in the ordinary course of business***

13.26 A person cannot be convicted of an offence against the ACL merely because the person, in the ordinary course of their business publishes an advertisement on behalf of another person [*Schedule 1, item 1: Chapter 4, Part 4-6, subsections 209(a) and 209(b)*].

13.27 This defence prevents media providers, including television, radio, and print media, from liability for contraventions of the ACL committed within advertisements published through those media on behalf of other persons. This defence can only be relied upon if the person did not know, or had no reason to suspect that publication of the advertisement will amount to a contravention of the ACL. [*Schedule 1, item 1: Chapter 4, Part 4-6, subsection 209(c)*]

***Supply goods or services in for the purposes of resupply***

13.28 It is a defence for a person in proceedings concerning the supply of goods or services in contravention of a product safety standard (sections 194 and 195 of the ACL) or an information standard (sections 203 and 204) if the defendant can prove that:

- the goods or services were acquired by the defendant for the purpose of resupply [*Schedule 1, item 1: Chapter 4, Part 4-6, paragraphs 210(1)(a) and 211(1)(a)*]; and
- the goods or services were acquired from a person who carried on a business in Australia of supplying such goods and is not an agent of a person outside Australia [*Schedule 1, item 1: Chapter 4, Part 4-6, paragraphs 210(1)(b) and 211(1)(b)*].

13.29 A defendant may only rely on this defence if:

- he or she did not know and could not have reasonably known, with the exercise of due diligence, that the goods or services did not comply with an applicable safety or information standard [*Schedule 1, item 1: Chapter 4, Part 4-6, subparagraphs 210(1)(c)(i) and 210(1)(d)(i)*]; or
- he or she relied in good faith on a representation by the person they acquired the goods or services from that no safety or information standard applied to the goods or services [*Schedule 1, item 1: Chapter 4, Part 4-6, paragraphs 210(1)(c)(ii) and 210(1)(d)(ii)*].

13.30 A supplier of goods or services may acquire goods or subcontract for the supply of services with another supplier, in good faith understanding

that either no safety or information standards exist for those goods or services, or that if such requirements do exist, they have been complied with. It may not be possible for a supplier to determine categorically that goods acquired from others or services supplied by others comply. However a supplier must still make their own efforts to ensure that goods or services supplied by them, irrespective of where they are acquired from, comply with any safety or information standards.

13.31 The defences in sections 210 and 211 can only be relied upon with leave from the court and if the defendant has identified the person from whom the defendant acquired the goods or services. [*Schedule 1, item 1: Chapter 4, Part 4-6, subsections 210(2) and 211(2)*]

### **Miscellaneous procedural requirements**

13.32 Part 4-7 provides some general rules for the conduct of criminal prosecutions under the ACL, including:

- time limits for commencement of prosecutions;
- relative prioritization of penalties and compensation;
- penalties for multiple convictions; and
- granting of injunctions and other orders.

#### ***Time limits for prosecution***

13.33 Under the ACL, criminal prosecutions must be commenced within 3 years of the commission of the offence [*Schedule 1, item 1: Chapter 4, Part 4-7, section 212*].

#### ***Preference must be given to compensation for victims***

13.34 If a court considers that it is appropriate to order a person convicted of an offence against the ACL to both pay a fine and to pay compensation to a victim of the offence, and the person does not have the financial resources to pay both, preference must be given to the payment of compensation [*Schedule 1, item 1: Chapter 4, Part 4-7, section 213*].

#### ***Penalties for multiple contraventions***

13.35 A court is not to impose aggregate penalties on a person that exceed the maximum fine for an offence in respect of multiple contraventions that are similar in nature and occurred at about the same time [*Schedule 1, item 1: Chapter 4, Part 4-7, section 214*].

### *Penalties for previous contraventions*

13.36 A court is not to impose aggregate penalties on a person that exceed the maximum fine for an offence in respect of previous contraventions that are similar in nature. [*Schedule 1, item 1: Chapter 4, Part 4-7, section 215*].

### *Granting of injunctions and other orders*

13.37 In addition to imposing fines up to the maximum levels set out in Chapter 4 of the ACL, a court may grant injunctions or other orders, including non-punitive and adverse publicity orders in respect of contraventions of the ACL. [*Schedule 1, item 1: Chapter 4, Part 4-7, section 216*]

## **Application and transitional provisions**

13.38 The ACL will commence on the later of 1 January 2011 or the commencement of Schedule 1 of the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (the first ACL Bill). The first ACL Bill is currently before the Parliament. [*Section 2*]

13.39 Chapter 4 of the ACL applies to all relevant conduct occurring in trade or commerce on or after 1 January 2011.

13.40 Conduct occurring prior to 1 January 2011 will remain subject to the repealed (and saved, for those purposes) provisions in the TP Act or the relevant FT Act of a State or Territory. [*Schedule 7, item 6*]

13.41 The TP Act, as in force immediately before the commencement of the ACL, continues to apply to or in relation to any proceedings under or in relation to that Act, which were commenced, but not concluded, before that commencement. [*Schedule 7, item 7*]

13.42 The Governor-General may make regulations prescribing matters of a transitional, application or saving nature in relation to the amendments and repeals made by the Schedules to this Act. [*Schedule 7, item 12*]

## **Consequential amendments**

13.43 References to provisions of the TP Act in other CC Act provisions and provisions of other Acts will be consequentially amended to refer to provisions of the ACL to ensure that the affected provisions continue to apply in the way in which they did under the TP Act. [*Schedules 5 and 6*]





---

# **C**hapter 14

## **Enforcement**

---

### **Outline of chapter**

14.1 The ACL provides for regulators taking enforcement action in respect of contraventions or apprehended contraventions of the Act.

14.2 Enforcement powers available to regulators under the ACL include:

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

### **Context of amendments**

14.3 In 2008, the PC's *Review of Australia's Consumer Policy Framework* noted that the TP Act and the FT Acts provided a range of enforcement tools for regulators to deter, punish and provide recompense to consumers for illegal conduct. The PC observed that some tools were not available to all regulators and that this can restrict their ability to adopt regulatory responses that are tailored to the severity of breaches of the relevant laws.

14.4 The PC also noted that the existing powers of the ACCC to gather information about claims or representations made in promoting the supply of goods or services were too limited. Some State and Territory regulators had the power to issue substantiation notices, but this power was not available to the ACCC under the TP Act. Accordingly, the PC recommended that a new, national consumer law should make provision for all regulators having the power to issue substantiation notices to require suppliers to provide information capable of supporting claims or representations made about goods or services.

14.5 The PC considered the 'naming and shaming powers' in the TP Acts and indicated that failure to include them in a national consumer law could undermine the consensus for a national consumer law. On that basis, the PC recommended that MCCA consider their inclusion in the ACL.

14.6 On 15 August 2009, MCCA agreed that the ACL should include substantiation notices as well as public warning notices to allow regulators to warn the public about potentially detrimental conduct.

## **Summary of new law**

14.7 The ACL provides regulators with uniform and comprehensive powers to enforce the provisions of the Act. By providing a uniform set of enforcement tools, the ACL ensures that regulators can take a multi-layered approach to enforcement by tailoring regulatory responses to the severity of breaches of the law. It also ensures that suppliers face the same incentives to comply with the law irrespective of where they reside.

### ***Undertakings***

14.8 Section 218 of the ACL allows a regulator to accept court-enforceable undertakings in connection with a matter in relation to which the regulator has a power or function under the ACL. An undertaking is a binding agreement between a person and the regulator. The only limit on the content of an undertaking that is provided for in the ACL is that it must relate to a matter in relation to which the regulator has power under the ACL.

14.9 Section 218 replaces section 87B of the TP Act.

### ***Substantiation notices***

14.10 Substantiation notices were introduced into the TP Act by the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (the first ACL Bill).

14.11 The power to issue a substantiation notice provides the regulator with a preliminary investigative tool to seek information about claims or representations that may assist them in determining whether to take action for a suspected breach of consumer protection provisions of the ACL.

14.12 A regulator may issue a substantiation notice under section 219 of the ACL in relation to a claim or representation promoting or apparently intended to promote:

- the supply, or possible supply, of goods or services by the person or another person;
- a sale or grant, or possible sale or grant, of an interest in land by the person or another person; or

- employment that is, or may, be offered by the person or another person.

14.13 The substantiation notice will require the person to provide, within 21 days of the notice being issued, information or documents which could be capable of substantiating the representations or their ability to supply, both generally and in relation to specific matters.

14.14 The regulator may seek particular information of a type that it specifies, so long as the information requested is relevant to the substantiation of the claim or representation or the person's ability to supply goods or services.

#### ***Public warning notices***

14.15 Public warning notices were introduced into the TP Act by the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (the first ACL Bill).

14.16 Public warning notices allow enforcement agencies to inform the public about persons engaged in business practices that may amount to a contravention of the ACL. Such notices are intended to stop or reduce the detriment caused by those business practices. They provide regulators with an enforcement tool that can be used in a preventative manner to avoid persons being adversely affected by conduct that may breach the ACL.

14.17 A regulator may issue a warning notice where:

- it has reasonable grounds to believe a person's conduct may have breached Chapter 2, 3, or 4 of the ACL; or
- a person refuses or fails to respond to a substantiation notice.

14.18 The power to issue a warning notice is limited to circumstances in which the regulator is satisfied that:

- one or more persons has suffered, or is likely to suffer, detriment as a result of the conduct; and
- it is in the public interest to issue a public warning notice.

## Comparison of key features of new law and current law

### Undertakings

<i>New law</i>	<i>Current law</i>
A regulator can accept court-enforceable undertakings in connection with a matter that the regulator has a power or function under the ACL.	The ACCC can accept court-enforceable undertakings in connection with a matter that the regulator has a power or function under the TP Act.

### Substantiation notices

<i>New law</i>	<i>Current law</i>
The provisions in Part 5-1 Division 2 of the Bill will allow a regulator to issue a notice requiring a person to provide information or documents which may be capable of substantiating particular claims or representations, or their ability to supply goods or services.	<p>Section 154 of the TP Act provides for the ACCC compelling persons to provide it with information, documents and evidence.</p> <p>Section 154 is limited by the fact that the ACCC must have a 'reason to believe' that a person is capable of providing information, documents or evidence 'relating to a matter' that may constitute a contravention of the TP Act.</p> <p>Most of the State and Territory FT Acts include provision for the issuance of substantiation notices.</p>

### Public warning notices

<i>New law</i>	<i>Current law</i>
Section 230 of the ACL allows a regulator to issue public warning notices relating to consumer protection in certain circumstances. Regulators are not required to make an application to a court or prove that a contravention of the ACL has occurred to issue such a notice.	<p>Section 86C and 86D of the TP Act provides the ACCC with the ability to ask a court to order the publication of corrective advertising in a way specified in the orders. The availability of such orders is limited to circumstances in which a person has contravened a provision of the TP Act.</p> <p>A number of the State and Territory FT Acts provide for ministerial or administrative discretion to issue public warning notices.</p>

## Detailed explanation of new law

### Regulator

- 14.19 A regulator is:
- for the purposes of the applied ACL as a law of the Commonwealth, the ACCC; and
  - for the purposes of the applied ACL as a law of each State and Territory, the body designated by the application law of each State or Territory [*Schedule 1, item 1: Chapter 1, section 2*] .

### Undertakings

14.20 Section 218 of the ACL provides regulators with the power to accept undertakings in connection with a matter with which they have a power or function under the ACL. The undertakings are court-enforceable. [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 1, section 218*]

14.21 The undertaking can be varied or withdrawn by the person making the undertaking, but only with the consent of the regulator that accepted it. [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 1, subsection 218(2)*]

14.22 Where a regulator considers that the person has breached any of the terms of the undertaking, it may apply to the court for an order:

- directing the person to comply with the term of the undertaking;
- directing the person to pay the Commonwealth or a State or Territory an amount up to the amount of any financial benefit reasonably attributable to the breach of the term of the undertaking; and
- any other orders. [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 1, subsections 218(3)-(4)*]

### Substantiation Notices

#### *Regulator may require claims to be substantiated*

14.23 A substantiation notice may be issued by the regulator if a person makes claims or representations promoting or apparently intended to promote certain things. [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 2, subsection 219(1)*]

14.24 The regulator may issue a substantiation notice in relation to:

- the supply, or possible supply, of goods or services by a person or another person; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 2, paragraph 219(1)(a)*]
- a sale or grant, or possible sale or grant, of an interest in land by a person or another person; and [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 2, section 219(1)(b)*]
- employment this is to be, or may be, offered by a person or another person. [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 2, paragraph 219(1)(c)*]

14.25 A substantiation notice can require the person that is issued the notice to do certain things, namely:

- give information or produce documents to the regulator which could be capable of substantiating or supporting the claims or representations; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 2, paragraph 219(2)(a)*]
- give information or produce documents to the regulator that could be capable of substantiating the quantities in which and the period for which the person will be able to make the supply to which the claims or representations relate (whether or not the claims or representations relate to those quantities or that period) [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 2, paragraph 219(2)(b)*]; and
- give information or produce documents of a kind the regulator specifies. [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 2, paragraph 219(2)(c)*]

14.26 A person must comply with the substantiation notice within 21 days of the notice being given to the person by the regulator. [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 2, section 219*]

14.27 In order to comply with a substantiation notice, the person to whom it is issued does not need to substantiate the claim to the satisfaction of the regulator or a court.

14.28 If the regulator specifies in the substantiation notice that particular information or documents are to be provided, then it must be satisfied that those documents provided are relevant to substantiating:

- the claims or representations; or

- the quantity in which, or the period for which, the corporation is or will be able to make such a supply. *[Schedule 1, item 1: Chapter 5, Part 5-1, Division 2, subsection 219(3)]*

14.29 The substantiation notice must include certain information, namely:

- the name of the person to whom it is given;
- a specification of the claim or representations to which it relates; and
- an explanation of the effect of those provisions of the ACL that relate to:
  - extending periods for complying with substantiation notices (section 219);
  - compliance with substantiation notices (section 220); and
  - the consequences of providing false or misleading information (section 221).

*[Schedule 1, item 1: Chapter 5,, Part 5-1, Division 2, subsection 219(4)]*

14.30 The notice issued may relate to more than one claim or representation. *[Schedule 1, item 1: Chapter 5, Part 5-1, Division 2, subsection 219(5)]*

14.31 Certain persons are exempt from substantiation notices on the basis that they publish that information on behalf of another person in a commercial context. Specifically, a person does not have to comply with a substantiation notice if they:

- are an information provider; *[Schedule 1, item 1: Chapter 5, Part 5-1, Division 2, paragraph 219(6)(a)]*
- made the claim or representation by publishing it on behalf of another person in the course of carrying on a business of providing information; and *[Schedule 1, item 1: Chapter 5, Part 5-1, Division 2, paragraph 219(6)(b)]*
- does not have a commercial relationship with the other person other than for the purpose of: publishing claims or representations promoting, or apparently intended to promote, the other person's business or other activities; or the other person supplying goods or services, or selling or granting interests in land. *[Schedule 1, item 1: Chapter 5: Part 5-1, Division 2, paragraph 219(6)(c)]*

***Extending periods for complying with substantiation notices***

14.32 A person who has been given a substantiation notice may, at any time within 21 days after the notice was given to the person, apply in writing to the regulator for an extension of the period for complying with the notice. The regulator may, by written notice given to the person, extend the period within which the person must comply with the notice. [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 2, section 220*]

***Compliance with substantiation notices***

14.33 A person who is given a substantiation notice must comply with it within the ***substantiation notice compliance period*** for the notice, which is defined as 21 days; or, if the period for complying with the notice has been extended under section 220, the period so extended. [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 2, subsections 221(1) & (2)*]

14.34 Failure to comply with a substantiation notice (that is, not providing any information which may be capable of substantiating the claims or as specifically requested by the regulator) may result in an infringement notice being issued or liability for a civil pecuniary penalty.

14.35 A person may refuse or fail to give particular information or produce a particular document in compliance with a substantiation notice on the ground that the information or production of the document might tend to incriminate the individual or to expose the individual to a penalty. [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 2, subsection 221(3)*]

***False or misleading information etc.***

14.36 A person must not, in compliance or purported compliance with a substantiation notice, give to the regulator false or misleading information; or produce to the regulator documents that contain false or misleading information. [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 2, subsection 222(1)*]

14.37 This section does not apply to:

- information that the person could not have known was false or misleading; or
- the production to the regulator of a document containing false or misleading information if the document is accompanied by a statement of the person that the information is false or misleading. [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 2, subsection 222(2)*]



### ***Enforcement and remedies***

14.38 A person contravening section 221(2) of the ACL is liable to pay a civil pecuniary penalty of up to [Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, section 224]:

- \$16,500 for a body corporate; and
- \$3,300 for other persons.

14.39 A person contravening section 222(2) of the ACL is liable to pay a civil pecuniary penalty of up to [Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, section 224]:

- \$27,500 for a body corporate;
- \$5,500 for other persons.

14.40 The ACCC may issue an infringement notice for a contravention of section 221(1) of the ACL. The amount of the penalty specified in the infringement notice is [Schedule 2, item 1: Part XI, Division 5]:

- 30 penalty units for a body corporate other than a listed corporation; and
- 6 penalty units for any other person.

14.41 The ACCC may issue an infringement notice for a contravention of section 222(1) of the ACL. The amount of the penalty specified in the infringement notice is [Schedule 2, item 1: Part XI, Division 5]:

- 50 penalty units for a body corporate other than a listed corporation; and
- 10 penalty units for any other person.

### **Public warning notices**

14.42 The regulator may issue a **public warning notice** in writing about the conduct of a corporation where:

- the regulator has reasonable grounds to suspect a person's conduct may be in contravention of a provision in Chapter 2, 3, or 4 of the ACL [Schedule 1, item 1: Chapter 5, Part 5-1, Division 3, paragraph 223(1)(a)]; and

- the regulator is satisfied that one or more persons has suffered, or is likely to suffer detriment as a result of the conduct; [*Schedule 1, item 1: Chapter 5, Part 5-1, Division 3, paragraph 223(1)(b)*] and
- the regulator is satisfied that it is in the public interest to issue a public warning notice. [*Schedule 2, Item 1: Part 5-1, Division 3, paragraph 223(1)(c)*]

14.43 The ACL specifically provides that a regulator may issue a public warning notice if a person refuses or fails to respond to a substantiation notice and the regulator is satisfied that it is in the public interest to issue a public warning notice. [*Schedule 2, Item 1: Part 5-1, Division 3, subsection 223(2)*]

14.44 The determination of whether the regulator is satisfied that there is, or is likely to be, detriment to one or more persons as a result of the conduct, and that it is in the public interest to issue a public warning notice, is a matter within the discretion of the regulator, in accordance with the proper exercise of their functions.

14.45 A public warning notice issued in relation to either a contravention or a substantiation notice matter is not a legislative instrument within the meaning of section 5 of the LI Act, and is not exempted from the operation of that Act. [*Schedule 2, Item 1: Part XI, paragraph 131E(2)(f)*].

## **Application and transitional provisions**

14.46 The ACL will commence on the later of 1 January 2011 or the commencement of Schedule 1 of the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (the first ACL Bill). The first ACL Bill is currently before the Parliament. [*Section 2*]

14.47 Chapter 5, Part 5-1 of the ACL applies to all relevant conduct occurring in trade or commerce on or after 1 January 2011.

14.48 Conduct occurring prior to 1 January 2011 will remain subject to the repealed (and saved, for those purposes) provisions in the TP Act or the relevant FT Act of a State or Territory. [*Schedule 7, item 6*]

14.49 The TP Act, as in force immediately before the commencement of the ACL, continues to apply to or in relation to any proceedings under or in relation to that Act, which were commenced, but not concluded, before that commencement. [*Schedule 7, item 7*]

14.50 The Governor-General may make regulations prescribing matters of a transitional, application or saving nature in relation to the amendments and repeals made by the Schedules to this Act. [*Schedule 7, item 12*]

### **Consequential amendments**

14.51 References to provisions of the TP Act in other CC Act provisions and provisions of other Acts will be consequentially amended to refer to provisions of the ACL to ensure that the affected provisions continue to apply in the way in which they did under the TP Act. [*Schedules 5 and 6*]



---

# Chapter 15

## Remedies

---

### Outline of chapter

15.1 Part 5-2 of the Australian Consumer Law (ACL) contains provisions for civil pecuniary penalties, injunctions, damages, compensation orders, other remedies and defences applicable to court proceedings for breaches of the ACL.

### Context of amendments

15.2 In 2008, the Productivity Commission's *Review of Australia's Consumer Policy Framework* recommended that a new, national consumer law should allow for civil pecuniary penalties, banning orders and redress for non-party consumers.

15.3 On 15 August 2009, MCCA agreed that the ACL will include civil pecuniary penalties, banning orders and redress for non-party consumers.

15.4 Many of these are to be included in the *Trade Practices Act 1974* (TP Act) and the *Australian Securities and Investments Commission Act 2001* (ASIC Act) by the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (first ACL Bill).

### Summary of new law

15.5 The penalty and remedy provisions in the ACL will provide regulators with various court-based options for pursuing breaches of the law. The range of remedies from injunctions, through to remedial orders and penalties provides a variety of options to allow proportionate enforcement of the ACL.

#### *Civil pecuniary penalties*

15.6 Civil pecuniary penalties will be introduced into the TP Act in respect of the consumer protection provisions in the first ACL Bill.

15.7 Civil pecuniary penalties enable a targeted and proportionate regulatory response, in addition to increasing the deterrent effect of consumer law provisions. Civil pecuniary penalties allow regulators to seek penalties and redress for consumers simultaneously. This was not possible previously, as criminal sanctions and civil remedies cannot be sought in the same proceedings.

15.8 The ACL provides for similar penalties applying to contraventions of provisions that are similar to repealed sections of the TP Act. The consumer protection provisions of the TP Act were typically subject to civil pecuniary penalties with a maximum penalty of \$1.1 million for bodies corporate and \$220,000 for persons other than bodies corporate.

15.9 In relation to product safety in Chapter 3 of the ACL, civil pecuniary penalties for provisions replacing existing TP Act provisions are set at a maximum of \$1.1 million for bodies corporate and \$220,000 for persons other than bodies corporate for prohibitions. Penalties of \$16,500 for bodies corporate and \$3,300 for persons other than bodies corporate apply to disclosure requirements. This reflects the general level of penalties and fines that applied under the TP Act.

15.10 The civil pecuniary penalties for consumer protection provisions in the ACL that are based on best practice from the FT Acts have been set at the highest penalty that a State or Territory applied for an equivalent contravention. In some instances outliers were ignored when a particular State or Territory applied a much higher penalty to a contravention than other jurisdictions. Penalties for persons other than bodies corporate are one-fifth of the amount for bodies corporate.

15.11 Civil pecuniary penalties apply to:

- a contravention of the unconscionable conduct provisions in Part 2-2;
- a contravention of the consumer protection provisions relating to unfair practices in Part 3-1;
- a contravention of the display notices provision in section 66(2);
- a contravention of certain provisions relating to consumer transactions in Part 3-2 (except Division 1);
- a contravention of certain product safety provisions in Part 3-3;

- a contravention of certain information standards provisions in Part 3-4; and
- failure to respond to a substantiation notice or providing false or misleading information in response to a substantiation notice in sections 221 and 222.

### ***Injunctions***

15.12 Division 2 of Part 5-2 provides the injunctive powers in relation to contraventions of the ACL, including injunctions, consent injunctions and interim injunctions. It also provides for variation and discharge of injunctions. Division 2 of Part 5-2 replaces the injunctive powers in section 80 of the TP Act.

### ***Damages***

15.13 Division 3 of Part 5-2 allows a person to seek recovery of the amount of loss or damage caused by another person's contravention of the consumer protection provisions in Chapters 2 or 3 of the ACL. It also allows such recovery of loss or damage from a person involved in a contravention.

15.14 The damages provision in the ACL replace section 82 of the TP Act and existing jurisprudence should continue to apply.

15.15 Limitations relating to death or personal injury or the regimes dealing with proportionate liability or structured settlements for tobacco-related injury or death continue to apply and are included in Part XI of the TP Act and other relevant State and Territory legislation.

### ***Compensation orders***

15.16 Sections 238 and 239 of the ACL provide a broad power for the court to make remedial orders such as variation of contracts, refunds of money or return of property or the payment of compensation for breaches of the consumer protection provisions.

### ***Orders for non-party consumers***

15.17 Order for non-party consumers will be included in the TP Act and ASIC Act by the first ACL Bill.

15.18 Section 239 of the ACL allows regulators to seek orders that will provide redress, in whole or in part, for loss or damage to non-party consumers arising out of a contravention of certain consumer protection provisions of the ACL or for consumers who are disadvantaged by a term in

a consumer contract which has been declared to be an unfair term under section 249.

15.19 The non-party consumer is only bound by such an order if he or she chooses to accept the order. If a non-party consumer does accept the redress he or she can not make further claims or take further action in relation to that loss or damage.

15.20 The types of redress available include: declaring a contract or arrangement void in whole or in part; varying a contract or arrangement; an order refusing to enforce provisions of a contract or arrangement; an order to refund monies or return property; an order to repair goods or supply services at the respondent's expense; or an order varying or terminating an instrument creating or transferring an interest in land.

#### *Non-punitive orders*

15.21 Section 246 allows a court, on application of a regulator, to make a non-punitive order where a person has contravened the Act. A non-punitive order includes:

- a service order related to the conduct for community benefit;
- an order to ensure conduct does not occur for a period;
- an order requiring the disclosure of information; or
- an order requiring an advertisement to be published.

15.22 The non-punitive order provisions in the ACL replace section 86C of the TP Act and existing jurisprudence will continue to apply.

#### *Punitive orders — adverse publicity*

15.23 Section 247 allows the court, on application of a regulator, to make an adverse publicity order, which is a punitive order, where a person has contravened a consumer protection provision.

15.24 The adverse publicity provisions in the ACL replace section 86D of the TP Act and existing jurisprudence will continue to apply.

#### *Disqualification orders*

15.25 Section 248 provides for a regulator applying to the court seeking an order disqualifying a person from managing corporations, in relation to a contravention of:



- an unconscionable conduct provision in Part 2-2;
- the consumer protection provisions relating to unfair practices in Part 3-1;
- provisions relating to unsolicited consumer agreements in Division 2 of Part 3-2.
- certain product safety provisions in Part 3-3;
- certain product information standards provisions in Part 3-4; and
- the offence provisions in Chapter 4.

#### ***Abrogation of penalty privilege***

15.26 Section 1349 of the Corporations Act was enacted by the *Corporations Amendment (Insolvency) Act 2007* to remove or abrogate the common law privilege against exposure to penalties when complying with a statutory requirement or a requirement in a proceeding. This abrogation has also been included in section 249 of the ACL to ensure that regulators' regulatory functions under the ACL are not frustrated by a person claiming this privilege.

#### ***Defences***

15.27 Division 6 of Part 5-2 provides defences to contraventions of consumer protection provisions in certain circumstances relating to the publication of advertisements or the supply of certain goods or product related services that were not compliant with a safety or information standard outside Australia. The defence provisions in the ACL replace section 85 of the TP Act and existing jurisprudence will continue to apply.

## Comparison of key features of new law and current law

### Civil pecuniary penalties

<i>New law</i>	<i>Current law</i>
Section 224 of the ACL applies civil pecuniary penalties to contraventions of various consumer protection provisions. Only a regulator can take action for a pecuniary penalty and it must be taken within 6 years of the alleged contravention (section 228).	Section 76E of the TP Act applies civil pecuniary penalties to contraventions of various consumer protection provisions. Only a regulator can take action for a pecuniary penalty and it must be within 6 years of the alleged contravention (section 77).
Section 224 of the ACL provides for attempted contraventions and accessorial liability of persons involved in contraventions.	Section 76E of the TP Act provides for attempted contraventions and accessorial liability of persons involved in contraventions.
Section 225 of the ACL applies statutory bars to civil pecuniary penalty proceedings in relation to conduct that is also subject to criminal penalties.	Section 76F of the TP Act applies statutory bars to civil pecuniary penalty proceedings in relation to conduct that is also subject to criminal penalties.
Section 226 of the ACL provides that a penalty does not have to be applied by the court if the person acted honestly and reasonably.	Section 85(7) of the TP Act provides that a penalty does not have to be applied by the court if the person acted honestly and reasonably.
Section 227 of the ACL requires that the court gives preference to compensation for victims over pecuniary penalties.	Section 79B of the TP Act requires that the court gives preference to compensation for victims over pecuniary penalties.
Sections 229-231 of the ACL provide that a body corporate must not indemnify a person from a civil pecuniary penalty or the legal costs associated with defending the proceedings.	Sections 77A-77C of the TP Act provide that a body corporate must not indemnify a person from a civil pecuniary penalty or the legal costs associated with defending the proceedings.

### Injunctions

<i>New law</i>	<i>Current law</i>
A regulator can apply to the court for injunctions, consent injunctions and interim injunctions under sections 232-234 for breaches of the ACL.	The ACCC can apply to the court for injunctions, consent injunctions and interim injunctions under section 80 for breaches of the TP Act.

**Damages**

<i>New law</i>	<i>Current law</i>
Section 236 of the ACL provides for a person seeking to recover the amount of loss or damage caused by another person's contravention (or involvement in a contravention) of a provision in Chapters 2 or 3 of the ACL.	A person to seek recovery of the amount of loss or damage caused by another person's contravention (or involvement in a contravention) of a provision in Parts IVA or V of the TP Act.

**Compensation orders**

<i>New law</i>	<i>Current law</i>
Sections 238 and 239 allow the court to make remedial orders such as variation of contracts, refunds of money or return of property or the payment of compensation for breaches of the consumer protection provisions.	Section 87 of the TP Act allows the court to make remedial orders such as variation of contracts, refunds of money or return of property or the payment of compensation for breaches of the consumer protection provisions.

**Orders for non-party consumers**

<i>New law</i>	<i>Current law</i>
Sections 239-242 of the ACL will allow a court to make certain types of orders to redress, in whole or in part, loss or damage suffered by a person that is not party to the proceedings.	Section 87AAA of the TP Act allows a court to make certain types of orders to redress, in whole or in part, loss or damage suffered by a person that is not party to the proceedings.

**Non-punitive orders**

<i>New law</i>	<i>Current law</i>
Section 246 allows a court, on application of a regulator, to make certain non-punitive orders.	Section 86C of the TP Act allows a court, on application of the ACCC, to make certain non-punitive orders.

### **Punitive orders — Adverse publicity**

<i>New law</i>	<i>Current law</i>
Section 247 of the ACL provides for regulators seeking orders requiring a person to disclose information that they have in their possession, or have access to, or to publish an advertisement after contravening a provision of the ACL.	Section 86D of the TP Act provides for regulators seeking orders requiring a person to disclose information that they have in their possession, or have access to, or to publish an advertisement after contravening certain provisions of the TP Act.

### **Disqualification orders**

<i>New law</i>	<i>Current law</i>
Section 248 of the ACL will allow a court to disqualify a person from managing corporations if it is satisfied that that the person has attempted to contravene, or has been involved in a contravention of certain provisions of the ACL.	Subsection 86E(1B) of the TP Act allows a court to disqualify a person from managing corporations in relation to contraventions, or involvement in contraventions, of various consumer protection-related provisions of the TP Act.

### **Defences**

<i>New law</i>	<i>Current law</i>
Division 6 of the ACL provides defences to contraventions of consumer protection provisions in certain circumstances relating to the publication of advertisements or the supply of certain goods or product related services that were not compliant with a safety or information standard outside Australia.	Section 85(3) of the TP Act provided the same defence in relation to the publication of advertisements. Subsections 85(4) and (5) of the TP Act provided the same defence in relation to the supply of certain goods or product related services that were not compliant with a safety or information standard outside Australia.

## **Detailed explanation of new law**

### **Civil pecuniary penalties**

#### *Details of civil pecuniary penalty provisions*

15.28 A court may order a person to pay a pecuniary penalty for a contravention of any of the following provisions:

- an unconscionable conduct provision in Part 2-2; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, subparagraph 224(1)(a)(i)*]
- a consumer protection provision relating to unfair practices in Part 3-1; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, subparagraph 224(1)(a)(ii)*]
- a requirement to display a notice relating to the supply of goods or services under section 66(2); [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, subparagraph 224(1)(a)(iii)*]
- a provision relating to unsolicited consumer agreements in Division 2 of Part 3-2; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, subparagraph 224(1)(a)(iv)*]
- a provision dealing with lay-by agreements; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, subparagraph 224(1)(a)(v)*]
- a contravention of certain provisions dealing with proof of transactions and itemised bills; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, subparagraph 224(1)(a)(vi)*]
- a contravention of certain provisions dealing with prescribed requirements for warranties and repairs; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, subparagraph 224(1)(a)(vii)*]
- a contravention of certain provisions dealing with safety of consumer goods and product related services; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, subparagraph 224(1)(a)(viii)*]
- a contravention of certain information standards provisions; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, subparagraph 224(1)(a)(ix)*] and
- failure to respond to a substantiation notice in section or providing false or misleading information in response to a substantiation notice in sections 220 or 221; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, subparagraph 224(1)(a)(x)*]

15.29 Liability to pay a civil pecuniary penalty is extended to an attempt to contravene the above provisions, as well as to any person involved in a contravention. Each act done or omission made by a person potentially attracts a pecuniary penalty. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, subparagraph 224(1)(b)-(f)*]

15.30 In circumstances where a single act or omission contravenes two or more provisions, pecuniary penalty proceedings may be brought in relation to any one of those provisions, but a person is liable to pay only one

pecuniary penalty. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, subsection 224(4)*]

15.31 There are a number of non-exhaustive factors that a court must consider in determining the amount of the pecuniary penalty, including:

- the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission;
- the circumstances in which the act or omission took place; and
- whether the person has previously been found by the court in proceedings in relation to consumer protection provision of the ACL or the TP Act to have engaged in any similar conduct. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, subsection 224(2)*]

#### ***Maximum civil pecuniary penalties***

15.32 The table in subsection 224(3) provides the maximum civil pecuniary penalties applicable to contraventions of the ACL. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, subsection 224(3)*]

#### ***General consumer protections***

15.33 The maximum pecuniary penalty payable for a contravention of an unconscionable conduct provision in Part 2-2, or a consumer protection provision relating to unfair practices in Part 3-1 (other than subsection 47(1)) is:

- for bodies corporate — \$1.1 million; and
- for persons other than bodies corporate — \$220,000. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, subsection 224(3), Items 1 and 2*]

15.34 The maximum pecuniary penalty payable for a contravention of the multiple pricing provision in section 47(1) is:

- for bodies corporate — \$5,000; and
- for persons other than bodies corporate — \$1,000. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, subsection 224(3), Item 3*]

15.35 The maximum civil pecuniary penalty for bodies corporate reflects the penalty for a similar contravention of the NSW FT Act (section 40), which is currently a maximum of \$5,500. The Northern Territory also has

---

an equivalent offence (section 22 NT FT Act) which has a maximum penalty of \$26,000 currently — however, that amount is a maximum applied across the NT FTA.

#### *Consumer Guarantees*

15.36 Consumer guarantees provide rights that accompany the purchase of goods or services. A failure to comply with a guarantee generally gives rise to specific remedies provided for in Part 5-4 of the ACL. A failure to comply with a guarantee is generally not treated as a contravention of the ACL.

15.37 A new contravention has been included in the ACL for failure to display a notice relating to consumer guarantees. This contravention does not exist in State and Territory laws. The maximum civil pecuniary penalties for failing to display a notice in the required form are:

- for bodies corporate — \$30,000; and
- for persons other than bodies corporate — \$6,000. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, subsection 224(3), Item 4*]

15.38 As this is a requirement that does not presently exist in the TP Act or the FT Acts, the maximum penalties have been set by reference to offences for conduct that is likely to cause comparable damage to consumers, such as failing to comply with disclosure and other requirements relating to lay-by agreements.

#### *Unsolicited consumer agreements*

15.39 The maximum pecuniary penalty payable for a contravention of the unsolicited consumer agreements provisions in Division 2 of Part 3-2 is:

- for bodies corporate — \$50,000; and
- for persons other than bodies corporate — \$10,000. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, subsection 224(3), Item 5*]

15.40 The maximum civil pecuniary penalty for bodies corporate has been drawn from the range of fines available for similar regimes in the States and Territories. The maximum amounts in those regimes are:

- Victoria — \$28,036.80;
- NSW — \$11,000;
- Queensland — \$50,000;

- South Australia — \$5,000;
- Western Australia — \$1,000; and
- the Northern Territory — \$130,000.

*Lay-by sales*

15.41 The maximum pecuniary penalty payable for a contravention of the lay-by sales in Division 3 of Part 3-2 is:

- for bodies corporate — \$30,000; and
- for persons other than bodies corporate — \$6,000. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, subsection 224(3), Item 6*]

15.42 The maximum civil pecuniary penalty for bodies corporate has been drawn from the range of fines available for similar regimes in NSW, Victoria and the ACT. Currently Victoria has a maximum fine of \$14,018.40, the ACT has \$27,500 and NSW has \$110,000. However, the NSW penalty is applied across a range of a consumer protection provisions rather than applying only to lay-by sales.

*Proof of transactions and itemised bills*

15.43 The maximum civil pecuniary penalty payable for a contravention of the proof of transactions and itemised bills provisions in sections 100(1), 100(3), 101(3) and 101(4) is:

- for bodies corporate — \$15,000; and
- for persons other than bodies corporate — \$3,000. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, subsection 224(3), Item 7*]

15.44 The maximum civil pecuniary penalty for bodies corporate is based on the maximum penalty for a contravention of a similar provision of the Vic FT Act, which currently has a maximum fine of \$14,018.40.

*Prescribed requirements for warranties and repairs*

15.45 The maximum civil pecuniary penalty payable for a contravention of prescribed requirements for warranties and repairs made under sections 102(2) and 103(2) is:

- for bodies corporate — \$50,000; and
- for persons other than bodies corporate — \$10,000. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, subsection 224(3), Item 8*]



15.46 The maximum civil pecuniary penalty for bodies corporate is based on the current maximum penalty for a corporation in relation to prescribed warranty under the Qld FT Act of \$50,000.

*Safety of consumer goods and product related services*

15.47 The maximum pecuniary penalty payable for a contravention of the product or product related services safety standard or interim or permanent ban provisions in sections 106(1)-(3), 106(5), 107(1)-(2), 118(1)-(3), 118(5), or 119(1)-(2) is:

- for bodies corporate — \$1.1 million; and
- for persons other than bodies corporate — \$220,000.  
*[Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, subsection 224(3), Item 9]*

15.48 The maximum pecuniary penalty payable relating to notifications of recalls as required by a compulsory recall notice in section 125(4) is:

- for bodies corporate — \$16,500; and
- for persons other than bodies corporate — \$3,300. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, subsection 224(3), Item 10]*

15.49 The maximum pecuniary penalty payable for non-compliance with a recall notice for consumer goods in section 127(1) or (3) is:

- for bodies corporate — \$1.1 million; and
- for persons other than bodies corporate — \$220,000.  
*[Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, subsection 224(3), Item 11]*

15.50 The maximum pecuniary penalty payable for notification of voluntary recalls and reporting of consumer goods or product related services associated with death or serious injury in sections 128(2) or (6), 131(1) or 132(1) is:

- for bodies corporate — \$16,500; and
- for persons other than bodies corporate — \$3,300. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, subsection 224(3), Item 12]*

*Information standards*

15.51 The maximum pecuniary penalty payable for non-compliance with an information standard in sections 136(1)-(3), 137(1) and (2) is:

- for bodies corporate — \$1.1 million; and
- for persons other than bodies corporate — \$220,000. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, subsection 224(3), Item 13]*

*Substantiation notices*

15.52 The maximum civil pecuniary penalty payable for failure to respond to a substantiation notice in section 221 is:

- for bodies corporate — \$16,500; and
- for persons other than bodies corporate — \$3,300. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, subsection 224(3), Item 14]*

15.53 The maximum civil pecuniary penalty payable for providing false or misleading information in response to a substantiation notice in section 222 is:

- for bodies corporate — \$27,500; and
- for persons other than bodies corporate — \$5,500. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, subsection 224(3), Item 15]*

*Parallel criminal and civil prohibitions*

15.54 Section 4C of the *Crimes Act 1904* provides some protection against double jeopardy where an act or omission constitutes an offence under two or more laws of the Commonwealth or under both a law of the Commonwealth and at common law. However, this protection does not extend to liability for civil penalties. To address concerns regarding parallel criminal and civil schemes, most Federal legislation containing such schemes provides for statutory bars to proceedings and such bars are included in the ACL, based on section 76F of the TP Act.

15.55 Section 258 provides that where substantially the same conduct is a civil contravention and an offence, the court will be prevented from making a pecuniary penalty if the person has already been convicted of an offence. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, subsection 225(1)]*

15.56 Further, proceedings for a pecuniary penalty order against a person for a contravention of the ACL is stayed if criminal proceedings are started or have already been started for an offence, and the offence is constituted by conduct that is substantially the same as the conduct alleged to constitute the contravention. The pecuniary penalty proceedings will be able to be resumed if the person is not convicted of the offence. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, subsection 225(2)]*

15.57 Criminal proceedings may be started against a person for conduct that is substantially the same as a consumer protection contravention regardless of whether a pecuniary penalty order has been made against the person in respect of the contravention. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, subsection 225(3)*]

15.58 Evidence of information given or of documents produced will not be admissible in criminal proceedings against the individual if the individual gave the evidence or produced the documents in proceedings for a pecuniary penalty order against the individual for a contravention and the conduct constituting the criminal and consumer protection pecuniary penalty contravention is substantially the same. This does not apply to a criminal proceeding in respect of the falsity of the evidence given by the individual in the proceedings for the pecuniary penalty order. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, subsection 225(4)*]

15.59 Criminal proceedings may be undertaken after civil proceedings to ensure that civil remedies do not preclude later criminal penalties from being imposed, and it is usual to stay the civil proceedings until the criminal proceedings are completed after which time, if the defendant is convicted of the criminal offence, the civil proceedings are terminated. Part 9.4B of the Corporations Act contains equivalent provisions.

#### ***Other provisions relating to civil pecuniary penalties***

15.60 The court may relieve a person either wholly or partly from liability to pay a pecuniary penalty under section 257 for a contravention of the ACL if it appears that the person has acted honestly and reasonably in the circumstances. This replicates section 85(7) of the TP Act. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, section 226*]

15.61 The court must also give preference to compensation for affected parties over imposing a penalty. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, section 227*]

15.62 Regulators may take action seeking a civil pecuniary penalty for 6 years from the date of the alleged contravention, replicating section 77 of the TP Act. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, section 228*]

15.63 A body corporate must not indemnify a person from a liability to pay a civil pecuniary penalty. Such indemnification is subject to a penalty of \$2,750. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, section 229*]

15.64 Anything that purports to indemnify a person in contravention of section 263 is void. However, section 263 does not authorise anything that would otherwise be unlawful. This section replicates section 77B of the TP Act. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, section 230*]

15.65 An individual convicted of unlawfully indemnifying a person, or inciting a person to do so, under Part 11.4 of the Criminal Code can be convicted of an offence with a penalty of \$550, replicating section 77C of the TP Act. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 1, section 231]*

## **Injunctions**

15.66 Section 232 confers a wide power on the court to grant an injunction in whatever terms it considers appropriate if it is satisfied that a person has engaged in, or is proposing to engage in, conduct that would amount to a contravention (or involvement in a contravention) of Chapters 2, 3 or 4 of the ACL. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 2, section 232]*

15.67 Injunctions are also available for applying or relying on (or purporting to apply or rely on) a declared unfair contract term under section 288, even though such use of an unfair term is not a 'contravention' of the ACL as such. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 2, subsection 232(3)]*

15.68 Injunctions are available either on application by private parties or a regulator. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 2, subsection 232(2)]*

15.69 The court's ability to grant an injunction is very broad and can be exercised:

- In relation to restraining injunctions:
  - whether or not it appears that the person will engage in the conduct again (or continue to engage in the conduct);
  - whether or not the person has previously engaged in such conduct; and
  - whether or not there is imminent danger of substantial damage to another person if the conduct is engaged in. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 2, subsection 232(4)]*
- In relation to performance injunctions:
  - whether or not it appears that the person intends to refuse or fail again (or continue to fail or refuse) to do the act or thing;
  - whether or not the person has previously refused or failed to do the act or thing; and

- whether or not there is imminent danger of substantial damage to another person if the person refuses or fails to do the act or thing. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 2, subsection 232(7)*]

15.70 In relation to performance injunctions, an indicative list of types of performance injunctions has been added to assist lower courts and tribunals in the exercise of their functions under the ACL. This list, not included in section 80 of the TP Act, is not exhaustive and does not limit the scope of the injunctive power in any way at all. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 2, subsection 232(6)*]

### *Consent injunctions*

15.71 Where an application for an injunction has been made under section 232, section 233 allows a court to grant an injunction where all parties consent without the requirements in section 232(1) that a court be satisfied that the person has engaged or is proposing to engage in conduct contravening (or being involved in a contravention) of the ACL. This allows court cases to be settled by agreement in a timely manner if the possibility arises. This power is similar to that in section 80(1AA) of the TP Act. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 2, section 233*]

### *Interim injunctions*

15.72 Recognising that proceedings can be lengthy and that, for example, conduct may need to be restrained in the meantime, a court has the power to issue an interim injunction during a proceeding in which an application for an injunction is made under section 232. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 2, section 234*]

15.73 A person applying for an interim injunction may be required to undertake to pay such compensation to an adversely affected party as the court sees fit. Section 234(2) provides a specific exemption to such a requirement for a regulator or the responsible Minister. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 2, subsection 234(2)*]

15.74 A court may vary or discharge an injunction that it has granted under Division 2 of Part 5-1. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 2, section 235*]

## **Damages**

15.75 Where a person contravenes a provision of Chapter 2 or 3 and another person suffers loss or damage because of that conduct, the other person may recover the amount of loss or damage against the person or any person involved in the contravention. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 2, section 236*]

15.76 Actions for damages must be commenced within 6 years after the day on which the cause of action accrued (when the loss or damage occurred). *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 3, subsection 236(2)]*

## **Compensation orders**

### *Compensation for parties to a proceeding*

15.77 Section 237 allows any person who has suffered loss or damage (or a regulator on their behalf) to seek compensatory orders after a finding of a contravention, whether by way of motion during proceedings after such a finding, or as a separate, subsequent proceeding.

15.78 If a court finds that the conduct of a person was in contravention of the ACL or their conduct that constitutes applying or relying on, or purporting to apply or rely on, a term of a consumer contract that has been declared under section 249 to be an unfair term — the court may make such order or orders as it thinks appropriate against the person who engaged in the conduct, or a person involved in that conduct on application of:

- a person who has suffered or is likely to suffer loss or damage as a result; or
- a regulator on behalf of one or more persons who have suffered or is likely to suffer loss or damage as a result.

*[Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, subsection 237(1)]*

15.79 If a court finds, in a proceeding under the ACL, that a person who is a party to the proceeding has suffered, or is likely to suffer, loss or damage because of the conduct of another person in contravention of the ACL or their conduct that constitutes applying or relying on, or purporting to apply or rely on, a term of a consumer contract that has been declared under section 249 to be an unfair term — the court may make such order or orders as it thinks appropriate against the person who engaged in the conduct, or a person involved in that conduct. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, subsection 238(1)]*

15.80 Under both sections 237 and 238, the order made must be one that the court considers will compensate the injured person in whole or in part for the loss or damage or prevent or reduce the loss or damage. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, subsections 238(2)]*

15.81 In relation to section 238, actions must be commenced within 6 years of the date the cause of action relating to the conduct accrued. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, subsections 238(3)]*

---

*Kinds of orders that may be made*

15.82 Section 243 sets out a non-exhaustive list of orders of redress that can be made, but does not limit the types of orders that can be made under section 237 or 238. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, section 243*]

15.83 The kinds of orders that can be made against a person (the respondent) to redress loss or damage suffered by a person (the ‘injured person’) *include* the following:

- an order declaring the whole or any part of a contract made between the respondent and the injured person, or a collateral arrangement relating to such a contract to be void; and, if the court thinks fit—to have been void from the beginning or void at all times on and after such date as is specified in the order (which may be a date that is before the date on which the order is made); [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, paragraph 243(a)*]
- an order varying such a contract or arrangement in such manner as is specified in the order; and, if the court thinks fit—declaring the contract or arrangement to have had effect as so varied on and after such date as is specified in the order (which may be a date that is before the date on which the order is made); [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, paragraph 243(b)*]
- an order refusing to enforce any or all of the provisions of such a contract or arrangement; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, paragraph 243(c)*]
- an order directing the respondent to refund money or return property to the injured person; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, paragraph 243(d)*]
- an order directing the respondent to pay the injured person the amount of loss or damage; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, paragraph 243(e)*]
- an order directing the respondent, at his or her own expense, to repair, or provide parts for, goods that had been supplied under the contract or arrangement to the injured person; [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, paragraph 243(f)*]
- an order directing the respondent, at his or her own expense, to supply specified services to the injured person; and [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, paragraph 243(g)*]

- an order, in relation to an instrument creating or transferring an interest in land (within the meaning of section 1), directing the respondent to execute an instrument that: varies, or has the effect of varying, the first mentioned instrument; or terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the first mentioned instrument. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, paragraph 243(h)*]

***Other provisions relating to compensatory orders***

15.84 In a proceeding for:

- recovery of a civil pecuniary penalty;
- an injunction;
- non-punitive orders;
- adverse publicity orders; or
- a disqualification order:

a person has been found to have contravened a provision (or been involved in a contravention) of Chapter 2, 3 or 4 — a finding of fact made in those proceedings is prima facie evidence of that fact in a proceeding for compensation orders under subsection 271(1), and can be proved by production of a document under the seal of the court that made the finding. [*Schedule 2, Item 1: Part XI, Division 7, section 137H*]

15.85 A court can make an order under Part 5-2, Division 4, Subdivision A or B of the ACL whether or not the court has granted an injunction under Division 4 of Part 5-2 or has made an order under sections 236 (actions for damages), 246 (non-punitive orders), 247 (adverse publicity orders) or 248 (disqualification orders). [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, section 244*]

15.86 The powers relating to compensatory orders and orders for non-party redress do not limit the generality of the injunctive powers under the ACL. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, section 245*]

***Reduced compensation in safety defective goods actions***

15.87 The amount of loss or damage recoverable in a safety defective goods action brought under the manufacturers' liability regime may be reduced by contributory acts or omissions of the person suffering the loss or damage in question. [*Schedule 2, item 1: Part XI, Division 7, section 137A*]



*Loss or damage suffered because of injuries*

15.88 The amount of loss or damage recoverable as a result of an injury to an individual under a safety defective goods action is reduced if an act or omission of the injured individual contributed to (but not necessarily the sole cause of) the loss or damage in question. The amount recoverable is also reduced if another person who the injured individual is responsible for, had contributed to that loss or damage. [*Schedule 2, Item 1: Part XI, Division 7, subsection 137A(1)*]

15.89 The amount which the loss or damage is reduced by will depend on what the court considers is fit, having regard to the injured individual's share in the responsibility for the loss or damage. This could result in the amount which is recoverable being reduced to zero (that is, no compensation can be recovered). [*Schedule 2, Item 1: Part XI, Division 7, subsection 137A(2)*]

15.90 The amount of loss or damage recoverable as a result of damage or destruction to goods (other than to goods containing a safety defect), land, buildings or fixtures under a safety defective goods action, is reduced if an act or omission of the person suffering the loss or damage in question (the first person) had contributed to (but need not be the sole cause of) such loss or damage. The amount recoverable is also reduced if another person (the second person) for who the first person is responsible had contributed to that loss or damage. [*Schedule 2, Item 1: Part XI, Division 7, subsection 137A(2)*]

15.91 The amount by which the loss or damage is reduced will depend on what the court considers is fit after having regard to the first person's share in the responsibility for the loss or damage. This could mean the amount recoverable is reduced to zero. [*Schedule 2, Item 1: Part XI, Division 7, subsection 137A(2)*]

**Orders for non-party consumers**

15.92 **Enforcement proceedings** are defined as proceedings for an offence against Chapter 4 or a proceeding instituted under Chapter 5 of the ACL (except sections 238 and 239). [*Schedule 1, item 1: Chapter 1, section 2*]

15.93 **Non-party consumers** are those persons who have not been party to an enforcement proceeding in relation to the particular conduct or to an enforcement proceeding in relation to the particular declared unfair term of a consumer contract. [*Schedule 1, item 1: Chapter 1, section 2*]

15.94 Where a person:

- engages in conduct in contravention of the prohibition on misleading and deceptive conduct or an unconscionable conduct provision in Chapter 2;

- engages in conduct in contravention of a specific consumer protection provision relating to unfair practices in Part 3-1 or commits an offence against Chapter 4; or
- is a party to a consumer contract and are advantaged by a term in relation to which the court has made a declaration under section 249;

and:

- the contravening conduct or declared term caused or is likely to cause loss or damage to a class of persons and the class of persons includes non-party consumers,

the court may make such orders to redress the non-party consumers (other than an award of damages) as it thinks appropriate. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, section 239]*

15.95 The orders that may be made are against the person who engaged in or was involved in the contravention or alternatively, as the case may be, the party to a contract who is advantaged by a declared term. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, subsection 239(2)]*

15.96 Such orders may only be made under subsection 273(1) if they will:

- redress, in whole or in part, the related loss or damage to the non-party consumers; or
- prevent or reduce the loss or damage suffered or likely to be suffered by the non-party consumers:

in relation to the contravening conduct or declared term. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, subsection 239(3)]*

15.97 An application seeking an order can be made even if enforcement proceedings have not been instituted. As such, a regulator can take action for redress for non-parties without previously taking other action in relation to the contravening conduct or declared term. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, subsection 242(1)]*

15.98 An application seeking an order can be made at any time within six years after the day on which the cause of action that relates to the contravening conduct accrues or the declaration relating to a term in a consumer contract is made. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, subsection 239(4)]*

15.99 In determining whether to make an order to redress non-party consumers, the court may have regard to the conduct of the person (engaging in the contravening conduct or party to a consumer contract advantaged by the declared term) and of the non-party consumers since the contravention or declaration was made. This ensures that the court may consider particularly whether the person has already provided some redress for the loss or damage to the non-party consumers. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, subsections 240(1) and (2)*]

15.100 In determining whether to make an order, the court does not need to make a finding about which specific persons are non-party consumers, nor the exact loss or damage suffered or likely to be suffered by such persons. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, subsections 240(3)*]

15.101 A non-party consumer is bound by an order if he or she accepts the redress, prevention or reduction of the loss or damage suffered or likely to be suffered in relation to the contravening conduct or declared term in accordance with the order. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, subsections 241(1)*]

15.102 A non-party consumer can only accept one order for redress under section 272(1) and the non-party consumer cannot make any other claim, action or demand in relation to the loss or damage. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, subsections 241(3)*]

#### *Kinds of orders that may be made*

15.103 Section 243 sets out a non-exhaustive list of orders to redress non-party consumers that can be made but does not limit the types of orders that can be made under section 239(1). [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, section 243*]

15.104 The kinds of orders that can be made against a person (the respondent) to redress loss or damage suffered by a non-party consumer *include* the following:

- an order declaring the whole or any part of a contract made between the respondent and a non-party consumer referred to in that subsection, or a collateral arrangement relating to such a contract to be void; and, if the court thinks fit—to have been void from the beginning or void at all times on and after such date as is specified in the order (which may be a date that is before the date on which the order is made); [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, subsection 243(a)*]
- an order varying such a contract or arrangement in such manner as is specified in the order; and, if the court thinks fit—declaring the contract or arrangement to have had effect

as so varied on and after such date as is specified in the order (which may be a date that is before the date on which the order is made); [Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, subsection 243(b)]

- an order refusing to enforce any or all of the provisions of such a contract or arrangement; [Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, subsection 243(c)]
- an order directing the respondent to refund money or return property to non-party consumers; [Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, subsection 243(d)]
- an order directing the respondent to pay the injured person an amount in respect of loss or damage suffered; [Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, subsection 243(e)]
- an order directing the respondent, at his or her own expense, to repair, or provide parts for, goods that had been supplied under the contract or arrangement to non-party consumers; [Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, subsection 243(f)]
- an order directing the respondent, at his or her own expense, to supply specified services to non-party consumers; and [Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, subsection 243(g)]
- an order, in relation to an instrument creating or transferring an interest in land (within the meaning of section 1), directing the respondent to execute an instrument that: varies, or has the effect of varying, the first mentioned instrument; or terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the first mentioned instrument. [Schedule 1, item 1: Chapter 5, Part 5-2, Division 4, subsection 243(h)]

### **Non-punitive orders**

15.105 Section 246 allows a court, on application of a regulator, to make a non-punitive order where a person has contravened the ACL. A non-punitive order includes:

- a service order related to the conduct for community benefit;
- an order to ensure conduct does not occur for a period;
- an order requiring the disclosure of information; or

- an order requiring an advertisement to be published.  
*[Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, subsection 246]*

15.106 It will be open to the court to make a non-punitive order on application of a regulator, where a person has engaged in contravening conduct, that is, has contravened a provision of Chapters 2, 3 or 4 of the ACL. A court may also make a non-punitive order where a person has been involved in a contravention of these provisions. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, subsection 246(1)]*

15.107 A service order related to the conduct for community benefit is an order that requires a person who has contravened the ACL to perform a service for the benefit of the community, or a section of the community. The order is directed at redressing the harm caused in the community as a result of the contravention, and at encouraging future compliance with the ACL. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, subsection 246(2)(a)]*

15.108 As the order is non-punitive in nature, the service the contravening party is required to undertake should be reasonably related to the conduct that contravened the ACL.

### **Example 15.1**

A service order related to the conduct for community benefit could be an order that requires a person who has made false representations to make available a training video which explains advertising obligations under the ACL or an order that requires a person who has engaged in misleading or deceptive conduct in relation to a particular product to conduct a community awareness program to address the needs of consumers when purchasing that product.

15.109 An order to ensure conduct does not occur for a period is an order which is designed to impose control over aspects of the conduct of the party in contravention of the Act. It is directed at achieving a change in the organisational or corporate culture to prevent a repetition of the contravention and to ensure future self-regulation. An order to ensure conduct does not occur for a period is aimed at the internal operations, management and environment of the corporation in addressing the areas of non-compliance. As the order is non-punitive in nature, it should be directly or reasonably related to the conduct that contravened the ACL. The period for such an order may not exceed three years. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, subsection 246(2)(b)]*

15.110 Examples of an order to ensure conduct does not occur for a period include:

- an order requiring a corporation to develop a compliance plan;

- an order requiring the provision of education and training for employees and managers as to their obligations and responsibilities under the ACL; and
- an order requiring the corporation to undertake a revision of their internal operations and control methods to address the contravention of the ACL.

15.111 An order requiring the disclosure of information requires a person who has contravened to Act to disclose information in relation to the contravention that he or she may have in their possession, or may have access to. An order requiring the disclosure of information is directed at redressing the harm caused by a contravention of the Act by providing information to business and consumers. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, subsection 246(2)(c)]*

15.112 An order requiring an advertisement to be published, or a corrective advertising order, requires a person who has contravened the Act to publish an advertisement which addresses the contravention of the Act. A corrective advertising order is directed at redressing the harm caused by the contravention. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, subsection 246(2)(d)]*

### **Adverse publicity orders**

15.113 Section 247 allows the court, on application of a regulator, to make an adverse publicity order, which is a punitive order, where a person has contravened a provision of Part 2-2, Chapter 3 or sections 221 or 222 or is guilty of an offence under Chapter 4. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, section 247]*

15.114 An adverse publicity order requires a person to disclose information that he or she has in their possession, or have access to, and publish at their own expense, an advertisement. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, section 247(2)]*

15.115 An example of an adverse publicity order is that the corporation is ordered to publicise the fact that it has breached the ACL, and details of what it has been ordered to do. The order is punitive in nature and is aimed at deterring future contraventions and encouraging compliance.

### **Disqualification orders**

15.116 A court may order that a person is disqualified from managing corporations, for a period the court considers appropriate, for a

contravention, or being involved in a contravention, of the following provisions:

- an unconscionable conduct provision in Part 2-2;
- a consumer protection provision relating to unfair practices in Part 3-1;
- a provision relating to consumer transactions in Division 2 of Part 3-2;
- product safety provisions in subsections 104(1)-(4), 105(1) and (2), 116(1)-(4), 117(1)(2), 123(4), 125(1) or (3), 126(2) or (6), 130(1) or 131(1);
- information standards provisions in subsections 135(1)-(3) and 136(1) and (2); and
- an offence provision in Chapter 4.

if the court is satisfied that such an order it is justified. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, section 248]*

15.117 A disqualification order is not available in relation to the misleading and deceptive conduct provision in section 16 since that provision does not purport to create any liability but establishes a norm of conduct. Other remedies are available for failing to observe that norm of conduct, including injunctions, publication orders, damages and remedial orders.

15.118 In determining whether a disqualification order is justified, the court is not limited to considering particular matters, but may have regard to a person's conduct in relation to the management of a business or corporation, and any other matters the court considers appropriate. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, subsection 248(2)]*

15.119 A person cannot refuse to comply with a requirement in a proceeding arising out of the ACL or a requirement under the ACL to:

- answer a question or give information;
- produce a document or any other thing; or
- do any other act:

on the ground that doing so may tend to expose the person to a disqualification order under section 248. *[Schedule 1, item 1: Chapter 5, Part 5-2, Division 5, section 249]*

15.120 This provision is required to ensure that persons who are capable of providing assistance to regulators in respect of their investigations are not capable of frustrating those investigations by claiming a privilege against exposure to a penalty. Prior to the High Court decision in *Rich and another v Australian Securities and Investments Commission*<sup>18</sup>, disqualification orders were considered to be protective in nature rather than constituting a penalty. Section 249 is required to reverse the effect of that case such that a person is not capable of claiming that he or she is entitled to refuse to do certain things because it may expose them to a ‘penalty’.

#### ***Corporations Act***

15.121 A new section 206 EA is inserted into the Corporations Act for the purposes of disqualifying a person from managing a corporation with respect to a contravention of the ACL or CC Act, along with 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. [*Schedule 3, items 32-35*]

### **Defences**

15.122 Section 251 provides that in relation to a proceeding under Part 5-2 of the ACL in relation to a contravention of Part 2-1 or 2-2 or Chapter 3, if the contravention was committed by the publication of an advertisement, it is a defence if the defendant proves that:

- he, she or it is in the business of publishing or arranging the publication of advertisements;
- he, she or it received the advertisement for publication in the ordinary course of business; and
- he, she or it did not know, and had no reason to suspect, that publication of the advertisement would amount to a contravention. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 6, section 251*]

15.123 Section 251 ensures that publishers are not liable for breaches in advertisements they publish as part of their business unless they have knowledge of, or should have known, that the advertisement would contravene the ACL. It would be far too onerous to require publishers to actually verify the content, and potentially seek legal advice on, the legality of every advertisement they publish.

---

18 (2004) 209 ALR 270.



15.124 Section 252 provides that in relation to a proceeding under Part 5-2 of the ACL in relation to a contravention of Part 2-1 or 2-2 or Chapter 3, if the contravention was committed by the supplying of consumer goods that:

- did not comply with a safety standard; or
- were supplied by a supplier who did not comply with an information standard for such goods:

it is a defence if the defendant proves that:

- the goods were acquired for the purpose of resupply;
- the goods were acquired from a person carrying on business in Australia (other than as an agent of an overseas supplier); and
- either:
  - the defendant did not know and could not with reasonable diligence have ascertained the non-compliance with the safety standard or that he or she was not complying with an information standard; or
  - the defendant relied in good faith on a representation by the person from whom he or she acquired the goods that there was no safety or information standard for such goods. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 6, section 252*]

15.125 In order to rely on the defence:

- the court must give leave; or
- the defendant has, not later than seven days before the day on which the hearing of the proceedings commences, served the person commencing the proceedings a written notice identifying the person from whom he or she acquired the consumer goods in question.

15.126 Section 254 provides that in relation to a proceeding under Part 5-2 in relation to a contravention of Part 2-1 or 2-2 or Chapter 3 and the contravention was committed by the supplying of product related services that:

- did not comply with a safety standard; or

- were supplied by a supplier who did not comply with an information standard for such product related services:

it is a defence if the respondent proves that:

- the product related services were acquired for the purpose of resupply;
- the product related services were acquired from a person carrying on business in Australia (other than as an agent of an overseas supplier); and
- either:
  - the respondent did not know and could not with reasonable diligence have ascertained the non-compliance with the safety standard or that he or she was not complying with an information standard; or
  - the respondent relied in good faith on a representation by the person from whom he or she acquired the product related services that there was no safety or information standard for such goods.

In order to rely on the defence:

- the court must give leave; or
- the defendant has, not later than seven days before the day on which the hearing of the proceedings commences, served the person commencing the proceedings a written notice identifying the person from whom they acquired the product related services in question. [*Schedule 1, item 1: Chapter 5, Part 5-2, Division 6, section 254*]

### **Example 15.2**

For example, if there was a blind cord installation safety standard and a person purchased new blinds ‘installed’ from a retailer of blinds, but the retailer engaged a separate company to do the installation, the retailer may be able to avail itself of the defence in appropriate circumstances.

---

## Application and transitional provisions

15.127 The ACL will commence on the later of 1 January 2011 or the commencement of Schedule 1 of the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (the first ACL Bill). The first ACL Bill is currently before the Parliament. *[Section 2]*

15.128 Chapter 5, Part 5-2 of the ACL applies to all relevant conduct occurring in trade or commerce on or after 1 January 2011.

15.129 Conduct occurring prior to 1 January 2011 will remain subject to the repealed (and saved, for those purposes) provisions in the TP Act or the relevant FT Act of a State or Territory. *[Schedule 7, item 6]*

15.130 The TP Act, as in force immediately before the commencement of the ACL, continues to apply to or in relation to any proceedings under or in relation to that Act, which were commenced, but not concluded, before that commencement. *[Schedule 7, item 7]*

15.131 The Governor-General may make regulations prescribing matters of a transitional, application or saving nature in relation to the amendments and repeals made by the Schedules to this Act. *[Schedule 7, item 12]*

## Consequential amendments

15.132 References to provisions of the TP Act in other CC Act provisions and provisions of other Acts will be consequentially amended to refer to provisions of the ACL to ensure that the affected provisions continue to apply in the way in which he or she did under the TP Act. *[Schedules 5 and 6]*

15.133 Subsections 87(1A) of the CC Act and 12GM(2) of the ASIC Act (other orders) are amended to ensure that they do not limit the generality of sections 87AAA of the CC Act or 12GNB of the ASIC Act, respectively. *[Schedule 2, Part 4, item 17, subsection 87(1A)] [Schedule 3, Part 5, item 24, subsection 12GM(2)]*

15.134 Paragraphs 156(1)(d) of the CC Act and 12HB(1)(b) of the ASIC Act (disclosure of documents by the Commission or ASIC respectively) are amended to apply to applications under sections 87AAA of the CC Act or 12GNB of the ASIC Act, respectively. *[Schedule 2, Part 4, item 20, paragraph 156(1)(d)] [Schedule 3, Part 5, item 27, paragraph 12HB(1)(b)]*

15.135 The Bill inserts references to the new disqualification order provision in relation to provisions in the CC Act requiring the ACCC to notify ASIC if a disqualification order has been made. *[Schedule 2, Part 2, item 9, subsection 86E(3)]*

15.136 A note in the ASIC Act clarifies that the Corporations Act provides that a person is disqualified from managing corporations if a disqualification order has been made. *[Schedule 3, Part 3, item 14, section 12GLD]*

15.137 A note in the ASIC Act clarifies that the Corporations Act provides that ASIC is required to keep a register of persons who have been disqualified from managing corporations. *[Schedule 3, Part 3, item 14, section 12GLD]*

### **Consequential amendments to the *Corporations Act 2001***

15.138 Mirroring section 206EA of the Corporations Act in relation to disqualification orders under the CC Act, a person will be disqualified from managing corporations if he or she has been disqualified from doing so under section 12GLD of the ASIC Act. *[Schedule 3, Part 3, item 15, section 206EB]*

15.139 The introduction of section 206EB requires references to it to be added to provisions requiring ASIC to keep a register of disqualified persons. *[Schedule 3, Part 3, item 15, paragraph 1273AA(1)(a)] [Schedule 3, Part 3, item 17, paragraph 1273AA(2)(ab)]*

---

# Chapter 16

## Country of origin representations

---

### Outline of chapter

16.1 The ACL provides a specific methodology for determining whether claims about the country of origin of goods are false, misleading or deceptive.

16.2 Claims that meet the criteria set out in Part 5-3 of the ACL cannot be found to be false, misleading or deceptive in action brought under the prohibitions in the ACL on misleading or deceptive conduct, or false or misleading representations.

### Context of amendments

16.3 Currently, Part V, Division 1AA of the *Trade Practices Act 1974* (TP Act) provides that certain country of origin representations made about goods do not contravene section 52 (which deals with misleading or deceptive conduct), subsections 53(a) or 53(eb) or paragraph 75AZC(1)(a) (which all deal with false or misleading representations).

16.4 Division 1AA of Part V of the TP Act was first inserted in 1998. Division 1AA was subsequently amended in 2001.

16.5 ‘Australian made’ or ‘made in Australia’ are examples of unqualified origin claims. Prior to 1998 the TP Act regulated claims of origin solely through the general prohibitions on misleading or deceptive conduct, or false or misleading representations, contained in the consumer protection provisions in Part V of the TP Act.

16.6 Prior to December 1994, an ‘essential character test’, based on the judicial interpretation of relevant provisions of the TP Act, was used to determine whether a product could be labelled as ‘made in Australia’ or ‘Australian made’. However, in December 1994, the Federal Court handed down a decision which effectively rejected the ‘essential character’ test, *QDSV Holdings Pty Ltd v Trade Practices Commission* ATPR 41-432 (1995), (the *Bush Friends* case). The ruling interpreted the relevant provisions of the TP Act in a restrictive manner, resulting in many firms, including many Australian Made logo licensees, being potentially excluded from labelling their products as Australian made.

16.7 These problems were compounded by a subsequent Federal Court decision, *Australian Competition and Consumer Commission v Lovelock Luke* [1987] 1100 FCA (the Email case), which, in deciding that certain air conditioners could be labelled ‘made in Australia’, expressly avoided setting down strict criteria for determining the validity of origin claims. The Court held that such cases should be resolved on a case-by-case basis. This represented a considerable impediment to compliance.

16.8 In response to the *Bush Friends* case and the *Email* case, the then Government introduced Part V, Division 1AA of the TP Act in order to provide clear, objective criteria against which to assess claims about .

16.9 In December 2007, the then Opposition announced an election policy to introduce a new ‘Grown in’ defence to the country of origin provisions of the TP Act. This Bill includes an extension to the country of origin defences of the TP Act to implement this election commitment.

16.10 In July 2009, in signing the *Intergovernmental Agreement for the Australian Consumer Law* (IGA), the Council of Australian Governments (COAG) agreed that the whole of Part V of the TP Act, including the country of origin provisions, will be included in the ACL.

## **Summary of new law**

16.11 Part 5-3 of the ACL provides a defence against action under section 19 or subsections 29(a) of 29(k) or paragraphs 151(1)(a) or 151(1)(k) of the ACL to allegations that claims about the country of origin of goods are false, misleading or deceptive.

16.12 The ACL apply in respect of claims about:

- goods being ‘made in’ a specified country;
- goods being the ‘produce of’ of a specified country;
- goods, or ingredients or components being ‘grown in’ a specified country, where no other representation is made about the country or origin of the goods; and
- claims of origin based on use of a logo prescribed pursuant to the ACL.

16.13 The defences in Part 5-3 can be relied upon provided that the goods about which a claim is made meet the prescribed criteria set out in that Part.

## Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
A person does not contravene sections 19, 29(1)(a) or (k) or 151(1)(a) or (k) only by making a representation as to the country of origin of goods provided that the goods have been substantially transformed in that country and 50% or more the cost of producing or manufacturing the goods occurred in that country.	Section 65AB of the TP Act provides a defence against contraventions of sections 52, 53(a) or (eb) or 75AZC(1)(a)(i) of that Act in respect of representation as to the country of origin of goods provided that the goods have been substantially transformed in that country and 50% or more the cost of producing or manufacturing the goods occurred in that country.
A person does not contravene sections 19, 29(1)(a) or (k) or 151(1)(a) or (k) only by making a representation that goods are the produce of a particular country provided that the country was the country of origin of each significant ingredient or component of the goods and all, or virtually all processes involved in the production or manufacture of the goods happened in that country.	Section 65AC of the TP Act provides a defence against contraventions of sections 52, 53(a) or (eb) or 75AZC(1)(a)(i) of that Act in respect of representations that goods are the produce of a particular country provided that the country was the country of origin of each significant ingredient or component of the goods and all, or virtually all processes involved in the production or manufacture of the goods happened in that country.
A person does not contravene section 19, 29(1)(a) or (k) or 151(1)(a) or (k) only by making a representation as to the country of origin of goods by means of a logo specified in the regulations provided that the goods have been substantially transformed in the country represented by the logo and the prescribed percentage of the cost of producing or manufacturing the goods happened in that country.	Section 65AD of the TP Act provides a defence against contraventions of sections 52, 53(a) or (eb) or 75AZC(1)(a)(i) of that Act in respect of representations as to the country of origin of goods by means of a logo specified in the regulations provided that the goods have been substantially transformed in the country represented by the logo and the prescribed percentage of the cost of producing or manufacturing the goods happened in that country.

<i>New law</i>	<i>Current law</i>
A person does not contravene section 19, 29(1)(a) or (k) or 151(1)(a) or (k) only by making a representation that goods were grown in a particular country provided that each significant ingredient or component of the goods was grown in that country and all, or virtually all processes involved in the production or manufacture happened in that country.	No equivalent Commonwealth law.
A person does not contravene section 19, 29(1)(a) or (k) or 151(1)(a) or (k) only by making a representation that ingredients or components of ingredients were grown in a particular country provided that each ingredient or significant component that is claimed to be grown or processed in that country was grown or processed only in that country and 50% or more of the total weight of the goods is comprised of ingredients or components that were grown or processed only in that country.	No equivalent Commonwealth law.

## Detailed explanation of new law

16.14 Part 5-3 of the ACL provides that certain claims about the country of origin of goods do not contravene the civil or criminal provisions of the ACL dealing with misleading or deceptive conduct or false or misleading representations. [*Schedule 1, item 1: Chapter 5, Part 5-2, section 254*]

16.15 A person who seeks to rely on these defences bears an evidential burden in proceedings under the ACL [*Schedule 1, item 1: Chapter 5, Part 5-2, section 258*].

16.16 **Evidential burden** is defined as the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist [*Schedule 1, item 1: Chapter 1, section 2*].

16.17 The defences do not apply to claims about the place or region of origin of goods that do not refer to a particular country. For example, the defence does not apply in respect of claims that a product is ‘made in Tasmania’ or ‘produce of California’. Origin claims that do not specify a country are still subject to sections 19, 29 and 151 of the ACL.



## Representations as to country of origin

16.18 The concept of a ‘representation’ is not defined in the ACL. A representation of origin includes, but is not limited to, oral or pictorial representations (and any combination thereof) affixed to a good or promotional material associated with a good. It does not include goods where the representation is an integral element of the good.

### Example 16.1

A t-shirt with a ‘made in Australia’ label sewn into it is carrying a country of origin representation while a T-shirt with the word ‘Australia’ emblazoned on it as part of the design is not making a country of origin representation.

16.19 Item 1 in the table at section 255 provides that a representation as to the country of origin of goods does not contravene the ACL false, misleading or deceptive conduct provisions provided that:

- the goods have been ‘substantially transformed’ in that country; and
- 50 per cent or more of the cost of producing or manufacturing the goods is attributable to production or manufacturing processes that occurred in that country  
*[Schedule 1, item 1: Chapter 5, Part 5-2, subsection 255(1)].*

16.20 Table item 1 does not apply if the representation takes the grammatical form of a representation that the goods are ‘produce of’ or ‘grown in’ a particular country. Representations that take these, or in the case of ‘product of’, variations of these, grammatical forms are dealt with in table items 2 and 3 of section 255.

16.21 The regulations may prescribe general rules for attributing costs of production to the country indicated by a country of origin representation. Such regulations may clarify the working of the production cost test and can address uncertainty as to how costs are attributed throughout the production chain. *[Schedule 1, item 1: Chapter 5, Part 5-2, subsection 257(1)]*

16.22 Use of this regulation making power will be on an equal national treatment basis, namely that the same rules will be used to allocate cost of production to Australia business as are used to allocate costs of production to overseas businesses. Regulations made under this power will not be able to discriminate between countries or classes of countries. *[Schedule 1, item 1: Chapter 5, Part 5-2, subsection 257(2)]*

### ***Substantial transformation***

16.23 The ACL provides a definition for ***substantially transformed***. The test is that a good must undergo a fundamental change, in the country indicated in the representation, to how it looks, operates or to its purpose, for a substantial transformation to have occurred. [*Schedule 1, item 1: Chapter 5, Part 5-2, subsection 255(2)*]

#### **Example 16.2**

Examples of substantial transformation include the growing of wheat from seed, the sewing of cloth into a shirt, or the moulding of sheet metal into a car panel.

16.24 Section 255 provides a regulation making power that can exclude from the definition of substantial transformation certain manufacturing or production processes that are not fundamental changes. [*Schedule 1, item 1: Chapter 5, Part 5-2, paragraph 255(3)(a)*]

16.25 Section 255 also provides a regulation making power that can include examples of types of production or manufacturing processes that are fundamental changes for the purpose of the substantial transformation test. [*Schedule 1, item 1: Chapter 5, Part 5-2, paragraph 255(3)(b)*]

16.26 Regulations made under subsection 255(3) are intended to clarify the application of the substantial transformation test. Regulations may be made in relation to particular goods or classes of goods.

### ***Cost of producing or manufacturing goods***

16.27 Section 256 of the ACL defines the total cost of producing or manufacturing a good as the sum of the expenditure of material, plus the sum of expenditure on labour, plus the sum of expenditure on overheads. [*Schedule 1, item 1: Chapter 5, Part 5-2, subsection 256(1)*]

#### **Example 16.3**

For example, a good that contains material costs of \$45, labour costs of \$25 and attributable overheads of \$15 has a production cost of \$85.

### ***Expenditure on materials***

16.28 Table item 1 in subsection 256(1) identifies those materials that can be counted as legitimate production costs. Expenditure on materials can be counted when a cost is incurred in the purchase of materials used in the production or manufacture of the good bearing the country of origin representation. All material costs directly associated with the production or manufacture of the good bearing the country of origin representation are

included, except where explicitly disallowed by virtue of a regulation made under subsection 256(2). [*Schedule 1, item 1: Chapter 5, Part 5-2, subsection 256(1)*]

16.29 **Materials** is defined separately in respect of goods that are unmanufactured raw products and those that are the result of a manufacturing process. ‘Materials’ in the context of unmanufactured raw products are those products themselves. ‘Materials’ in the context of manufactured products includes all matter and substances used or consumed in the manufacture of the goods, other than overheads. In both cases, the ‘inner containers’ in which the goods are packed are counted as materials. [*Schedule 1, item 1: Chapter 1, section 2*]

16.30 An **inner container** is limited to the retail packaging for sale, and does not include packaging solely related to the transportation of the good from the manufacturer or wholesaler to the retail outlet. [*Schedule 1, item 1: Chapter 1, section 2*]

#### **Example 16.4**

The can in tinned tomatoes is included within the definition of ‘inner container’ but the cardboard box holding the tins is not.

16.31 The regulations may prescribe that the costs of certain materials are not to be counted as part of the cost of production for the purposes of section 256. [*Schedule 1, item 1: Chapter 5, Part 5-2, paragraph 256(2)(a)*]

16.32 The regulations may also prescribe the manner in which costs relating to certain materials are to be worked out. [*Schedule 1, item 1: Chapter 5, Part 5-2, paragraph 256(3)(a)*]

#### *Expenditure on labour*

16.33 Table item 2 in subsection 256(1) identifies the types of labour costs that can be allocated to the production or manufacture of goods. All labour costs that have been incurred by the manufacturer that relate to the production or manufacture of the goods to which a country of origin claim have been made can be included provided that:

- they can reasonably be allocated to the production or manufacture of the goods; and
- the regulations do not exclude them. [*Schedule 1, item 1: Chapter 5, Part 5-2, subsection 256(1)*]

16.34 It is more difficult to allocate labour costs than material costs in a good, and this provision is intended to prevent the padding-out of the labour component by the inclusion of costs peripheral to the manufacturing or production process.

16.35 The regulations may prescribe that certain labour costs are not to be counted as part of the cost of production for the purposes of section 256. *[Schedule 1, item 1: Chapter 5, Part 5-2, paragraph 256(2)(b)]*

16.36 The regulations may also prescribe the manner in a certain labour cost is to be worked out. *[Schedule 1, item 1: Chapter 5, Part 5-2, paragraph 256(3)(b)]*

*Expenditure on overheads*

16.37 Table item 3 in subsection 256(1) identified the types of overheads costs that may be counted for the purposes of calculating the costs or production or manufacture of goods about which country of origin claims have been made. The calculation of overheads is identical to the considerations that must be taken into account in respect of labour costs, that is, all overhead costs that have been incurred by the manufacturer that relate to the production or manufacture of the goods to which a country of origin claim have been made can be included provided that:

- they can reasonably be allocated to the production or manufacture of the goods; and
- the regulations do not exclude them. *[Schedule 1, item 1: subsection 256(1)]*

16.38 The regulations may prescribe that certain overhead costs are not to be counted as part of the cost of production for the purposes of section 256. *[Schedule 1, item 1: Chapter 5, Part 5-2, paragraph 256(2)(c)]*

16.39 The regulations may also prescribe the manner in which a certain overhead cost is to be worked out. *[Schedule 1, item 1: Chapter 5, Part 5-2, paragraph 256(3)(c)]*

**Representations that goods are produce of a particular country**

16.40 Item 2 in the table at subsection 255(1) provides that representations that goods are ‘produce of’ a particular country do not contravene the ACL false, misleading or deceptive conduct provisions provided that:

- the specified country was the country or origin of each significant ingredient or significant component of the goods; and
- all, or virtually all, processes involved in the production or manufacture happened in the specified country. *[Schedule 1, item 1: Chapter 5, Part 5-2, subsection 255(1)]*

16.41 Table item 2 also applies to all grammatical variations of the word ‘produce’, including ‘product of’ and ‘produce of’. [*Schedule 1, item 1: Chapter 5, Part 5-2, subsection 255(5)*]

16.42 The nature of the good is relevant to what is a significant component. If an ingredient or component is integral to the nature of the good, that ingredient has to be from the country of the origin representation to allow it to carry a ‘product of’ label. The question of whether a component is a significant component does not, necessarily go to the percentage content of ingredient or component, as, on occasion, small percentages of an ingredient can be critical in establishing the nature or function of the good.

### **Example 16.5**

For an apple and cranberry juice bottle to be able to carry a ‘produce of Australia’ label, both the apple and the cranberry juice have to be sourced from Australia. This is despite the cranberry juice being, on average, about 5 per cent of the total volume of the product.

If a local source can be found for the apple juice and the cranberry juice, then it is legitimate to employ a ‘product of Australia’ label, even if, say, a preservative was added to the juice and the preservative was imported. This is because the preservative does not go to the nature of the good.

## **Representations by means of a prescribed logo**

16.43 Item 3 in the table at subsection 255(1) provides that a representation as to the country of origin of goods by means of use of a prescribed logo does not contravene the ACL false, misleading or deceptive conduct provisions provided that:

- the goods have been substantially transformed in the country represented by the logo as the country of origin of the goods; and
- the prescribed percentage of the cost of producing or manufacturing the goods is attributable to production of manufacturing processes that happened in that country.  
*[Schedule 1, item 1: Chapter 5, Part 5-2, subsection 255(1)]*

16.44 This provision provides a mechanism for the Government to encourage voluntary industry promotional campaigns through legislative protection for premium marks. Reflecting the intended premium nature of the prescribed logo provision, requirements for prescription are stricter than the general test set out in table item 1 of subsection 255(1).

16.45 In addition to meeting the substantial transformation test, the Minister may prescribe an industry logo, being either words or pictures or a combination thereof, the use of which is a representation of country of origin with a level of cost of production occurring in that country as prescribed. Logos will only be prescribed where the percentage of the cost is 51 per cent or greater. *[Schedule 1, item 1: Chapter 5, Part 5-2, subsection 255(6)]*

16.46 The meaning of ‘substantially transformed’ and the method of working out the production costs attributable to a certain country are the same as those for general country of origin claims.

### **Representations goods or ingredients were grown in a particular country**

16.47 Item 4 in the table at subsection 255(1) provides that a representation that goods are ‘grown in’ a particular country does not contravene the ACL false, misleading or deceptive conduct provisions provided that:

- each significant ingredient or significant component of the goods was grown in that country; and
- all, or virtually all, processes involved in the production or manufacture happened in that country. *[Schedule 1, item 1: Chapter 5, Part 5-2, subsection 255(1)]*

16.48 Item 5 in the table at subsection 255(1) provides that a representation that ingredients or components of goods are ‘grown in’ a particular country does not contravene the ACL false, misleading or deceptive conduct provisions provided that:

- each ingredient or significant component that is claimed to be grown in that country was grown only in that country; and
- each ingredient or significant component that is claimed to be grown in that country was processed only in that country; and
- 50 per cent or more of the total weight of the goods is comprised of ingredients or components that were grown and processed only in that country. *[Schedule 1, item 1: Chapter 5, Part 5-2, subsection 255(1)]*

16.49 Despite subsection 255(1), section 255 does not apply to a representation of a kind referred to in table items 4 or 5 if that representation is made together with another representation of a kind referred to in table item 1 or 2. Such representations can still be made, but will not be subject to the defence provided by section 255(1). *[Schedule 1, item 1: Chapter 5, Part 5-2, subsection 255(2)]*

16.50 In addition, in respect of both table items 4 and 5, a person may only make a representation that a good is ‘grown in’ a particular country if the good, or an ingredient or component, also meets the criteria to satisfy the general test for country of origin representations set out in table item 1 of section 255, or meets the criteria to use a ‘product of’ claim as set out in table item 2.

16.51 **Grown** in relation to goods, ingredients or components, is defined broadly in the ACL to include agricultural and activities as well as harvesting of wild plants and animals. [*Schedule 1, item 1: Chapter 5, Part 5-2, subsection 255(7)*]

16.52 Packaging materials are not ingredients or components of goods and are not to be included in measurements to determine the weight of goods, ingredients or components [*Schedule 1, item 1: Chapter 5, Part 5-2, subsection 255(8)*].

16.53 Water used to reconstitute dried or concentrated products to no more than their natural level of hydration is to be included in determining the weight of a product, and is deemed to have the same country of origin as the ingredient or component, regardless of its actual country of origin [*Schedule 1, item 1: Chapter 5, Part 5-2, subsection 255(9)*].

## Application and transitional provisions

16.54 The ACL will commence on the later of 1 January 2011 or the commencement of Schedule 1 of the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (the first ACL Bill). The first ACL Bill is currently before the Parliament. [*Section 2*]

16.55 Chapter 5, Part 5-3 of the ACL applies to all relevant conduct occurring in trade or commerce on or after 1 January 2011.

16.56 Conduct occurring prior to 1 January 2011 will remain subject to the repealed (and saved, for those purposes) provisions in the TP Act or the relevant FT Act of a State or Territory. [*Schedule 7, item 6*]

16.57 The TP Act, as in force immediately before the commencement of the ACL, continues to apply to or in relation to any proceedings under or in relation to that Act, which were commenced, but not concluded, before that commencement. [*Schedule 7, item 7*]

16.58 The Governor-General may make regulations prescribing matters of a transitional, application or saving nature in relation to the amendments and repeals made by the Schedules to this Act. [*Schedule 7, item 12*]

## **Consequential amendments**

16.59 References to provisions of the TP Act in other CC Act provisions and provisions of other Acts will be consequentially amended to refer to provisions of the ACL to ensure that the affected provisions continue to apply in the way in which they did under the TP Act. *[Schedules 5 and 6]*



---

# **Chapter 17**

## ***Application of the Australian Consumer Law***

---

### **Outline of chapter**

17.1 The Bill amends the *Trade Practices Act 1974* (TP Act) to complete the implementation of a single, national consumer law — the Australian Consumer Law (ACL), which applies as a law of the Commonwealth and each of the States and Territories.

17.2 Part XI of the TP Act will make provision for the application, administration and amendment of the ACL as a law of the Commonwealth.

17.3 Part XIAA of the TP Act will make provision for the application of the ACL as a law of the States and Territories.

### **Context of amendments**

17.4 The ACL will be a law of the Commonwealth and of each State and Territory.

17.5 In accordance with the Council of Australian Government's (COAG) 2 October 2008 decision, the ACL will be implemented as an application law, with the Australian Government as the lead legislator.

17.6 An application law scheme is necessary as the Australian Parliament does not have power to legislate generally with respect to fair trading and consumer protection matters. It has the power to legislate in respect of 'foreign corporations and trading or financial corporations formed within the limits of the Commonwealth', within the meaning of section 51(xx) of the *Australian Constitution* and in respect of 'trade and commerce ... among the States; within the meaning of section 51(i) of the *Australian Constitution*.

17.7 The use of an application law model will not preclude a State or Territory from referring all or part of its consumer law powers or functions to the Australian Government at a later time.

## **Summary of new law**

17.8 The Bill amends the TP Act (now renamed the CC Act) to insert a new Part XI which applies the ACL as a law of the Commonwealth.

17.9 Divisions 1 and 2 of Part XI of the CC Act lists the definitions for the Part and provides that the ACL applies as a law of the Commonwealth to the conduct of corporations, except in relation to financial products and the supply, or possible supply, of services that are financial services. Financial products and services are dealt with separately under the ASIC Act.

17.10 Part XI (Divisions 3 to 8) also applies certain additional provisions 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 ACL. These include certain product safety enforcement powers, certain provisions relating to remedies and other miscellaneous provisions.

17.11 Part XIAA of the CC Act provides for participating States and participating Territories (collectively called participating jurisdictions) to enact an applied Australian Consumer Law (applied ACL) as part of the law of their respective jurisdictions. A participating jurisdiction is a party to the *Intergovernmental Agreement for the Australian Consumer Law* (IGA) that has applied the ACL, with or without modification.

17.12 Part XIAA facilitates the application of the ACL in participating jurisdictions by:

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

## Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Schedule 1 (the applied ACL) applies as a law of the Commonwealth to the conduct of corporations.	Such a provision was recently inserted into the TP Act to have the same effect in relation to the ACL which initially only contained the unfair contract terms provisions.
The applied ACL consists of: <ul style="list-style-type: none"> <li>• Schedule 2;</li> <li>• the remaining provisions of the CC Act (except sections 2A, 4KB, 5, 6 and 172) so far as they relate to Schedule 2; and</li> <li>• the regulations under the CC Act so far as they relate to Schedule 2.</li> </ul>	Such a provision was recently inserted into the TP Act to have the same effect in relation to the ACL which initially only contained the unfair contract terms provisions. A similar provision exists in relation to the Competition Code (section 150C of Part XIA of the TP Act).
The Federal Court may exercise jurisdiction conferred on it by an application law of a State or Territory. However, the provisions in Part XI AA relate to the CCA only and do not affect any other laws relating to cross-vesting of jurisdiction.	Similar provisions exist in the TPA in relation to the Competition Code in sections 150D and 150E.
An application law of a participating State or Territory may confer functions or powers, or impose duties, on a Commonwealth entity for the purposes of the applied ACL, but only to the extent that conferral or imposition does not contravene the constitutional doctrines that bind the Commonwealth, or otherwise exceed the Commonwealth's legislative power.	Such a provision was recently inserted into the TP Act to have the same effect in relation to the ACL which initially only contained the unfair contract terms provisions. A similar provision exists in relation to the Competition Code (section 150F of Part XIA of the TP Act).

<i>New law</i>	<i>Current law</i>
<p>A duty is not taken to be imposed on a Commonwealth entity by an application law of a participating State or Territory if the legislative power of that State or Territory is sufficient to support the duty concerned. However, if the Commonwealth's legislative power is sufficient to support the imposition of a duty in circumstances where a State or Territory legislative power is not, then the duty is taken to be imposed by the CC Act to the extent necessary to ensure the validity of the duty.</p>	<p>Such a provision was recently inserted into the TP Act to have the same effect in relation to the ACL which initially only contained the unfair contract terms provisions. A similar provision exists in relation to the Competition Code (sections 150F and 150FA of Part XIA of the TP Act).</p>
<p>An application law may impose a duty on a Commonwealth entity if the law confers a power or function on the entity in circumstances that gives rise to an obligation on the entity to perform the function or exercise the power.</p>	<p>Such a provision was recently inserted into the TP Act to have the same effect in relation to the ACL which initially only contained the unfair contract terms provisions. A similar provision exists in relation to the Competition Code (section 150FB of Part XIA of the TP Act).</p>
<p>An application law of a participating State or Territory is capable of operating concurrently with the CC Act, unless the application law is directly inconsistent with the provisions of the CC Act.</p>	<p>Such a provision was recently inserted into the TP Act to have the same effect in relation to the ACL which initially only contained the unfair contract terms provisions. A similar provision exists in relation to the Competition Code (section 150G of Part XIA of the TP Act).</p>
<p>A person who commits an offence against both the CC Act and an application law and is punished or liable to pay a pecuniary penalty under an application law, cannot then be punished or subject to a pecuniary penalty under the CC Act.</p>	<p>Such a provision was recently inserted into the TP Act to have the same effect in relation to the ACL which initially only contained the unfair contract terms provisions. A similar provision exists in relation to the Competition Code (section 150H of Part XIA of the TP Act).</p>

## Detailed explanation of new law

### Part XI

17.13 This Chapter does not explain the enforcement powers applicable to product safety matters.

### ***Definitions***

17.14 Part XI, Division 1 sets out the relevant definitions relating to Part XI. *[Schedule 2, item 1, section 130]*

### ***Application of the Australian Consumer Law as a law of the Commonwealth***

17.15 The ACL applies as a law of the Commonwealth to the conduct of corporations. The ACL applies with respect to all other persons by virtue of the operation of the applied ACL as a law of the States and Territories. *[Schedule 2, item 1, section 131]*

### ***Division does not apply to financial services etc.***

17.16 The ACL applies to all parts of the economy, except for financial products and services. Financial products and services are dealt with separately under the ASIC Act. *[Schedule 2, item 1, section 131A]*

### ***Division does not apply to interim bans imposed by State or Territory Ministers***

17.17 Despite section @131, which applies the ACL as a law of the Commonwealth, an interim ban imposed by a State or Territory Minister does not form part of the Commonwealth-applied ACL. *[Schedule 2, item 1, section @131B]*

### ***Saving of laws and other remedies***

17.18 Section 131C of the CC Act includes a savings provision in respect of the concurrent operation of other laws and remedies in States and Territories. While the ACL applies as a law of the Commonwealth, it is not intended to exclude or limit the concurrent operation of any law of a State or Territory. *[Schedule 2, item 1, section 131C(1)]*

17.19 A person cannot be convicted under the Commonwealth-applied ACL and in a State or Territory applied ACL arising from the same act or omission. *[Schedule 2, item 1, section 131C(2)]*

17.20 The ACL and Part XI are not intended to affect the rights or remedies a person otherwise has, unless it specifically states the intention to do so. *[Schedule 2, item 1, section 131C(3)]*

### ***Effect of Part VIB on Chapter 5 of the Australian Consumer Law***

17.21 The remedies in Chapter 5 of the ACL, insofar as they relate to personal injury or death claims, will be subject to the regime set out in Part VIB of the CC Act. *[Schedule 2, item 1, section 131D]*

***Legislative instruments***

17.22 The following instruments made by the Commonwealth Minister under the ACL are legislative instruments for the purposes of the *Legislative Instruments Act 2003*:

- a determination under subsection ^66(1) relating to display notices;
- a notice under subsection ^104(1) or ^105(1) relating to safety standards;
- a notice under subsection ^109(1) or (2) relating to interim bans;
- a notice under section ^111 relating to extensions of interim bans);
- a notice under section ^113 relating to revocation of interim bans;
- a notice under subsection ^114(1) or (2) relating to permanent bans;
- a notice under section ^117 relating to the revocation of permanent bans;
- a notice by the Commonwealth Minister under subsection ^122(1) relating to recall notices; and
- a notice under subsection ^134(1) or ^135(1) relating to information standards.

17.23 The list set out in subsection 131E of the CC Act is merely declaratory of the law, so as to ensure that it is clear that the specified documents are to be made by legislative instruments. [*Schedule 2, item 1, subsection @131E(1)*]

17.24 The following are not legislative instruments under the ACL for the purposes of the *Legislative Instruments Act 2003*:

- an approval given under paragraph ^106(5)(b) relating to approval to export;
- an approval given under paragraph ^118(5)(b) relating to approval to export;

- a notice under subsection ^128(3) relating to voluntary recalls;
- a notice under subsection ^129(1) or (2) relating to safety warning notices;
- a notice under subsection ^130(1) relating to announcement of results of an investigation; and
- a notice under subsection ^223(1) or (2) relating to public warning notices.

17.25 These are not legislative instruments; however, this provision is declaratory of law and is not an exemption from the Legislative Instruments Act 2003. [*Schedule 2, item 1, subsection @131E(2)*]

17.26 No instruments made by a Minister other than the Commonwealth Minister are legislative instruments for the purposes of that Act. [*Schedule 2, item 1, subsection @131E(3)*]

#### ***Application of Crimes Act***

17.27 Section 4AB of the *Crimes Act 1914*, which provides for the conversion of penalties expressed in dollar amounts into penalty units, does not apply to the ACL as it is being drafted in accordance with the Parliamentary Counsels Committee *Protocol on Drafting National Uniform Legislation*, which requires dollar amounts to be used for application law schemes due to the differing amounts of penalty units between jurisdictions. [*Schedule 2, item 1, section 131F*]

#### ***Application of the Criminal Code***

17.28 The Bill clarifies that the corporate responsibility provisions in Part 2.5 of the *Criminal Code Act 1995* do not apply, as corporate responsibility is provided for specifically in sections @139B and @139C. [*Schedule 2, item 1, sub section @131G(1)*]

17.29 As offences against Chapter 4 of the ACL are subject to a specific defence of mistake of fact in section 207 of the ACL, the general mistake of fact defence in section 9.2 of the *Criminal Code Act 1995* does not apply. [*Schedule 2, item 1, section 131G(2)*]

### **Part XIAA**

17.30 The IGA provides that the ACL will be implemented as a law of the Commonwealth and of each State and Territory by means of an application law, with the Commonwealth as the lead legislator. The object

of the new Part XIAA of the CC Act is to facilitate the application of the ACL by participating jurisdictions. [Schedule 2, item 1, section 140A]

### **Definitions**

17.31 Each participating jurisdiction will apply the ACL by means of an application law. For the purposes of Part XIAA of the CC Act, **an application law** is:

- a law of a participating jurisdiction that applies the applied ACL, either with or without modifications, as a law of the participating jurisdiction;
- any regulations or other legislative instrument made under a law of a participating jurisdiction that applies the ACL; or
- the applied ACL, applying as a law of the participating jurisdiction, either with or without modifications. [Schedule 2, item 1, section 140]

17.32 The meaning of **apply** is to apply the ACL by reference:

- as in force from time to time; or
- as in force at a particular time. [Schedule 2, item 1, section 140]

17.33 A **Commonwealth entity** means an authority of the Commonwealth or an officer of the Commonwealth. For these purposes, a Commonwealth authority might relevantly include the ACCC, ASIC or the Administrative Appeals Tribunal. [Schedule 2, item 1, section 140]

17.34 An **officer** of the Commonwealth includes:

- a Minister of the Australian Government;
- a person who holds an office established by or under an Act; or an appointment made under an Act; or an appointment made by the Governor-General or a Minister (but not under an Act);
- a person who is a member or officer of an authority of the Commonwealth; and
- a person who is in the service or employment of the Commonwealth, or of an authority of the Commonwealth; or employed or engaged under an Act. [Schedule 2, item 1, section 140]



17.35 A **participating jurisdiction** is a **participating State** or **participating Territory**. A participating jurisdiction:

- is a party to the IGA; and
- applies the applied ACL as a law of the State or Territory, either with or without modifications. [*Schedule 2, item 1, section 140*]

17.36 A **Territory** means the Australian Capital Territory or the Northern Territory of Australia. [*Schedule 2, item 1, section 140*]

#### ***The applied Australian Consumer Law***

17.37 An **applied Australian Consumer Law** is defined, according to the context, as either the text described in section 140B of Part XI of the TP Act, or that text, applying as a law of a participating jurisdiction, with or without modifications (which include additions, submissions and substitutions).

17.38 Section 140B provides that an applied ACL consists of:

- Schedule 2;
- the regulations prescribed under the CC Act to the extent that they relate to any provision covered by Schedule 2 [*Schedule 2, item 1, sections 140 & 140B*]

17.39 In making regulations which relate to the ACL, the Minister will be required to follow the ACL amendment process set out in the IGA.

#### ***Federal Court may exercise jurisdiction under application laws of Territories***

17.40 A participating Territory may confer exclusive jurisdiction (whether original or appellate) on the Federal Court with respect to a matter arising under the applied ACL. [*Schedule 2, item 1, section 140C*]

17.41 The Federal Court does not have jurisdiction to determine a matter arising under the applied ACL of a participating State. This reflects the decision of the High Court of Australia in *Re Wakim; Ex parte McNally* [1999] HCA 27, where the Court found that it was unconstitutional for State laws to confer jurisdiction on courts with federal jurisdiction. Accordingly, proceedings under an applied ACL may be commenced in relevant courts or tribunals of a participating State, but not in the Federal Court.

***Exercise of jurisdiction under cross-vesting provisions***

17.42 Matters arising under the applied ACL may be subject to the cross-vesting scheme which applies in respect of Federal, State and Territory Courts. Part XIAA of the CC Act does not affect the operation of any other law of the Commonwealth, or any law of a State or Territory, with respect to the cross-vesting of jurisdiction. *[Schedule 2, item 1, section 140D]*

***Conferral of functions etc. on Commonwealth entities***

17.43 For the purposes of the applied ACL, an application law of a participating jurisdiction may confer functions or powers, or impose duties on a Commonwealth entity with the consent of the Australian Government.

17.44 An application law is taken to impose a duty on a Commonwealth entity if the law confers a function or power on the entity in circumstances that give rise to an obligation on the entity to perform the function or exercise the power. An application law may not confer a power or function, or impose a duty, to the extent to which the conferral or imposition, or the authorisation, contravenes any constitutional doctrines that bind the Commonwealth, or the authorisation otherwise exceeds the legislative power of the Commonwealth. Further, the Commonwealth entity is not permitted to perform a duty or function, or exercise a power, under an application law unless the conferral or imposition is in accordance with the agreement between the Australian Government and the State or Territory concerned. *[Schedule 2, item 1, sections 140E and 140G]*

17.45 If a duty is imposed on a Commonwealth entity by a participating jurisdiction, section 140F sets out the method in which the duty may be imposed. However, this provision is not intended to limit the operation of section 140E, which permits the Commonwealth to consent to a conferral of a function or power or imposition of a duty under an application law. *[Schedule 2, item 1, subsections 140F(1) and (6)]*

17.46 A participating jurisdiction may only impose a duty on a Commonwealth entity where that participating State's or Territory's legislative power is sufficient to support the duty and imposing the duty would be consistent with the constitutional doctrines restricting the duties that may be imposed on the Commonwealth entity. *[Schedule 2, item 1, subsection 140F(2)]*

17.47 In circumstances where the legislative power of the Commonwealth is sufficient to support the imposition of a duty but the legislative powers of the participating State or Territory are not, then the duty is taken to be imposed by the CC Act to the extent necessary to ensure the validity of the purported imposition of duty. *[Schedule 2, item 1, subsection 140F(3)]*

17.48 In such cases, the Australian Parliament will rely on all of its constitutional powers to support the imposition of a duty on a Commonwealth entity by the CC Act. However, a duty is only taken to be imposed by the CC Act to the extent that the imposing duty is within the Commonwealth's legislative powers and is consistent with the Australian Constitution. *[Schedule 2, item 1, subsections 140F(4) and (5)]*

17.49 The Commonwealth-applied ACL is not intended to exclude the operation of any application law of a participating jurisdiction. As a result, an application law can operate concurrently with the Commonwealth-applied ACL, unless it is directly inconsistent with a provision in the Commonwealth-applied ACL. *[Schedule 2, item 1, section 140H]*

#### *No 'doubling-up' of liabilities*

17.50 If an act or omission is an offence against the Commonwealth-applied ACL and an offence against an application law of a participating jurisdiction, and the offender has been punished for an offence under the applied law, then that offender cannot be punished for a like offence under the Commonwealth-applied ACL. Similarly, if a person is ordered to pay a civil pecuniary penalty for a contravention of a provision under an application law of a participating jurisdiction, the person is not subject to a pecuniary penalty under the Commonwealth-applied ACL in respect of the same conduct. *[Schedule 2, item 1, section 140J]*

17.51 It is expected that the application laws of participating jurisdictions will provide for the reverse protection for persons punished for an offence or subject to a civil pecuniary penalty under the Commonwealth-applied ACL.

#### *References in instruments to the Australian Consumer Law*

17.52 Section 143 provides that, unless the contrary intention appears or the context would otherwise require, an instrument to the ACL does not need to refer specifically to the applied ACL of each participating jurisdiction. A reference in any instrument to the ACL is taken to be a reference to:

- the ACL as applied under Division 2 of Part XI; and
- the applied ACL of any or all of the participating jurisdictions. *[Schedule 2, item 1, section 140K]*

## **Application and transitional provisions**

17.53 The ACL will commence on the later of 1 January 2011 or the commencement of Schedule 1 of the Trade Practices Amendment

(Australian Consumer Law) Bill 2009 (the first ACL Bill). The first ACL Bill is currently before the Parliament. *[Section 2]*

17.54 Schedule 2 of the Bill applies to all relevant conduct occurring in trade or commerce on or after 1 January 2011.

17.55 Conduct occurring prior to 1 January 2011 will remain subject to the repealed (and saved, for those purposes) provisions in the TP Act. *[Schedule 7, item 6]*

17.56 The TP Act as in force immediately before the commencement of the ACL continues to apply to or in relation to any proceedings, under or in relation to that Act, which were commenced, but not concluded, before that commencement. *[Schedule 7, item 7]*

17.57 The Governor-General may make regulations prescribing matters of a transitional, application or saving nature in relation to the amendments and repeals made by the Schedules to this Act. *[Schedule 7, item 12]*

## **Consequential amendments**

17.58 References to provisions of the TP Act in other CC Act provisions and provisions of other Acts will be consequentially amended to refer to provisions of the ACL to ensure that the affected provisions continue to apply in the way in which they did under the TP Act. *[Schedules 5 and 6]*

---

## **Chapter 18**

# **Commonwealth enforcement and administration**

---

### **Outline of chapter**

18.1 Divisions 7 and 8 of Schedule 2 of the ACL Bill contain provisions relating to the jurisdiction of courts and access to remedies under the ACL. The provisions of Schedule 2 will be supplemented by additional provisions contained in the laws of the Commonwealth and each of the States and Territories, which will facilitate the application of the ACL as a law of each of those jurisdictions, respectively.

### **Context of amendments**

18.2 Many of the enforcement powers in the ACL had certain limits or qualifications on those powers when they were in the *Trade Practices Act 1974* (TP Act), 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 ACL 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.

### **Summary of new law**

18.3 Certain prescribed State and Territory laws on professional standards are not excluded and limit the liability arising from misleading or deceptive conduct under the ACL.

18.4 Certain terms in relation to recreational services that restrict application of consumer guarantees under the ACL are not void in certain circumstances under the Commonwealth-applied ACL.

18.5 For compensatory orders under the ACL in relation to unconscionable conduct or declared unfair terms, at the Commonwealth level, the court is guided that it can consider the actions of the parties (such

as a refund of payments) since the time of the contravening conduct or declaration of an unfair term.

18.6 Failure to take reasonable care can reduce the availability of damages for economic loss or damage to property under the Commonwealth-applied ACL.

18.7 In proceedings for damages or compensatory orders under the ACL, a person can rely on a finding of fact in certain previous court actions for a contravention of the ACL as being prima facie evidence of that fact.

18.8 At the Commonwealth level, the ability to seek damages is limited in that damages and compensatory orders cannot be sought under sections 236, 238 or 239 of the ACL for personal injury or death (unless it relates to smoking or use of tobacco products, where the section can apply with some limitations). Death and personal injury claims are subject to Part VIB of the CC Act.

18.9 In certain proceedings for remedies under the ACL, the regulator or the Commonwealth Minister may apply for a court order to preserve assets pending the court's determination of the matter. Non-compliance with such an order is an offence.

## **Comparison of key features of new law and current law**

<i>New law</i>	<i>Current law</i>
Certain prescribed State and Territory professional standards laws are not excluded by the Commonwealth-applied ACL in actions for contravention of the misleading and deceptive conduct provision.	Certain prescribed State and Territory professional standards laws are not excluded by the TP Act in actions for contravention of the misleading and deceptive conduct provision.
Certain terms in relation to recreational services that restrict application of consumer guarantees under the ACL are not void in certain circumstances under the Commonwealth-applied ACL.	Certain terms that restrict application of implied conditions and warranties under the TP Act are not void in certain circumstances.

<i>New law</i>	<i>Current law</i>
In considering orders for damages or compensation under the Commonwealth-applied ACL in relation to unconscionable conduct or declared unfair terms, a court can consider the actions of the parties since the breach or declaration of a term.	In considering orders for damages or compensation under the TP Act in relation to unconscionable conduct or declared unfair terms, a court can consider the actions of the parties since the breach or declaration of a term.
Failure to take reasonable care can reduce the availability of damages for economic loss or damage to property under the Commonwealth-applied ACL.	Failure to take reasonable care can reduce the availability of damages for economic loss or damage to property under the TP Act.
In proceedings for damages or compensatory orders under the Commonwealth-applied ACL, a person can rely on a finding of fact in certain previous court actions for a contravention of the ACL as being prima facie evidence of that fact.	In proceedings for damages or compensatory orders under the TP Act, a person can rely on a finding of fact in certain previous court actions for a contravention of the TP Act as being prima facie evidence of that fact.
Restrictions apply to applications for damages and compensatory orders where the loss or damage relates to personal injury or death under the Commonwealth-applied ACL.	Restrictions apply to applications for damages and compensatory orders where the loss or damage relates to personal injury or death under the TP Act.
In certain proceedings under the Commonwealth-applied ACL the ACCC or the Commonwealth Minister may apply for a court order to preserve assets pending the court's determination of the matter.	In certain proceedings under the TP Act the ACCC or the Commonwealth Minister may apply for a court order to preserve assets pending the court's determination of the matter.

## Detailed explanation of new law

### Limits on occupational liability

18.10 State and Territory laws on professional standards that were prescribed by the regulations and in force at the time of a contravention are not excluded and limit the liability arising from misleading or deceptive conduct under the ACL. [*Schedule 2, item 1: section 137(1) & (2)*]

18.11 Definitions of 'professional standards law' and 'occupational liability' provide the scope of the provision, broadly, to situations where there are laws which provide for schemes limiting liability in situations where a person does something in the course of a profession, trade or

occupation and the person is a member of a relevant professional body or association. *[Schedule 2, item 1: section 137(3)-(5)]*

### **Damages and reasonable care**

18.12 Where a claim for damages for economic loss or damage to property is made in relation to a contravention of the prohibition on misleading and deceptive conduct in section 19, and the loss or damage was partly the fault of the alleged contravener and partly due to the claimant's failure to take reasonable care, the amount he or she may recover is reduced to the extent the court thinks fair having regard to the claimant's share of responsibility. This only applies if the alleged contravener did not intentionally or fraudulently cause the loss or damage. This provision is based on section 82(1B) of the TP Act. *[Schedule 2, item 1: section 137B]*

### **Personal injury and death**

18.13 Actions for damages and compensatory orders under sections 236, 238 or 239 cannot recover amounts that relate to personal injury and death to the extent that they relate to misleading and deceptive conduct (Part 2-1) or unfair practices (Part 3-1) where they do not relate to smoking or use of tobacco products. This provision is based on subsections 82(1AAA) and (1AAB) of the TP Act. *[Schedule 2, item 1: sections 137C(1) & 137E(1)]*

18.14 If that personal injury or death relates to smoking or use of tobacco products, the structured settlement regime in Divisions 2 and 7 Part VIB of the CC Act applies to orders under sections 236, 238 or 239. This provision is based on subsections 87(1AA), (1AB) and (1AC) of the TP Act. *[Schedule 2, item 1: sections 137C(2) & 137E(2) & (3)]*

18.15 Part VIB of the CC Act deals with claims for damages or compensation for death or personal injury.

### **Compensation orders**

18.16 In determining whether to make an order for compensation under sections 238 or 239 (compensatory orders) in relation to unconscionable conduct (Part 2-2) or a declared unfair term (section 249), a court may have regard to the conduct of the parties (but not the ACCC, if it is a party) since the conduct or declaration of an unfair term. This draws the court's attention to the fact that, for instance, the supplier that breached the ACL may have already refunded money to the consumer. *[Schedule 2, item 1: section 137D]*



### **Court may make orders for the purpose of preserving money or other property held by a person**

18.17 On application by the Commonwealth Minister or the ACCC in proceedings for an application for:

- an offence against Chapter 4;
- an injunction under section 232 in relation to a contravention of Chapter 2, 3 or 4 or a declared unfair term;
- damages under section 236 in relation to a contravention Part 2-1 or Chapter 3;
- compensatory orders under subsections 238(1) or 239(1) in relation to a contravention of Chapter 2, 3 or 4 or a declared unfair term (including where such proceedings may be taken):

and the court is satisfied that it is necessary or desirable to preserve money or property if the respondent may be liable under the ACL to pay money or transfer, sell or refund property; and the making of the order will not unduly prejudice the rights and interests of the person, the court may make particular orders. [*Schedule 2, item 1: subsections 137K(1) & (2)*]

18.18 The types of orders that may be made are:

- an order prohibiting, either wholly or conditionally, an indebted person from repaying the respondent or another person at the respondent's direction or request;
- an order prohibiting, either wholly or conditionally, a person holding money or property for the respondent from paying the respondent, paying another person or transferring property at the respondent's direction or request, or otherwise disposing of the property;
- an order prohibiting, either wholly or conditionally, the transfer of money or taking, sending or transfer of property, of the respondent or an associate of the respondent to a place outside the State or Territory where it is located; and
- for natural persons only — an order appointing a receiver or trustee of the property, or part of the property, of the respondent with such powers as are specified in the order. [*Schedule 2, item 1: subsection 137K(3)*]

18.19 The orders are restricted to 30 days for ex parte orders (without the respondent present) or are otherwise in force for the period specified in the order or, if proceedings in relation to which the order is made are concluded before the end of the specified period, until that time of conclusion. *[Schedule 2, item 1:section 137K(4)]*

18.20 Other powers of the court are not affected by this provision and it operates subject to the *Bankruptcy Act 1956*. These provisions are based on section 87A of the TP Act. *[Schedule 2, item 1: section 137K (5)]*

18.21 A contravention, refusal or failure to comply with such an order is an offence subject to a maximum fine of 900 penalty units (currently \$99,000) for a body corporate or 180 penalty units (currently \$19,800) for a person that is not a body corporate. *[Schedule 2, item 1: section 137L]*

### **Findings in proceedings to be evidence**

18.22 In proceedings for damages (section 236) or compensatory orders (sections 238 and 239) under the Commonwealth-applied ACL, a person can rely on a finding of fact in certain previous court actions for a contravention of the ACL as being prima facie evidence of that fact. This section is based on section 83 of the TP Act. *[Schedule 2, item 1: section 137M(1)]*

18.23 The proceedings to which this applies are proceedings for civil pecuniary penalties (section 228), injunctions (section 232), non-punitive orders (section 246), adverse publicity orders (section 247), disqualification orders (section 248) or an offence against Chapter 4, where the person has been found to have contravened or been involved in a contravention of Chapter 2, 3 or 4. *[Schedule 2, item 1: section 137M(2)]*

### **Jurisdiction and the Federal Court and transfer of proceedings**

18.24 Division 8 of Part XI provides the jurisdictional and transfer of matters arrangements for the Commonwealth-applied ACL. These provisions reflect section 86 of the TP Act.

18.25 The Federal Court has jurisdiction over any civil matter under the Commonwealth-applied ACL. This jurisdiction is exclusive except insofar as it is conferred upon the Federal Magistrates Court, the several courts of the States and Territories and the High Court. *[Schedule 2, item 1: section 138]*

18.26 The Federal Magistrates Court has jurisdiction over civil matters (other than those instituted by the Minister) arising under the general the ACL. However, in relation to manufacturers' liability (Part 3-5) or in relation to orders for damages (section 236) it only has jurisdiction to award

amounts for loss or damage up to \$750,000 or another amount specified in the regulations. *[Schedule 2, item 1: section 138A]*

18.27 The courts of the States and Territories has jurisdiction over civil matters arising under the ACL. *[Schedule 2, item 1: section 138B]*

18.28 The Federal Court may, in a proceeding instituted by a person other than the Minister or the ACCC, transfer matters for determination to a State or Territory court that has jurisdiction to hear a matter under the Commonwealth-applied ACL. This section reflects section 86A(1)-(3). *[Schedule 2, item 1: section 138C]*

18.29 A State or Territory court hearing a matter under Part XI of the CC Act or the Commonwealth-applied ACL must transfer the matter to the Federal Court if the Federal Court directs it to do so. Further, it can transfer a matter to a court with appropriate jurisdiction in another State or Territory. This section reflects section 86A(4)-(6). *[Schedule 2, item 1: section 138D]*

18.30 The Federal Court can transfer matters to the Family Court for determination. The Family Court can then hear and determine matters not ordinarily within its jurisdiction, make orders that the Federal Court could make. In effect, following such a transfer the matter is heard in the Family Court but it is taken to be as if the matter were before the Federal Court. *[Schedule 2, item 1: section 138E]*

## Other miscellaneous provisions

### *Intervention by the ACCC*

18.31 The ACCC may, with leave of the court, become a party to any proceeding taken under the ACL. *[Schedule 2, item 1: section 139]*

### *Exception relating to the supply of recreational services*

18.32 A term in a contract is not void under section 64 of the ACL if it excludes the application or a right or liability under the consumer guarantees in Subdivision B of Division 1 of Part 3-2 of the ACL and:

- it relates to recreational services; and
- is limited to liability concerning death, personal or mental injury, a disease or something that is harmful or disadvantageous to an individual or the community. *[Schedule 2, item 1: section 139A(1) & (3)]*

18.33 Recreational services are services that consist of a sporting activity or similar leisure time pursuit, or any other activity that involves a

significant degree of physical exertion or risk that is undertaken as recreation, enjoyment or leisure. [*Schedule 2, item 1: section 139A(2)*]

18.34 This exception does not extend to exclude liability for reckless conduct by the supplier, which is where it is aware or should have been aware that there is a significant risk that the conduct could result in personal injury to the other person and it engages in the conduct without adequate justification. [*Schedule 2, item 1: section 139A(4) & (5)*]

#### ***Conduct of directors, employees, servants and agents***

18.35 Where a person is employed to carry out the acts of another, the state of mind of directors, employees or agents is deemed to be that of the body corporate and, similarly, conduct engaged in by such persons is also taken to have been engaged in by the relevant body corporate. Similar rules apply to servants or agents of persons other than a body corporate. This helps to ensure that a body corporate or person cannot use employees as a shield from liability under the ACL. This reflects section 84 of the CC Act. [*Schedule 2, item 1: sections 139B & 139C*]

#### ***Enforcement and recovery of certain fines***

18.36 Sections 139D and 139E provide a regime for the recovery and enforcement of fines that are not paid following conviction under the ACL or Part XI. This covers payment by instalments and, potentially, rates of reduction of debt based on imprisonment under State and Territory laws relating to defaulting on payment. [*Schedule 2, item 1: section 139D & 139E*]

18.37 If Part XI of the CC Act results in an acquisition of property (as in section 51(xxxi) of the *Australian Constitution*) the Commonwealth is liable to pay a reasonable amount of compensation to the person and the person has a right to have that amount determined by the court. [*Schedule 2, item 1: section 139F*]

18.38 Section 139G provides the general regulation-making power for matters required or permitted to be prescribed under the ACL or necessary or convenient to be prescribed to give effect to the ACL. [*Schedule 2, item 1: section 139G*]

## **Application and transitional provisions**

18.39 The ACL will commence on the later of 1 January 2011 or the commencement of Schedule 1 of the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (the first ACL Bill). The first ACL Bill is currently before the Parliament. [*Section 2*]

18.40 Divisions 7 and 8 of Schedule 2 of the Bill applies to all relevant conduct occurring in trade or commerce on or after 1 January 2011.

18.41 Conduct occurring prior to 1 January 2011 will remain subject to the repealed (and saved, for those purposes) provisions in the TP Act or the relevant FT Act of a State or Territory. *[Schedule 7, item 6]*

18.42 The TP Act, as in force immediately before the commencement of the ACL, continues to apply to or in relation to any proceedings under or in relation to that Act, which were commenced, but not concluded, before that commencement. *[Schedule 7, item 7]*

18.43 The Governor-General may make regulations prescribing matters of a transitional, application or saving nature in relation to the amendments and repeals made by the Schedules to this Act. *[Schedule 7, item 12]*

## **Consequential amendments**

18.44 References to provisions of the TP Act in other CC Act provisions and provisions of other Acts will be consequentially amended to refer to provisions of the ACL to ensure that the affected provisions continue to apply in the way in which they did under the TP Act. *[Schedules 5 and 6]*



---

## **Chapter 19**

# **Administration and enforcement of consumer product safety**

---

### **Outline of chapter**

19.1 Divisions 4 and 6 of Schedule 2 of the Trade Practices Amendment (Australian Consumer Law) Bill 2010 (the Bill) amend the *Trade Practices Act 1974* (TP Act) to create enhanced investigation and enforcement tools relating to consumer product safety.

19.2 Division 3 of Schedule 2 also provides a framework for industry consultation on proposed product safety regulatory actions, such as the issue of bans, standards or recalls.

### **Context of amendments**

19.3 Currently the TP Act provides for a post-market approach to consumer product safety regulation in Australia. Under this approach, suppliers are generally free to supply goods into the market without first obtaining approval from a regulatory agency to do so. However, the Government reserves the power, under the TP Act, to require that goods are to be withdrawn from the market if they are discovered to pose a safety hazard. The Government also has the power to require goods to comply with mandatory standards or to ban the supply of certain goods *per se*.

19.4 Through their fair trading legislation, the States and Territories all have similar regulatory regimes that apply in their respective jurisdictions in respect of consumer product safety.

19.5 This generic regime is supplemented by Commonwealth and State and Territory industry-specific regulation where particular products, such as electrical goods, chemicals, or drugs, pose higher risks to consumer or public safety.

19.6 In July 2008, the Council of Australian Governments (COAG) agreed to create a single national generic consumer product safety law, which is to be enforced jointly by the Australian Competition and Consumer Commission (ACCC) and State and Territory fair trading agencies. In

October 2008, COAG further agreed that this national product safety law will be part of the Australian Consumer Law (ACL).

### **Enforcement of consumer product safety**

19.7 Currently, the Commonwealth and States and Territories have their own jurisdiction-specific product safety investigation and enforcement provisions. The Commonwealth's powers, which can be exercised by the ACCC, are set out in Division 1A of Part V of the TP Act.

19.8 The ACCC's product safety investigation and enforcement role differs from its other TP Act compliance functions in key ways:

- market surveillance activities are directed at identifying potential product safety hazards (which may not be contraventions of the TP Act), in addition to detecting breaches of the TP Act; and
- the responsible Commonwealth Minister can respond to product safety hazards detected by the ACCC through the exercise of administrative functions (such as banning goods or ordering a product recall).

19.9 The removal of unacceptable product safety hazards from the Australian market as soon as possible once they are identified is a critical focus of the ACCC's market surveillance and enforcement activities.

#### ***Enhancing the Commonwealth product safety enforcement role***

19.10 The model for a national product safety law agreed by COAG requires the ACCC to take a stronger role in the day-to-day administration and enforcement of the product safety law. For example, under the ACL, only the Commonwealth Minister will be able to make permanent product safety bans and mandatory standards.

19.11 In addition to the legislative changes contained in this Bill, the ACCC is currently implementing, in partnership with State and Territory agencies, significant reforms to its own administrative arrangements for product safety, including:

- the development of a clearing-house of consumer product injury and incident data; and
- a one-stop shop website containing all relevant product safety requirements and general information for Australian suppliers and consumers.



19.12 The *Intergovernmental Agreement for the Australian Consumer Law* (IGA) provides that, with the agreement of the Commonwealth, any State or Territory may confer its powers in relation to enforcement and administration of the ACL on the Commonwealth.

19.13 Generally, the State and Territory product safety regulators have greater access to investigation and enforcement approaches than does the ACCC. Given the greater role the ACCC will take in national product safety matters under the ACL, strengthening the ACCC's investigatory and enforcement powers will allow the ACCC to work more effectively in a coordinated manner with State and Territory agencies.

### **Conference requirements for Commonwealth safety bans and recalls**

19.14 The exercise of administrative functions such as the banning of consumer products or ordering the recall of a product, are regulatory actions that impact significantly on suppliers involved.

19.15 The TP Act currently imposes requirements on the responsible Commonwealth Minister, through the ACCC, to consult with affected suppliers before exercising certain administrative functions under the ACL. These consultation arrangements are referred to in the TP Act as a conference process.

19.16 It is the Government's intention that the current conference arrangements in the TP Act will be retained as a law of the Commonwealth to support the Commonwealth's administration of product bans and compulsory recalls under the ACL. To accommodate the substantial restructuring of the consumer protection provisions of the TP Act under the ACL, the existing conference provisions will be renumbered re-drafted to reflect the drafting approach taken in the ACL.

19.17 More general Commonwealth administrative review laws, such as the *Administrative Decisions (Judicial Review) Act 1977* will also continue to apply to decisions made by a responsible Commonwealth Minister under the product safety provisions of the ACL.

## **Summary of new law**

### **Product safety market surveillance and enforcement**

19.18 The Bill amends the TP Act to include an enhanced suite of product safety market surveillance and enforcement provisions. An

inspector of the ACCC, or the responsible Minister where appropriate, will be able to:

- enter premises to which the public has access in order to inspect, take photographs of, or purchase any consumer goods or product related services;
- require a person who supplies consumer goods or product related services in trade or commerce, to provide the ACCC or the Minister with information, documents or evidence about those goods or services;
- enter premises under a search warrant, or without a warrant in cases where the occupier has consented or there is an immediate danger to life or public safety, and exercise search-related powers, including:
  - if entry is under a warrant, the power to seize goods or equipment relating to consumer goods or product related services;
  - inspect, handle and measure goods;
  - take samples of consumer goods;
  - inspect, handle and make copies of documents relating to consumer goods or product related services;
  - make still or moving image recordings of any consumer goods or equipment or premises related to consumer goods or product related services;
  - ask questions or seek the production of documents;
  - if entry is under a warrant, issue embargo notices to prevent the movement or supply of consumer goods or product related services; and
  - in circumstances where an embargo notice has been issued, secure consumer goods or equipment used to supply product related services.

19.19 The TP Act is also amended to allow a court to issue an order allowing an inspector of the ACCC to destroy or otherwise dispose of consumer goods that do not comply with a safety standard, ban or recall.

19.20 The product safety investigation and enforcement powers can only be exercised where an inspector of the ACCC or the responsible Minister, as appropriate:

- believes that consumer goods or product related services (or a reasonably foreseeable misuse) will or may cause injury to any person; or
- for the purposes of ascertaining whether consumer goods or product related services are of a kind that will or may cause injury to any person.

### **Conference requirements for Commonwealth safety bans and recalls**

19.21 The Bill amends the conference process provisions of the TP Act to reflect the drafting style used in the ACL. However the substantive effect of those provisions is not amended.

19.22 Pursuant to the conference process, before imposing an interim ban or permanent ban on consumer goods or product related services, or prior to issuing a compulsory recall notice for consumer goods, the Commonwealth Minister must:

- publish a proposed ban or recall notice on the internet; and
- invite any person who supplies or proposes to supply the goods or services in question to notify the ACCC if he or she wishes the ACCC to hold a conference in relation to the proposed imposition of the ban or recall

19.23 The ACCC must hold a conference if a person requests that the ACCC does so in response to a proposed ban or recall notice.

19.24 The responsible Commonwealth Minister must be informed of the outcome of a conference and must take the recommendations of the conference into account in deciding whether to proceed with a proposed ban or recall notice.

19.25 A conference may be held after the imposition of an interim ban if the Minister considers that the ban must be imposed without delay if there is an imminent risk of death, serious illness or injury.

## Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
An inspector of the ACCC may enter premises to which the public has access in order to inspect, take photographs of, or purchase any consumer goods or product related services for the purpose of ascertaining whether consumer goods or product related services will or may cause injury to any person.	No equivalent Commonwealth law.
The responsible Minister or an inspector of the ACCC may require a person who supplies consumer goods or product related services in trade or commerce, to provide information, documents or evidence about consumer goods or product related services, if the Minister or an inspector of the ACCC has reason to believe the consumer goods or product related services will or may cause injury to any person.	No equivalent Commonwealth law.
An inspector of the ACCC may enter premises under a search-warrant and exercise search-related powers, including inspecting goods or product related services taking samples, inspecting documents or inspecting equipment used in the manufacturing, processing or storage of goods or product related services.	Subsection 65Q(2) of the TP Act allows an authorised officer to enter premises under a search-warrant and exercise search-related powers, including inspecting goods, taking samples, inspecting documents or inspecting equipment used in the manufacturing, processing or storage of goods.
When exercising search-related powers an inspector of the ACCC may embargo or secure consumer goods or product related services to prevent their supply or movement.	No equivalent Commonwealth law.
When exercising search-related powers an inspector of the ACCC may make still or moving image recordings of any consumer goods or equipment or premises related to consumer goods or product related services.	No equivalent Commonwealth law.

<i>New law</i>	<i>Current law</i>
An inspector of the ACCC may enter premises and exercise search-related powers in circumstances where the exercise of those powers is required without delay in order to protect life or public safety.	Subsection 65Q(3) of the TP Act allows an authorised officer to enter premises and exercise search-related powers in circumstances where the exercise of those powers is required without delay in order to protect life or public safety.
An inspector of the ACCC may apply to a court to order the destruction or other disposal of consumer goods that do not comply with a safety standard, ban or recall notice.	No equivalent Commonwealth law.
The Commonwealth Minister must take into account the findings of a supplier consultation ('conference process') before making a ban or recall, or where an interim ban has been imposed by the Commonwealth Minister due to imminent danger, after the imposition of the interim ban.	These provisions continue the operation of current sections 65J-65P of the TP Act.

## Detailed explanation of new law

### Product safety market surveillance and enforcement

19.26 Product safety market surveillance and enforcement powers may only be exercised by the responsible Commonwealth Minister or an inspector appointed by the Chairperson of the ACCC.

19.27 The responsible Commonwealth Minister is the Minister responsible for the administration of the consumer product safety provisions of the CC Act. Currently, the responsible Minister is the Minister for Competition Policy and Consumer Affairs.

19.28 The Chairperson of the ACCC has discretion to appoint any member of the staff assisting the Commission as an 'inspector' provided that:

- the appointment is in writing [*Schedule 2, Part XI, subsection 133(1)*]; and
- the Chairperson is satisfied that the person has suitable qualifications and experience to exercise properly the powers of an inspector [*Schedule 2, Part XI, subsection 133(2)*].

19.29 The **Chairperson** is the Chairperson of the ACCC, established under section 6A of the TP Act. Staff assisting the Commission are persons employed under the *Public Service Act 1999*, in accordance with section 27 of the TP Act.

19.30 An inspector appointed by the Chairperson must comply with any directions given by the Chairperson [*Schedule 2, Part XI, subsection 133(3)*]. Written directions given by the Chairperson are not legislative instruments within the meaning of section 5 of the *Legislative Instruments Act 2003*, and are not exempted from the operation of that Act [*Schedule 2, Part XI, subsection 133(4)*].

19.31 An inspector appointed under section 133 must carry an identity card at all times while exercising powers as an inspector [*Schedule 2, Part XI, subsection 133A(6)*]. The Chairperson must issue an identity card in a prescribed form to any person appointed as an inspector [*Schedule 2, Part XI, subsection 133A(1)*]. An identity card is a form of photographic ID to minimise the risk of fraud or inappropriate conduct in relation to the functions of inspectors.

19.32 Upon ceasing to be an inspector, a person must return the identity card to the Chairperson, unless the card has been lost or destroyed. A person that claims their identity card has been lost or destroyed bears an evidential burden. [*Schedule 2, Part XI, subsection 133A(4) and 133A(5)*]

***Market surveillance powers that may be exercised without a warrant***

19.33 The Bill amends the TP Act to provide for two additional market surveillance powers to be employed by the ACCC, or where appropriate, the responsible Minister. These powers are designed to facilitate general market surveillance activities of the ACCC, consistent with its role in identifying and removing product safety hazards in a timely way.

***Entry to premises open to the public***

19.34 An inspector may enter premises from which a person, in trade or commerce, is supplying consumer goods or product related services for the purpose of ascertaining whether:

- any of the consumer goods or product related services will or may cause injury to any person; or
- a reasonably foreseeable misuse of those goods or product related services will or may cause injury to any person.  
[*Schedule 2, Part XI, Division 4, subsection 133B(1)*]

19.35 Consumer goods are defined in the ACL as 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 goods that have become fixtures since the time they were supplied if:

- a recall notice for the goods has been issued; or
- a person has voluntarily recalled the goods [*Schedule 1, item 1, Chapter 1, section 2*].

19.36 **Product related services** are defined in the ACL as a service for or relating to:

- the installation of consumer goods of a particular kind; or
- the maintenance, repair or cleaning of consumer goods of a particular kind; or
- the assembly of consumer goods of a particular kind; or
- the delivery of consumer goods of a particular kind

and includes any other services that relates to the supply of consumer goods of that kind [*Schedule 1, item 1, Chapter 1, section 2*].

19.37 An inspector does not require a warrant to enter premises that are open to the public. An inspector has the right to remain on the premises so long as the public has access to those premises. However, the inspector may not enter or remain on those premises under section 133B if they are closed to the public.

Conduct while on premises

19.38 While on public premises, an inspector may:

- take photographs of any consumer goods or equipment used in the manufacturing, processing or storage of consumer goods or product related services or take photographs of premises where product related services are supplied;
- inspect any consumer goods or equipment related to those consumer goods or product related services;
- purchase any consumer goods or product related services. [*Schedule 2, Part XI, Division 4, subsections 133B(2) and 133C(2)*]

19.39 If an inspector purchases any of the goods or product related services he or she would generally do so at the price offered to other purchasers of those goods or services at that time.

*Power to obtain information and documents*

19.40 The responsible Minister or an inspector may give a ‘disclosure notice’ to a person who, in trade or commerce, supplies consumer goods or product related services seeking information, documents or evidence relating to those consumer goods or product related services. *[Schedule 2, item 2, Part XI, Division 4, section 133D]*

19.41 A **disclosure notice** is a written notice requiring the person to give information to the inspector or responsible Minister, produce documents or appear before the inspector or responsible Minister at a reasonable time to give information or produce documents *[Schedule 2, item 2, Part XI, Division 4, subsection 133D(3)]*.

Grounds for issuing a disclosure notice

19.42 Before a the responsible Minister or an inspector may issue a disclosure notice he or she must:

- reason to believe that consumer goods or product related services of a particular kind (or a reasonably foreseeable misuse of consumer goods or product related services of a particular kind) will or may cause injury to any person; and
- the person to who the disclosure notice is issued is capable of giving information, producing documents or giving evidence in relation to those consumer goods or product related services. *[Schedule 2, Part XI, Division 4, subsection 133D]*

Compliance with disclosure notices

19.43 A person commits an offence if he or she refuses or fail to comply with a disclosure notice or he or she knowingly gives information, evidence or a document to an inspector or the responsible Minister that is false or misleading in any material particular *[Schedule 2, item 2, Part XI, Division 4, subsection 133F(1) and section 133G]*.

19.44 A person does not commit an offence if he or she complies with a notice to the extent that he or she is capable of complying with it. However, a defendant bears an evidential burden if he or she claims that he or she could not comply fully with a disclosure notice. *[Schedule 2, Part XI, Division 4, subsection 133F(2)]*



19.45 Non compliance with a disclosure notice is a strict liability offence [*Schedule 2, Part XI, Division 4, subsection 133F(2)*]. The strict liability nature of this offence reflects the potential for widespread detriment, both in terms of potential safety risks for individual consumers and for its effect on the market and consumer confidence more generally, that can be caused by a person that breaches this provision, whether or not he or she intended to engage in the contravention.

19.46 A person is not excused from complying with a disclosure notice on the ground that the information or evidence, or production of a document, might tend to incriminate the person or expose the person to a penalty. However, in the case of an individual, the giving of information or evidence of production of a document pursuant to a disclosure notice is not admissible as evidence against the individual in proceedings instituted by the individual or in any criminal proceedings against the individual other than for an offence against sections 133F or 133G (which relate to .

19.47 The abrogation of privilege against self-incrimination is necessary in the context of this product safety investigatory power for two reasons:

- Disclosure notices may be issued where a Minister or inspector believes that goods or services pose a danger to any person and for this reason timely gathering of information about the extent and nature of any risks is critical. While it may be technically feasible for the regulator to obtain information by other means that do not impinge of the right against self incrimination, these may take a longer time. The first priority in product safety enforcement actions is the removal of goods or services from the marketplace. Prosecution and resulting penalties for those involved in the supply of goods is generally a secondary consideration.
- The ACCC will not always have specific information about the activities of particular suppliers when undertaking early investigations — the ACCC may receive information about product safety hazards, such as reports of faulty goods in overseas markets, which will form the basis of its market surveillance activities. The receipt of such information may place the ACCC in the position where it needs to seek information from suppliers of similar goods in order to ascertain whether the same problem exists in Australia.

#### ***Court orders for the disposal of consumer goods***

19.48 An inspector may apply to a court for an order to destroy or otherwise dispose of consumer goods which do not comply with a

requirement of the Australian Consumer Law (ACL). *[Schedule 2, item 1, Part XI, Division 4, subdivision D, section 133H]*

19.49 This power provides a certain means of removing consumer goods from the community in situations where a consumer good does not comply with a safety requirement of the law and the court is satisfied that the consumer good cannot be made safe.

19.50 Before making an application to a court for an order under section 133H an inspector must take reasonable steps to discover who has an interest in the consumer goods and to the extent it is practicable to do so, notify each person of their intention to make an application for the destruction of the consumer goods. Any person so notified is entitled to be heard in relation to the application. *[Schedule 2, item 1, Part XI, Division 4, Subdivision D, subsections 133H(3) and 133H(4)]*

#### *Grounds for making a order*

19.51 A court may make an order under section 133H if it is satisfied that a person possesses or has control of consumer goods of a particular kind and the goods fail to comply with:

- a mandatory safety standard that is in force for consumer goods of that kind and the cause of the 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 a consumer good identified in the recall notice cannot be remedied. *[Schedule 2, item 1, Part XI, Division 4, Subdivision D, subsection 133H(1)]*

#### *Terms of an order*

19.52 A court may make an order allowing one or more inspectors to:

- enter premises of the person specified in the order;
- search the premises for consumer goods of the kind specified in the order;
- seize any such consumer goods found on the premises;
- destroy or otherwise dispose of any such consumer goods that are seized. *[Schedule 2, item 1, Part XI, Division 4, Subdivision D, subsection 133H(2)]*

19.53 A person from whom consumer goods are seized under an order made under section 133H or the owner of those goods if the person from whom the goods were seized is not entitled to possess them, is liable to pay the Commonwealth the reasonable costs incurred in seizing, destroying or otherwise disposing of the goods. *[Schedule 2, item 1, Part XI, Division 4, Subdivision D, section 133J]*

*Search and entry under a warrant*

19.54 The Bill amends the TP Act to allow an inspector to enter premises:

- under a warrant;
- with the consent of the occupier of the premises; or
- without a warrant or consent in circumstances in which entry is required without delay in order to protect life or public safety. *[Schedule 2, item 1, Part XI, Division 6, Subdivision A, subsection 135(3)]*

19.55 Where an inspector enters premises with the consent of the occupier, the inspector must, if requested by the occupier, show the occupier their identity card.

19.56 The inspector must also inform the occupier that the occupier may refuse consent and the occupier may revoke their consent at any time. If the occupier revokes their consent, the inspector and any person assisting the inspector must leave the premises. *[Schedule 2, item 1, Part XI, Division 6, Subdivision B, section 135H]*

19.57 These provisions are based on the current section 65Q of the TP Act, with some modifications to the drafting style and some additions to the search-related activities that may be undertaken while on a premises.

*Grounds for entering and searching premises*

19.58 An inspector may enter premises and conduct search-related powers if an inspector has reason to believe that:

- consumer goods (either themselves or as a result of the supply of product related services) of a particular kind will or may cause injury to any person; or
- a reasonably foreseeable misuse of consumer goods (either themselves or as a result of the supply of product related services) of a particular kind will or may cause injury to any person

and the inspector enters premises for the purposes of ascertaining whether this is the case. [*Schedule 2, item 1, Part XI, Division 6, Subdivision A, subsections 135(1) and 135(2)*]

*Search-related powers*

19.59 If an inspector lawfully enters premises under section 135, the inspector may:

- if entry is under a warrant, seize goods or equipment relating to consumer goods or product related services [*Schedule 2, item 1, Part XI, Division 6, Subdivision A, paragraphs 135A(1)(a) and 135A(2)(b)*];
- inspect, handle and measure consumer goods or equipment relating to consumer goods or product related services [*Schedule 2, item 1, Part XI, Division 6, Subdivision A, paragraph 135A(1)(b), 135A(1)(e) and 135A(2)(b)*];
- take samples of consumer goods [*Schedule 2, item 1, Part XI, Division 6, Subdivision A, paragraph 135A(1)(c)*];
- inspect, handle and make copies of documents relating to consumer goods or product related services [*Schedule 2, item 1, Part XI, Division 6, Subdivision A, paragraphs 135A(1)(d) and 135A(2)(a)*];
- make still or moving image recordings of any consumer goods or equipment or premises related to consumer goods or product related services [*Schedule 2, item 1, Part XI, Division 6, Subdivision A, paragraphs 135A(1)(f) and 135A(2)(c)*];
- ask questions or seek the production of documents [*Schedule 2, item 1, Part XI, Division 6, Subdivision A, sections 135B and 135C*];
- if entry is under a warrant, issue embargo notices to prevent the movement or supply of consumer goods or product related services [*Schedule 2, item 1, Part XI, Division 6, Subdivision E, section 135S*]; and
- in circumstances where an embargo notice has been issued, secure consumer goods or equipment used to supply product related services [*Schedule 2, item 1, Part XI, Division 6, Subdivision E, sections 135V and 135W*].

Asking questions or seeking production of documents

19.60 When an inspector enter premises lawfully in accordance with section 135, the inspector may ask the occupier to:

- answer any questions relating to the reasons for the inspector entering the premises that are put by the inspector; and
- produce any document relating to the reasons for the inspector entering the premises that is requested by the inspector. *[Schedule 2, item 1, Part XI, Division 6, Subdivision A, section 135B]*

19.61 Where an inspector has entered the premises under a search warrant, the occupier commits an offence if he or she fails to comply with a request by an inspector to answer any questions or produce any documents. However, a person is not required to comply with such a request if the inspector is lawfully on their premises without a warrant, in accordance with subsections 135(3)(a) or (c). *[Schedule 2, item 1, Part XI, Division 6, Subdivision A, subsection 135C(1)]*

19.62 A person is not excused from answering a question or producing a document on the ground that the answer, or the production of a document, might tend to incriminate the person or expose the person to a penalty. *[Schedule 2, item 1, Part XI, Division 6, Subdivision A, subsection 135C(2)]*

19.63 However, in the case of an individual, the answer to a question or a document produced are not admissible in evidence against the individual in any criminal proceeding other than proceedings:

- for an offence against this section;
- proceedings for an offence based on the answer or document being false or misleading; or
- an offence based on the obstruction of public officials. *[Schedule 2, item 1, Part XI, Division 6, Subdivision A, subsection 135C(3)]*

19.64 Failure to comply with a request under subsection 135B(2) is an offence of strict liability. The strict liability nature of this offence reflects the potential for widespread detriment, both in terms of potential safety risks for individual consumers and for its effect on the market and consumer confidence more generally, that can be caused by a person that breaches this provision, whether or not he or she intended to engage in the contravention.

Seizure of goods or equipment

19.65 If an inspector seizes consumer goods or equipment relating to consumer goods or product related services under section 135A, the inspector must provide a receipt for those goods or equipment [Schedule 2, item 1, Part XI, Division 6, Subdivision C, subsections 135M(1) and 135M(2)]. A single receipt may cover 2 or more kinds of consumer goods and/or equipment that been seized [Schedule 2, item 1, Part XI, Division 6, Subdivision C, subsection 135M(3)].

19.66 An inspector must take reasonable steps to return any consumer goods or equipment related to consumer goods or product related services to the person from whom they were seized (or the owner if that person is not entitled to possess it) if the reason for the seizure no longer exists or after no more than 60 days, whichever happens first. [Schedule 2, item 1, Part XI, Division 6, Subdivision C, subsections 135N(1), 135N(4) and 135N(5)].

19.67 An inspector is not required to take reasonable steps to return seized consumer goods or equipment if:

- the ownership of the goods or equipment is in dispute; or
- the goods or equipment are forfeited or forfeitable to the Commonwealth; or
- the return of the consumer goods or equipment could cause an imminent risk of death, serious illness or serious injury; or
- the inspector is otherwise authorised by law to retain, destroy, dispose of or otherwise deal with the consumer goods or equipment. [Schedule 2, item 1, Part XI, Division 6, Subdivision C, subsections 135N(2) and 135N(3)]

19.68 An inspector may apply to a judge of the Federal Court for an order to extend the period that seized consumer goods or equipment may be held for up to a further 60 days. A judge must be satisfied that it is necessary in all the circumstances for the inspector to continue to retain the consumer goods or equipment before granting an extension of up to 60 days [Schedule 2, item 1, Part XI, Division 6, Subdivision C, subsections 135P(1) and 135P(2)]. Before applying for an extension, the inspector must take reasonable steps to discover who has an interest in the retention of the consumer goods and equipment and, if it is practicable to do so, notify each person who the inspector believes has such an interest of the proposed application [Schedule 2, item 1, Part XI, Division 6, Subdivision C, subsection 135P(3)].

19.69 A person from whom consumer goods or equipment are seized under a search warrant or the owner of those goods or equipment if the person from whom the goods were seized is not entitled to possess them, is

liable to pay the Commonwealth the reasonable costs incurred in seizing the goods. [Schedule 2, item 1, Part XI, Division 6, Subdivision C, section 135Q]

19.70 An inspector is not required to return seized consumer goods or equipment if despite, making reasonable efforts, the inspector cannot locate the person to return the seized goods to, or the person refuses to take possession of the consumer goods or equipment. In this event, a court may, on the application of the inspector, make an order authorising the inspector to destroy or otherwise dispose of the consumer goods or equipment [Schedule 2, item 1, Part XI, Division 6, Subdivision D, subsection 135R(1)].

19.71 If a person refuses to accept possession of consumer goods or equipment, the inspector must notify that person of their intention to make an application for disposal or destruction of the consumer goods or equipment. If an order is made, that person is liable to pay the Commonwealth the reasonable costs incurred by the inspector in destroying or disposing of the consumer goods or equipment. [Schedule 2, item 1, Part XI, Division 6, Subdivision D, subsections 135R(2), 135R(3) and 135R(4)]

#### Embargo and securing of goods

19.72 An embargo is a temporary mechanism to prevent the continued supply or movement of consumer goods or product related services that may pose a danger to the community. Consumer goods or equipment used to supply product related services, may also be secured by an inspector remaining with the goods, or by locking the goods or equipment up or otherwise, for up to 24 hours, where there is a high risk of non-compliance with an embargo notice.

19.73 An inspector who enters premises under a search warrant may give an embargo notice to the occupier of the premises [Schedule 2, item 1, Part XI, Division 6, Subdivision E, subsection 135S(1)].

19.74 An *embargo notice* must:

- be in writing;
- specify the consumer goods or product related services to which the notice relates;
- prevent the supply of those specified consumer goods or product related services or, the case of consumer goods, the movement, transfer, alteration, destruction or other interference with specified consumer goods; and
- explain the effect of an order to secure consumer goods or product related services. [Schedule 2, item 1, Part XI, Division 6, Subdivision E, subsection 135S(3)]

19.75 An inspector may issue an embargo notice by causing a copy of the notice to be served on the occupier of the premises, or if the occupier cannot be located after all reasonable steps have been taken to do so, by causing a copy of the notice to be given to be served on a person on the premises who is believed to be in regular contact with the occupier, or causing a copy of the notice to be affixed to the premises or thing on the premises, in a prominent position. *[Schedule 2, item 1, Part XI, Division 6, Subdivision E, subsection 135S(2)]*

19.76 If an inspector has issued an embargo notice in respect of consumer goods or product related services and the inspector who gives the notice believes on reasonable grounds that it is necessary to secure the consumer goods or equipment in order to ensure that the notice is complied with, the inspector may do anything that the inspector thinks is necessary to secure those consumer goods or equipment. *[Schedule 2, item 1, Part XI, Division 6, Subdivision E, sections 135V and 135W]*

19.77 The primary objective of an embargo notice is to prevent the supply of consumer goods that are potentially hazardous. Despite anything in any other law, a contract for the supply of consumer goods or product related services that is prohibited by an embargo notice is void *[Schedule 2, item 1, Part XI, Division 6, Subdivision E, subsection 135S(4)]*. Further, if consumer goods are supplied in contravention of an embargo notice:

- the supplier must immediately return or refund to the person who acquired the goods any consideration that that person paid; and
- if the goods have been removed from the premises in which they were subject to the embargo notice, the person who acquired the goods must return the goods to the premises or notify the supplier of the place where he, she or it can collect the goods (and the supplier must collect them and return them to the premises). *[Schedule 2, item 1, Part XI, Division 6, Subdivision E, subsection 135S(5)]*

19.78 An inspector cannot issue embargo notices for longer than:

- 28 days; or
- 24 hours, where the inspector secures consumer goods or equipment under section 135V or 135W. *[Schedule 2, item 1, Part XI, Division 6, Subdivision E, subsection 135T(1)]*

19.79 On application of an inspector, made before the initial embargo period ends, the Federal Court may extend an embargo notice for a specified period *[Schedule 2, item 1, Part XI, Division 6, Subdivision E, subsections 135T(2) and 135T(5)]*. An inspector must notify the occupier of the premises to which the



embargo notice relates before making such an application and the occupier is entitled to be heard in relation to the application [*Schedule 2, item 1, Part XI, Division 6, Subdivision E, subsections 135T(3) and 135T(4)*].

19.80 An inspector may not issue embargo notices in relation to the same consumer goods or product related services within 5 days of the previous embargo notice ending. [*Schedule 2, item 1, Part XI, Division 6, Subdivision E, section 135U*]

19.81 A person commits an offence if that person, in the knowledge that an embargo notice has been given, does or causes another person to do an act or thing, or omits or causes another person to omit, to do an act, contrary to the embargo notice [*Schedule 2, item 1, Part XI, Division 6, Subdivision E, subsections 135Y(1) and 135Y(2)*]. A person does not commit an offence if he or she has the consent of the Commonwealth Minister or Chairperson of the ACCC or an inspector to do, or not do the act or thing, or an act was done for the purpose of protecting or preserving the consumer goods or equipment [*Schedule 2, item 1, Part XI, Division 6, Subdivision E, subsection 135Y(3)*].

19.82 Non-compliance with an embargo notice is a strict liability offence [*Schedule 2, item 1, Part XI, Division 6, Subdivision E, subsection 135Y(4)*]. The strict liability nature of this offence reflects the potential for widespread detriment, both in terms of potential safety risks for individual consumers and for its effect on the market and consumer confidence more generally, that can be caused by a person that breaches this provision, whether or not he or she intended to engage in the contravention.

19.83 The owner of consumer goods or another person who has an interest in the goods may, in writing, request consent to supply the goods or to move, transfer, alter, destroy or otherwise interfere with the goods. [*Schedule 2, item 1, Part XI, Division 6, Subdivision E, subsection 135X(1)*]

19.84 A person who would be the supplier of product related services or another person whose interests would be affected if the services were not supplied, may request consent to supply product related services that are subject to an embargo notice. [*Schedule 2, item 1, Part XI, Division 6, Subdivision E, subsection 135X(2)*]

19.85 The responsible Commonwealth Minister or, the Chairperson of the ACCC or an inspector may grant consent in writing [*Schedule 2, item 1, Part XI, Division 6, Subdivision E, subsection 135X(3)*]. A written grant of consent is not a legislative instrument within the meaning of section 5 of the LI Act and is not exempted from the operation of that Act [*Schedule 2, item 1, Part XI, Division 6, Subdivision E, subsection 135X(4)*].

*Procedural requirements*

19.86 Before entering a premises under section 135 an inspector must announce that he or she is authorised to enter the premises, shown his or her identity card and allow any person at the premises an opportunity to allow entry [Schedule 2, item 1, Part XI, Division 6, Subdivision A, subsection 135F(1)]. However an inspector does not have to do any of these things if he or she believes on reasonable grounds that immediate entry to the premises is required to ensure the safety of any person or to ensure the effective execution of the warrant is not frustrated [Schedule 2, item 1, Part XI, Division 6, Subdivision A, subsection 135F(2)]. If any person who is or appears to represent the occupier of the premises is present the inspector must as soon as practicable after entering the premises show his or her identity card to the occupier or other person [Schedule 2, item 1, Part XI, Division 6, Subdivision A, subsection 135F(3)].

19.87 An inspector executing a search warrant in relation to premises must be in possession of that warrant (or a copy of that warrant) or, if the warrant was issued by telephone or fax the form of that warrant (or a copy of that form) [Schedule 2, item 1, Part XI, Division 6, Subdivision A, section 135G]. If the occupier of the premises or another person who apparently represents the occupier of the premises is present at the premises, an inspector must as soon as practicable, make a copy of the warrant available to the occupier or other person (or a copy of the form of warrant, if the warrant was issued by telephone or fax) [Schedule 2, item 1, Part XI, Division 6, Subdivision B, section 135J].

19.88 Inspectors may be assisted by another person in entering premises under section 135. However, the person assisting the inspector may only enter the premises and undertake search-related powers in accordance with a direction given to the person by the inspector. Any power exercised by the person assisting the inspector is taken to have been exercised by the inspector. [Schedule 2, item 1, Part XI, Division 6, Subdivision A, section 135D]

19.89 An inspector executing a search warrant may use such force against persons and things as is necessary and reasonable in the circumstances. [Schedule 2, item 1, Part XI, Division 6, Subdivision A, section 135E]

Issue of search warrants

19.90 An inspector may apply to a judge of the Federal Court for a warrant [Schedule 2, item 1, Part XI, Division 6, Subdivision F, subsection 135Z(1)].

19.91 A judge may issue an warrant only if:

- an affidavit has been given to the judge setting out the grounds on which the issue of the warrant is being sought; and

- the judge has been given such further information (if any) as the judge requires concerning the grounds on which the issue of the warrant is being sought; and
- the judge is satisfied that there are reasonable grounds for issuing the warrant. *[Schedule 2, item 1, Part XI, Division 6, Subdivision F, subsection 135Z(2)]*

19.92 An application may be made by telephone, fax or other electronic means if the inspector believes on reasonable grounds that the delay that would occur if an application were made in person would frustrate the effective execution of the warrant *[Schedule 2, item 1, Part XI, Division 6, Subdivision F, subsection 136(1)]*. Where an application is made by electronic means, the judge may require communication by voice to the extent that it is practicable in the circumstances *[Schedule 2, item 1, Part XI, Division 6, Subdivision F, subsection 136(2)]*.

19.93 Before applying for a warrant by electronic means, an inspector must prepare an affidavit (of the kind required when applying for a warrant in person under section 135Z). However, if it is necessary to do so, the inspector may apply for the warrant before the affidavit has been sworn. *[Schedule 2, item 1, Part XI, Division 6, Subdivision F, subsections 136(3) and 136(4)]*

19.94 If the judge agrees to issue a warrant under section 136, the judge must complete and sign the same warrant that the judge may issue under section 135Z if the application had been made in person under that section *[Schedule 2, item 1, Part XI, Division 6, Subdivision F, subsection 136(5)]*. If the judge completes and signs the warrant:

- the judge must inform the inspector by electronic means of the terms of the warrant and the day and time on which the warrant was signed *[Schedule 2, item 1, Part XI, Division 6, Subdivision F, subsection 136(6)]*;
- the inspector must then complete a form of warrant in the same terms as the warrant completed and signed by the judge, stating the name of the judge and the day and time at the which the warrant was signed *[Schedule 2, item 1, Part XI, Division 6, Subdivision F, subsection 136(7)]*;
- the inspector must, not later than the earlier of the day after the day on which the warrant ceased to be in force or the day of execution of the warrant, send to the judge the form of warrant completed by the inspector and the sworn affidavit *[Schedule 2, item 1, Part XI, Division 6, Subdivision F, subsection 136(8)]*; and

- the judge must attach to these documents the warrant signed by the judge [*Schedule 2, item 1, Part XI, Division 6, Subdivision F, subsection 136(9)*].

19.95 A form of warrant completed under subsection 136(7) is authority for the same powers as are authorised by the warrant signed by the judge [*Schedule 2, item 1, Part XI, Division 6, Subdivision F, subsection 136(10)*]. However, if it is material in any proceedings for a court to be satisfied that an exercise of a power was authorised by section 136 and the warrant signed by the judge authorising the exercise of the power is not produced in evidence, the court must assume that the exercise of the power was not authorised by such a warrant [*Schedule 2, item 1, Part XI, Division 6, Subdivision F, subsection 136(11)*].

19.96 A warrant must:

- specify the purpose for which the warrant is issued;
- describe the premises to which the warrant relates;
- state that the warrant is issued under section 135Z of the CC Act;
- name one or more inspectors;
- authorise the names inspectors to enter the premises and exercise search-related powers in relation to the premises;
- state whether the entry is authorised to be made at any time of the day or night; and
- specify a day (which must not be more than 7 days after the day the warrant is issued) on which the warrant ceases to be in force. [*Schedule 2, item 1, Part XI, Division 6, Subdivision F, subsection 135Z(3)*]

19.97 A power conferred on a judge by Division 4 of Part XI of the CC Act is conferred in a personal capacity and not as a member of a court [*Schedule 2, item 1, Part XI, Division 6, Subdivision G, subsection 136B(1)*]. A judge is not compelled to accept a power conferred under this Division [*Schedule 2, item 1, Part XI, Division 6, Subdivision G, subsection 136B(2)*]. However, a judge exercising such a power has the same protection and immunity as if he or she were exercising the power as the court of which the judge is a member, or as a member of the court of which the judge is a member [*Schedule 2, item 1, Part XI, Division 6, Subdivision G, subsection 136B(3)*].

Occupier's rights and responsibilities

19.98 An inspector must inform an occupier or other person who apparently represents the occupier of the premises of their rights and responsibilities in relation to the execution of a search warrant. [Schedule 2, item 1, Part XI, Division 6, Subdivision B, section 135J]

19.99 An occupier or other person who apparently represents the occupier has a right to be present and observe the execution of a search warrant [Schedule 2, item 1, Part XI, Division 6, Subdivision C, subsection 135K(1)]. However, the occupier or other person forfeits that right if he or she impedes the execution of the warrant [Schedule 2, item 1, Part XI, Division 6, Subdivision C, subsection 135K(2)]. Inspectors and persons assisting inspectors may execute the search warrant in two or more areas of the premises at the same time [Schedule 2, item 1, Part XI, Division 6, Subdivision C, subsection 135K(3)].

19.100 An occupier or a person apparently representing the occupier of a premises must provide an inspector and any person who is assisting the inspector with all reasonable facilities or assistance for the effective exercise of their powers [Schedule 2, item 1, Part XI, Division 6, Subdivision C, subsection 135L(1)]. Failure to provide all reasonable facilities and assistance is a strict liability offence [Schedule 2, item 1, Part XI, Division 6, Subdivision C, subsection 135L(2)]. Section 135L replaces the obligation imposed currently by subsection 65Q(10) of the TP Act, which is also a strict liability offence.

Offences by an inspector

19.101 An inspector commits an offence if the inspector:

- states in a document that purports to be a form of warrant under section 136 the name of a judge unless that judge signed the warrant;
- states on a form of warrant under that section a matter that, to the inspector's knowledge, departs in a material particular from the terms of the warrant signed by the judge under that section;
- purports to execute, or presents to another person, a document that purports to be a form of warrant under section 136 that the inspector knows has not been approved by a judge or departs in a material particular from the terms of a warrant signed by a judge; or
- gives to a judge a form of warrant under that section that is not the form of warrant that the inspector purported to execute. [Schedule 2, item 1, Part XI, Division 6, Subdivision F, section 136A)]

## **Conference requirements for Commonwealth safety bans and recalls**

19.102 Before imposing a new safety ban on consumer goods or product related services, or issuing a compulsory recall notice on consumer goods, the Commonwealth is required to comply with certain procedural requirements. *[Schedule 2, item 1, Part XI, Division 3]* Such requirements include the Commonwealth, through the Competition and Consumer Commission (the ACCC):

- publishing a copy of the draft proposed ban or recall notice; and
- inviting affected, or potentially affected, suppliers to request a conference to be held in relation to the proposed ban or recall.

### *Conference requirements for proposed bans and recall notices*

19.103 The Commonwealth Minister is required to observe conference requirements before imposing an interim ban or permanent ban, or issuing a compulsory recall notice, for consumer goods and product related services.

### *Conference requirements for proposed bans*

19.104 A proposed ban notice must be published by the Commonwealth Minister where the Minister proposes to impose an interim ban or permanent ban with respect to particular kinds of consumer goods or product related services. *[Schedule 2, item 1, Part XI, Division 3, subsection 132(1)]*

19.105 The proposed ban notice must *[Schedule 2, item 1, Part XI, Division 3, subsection 132(3)]*:

- be in writing and published on the internet;
- set out a copy of the draft notice for the proposed ban;
- provide a summary of reasons for the proposed ban; and
- invite suppliers of, or those who propose to supply, those kinds of goods or services to notify the Commission if he or she wishes a conference to be held in relation to the proposed ban.

19.106 A supplier who wishes for a conference to be held must notify the Commission in writing and within the time period specified in the proposed ban notice. *[Schedule 2, item 1, Part XI, Division 3, paragraph 132(3)(e)]* The time period in the notice must be at least 10 days and cannot commence before

the publication of the notice. *[Schedule 2, item 1, Part XI, Division 3, subsection 132(4)]*

19.107 The Commission is required to notify the Commonwealth Minister in writing if no conference has been requested. *[Schedule 2, item 1, Part XI, Division 3, section 132B]* The notification is not a legislative instrument within the meaning of section 5 of the LI Act, and is not exempted from the operation of that Act. *[Schedule 2, item 1, Part XI, Division 3, subsection 132B(2)]*

19.108 However, these conference requirements do not apply where the Commonwealth has certified that an interim ban can be imposed without delay. *[Schedule 2, item 1, Part XI, Division 3, subsection 132(2)]*

19.109 Proposed ban notices are not legislative instruments within the meaning of the LI Act. *[Schedule 2, item 1, Part XI, Division 3, subsection 132(5)]*

*Conference requirements for proposed recalls*

19.110 A proposed recall notice must be published by the Commonwealth Minister where the Minister proposes to issue a compulsory recall notice for particular kinds of consumer goods. *[Schedule 2, item 1, Part XI, Division 3, subsection 132A(1)]*

19.111 The proposed recall notice must *[Schedule 2, item 1, Part XI, Division 3, subsection 132A(3)]*:

- be in writing and published on the internet;
- set out a copy of the draft notice for the proposed recall;
- provide a summary of reasons for the proposed recall; and
- invite suppliers of, or those who propose to supply, those kinds of goods to notify the Commission if he or she wishes for a conference to be held in relation to the proposed recall.

19.112 A supplier who wishes for a conference to be held must notify the Commission in writing and within the time period specified in the proposed recall notice. *[Schedule 2, item 1, Part XI, Division 3, paragraph 132A(3)(e)]* The time period in the notice must be at least 10 days and cannot commence before the publication of the notice. *[Schedule 2, item 1, Part XI, Division 3, subsection 132A(4)]*

19.113 The Commission is required to notify the Commonwealth Minister in writing if no conference has been requested. *[Schedule 2, item 1, Part XI, Division 3, subsection 132B(1)]* The notification is not a legislative instrument within the meaning of the LI Act. *[Schedule 2, item 1, Part XI, Division 3, subsection 132B(2)]*

19.114 The conference requirements do not apply where the Commonwealth certifies that a compulsory recall notice can be issued without delay. *[Schedule 2, item 1, Part XI, Division 3, subsection 132A(2)]*

19.115 Proposed recall notices are not legislative instruments within the meaning of section 5 of the LI Act, and are not exempted from the operation of that Act. *[Schedule 2, item 1, Part XI, Division 3, subsection 132(5)]*

*Notifying about conferences*

19.116 Where one or more person has notified the Commission that he or she wish for a conference to be held in relation to a proposed ban or recall notice, the Commission must nominate a day, time and place for the conference. *[Schedule 2, item 1, Part XI, Division 3, subsection 132C(1)]*

19.117 The Commission is also required to notify in writing, the Commonwealth Minister and each person who requested a conference, the conference date, time and venue. *[Schedule 2, item 1, Part XI, Division 3, subsection 132C(1)]* The notification is not a legislative instrument within the meaning of section 5 of the LI Act, and is not exempted from the operation of that Act. *[Schedule 2, item 1, Part XI, Division 3, subsection 132C(3)]*

19.118 The conference day nominated must be within 5 and 14 days after the time period which a person is required to notify the Commission if he or she wished for a conference to be held. *[Schedule 2, item 1, Part XI, Division 3, subsection 132C(2)]*

*Recommendations after conferences*

19.119 As soon as practicable following the conclusion of a conference the Commission is required to provide a written recommendation to the Commonwealth Minister in relation to a proposed ban or recall notice. *[Schedule 2, item 1, Part XI, Division 3, section 132D]*

19.120 The Commission can recommend *[Schedule 2, item 1, Part XI, Division 3, paragraphs 132D(1)(a) & 132D (2)(a)]*:

- that the proposed ban or recall be imposed in the same terms as the draft ban or recall notice;
- that the proposed ban or recall be modified from the terms in the draft ban or recall notice; or
- not impose the proposed ban or recall.

19.121 A copy of the Commission's recommendation must be given to each person who was present or represented at the conference. *[Schedule 2, item 1, Part XI, Division 3, paragraphs 132D(1)(b) & 132D(2)(b)]*



19.122 The Commonwealth Minister must consider the Commission's recommendation, and where the Minister decides not to act in accordance with the recommendation, then the reasons for so deciding must be published on the internet. *[Schedule 2, item 1, Part XI, Division 3, subsection 132D(3)]*

*Conference requirements after issuing interim bans and recall notices*

19.123 The Commonwealth is not required to comply with the above conference requirements prior to issuing an interim ban or recall notice, where it appears to the Commonwealth Minister that any delay in issuing an interim ban or recall notice would pose an imminent risk of injury to any person. However, in such circumstances, a conference process must be initiated after the interim ban or recall has been made.

19.124 *Interim bans or recalls without delay*

19.125 The Commonwealth Minister may certify, by publishing a notice on the internet that an interim ban or a recall notice can be issued without delay where it appears that consumer goods or product related services of a particular kind create an imminent risk of death, serious illness or serious injury to any person. *[Schedule 2, item 1, Part XI, Division 3, subsections 132J(1) and 132J(2)]* The certification is not a legislative instrument within the meaning of section 5 of the LIA, and is not exempted from the operation of that Act. *[Schedule 2, item 1, Part XI, Division 3, subsection 132J(4)]*

19.126 Where the Commonwealth Minister makes such a certification and an action has been taken with respect to the conference process for the ban or recall (such as the publication of a proposed ban or recall notice or notification about conference date and time) — but the Commission has not yet made a recommendation in relation to that ban or recall — the Minister can then issue the ban or recall notice without having regard to the conference process. *[Schedule 2, item 1, Part XI, Division 3, subsection 132J(3)]*

19.127 The certification is not a legislative instrument within the meaning of section 5 of the LI Act, and is not exempted from the operation of that Act. *[Schedule 2, item 1, Part XI, Division 3, subsection 132J(4)]*

*Conferences after imposing interim bans*

19.128 The Commonwealth Minister is not required to observe the conference requirements prior to imposing an interim ban on consumer goods or product related services of a particular kind, if the Minister has certified that the interim ban is required to be issued without delay. *[Schedule 2, item 1, Part XI, Division 3, subsection 132E(1)]*

Opportunity for a conference

19.129 The Commonwealth Minister is required to invite affected suppliers, or potentially affected suppliers, of the consumer goods or product related services which are the subject of an interim ban, to notify the Commission if he or she wishes a conference to be held in relation to the ban. *[Schedule 2, item 1, Part XI, Division 3, subsection 132E(2)]*

19.130 The invitation is to be published on the internet and is not a legislative instrument within the meaning of section 5 of the LI Act, and is not exempted from the operation of that Act. *[Schedule 2, item 1, Part XI, Division 3, subsections 132E(1) and 132E(4)]*

19.131 A person who wishes a conference to be held must notify the Commission in writing and within the time specified in the invitation. *[Schedule 2, item 1, Part XI, Division 3, subsection 132E(2)]* The time period in the invitation must be at least 10 days and cannot commence before the publication of the invitation. *[Schedule 2, item 1, Part XI, Division 3, subsection 132E(3)]*

Notifying about a conference

19.132 Where the ACCC has been notified that one or more persons requests a conference, the Commission must then nominate a day, time and place for a conference. Written notice of the conference date, time and venue must be provided to the Commonwealth Minister and to each person who so notified the Commission. *[Schedule 2, item 1, Part XI, Division 3, subsection 132F(1)]* The notification is not a legislative instrument within the meaning of section 5 of the LIA, and is not exempted from the operation of that Act. *[Schedule 2, item 1, Part XI, Division 3, subsection 132F(4)]*

19.133 The date for holding a conference must be between five and 14 days after the time period for notifying the ACCC if a conference was wished to be held. *[Schedule 2, item 1, Part XI, Division 3, subsection 132F(2)]*

*Recommendations after conferences*

19.134 As soon as practicable following the conclusion of a conference on an interim ban, the ACCC must provide a written recommendation to the Commonwealth Minister. The recommendation can be for the interim ban to remain in force, be varied or revoked. *[Schedule 2, item 1, Part XI, Division 3, subsection 132G(1)]*

19.135 The Commission must provide a copy of the recommendation to all those who were present or represented at the conference. *[Schedule 2, item 1, Part XI, Division 3, subsection 132G(1)]*

19.136 The Commonwealth Minister is required to consider the Commission's recommendation. Where the Minister decides to act

otherwise than in accordance with the recommendation, then reasons for so deciding must be published on the internet. *[Schedule 2, item 1, Part XI, Division 3, subsection 132G(2)]*

*Conferences after issuing recall notices*

19.137 Unlike interim bans, the Commonwealth Minister is not required to invite affected (or potentially affected suppliers) to request for a conference in relation to a recall notice, where the Minister has certified for the recall notice to be issued without delay.

19.138 The Commonwealth Minister may certify (in writing and published on the internet) for a recall notice in relation to consumer goods of a particular kind to be imposed without delay, where it appears that goods of that kind create an imminent risk of death, serious illness or serious injury to any person. *[Schedule 2, item 1, Part XI, Division 3, subsection 132J(1)]*

19.139 Where the Commonwealth Minister has certified for a recall without delay and an action has been taken with respect to the conference process for the recall (like the publication of a proposed recall notice or notification about conference date and time) — but the Commission has not yet made a recommendation in relation to the recall — the Minister can then issue the recall notice without having regard to the conference process. *[Schedule 2, item 1, Part XI, Division 3, subsection 132J(3)]*

19.140 The certification is not a legislative instrument within the meaning of section 5 of the LI Act, and is not exempted from the operation of that Act. *[Schedule 2, item 1, Part XI, Division 3, subsection 132J(4)]*

*Conducting conferences*

19.141 At conferences, the Commission must be present or be represented by one or more members of the Commission who have been nominated by the Chairperson. *[Schedule 2, item 1, Part XI, Division 3, subsection 132H(3)]* The following persons may also be present or represented at conferences *[Schedule 2, item 1, Part XI, Division 3, subsection 132H(1)]*:

- the Commonwealth Minister or any person(s) nominated by the Minister;
- each person who notified the Commission that they wish for a conference to be held in relation to a proposed ban notice, proposed recall notice or an interim ban (certified for issue without delay); and
- any other person whose presence at the conference is considered by the Commission to be appropriate.

19.142 The Commission is required to set out the procedure for conducting conferences. [*Schedule 2, item 1, Part XI, Division 3, paragraph 132H(1)(e)*] The Commission must also keep records of conference proceedings. [*Schedule 2, item 1, Part XI, Division 3, subsection 132H(2)*]

19.143 The Commission must ensure (as far as practicable) that all those who are entitled to be present or represented at a conference, are provided with a reasonable opportunity to present their case at the conference. This includes a reasonable opportunity to inspect, and to make submissions in relation to, documents which the Commission proposes to consider when making a recommendation (where the document does not contain details about secret formulas or secret processes). [*Schedule 2, item 1, Part XI, Division 3, subsection 132H(3)*]

#### ***Notification requirements***

19.144 The Commonwealth Minister is required to send a copy of the following notices to those whom the Minister knows supplies consumer goods or product related services which the notice relates to [*Schedule 2, item 1, Part XI, Division 3, subsection 132K(1)*]:

- proposed ban notice;
- proposed recall notice;
- notice inviting persons to notify the Commission if they wish for a conference to be held in relation to an interim ban; or
- notice certifying an interim ban or compulsory recall to be issued without delay.

19.145 Copies must be sent at least within two days of the notice being published or issued [*Schedule 2, item 1, Part XI, Division 3, subsection 132K(2)*]. However, a failure to provide a copy of a notice does not invalidate that notice. [*Schedule 2, item 1, Part XI, Division 3, subsection 132K(3)*]

## **Application and transitional provisions**

19.146 The ACL will commence on the later of 1 January 2011 or the commencement of Schedule 1 of the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (the first ACL Bill). The first ACL Bill is currently before the Parliament. [*Section 2*]

19.147 Chapter 2, Part 2-1 applies to all relevant conduct occurring in trade or commerce on or after 1 January 2011.

19.148 Conduct occurring prior to 1 January 2011 will remain subject to the repealed (and saved, for those purposes) provisions in the TP Act or the relevant FT Act of a State or Territory. *[Schedule 7, item 6]*

19.149 The TP Act, as in force immediately before the commencement of the ACL, continues to apply to or in relation to any proceedings under or in relation to that Act, which were commenced, but not concluded, before that commencement. *[Schedule 7, item 7]*

19.150 The Governor-General may make regulations prescribing matters of a transitional, application or saving nature in relation to the amendments and repeals made by the Schedules to this Act. *[Schedule 7, item 12]*

### **Consequential amendments**

19.151 References to provisions of the TP Act in other CC Act provisions and provisions of other Acts will be consequentially amended to refer to provisions of the ACL to ensure that the affected provisions continue to apply in the way in which they did under the TP Act. *[Schedules 5 and 6]*



---

## **C**hapter 20

# ***Liability of suppliers and credit providers***

---

### **Outline of chapter**

20.1 Part 5-5 of the ACL 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.

### **Context of amendments**

20.2 The repealed section 73 of the TP Act provided for joint liability of suppliers and linked credit providers. This provision provided consumers with additional protection when they bought goods or services and also received credit from a party linked to the supplier. Joint liability meant that a consumer could seek a remedy from either the lender or the supplier of goods or services in the event of a contractual dispute.

20.3 This provision had particular application to circumstances whereby either a supplier or a linked credit provider became insolvent. In those circumstances, a section 73 of the TP Act provided the consumer with the option of pursuing action against the party that remained solvent.

20.4 Part 5-5 of the ACL replaces the repealed section 73 of the TP Act so that consumers retain the ability to pursue actions against suppliers and linked credit providers jointly in appropriate circumstances.

20.5 Consumers also sometimes experience issues when dealing with suppliers and linked credit providers who default on their obligations to consumers under contracts. Without specific legislative intervention, consumers will usually remain liable to a credit provider in the event that a contract for the supply of goods and services is terminated.

20.6 To deal with this situation, section 135 of the Schedule 1 to the *National Consumer Credit Protection Act 2009* (the National Credit Code) provides that a consumer is entitled to terminate tied credit contract when a contract for the supply of goods or services is rescinded or discharged.

20.7 To allow such issues to be dealt with expeditiously in a single proceeding, the ACL provides that, if a consumer is entitled to terminate a

linked credit contract under section 135 of the National Credit Code, he or she is entitled to recover the same amount in the proceedings as if action were taken under section 135.

## **Summary of new law**

20.8 Section 278 of the ACL provides that suppliers and linked credit providers are jointly and severally liable to a consumer who is a party to a linked credit contract in relation to the sale of goods or services for the amount of loss or damage suffered as a result of a:

- misrepresentation in relation to the contract;
- breach of the contract;
- failure of consideration in relation to the contract;
- failure to comply with a consumer guarantee for the goods or services; or
- breach of an implied warranty for financial services.

20.9 Where a linked credit provider and a supplier are jointly liable an action must be taken jointly in a court of competent jurisdiction, unless the supplier is dissolved or winding up proceedings have commenced, the court believes an order against them may have no chance of obtaining remedies from a judgement or the court has declared that the requirement does not apply in the proceedings at hand.

20.10 There are a number of specific exceptions where a linked credit provider will not be liable to the consumer, such as where the consumer approached the credit provider independently without influence by the supplier, or where in certain lease arrangements the credit provider had no reason to suspect that there was likely to be a problem with the supplier.

20.11 The amount of liability a linked credit provider has to a consumer is limited to the amount financed under the credit contract plus the amount of interest awarded by the court and costs of proceedings. Other rules are provided dealing with counter-claims and offsets, awards of interest, liability of suppliers to credit providers and effects of termination.

20.12 A definition of non-linked credit providers is provided to ensure that this Part does not apply to credit providers that were not sufficiently involved in the transaction so as to justify joint and several liability with the supplier.



## Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<p>Part 5-5 sets out a regime which provides joint and several liability for actions against suppliers and linked credit providers in certain circumstances.</p> <p>The Part provides rights that arise from termination that would arise if action was taken under section 135 of the National Credit Code.</p>	<p>Section 73 of the TP Act sets out a regime which provides joint and several liability for actions against suppliers and linked credit providers in certain circumstances.</p>

## Detailed explanation of new law

20.13 A number of definitions relevant to Part 5-5 are set out in Chapter 1 of the ACL, these are:

- a *continuing credit contract* means a credit agreement for providing credit:
  - in relation to payment for goods or services (including by way of payment to another person for supplies from time to time) or for cash supplied from time to time; and
  - where there is an agreement, arrangement, understanding or course of dealing relating to the provision of credit; and
  - where the amounts owing from time to time are calculated on the amounts payable and paid by way of entry into accounts kept for the purpose of the agreement or dealing.

Any amount paid to a third party for provision of goods, services or cash to a consumer is taken to be credit provided for the purposes of those purchases as if it was not through a third party. *[Schedule 1, item 1: section 14]*

- a *credit provider* is a person providing or proposing to provide credit in relation to the acquisition of goods or services; *[Schedule 1, item 1: section 2]*
- *joint liability proceedings* are proceedings relating to the joint and several liability of a linked credit provider and a supplier of goods or services under section 278; *[Schedule 1, item 1: section 2]*

- the definition of *linked credit provider* is an inclusive definition and means a credit provider:
  - that has a contract, arrangement or understanding with the supplier relating to the supply of goods or services to, or the business of, the supplier; or, the provision to persons to whom goods or services are supplied by the supplier of credit in respect of payment for those goods or services;
  - to which a supplier regularly refers credit seekers;
  - that makes its application forms available from the supplier; or
  - that has an arrangement whereby its credit forms may be signed at the supplier’s premises; [*Schedule 1, item 1, section 2*]
- *loan contract* — this definition provides basic features of a loan arrangement. This is limited to contracts made in the course of business, thus excluding personal loans between individuals unconnected with a business. [*Schedule 1, item 1: section 2*]
- the definition of a *tied continuing credit contract* builds on the definition of continuing credit contract (see above) by providing that it is ‘tied’ to the supply when it is credit in respect of a payment for consumer goods or services where the credit provider is a ‘linked credit provider’ (see above). [*Schedule 1, item 1: section 2*]
- the definition of a *tied loan contract* builds on the definition of loan contract (see above) by providing that it is ‘tied’ to the supply when the credit provider knows, or should have known, that the loan was partly or wholly for use as a payment for consumer goods or services where the credit provider is a ‘linked credit provider’ (see above); [*Schedule 1, item 1: section 2*]

20.14 Section 322 of the ACL provides that suppliers and linked credit providers are jointly and severally liable to a consumer who is a party to a linked credit contract in relation to the sale of goods or services for the amount of loss or damage suffered as a result of:

- a misrepresentation in relation to the sale contract or a linked credit contract;
- a breach of the sale contract or a linked credit contract;

- a failure of consideration in relation to the sale contract or a linked credit contract;
- a failure to comply with a consumer guarantee under Division 1 of Part 3-2 of the ACL for the goods or services; or
- a breach of an implied warranty for financial services under section 12ED of the *Australian Securities and Investments Commission Act 2001* (ASIC Act). [*Schedule 1, item 1: subsection 278(1)*]

20.15 Joint and several liability means that both or all parties the subject of a claim are liable for up to the full amount claimed until that amount is recovered. Joint and several liability does not consider apportionment of blame and has the effect of ensuring that a claimant can recover the money in the first instance without the need to consider apportionment of blame for conduct by parties to a contract.

20.16 A linked credit contract is a contract for the provision of credit (with a linked credit provider) in relation to the supply by sale, lease, hire or hire purchase of goods where the linked credit provider provides goods to the consumer, or, where goods or services are supplied directly from the supplier to the consumer. [*Schedule 1, item 1: subsection 278(2)*]

20.17 If a linked credit provider and jointly and severally liable under this Part the consumer may recover the amount of any loss or damage and that amount may be recovered, against the supplier and linked credit provider jointly. [*Schedule 1, item 1: section 279*]

20.18 In joint liability proceedings, a linked credit provider is not liable to a consumer where the consumer approached the credit provider and the approach was not induced by the supplier. This allows linked credit providers to be excused from liability under section 279 where their credit contract with the consumer was not connected to the supplier, that is, it was not caused by an action such as a referral by the supplier. [*Schedule 1, item 1: subsection 280(1)*]

20.19 In joint liability proceedings, a linked credit provider is not liable to a consumer where in relation to:

- goods that are provided by the linked credit provider as a lease, hire or hire purchase; or
- a contract of sale in relation to which a tied loan contract applies: and,

the linked credit provider was satisfied before becoming a linked credit provider that the reputation and financial standing and business conduct of the supplier was good; the linked credit provider had no cause to suspect that the consumer might be entitled to recover for a breach, or that the supplier might not be able to meet their liabilities. *[Schedule 1, item 1: subsections 280(2)-(3)]*

20.20 In joint liability proceedings, a linked credit provider is not liable to a consumer where, in relation to a tied continuing credit contract, the credit provider, before becoming aware of the contract of sale or proposals for making such a contract, and having regard to:

- the nature and volume of the business of the credit provider; and
- such other matters relevant to the case,

had no cause to suspect that the person entering into such a contract with the supplier might be entitled to make a claim as a result of:

- a misrepresentation in relation to the sale contract or a linked credit contract;
- a breach of the sale contract or a linked credit contract;
- a failure of consideration in relation to the sale contract or a linked credit contract;
- a failure to comply with a consumer guarantee under Division 1 of Part 3-2 of the ACL for the goods or services; or
- a breach of an implied warranty for financial services under section 12ED of the ASIC Act. *[Schedule 1, item 1: subsections 280(4)-(6)]*

20.21 The amount of liability a linked credit provider has to a consumer is limited to the amount financed under the credit contract plus the amount of interest awarded by the court and costs of proceedings. *[Schedule 1, item 1: section 281]*

20.22 If a linked credit provider claims against a consumer, the consumer cannot make a counter claim unless he or she also claims in those proceedings against the supplier. Any claim by the credit provider can be offset against the credit provider's liability that arises under the Part. *[Schedule 1, item 1: section 282]*

20.23 Prior to a judgement being enforced by or a right being conferred on the consumer as against the linked credit provider, a written demand must have been unsatisfied for at least 30 days. If that condition has been met the amount enforceable is only the amount financed plus interest and costs, less any amount already satisfied by the supplier already. If a consumer recovers under joint liability against the linked credit provider for something that is the fault of the supplier, the linked credit provider can pursue the supplier for loss or damage as though it were a consumer. *[Schedule 1, item 1: section 283]*

20.24 A consumer has an automatic right to an award of interest (on all or part of the amount in question) where a judgement is made against a linked credit provider or supplier in joint liability proceedings, unless the respondents show good cause that interest should not be awarded. Payments made to the court by the supplier or linked credit provider may be relevant to good cause not to award interest. *[Schedule 1, item 1: subsections 284(1) & (4)]*

20.25 The period for interest to be calculated is from the date of the time the consumer became entitled until the judgement. The interest rate to be used is the lowest of any rates the consumer is subject to under the credit contract or 8 per cent (or another amount prescribed by regulations), whichever is higher. *[Schedule 1, item 1: subsection 284(2)]*

20.26 If a supplier and credit provider are liable to a consumer under section 279, the supplier is liable to the credit provider for the amount of loss suffered by the credit provider (up to the amount of the credit contract plus interest and costs) if the breach was in relation to the sale contract or related to a consumer guarantee under the ACL. Conversely, a credit provider is liable to the supplier (up to the amount of the sale contract plus costs) for the amount of loss suffered in relation to the credit contract or that relates to a warranty under section 12ED of the ASIC Act. *[Schedule 1, item 1: section 285]*

20.27 If a consumer terminates a contract, and he or she otherwise has (or had) a right to terminate a linked credit contract under section 135 of the NCC, the consumer may recover the amount (that he or she is entitled to recover under that section and which has not already been recovered) including crediting or repayments of interest charged, under the ACL. This provision allows certain State and Territory courts and tribunals to make orders for recovery of amounts from credit providers under linked credit contracts when jurisdiction would otherwise not be available under the National Credit Code. *[Schedule 1, item 1: section 286]*

20.28 Division 2 of Part 5-5 provides that liability under this Part does not extend to transactions that have a non-linked credit contract. That is, if a credit provider and supplier are not sufficiently connected the joint and several liability will not automatically apply under section 279. *[Schedule 1, item 1: section 287(1)]*

- 20.29 A non-linked credit contract is a contract for:
- the supply by sale, lease, hire or hire-purchase of goods where the credit provider does not take possession of the goods, had no part in the negotiation of the sale contract and the credit provider is not a 'linked credit provider' (see above); or
  - the supply of services where the credit provider is not a linked credit provider. *[Schedule 1, item 1: section 287(2)]*

## **Application and transitional provisions**

20.30 The ACL will commence on the later of 1 January 2011 or the commencement of Schedule 1 of the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (the first ACL Bill). The first ACL Bill is currently before the Parliament. *[Section 2]*

20.31 Chapter 2, Part 2-1 applies to all relevant conduct occurring in trade or commerce on or after 1 January 2011.

20.32 Conduct occurring prior to 1 January 2011 will remain subject to the repealed (and saved, for those purposes) provisions in the TP Act or the relevant FT Act of a State or Territory. *[Schedule 7, item 6]*

20.33 The TP Act, as in force immediately before the commencement of the ACL, continues to apply to or in relation to any proceedings under or in relation to that Act, which were commenced, but not concluded, before that commencement. *[Schedule 7, item 7]*

20.34 The Governor-General may make regulations prescribing matters of a transitional, application or saving nature in relation to the amendments and repeals made by the Schedules to this Act. *[Schedule 7, item 12]*

## **Consequential amendments**

20.35 References to provisions of the TP Act in other CC Act provisions and provisions of other Acts will be consequentially amended to refer to provisions of the ACL to ensure that the affected provisions continue to apply in the way in which they did under the TP Act. *[Schedules 5 and 6]*

---

## **C**hapter 21

### ***Infringement notices***

---

#### **Outline of chapter**

21.1 The ACL Bill will insert an infringement notice regime to apply to breaches of many of the provisions of the Australian Consumer Law (ACL).

21.2 These provisions will only apply to the Commonwealth ACL and will be located in Part XI of the *Competition and Consumer Act 2010* (CC Act).

21.3 The provisions on infringement notices are not included in the ACL because of issues to do with the way in which the ACL must interact with existing laws of some States concerning infringement notices. For this reason, those States may choose to use their existing infringement notice provisions for the purposes of the ACL, and other jurisdictions may wish to apply a regime similar to that in Part XI of the CC Act for their own purposes.

#### **Context of amendments**

##### ***Infringement notices***

21.4 Infringement notices were recently introduced into the TP Act in the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (first ACL Bill).

21.5 Infringement notices supplement criminal sanctions and civil penalties, as well as the other enforcement powers proposed in the Bill.

21.6 The capacity to issue an infringement notice is not intended to amount to the imposition of a financial penalty by the regulator. It is intended, instead, to provide a mechanism through which a person that in the opinion of the regulator has contravened certain provisions of the ACL may forestall an application to the courts by the regulator for the imposition of a criminal sanction or civil penalty.

21.7 Infringement notices will allow the regulator to take action against minor breaches of unfair practices and other conduct more efficiently and effectively than through court action alone, and provide the potential for a

speedier resolution of matters than is possible through the courts (although this would depend on the complexity of each matter).

## **Summary of new law**

21.8 The ACCC can issue a person with an infringement notice containing a financial penalty for suspected contraventions of the following provisions of the ACL:

- the unconscionable conduct provisions in Part 2-2;
- provisions relating to unfair practices in Part 3-1 (except subsections 32(1), 35(1), 36(1)-(3), sections 40 and 43);
- the requirement to display prescribed notices relating to consumer guarantees in section 66(2);
- provisions relating to unsolicited consumer agreements in Part 3-2, Division 2;
- provisions relating to lay-by sales in Part 3-2, Division 3 and the requirements for proofs of transactions and itemised Bills in Part 3-2, Division 4;
- certain product safety provisions in Part 3-3;
- information standards provisions in Part 3-4; and
- failure to respond to a substantiation notice or providing false or misleading information in response to a substantiation notice in sections 221 and 222.

21.9 Infringement notices will not be able to be issued for alleged contraventions of subsections 32(1), 35(1), 36(1)-(3), section 40 or 43 as those provisions include reference to the state of mind or knowledge of the person, a decision on which should be left to the court to determine.

21.10 Infringement notices will also not be available for breaches of the provisions on misleading and deceptive conduct (Part 2-1) or unfair contract terms (Part 2-3) as those provisions are not subject to civil pecuniary penalties.

21.11 Compliance with an infringement notice requires payment of the financial penalty within a certain period of time to avoid legal liability in respect of the alleged contravention.



21.12 For infringement notices relating to those contraventions that have a corresponding maximum civil pecuniary penalty of \$1.1 million for bodies corporate and \$220,000 for persons other than bodies corporate, the infringement notice amounts are:

- 600 penalty units (presently \$66,000) for listed corporations;
- 60 penalty units (presently \$6,600) for bodies corporate that are not listed corporations; and
- 12 penalty units (presently \$1,320) for persons other than bodies corporate.

21.13 The higher amount applicable for publicly listed companies is included to ensure that infringement notices are an effective enforcement measure against large entities.

21.14 The infringement notice amounts of 60 and 12 penalty units, which apply with respect to bodies corporate other than listed corporations and persons other than bodies corporate, are in line with the general limit suggested by the Attorney-General's *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

21.15 For infringement notices relating to those contraventions of the unsolicited consumer agreements regime and the prescribed requirements for warranties and repairs (in Divisions 2 and 4 of Part 3-2 respectively) that have a corresponding maximum civil pecuniary penalty of \$50,000 for bodies corporate and \$10,000 for persons other than bodies corporate, the infringement notice amounts are:

- 60 penalty units (presently \$6,600) for bodies corporate; and
- 12 penalty units (presently \$1,320) for persons other than bodies corporate.

These amounts are in line with the general limit suggested by the Attorney-General's *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

21.16 For infringement notices relating to those contraventions that have a corresponding maximum civil pecuniary penalty equal to or less than \$30,000 for bodies corporate and \$6,000 for individuals, the infringement notice amount is 20 per cent the amount of the maximum civil pecuniary penalty.

21.17 These penalties are substantially less than the maximum civil pecuniary penalties proposed for contraventions of these provisions, which reflects their intended application to minor infringements of the law.

21.18 Compliance with an infringement notice is not taken as an admission of liability or a contravention of the ACL. Furthermore, if a person complies, he or she is not subject to further civil or criminal proceedings in relation to the alleged contravention.

21.19 An infringement notice does not give rise to an enforceable requirement to pay the financial penalty. If a person does not comply with the infringement notice within the period of time specified, the regulator cannot enforce the infringement notice.

21.20 Instead, the regulator may bring civil or criminal proceedings against the person in relation to the same alleged contravention, but not for failure to pay the penalty in the infringement notice.

21.21 The regulator will have the power both to issue and revoke an infringement notice, as well as the ability to extend the compliance period.

## Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Part XI of the CC Act provides a mechanism for a regulator to issue a person with an infringement notice containing a financial penalty for suspected contraventions of various consumer protection-related provisions of the ACL.	The first ACL Bill will insert Part VIC of the TP Act provides the same power to the ACCC.

## Detailed explanation of new law

### *Definitions*

21.22 An ***infringement notice compliance period*** is 28 days beginning on the day after the day the notice is issued. [Schedule 2, item 1: Part XI, Division 5, section 134F]

21.23 An ***infringement notice*** means an infringement notice issued under section 134A and 134CA of the CC Act. [Schedule 2, item 1: Part XI, Division 1, section 130]

21.24 An ***infringement notice provision*** refers to [*Schedule 2, item 1: Part XI, Division 5, subsection 134A(2)*]:

- the unconscionable conduct provisions in Part 2-2;
- provisions relating to unfair practices in Part 3-1 (except subsections 32(1), 35(1), 36(1)-(3), sections 40 and 43);
- the requirement to display prescribed notices relating to consumer guarantees in section 66(2);
- provisions relating to unsolicited consumer agreements in Part 3-2, Division 2 ;
- provisions relating to lay-by sales in Part 3-2, Division 3 and the requirements for proofs of transactions and itemised Bills in Part 3-2, Division 4;
- certain product safety provisions in Part 3-3;
- information standards provisions in Part 3-4; and
- failure to respond to a substantiation notice or providing false or misleading information in response to a substantiation notice in sections 221 and 222.

21.25 Infringement notices will not be able to be issued for alleged contraventions of subsections 32(1), 35(1), 36(1)-(3), section 40 or 43 as those provisions include reference to the state of mind or knowledge of the person, a decision on which should be left to the court to determine.

21.26 Infringement notices will also not be available for breaches of the provisions on misleading and deceptive conduct (Part 2-1) or unfair contract terms (Part 2-3) as those provisions are not subject to civil pecuniary penalties.

21.27 The ACCC has the power to issue a person with an infringement notice containing a financial penalty for suspected contraventions of infringement notice provisions of the ACL. [*Schedule 2, item 1: Part XI, Division 5, section 134A*]

21.28 The liability of a person to court proceedings is unaffected if an infringement notice is either not issued or withdrawn. [*Schedule 2, item 1: Part XI, Division 5, section 134D*]

21.29 If a person fails to comply with the infringement notice there is no penalty for non-compliance. However if the regulator commences court proceedings, a court can impose a higher penalty than the infringement

notice penalty in respect of the conduct giving rise to the original alleged breach. *[Schedule 2, item 1: Part XI, Division 5, section 134D]*

***Issue of an infringement notice***

21.30 The ACCC can issue an infringement notice to a person where it has reasonable grounds to believe has contravened an infringement notice provision. *[Schedule 2, item 1: Part XI, Division 5, subsection 134A(1)]*

21.31 An infringement notice can only be issued once for the same alleged contravention. It has no effect if it either is issued more than 12 months after the contravention allegedly occurred or relates to more than one alleged contravention. *[Schedule 2, item 1: Part XI, Division 5, subsections 134A (3) and (4)]*

***Matters to be included in an infringement notice***

21.32 The infringement notice must include various matters, including a number of formal and administrative requirements. *[Schedule 2, item 1: Part XI, Division 5, section 134B]*

21.33 The infringement notice must:

- be identified by a unique number;
- state the day on which it was issued;
- state the name and address to whom it is issued;
- identify the ACCC;
- state how the ACCC may be contacted;
- inform the person of the details of the alleged contravention;
- inform the person of the maximum pecuniary penalty that a court may impose (if the regulator commences proceedings against the person following the person's decision not to comply with the infringement notice);
- specify the penalty payable;
- state that the penalty is payable within the compliance period;
- state that the penalty is payable to the ACCC on behalf of the Commonwealth;

- explain how the payment of the penalty is to be made; and
- explain the consequences for the person if he or she complies or fail to comply with the infringement notice, and of the regulator withdrawing the infringement notice.

***Penalties specified in the infringement notice***

21.34 The penalties payable under an infringement notice are set out in section 134C of the CC Act. The penalties payable are described at the place in this explanatory memorandum where the relevant contravention is explained. *[Schedule 2, item 1: Part XI, Division 5, section 134D]*

21.35 A penalty unit is \$110 at the time of writing, as defined in section 4AA of the *Crimes Act 1914*.

***Effect of compliance with an infringement notice***

21.36 A person complies with an infringement notice if he or she correctly pays the penalty specified in the infringement notice within the infringement notice compliance period, and the infringement notice is not withdrawn. *[Schedule 2, item 1: Part XI, Division 5, section 134D]*

21.37 If a person complies with an infringement notice:

- the person is not taken by the same conduct to have contravened the ACL for any other purpose; and
- new or existing civil or criminal proceedings in relation to the alleged contravention cannot be commenced or continued by the issuing jurisdiction. *[Schedule 2, item 1: Part XI, Division 5, subsections 134D]*

21.38 Compliance with an infringement notice brings the process for enforcing the alleged contravention to an end after its administrative phase. This reflects the intention behind the infringement notice mechanism of providing a process through which the entity may forestall court proceedings by the ACCC in relation to the alleged contravention.

21.39 While the ACCC cannot take further action in respect of the alleged contravention, this does not prevent private parties from doing so.

***Effect of failure to comply with an infringement notice***

21.40 If a person does not comply with an infringement notice — that is, if he or she does not correctly pay the penalty specified in the infringement notice within the infringement notice compliance period and the

infringement notice is not withdrawn — the ACCC or the Commonwealth may bring civil or criminal proceedings against the person not for failing to pay, but in relation to the alleged contravention to which the notice relates. *[Schedule 2, item 1: Part XI, Division 5, section 134D]*

21.41 The limitation on the size of the financial penalty specified in the infringement notice and restrictions preventing the regulator from taking other action in relation to conduct dealt with using this mechanism are intended to ensure that it is not used for more serious contraventions as an alternative to existing court processes. However, if a person fails to comply with an infringement notice and a court subsequently determines that a contravention has occurred, the court can impose a significantly higher pecuniary penalty.

21.42 To avoid doubt, while the infringement notice mechanism applies to suspected contraventions of certain civil pecuniary penalty provisions of the ACL, a person that fails to comply with an infringement notice may still be pursued by the ACCC or the Commonwealth in relation to a civil or criminal breach arising from the same alleged contravention.

#### ***Compliance period for infringement notice***

21.43 The infringement notice compliance period is initially 28 days. However, the regulator may extend the infringement notice compliance period once for a further period of 28 days. *[Schedule 2, item 1: Part XI, Division 5, section 134F]*

21.44 The ACCC must give notice of an extension of an infringement notice compliance period to the person issued with the infringement notice; however, failure to do so does not make the extension invalid. *[Schedule 2, item 1: Part XI, Division 5, subsections 134F(4)-(5)]*

#### ***Withdrawal of an infringement notice***

21.45 The recipient of an infringement notice may make written representations to the regulator seeking its withdrawal. *[Schedule 2, item 1: Part XI, Division 5, subsection 134G(1)]*

21.46 Evidence given to the ACCC in making such representations is not admissible as evidence in a proceeding other than proceedings based on the evidence or information given being false or misleading. *[Schedule 2, item 1: Part XI, Division 5, subsection 134G(2)]*

21.47 The ACCC may withdraw an infringement notice if it considers it appropriate, by written notice to the person. *[Schedule 2, item 1: Part XI, Division 5, subsection 134G(3)]*

21.48 The ACCC may withdraw the notice whether or not the person has sought a withdrawal. *[Schedule 2, item 1: Part XI, Division 5, subsection 134G(4)]*

21.49 The withdrawal notice must include various matters. In addition to the formal and administrative requirements, the withdrawal notice must inform the person that he or she is liable to civil or criminal proceedings in relation to the alleged contravention. *[Schedule 2, item 1: Part XI, Division 5, subsection 134G(5)]*

21.50 The ACCC may withdraw the infringement notice with the intention of not pursuing the alleged contravention, in which case the regulator would not commence proceedings against the entity. Alternatively, the rationale behind the withdrawal may be that the regulator considers that the alleged contravention is more serious than the regulator initially believed, and warrants civil or criminal proceedings.

21.51 If the ACCC wishes to withdraw an infringement notice, then a withdrawal notice must be issued within the infringement notice compliance period for the infringement notice. *[Schedule 2, item 1: Part XI, Division 5, subsection 134G(6)]*

21.52 If the ACCC withdraws the notice following payment of the penalty, the regulator must refund the penalty paid by the person. *[Schedule 2, item 1: Part XI, Division 5, subsection 134G(7)]*

## **Application and transitional provisions**

21.53 The ACL will commence on the later of 1 January 2011 or the commencement of Schedule 1 of the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (the first ACL Bill). The first ACL Bill is currently before the Parliament. *[Section 2]*

21.54 Chapter 2, Part 2-1 will apply to all relevant conduct occurring in trade or commerce on or after 1 January 2011.

21.55 Conduct occurring prior to 1 January 2011 will remain subject to the repealed (and saved, for those purposes) provisions in the TP Act or the relevant FT Act of a State or Territory. *[Schedule 7, item 6]*

21.56 The TP Act, as in force immediately before the commencement of the ACL, continues to apply to or in relation to any proceedings under or in relation to that Act, which were commenced, but not concluded, before that commencement. *[Schedule 7, item 7]*

21.57 The Governor-General may make regulations prescribing matters of a transitional, application or saving nature in relation to the amendments and repeals made by the Schedules to this Act. *[Schedule 7, item 12]*

### **Consequential amendments**

21.58 References to provisions of the TP Act in other CC Act provisions and provisions of other Acts will be consequentially amended to refer to provisions of the ACL to ensure that the affected provisions continue to apply in the way in which they did under the TP Act. *[Schedules 5 and 6]*



---

## **Chapter 22**

# ***Amendments to Part IVB of the TP Act***

---

### **Outline of chapter**

22.1 The ACL Bill amends the TP Act to provide for additional enforcement and remedies in respect of contraventions and suspected contraventions of mandatory or voluntary industry codes that are made under Part IVB of the TP Act.

### **Context of amendments**

22.2 Part IVB of the TP Act allows the Minister to prescribe industry codes of conduct (industry codes). Part IVB was inserted into the TP Act in 1998.

22.3 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.

22.4 There are no voluntary industry codes.

22.5 Industry codes are defined in Part IVB as codes that regulate the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry.

22.6 Codes may be prescribed as mandatory or voluntary. Relevant participants in an industry must comply with mandatory codes but may elect to be bound by a voluntary code. However, if an industry participant elects to be bound by a voluntary code, it is a contravention of the TP Act not to comply.

22.7 Non-compliance with a relevant mandatory or voluntary code attracts civil remedies under the TP Act, including injunctions (section 80),

actions for damages (section 82), non-punitive orders (section 86C) and other orders (section 87). There are no criminal sanctions for non-compliance with an applicable industry code.

22.8 In its July 2008 *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, the Australian Competition and Consumer Commission (ACCC) recommended that its enforcement powers in respect of industry codes be enhanced to include civil pecuniary penalties, infringement notices and powers facilitate the conduct of random record audits.

22.9 In December 2008, the Parliamentary Joint Committee on Corporations and Financial Services (Joint Committee) also recommended in its report, *Opportunity not opportunism: improving conduct in Australian franchising*, that civil pecuniary penalties be available in respect of breaches industry codes and that the ACCC be given the power to investigate suspected breaches of industry codes without having to rely on specific complaints from industry participants.

22.10 On 5 November 2009, the Government announced its response to the Parliamentary Committee's report. The Government agreed to strengthen enforcement of industry codes by:

- empowering the ACCC undertake random record audits in respect of documents or other information required to be held pursuant to an industry code;
- allowing a court to order redress for non-parties in respect of conduct that has breached a relevant industry code; and
- empowering the ACCC to issue public warnings where a party has breached an industry code.

## **Summary of new law**

22.11 The Bill amends the TP Act to provide three additional enforcement and redress measures for contraventions of industry codes:

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

22.12 These additional remedies are available to the ACCC or the courts, as appropriate, in addition to the current suite of enforcement and redress provisions of the TP Act and are not intended to limit use of those abilities.

### Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
The ACCC can issue public warning notices relating to suspected breaches of an applicable industry code.	No equivalent provision exists in the TP Act.
The ACCC may apply to a court to make certain types of orders to redress, in whole or in part, loss or damage suffered by a person that is not party to the proceedings.	No equivalent provision exists in the TP Act.
A corporation must comply with a written request by the ACCC to provide information or documents that the corporation is required to generate or publish under an applicable industry code.	No equivalent provision exists in the TP Act.

### Detailed explanation of new law

22.13 Access to the remedies and enforcement powers created by Divisions 2, 3 and 4 of Schedule 4 of the Bill have effect subject to the operation of Part VIB of the TP Act [*Schedule 4, item 4, Section 51AEAH*].

22.14 Part VIB provides a statutory regime for claims for compensation for death or personal injury arising in proceedings under certain provisions of the TP Act.

### Public warning notices

22.15 The ACCC may issue a written notice to the public about the conduct of a corporation if the ACCC:

- has reasonable grounds to suspect that the conduct may constitute a contravention of an applicable industry code; and
- the ACCC is satisfied that one or more persons has suffered, or is likely to suffer, detriment as a result of the conduct; and

- the ACCC is satisfied that it is in the public interest to issue the notice. [*Schedule 4, item 4, subsection 51AEAA(1)*]

22.16 The determination of whether the ACCC is satisfied that there is, or is likely to be, detriment to one or more persons as a result of the conduct, and that it is in the public interest to issue a public warning notice, is a matter within the discretion of the ACCC, in accordance with the proper exercise of its functions.

***Notice is not a legislative instrument***

22.17 A public warning notice issued in relation to a suspected contravention is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003* [*Schedule 4, item 4, subsection 51AEAA(2)*]

**Orders for non-party redress**

22.18 The ACCC can apply to a court with jurisdiction in a relevant matter for an order that will:

- redress, in whole or in part, the loss or damage suffered by a non-party in relation to a contravention of an applicable industry code; or
- prevent, or reduce the loss or damage suffered, or likely to be suffered, by non-parties in relation to a contravention of an applicable industry code. [*Schedule 4, item 4, subsections 51AEAB(1) and 51AEAB(3)*]

22.19 An ***applicable industry code*** is defined in subsection 51ACA(1) of the current TP Act [*Schedule 4, item 1, subsection 4(1)*]. An applicable industry code in relation to a corporation that is a participant in an industry means, the prescribed provisions of either a mandatory industry code relating to that industry, or the prescribed provisions of any voluntary industry code that binds the corporation.

22.20 An order may be made against either the corporation in its own name or a person involved in the contravention of an applicable industry code. [*Schedule 4, item 4, subsection 51AEAB(2)*]

***Grounds for making an order***

22.21 A court may make an order under this section if three conditions are satisfied.

- A corporation engaged in conduct in contravention of an applicable industry code.

- The contravening conduct caused, or is likely to cause, a class of persons to suffer loss or damage.
- The class includes persons who are not, or have not been, parties to a proceeding instituted under Part VI of the TP Act in relation to the contravention of an applicable industry code. [Schedule 4, item 4, subsection 51AEAB(1)]

22.22 An application seeking an order can be made even if enforcement proceedings have not been instituted. As such, the ACCC can take action for redress for non-parties without previously taking other action in relation to contravening conduct. [Schedule 4, item 4, subsection 51AEAB(4)]

22.23 An application seeking an order can be made at any time within six years after the day on which the cause of action that relates to the contravening conduct accrues. [Schedule 4, item 4, subsection 51AEAB(5)]

22.24 In determining whether to make an order the court may have regard to the conduct of the person who engaged in the contravening conduct as well as the conduct of the non-parties since the contravention occurred [Schedule 4, item 4, subsection 51AEAB(6)]. This ensures that the court may consider particularly whether the person has already provided some redress for the loss or damage to the non-party consumers.

22.25 In determining whether to make an order, the court does not need to determine which specific persons are non-parties, nor the exact loss or damage suffered, or likely to be suffered by such persons. [Schedule 4, item 4, subsection 51AEAB(8)]

22.26 If a non-party consumer accepts the redress provided under an order then:

- the non-party is bound by the order; and
- any other order in relation to that loss or damage has no effect in relation to the non-party consumer; and
- the non-party cannot make any claim, action or demand against the person involved in the contravention in relation to that loss or damage. [Schedule 4, item 4, subsection 51AEAB(9)]

#### ***Kinds of orders that can be made***

22.27 The court may make any order it thinks appropriate, other than an award of damages [Schedule 4, item 4, subsection 51AEAB(1)]. Section 51AEAC of the TP Act does not limit the types of orders that can be made [Schedule 4, item 4, section 51AEAC].

22.28 The kinds of orders that can be made against a person (the respondent) to redress loss or damage suffered by a non-party include the following [*Schedule 4, item 4, section 51A EAC*]:

- an order declaring the whole or any part of a contract made between the respondent and a non-party, or a collateral arrangement relating to such a contract:
  - to be void; and
  - if the court thinks fit—to have been void ab initio or void at all times on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);
- an order:
  - varying such a contract or arrangement in such manner as is specified in the order; and
  - if the court thinks fit—declaring the contract or arrangement to have had effect as so varied on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);
- an order refusing to enforce any or all of the provisions of such a contract or arrangement;
- an order directing the respondent to refund money or return property to a non-party;
- an order directing the respondent, at his or her own expense, to repair, or provide parts for, goods that have been supplied under the contract or arrangement to a non-party;
- an order directing the respondent, at his or her own expense, to supply specified services to a non-party;
- an order, in relation to an instrument creating or transferring an interest in land (within the meaning of section 53A of the TP Act), directing the respondent to execute an instrument that:
- varies, or has the effect of varying, the first-mentioned instrument; or

- terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the first-mentioned instrument.

### Random audit power

22.29 The ACCC may request a corporation that is required to keep, to generate or to publish information or a document under an applicable industry code, to provide any such information, document or record to the ACCC [Schedule 4, item 4, subsections 51AEAD(1) and (2)].

22.30 Such a notice must be in writing and must:

- name the corporation to which it is given; and
- specify the information or document which is being sought by the ACCC. [Schedule 4, item 4, Subsection 51AEAD(3)]

22.31 This investigation power will assist the ACCC in situations where significant imbalances in bargaining power between industry participants makes less powerful participants hesitant to report instances of contraventions of industry codes by more powerful industry participants to the ACCC, for fear of retaliatory action by those more powerful participants. This investigation powers allows the ACCC to monitor compliance with applicable industry codes without relying on complaints by other industry participants.

22.32 To assist a corporation to comply with the notice, a notice must also:

- specify the provisions of the applicable industry code which require the corporation to keep, generate or publish the information or document; and
- explain the corporation's obligations to comply with the notice and right to apply for an extension of time to comply, as set out in sections 51AEAE, 51AEAF and 51AEAG. [Schedule 4, item 4, subsection 51AEAD(3)]

22.33 A single notice may require the corporation to provide more than one piece of information or to more than one document. [Schedule 4, item 4, subsection 51AEAD(5)]

### ***Compliance with a notice***

22.34 A corporation that is given a notice must comply with it in within 21 days or such longer time as agreed in writing by the ACCC. [*Schedule 4, item 4: section 51AEAF*]

22.35 A corporate may apply in writing to the ACCC within 21 days of receiving a notice under section 51AEAD for an extension of time to comply [*Schedule 4, item 4, subsection 51AEAE(1)*]. The ACCC may extend the time for compliance with the notice by written notice to the corporation [*Schedule 4, item 4, subsection AEAE(2)*]. The ACCC has discretion as to the length of the extension it will grant.

22.36 A corporation must not give the ACCC false or misleading information or documents in purported compliance with a notice. [*Schedule 4, item 4, subsection 51AEAG(1)*]

22.37 However, a corporation does not contravene subsection 51AEAG(1) if the corporation provides false or misleading information that the corporation could not have known was false or misleading or if the corporation provides a document containing false or misleading information accompanied by a statement of the corporation that the information is false or misleading. [*Schedule 4, item 4, subsection 51AEAG(2)*]

22.38 A corporation that fails to comply with a notice, or provides false or misleading information or documents in response to a notice, is subject to the existing civil remedy provisions of the TP Act that apply to contraventions of Part IVB.

## **Application and transitional provisions**

22.39 The ACL will commence on the later of 1 January 2011 or the commencement of Schedule 1 of the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (the first ACL Bill). The first ACL Bill is currently before the Parliament. [*Section 2*]

22.40 Chapter 2, Part 2-1 applies to all relevant conduct occurring in trade or commerce on or after 1 January 2011.

22.41 Conduct occurring prior to 1 January 2011 will remain subject to the repealed (and saved, for those purposes) provisions in the TP Act or the relevant FT Act of a State or Territory. [*Schedule 7, item 6*]

22.42 The TP Act, as in force immediately before the commencement of the ACL, continues to apply to or in relation to any proceedings under or in



relation to that Act, which were commenced, but not concluded, before that commencement. *[Schedule 7, item 7]*

22.43 The Governor-General may make regulations prescribing matters of a transitional, application or saving nature in relation to the amendments and repeals made by the Schedules to this Act. *[Schedule 7, item 12]*

## **Consequential amendments**

22.44 References to provisions of the TP Act in other CC Act provisions and provisions of other Acts will be consequentially amended to refer to provisions of the ACL to ensure that the affected provisions continue to apply in the way in which they did under the TP Act. *[Schedules 5 and 6]*



---

## **Chapter 23**

# ***Regulation Impact Statement: The Australian Consumer Law — Reforms based on best practice in State and Territory consumer laws***

---

### **Introduction**

23.1 The Regulation Impact Statement (RIS) set out below was prepared for the consideration of the Ministerial Council on Consumer Affairs at its 4 December 2009 meeting.

23.2 The RIS was considered by the Office of Best Practice Regulation (OBPR) and passed on 1 December 2009. The RIS was given the OBPR reference number 10808.

### **Part A Background**

#### **Introduction**

23.3 On 2 October 2008, COAG agreed to establish a single national consumer law as part of the *National Partnership Agreement to Deliver a Seamless National Economy* (NPA), which will include reforms based on best practice in existing State and Territory consumer laws ('the best practice reforms'). This COAG agreement is based on detailed reform proposals developed by the Ministerial Council on Consumer Affairs (MCCA) on 15 August 2008, and agreed to by the Business Regulation and Competition Working Group of COAG (BRCWG). The proposals to be discussed in this Regulation Impact Statement (RIS) can be divided into two groups:

- reforms which create a single, simplified national law, based on State and Territory laws that already exist in most or all jurisdictions ; and
- reforms which reflect best practice among State and Territory laws, which currently exist in only one or a few jurisdictions.

23.4 These proposals are based on consumer policy objectives agreed by MCCA and set out in its communiqué of 15 August 2008.

23.5 This Part examines the case for implementing the best practice reforms. All of the proposals considered in this RIS currently exist in at least one State or Territory's law and reflect a process of policy development and discussion between Australian governments to achieve a single national consumer law.

23.6 Under the *Intergovernmental Agreement for the Australian Consumer Law*, the Commonwealth and all State and Territory governments must agree unanimously to the initial text of the ACL.

23.7 In undertaking these reforms MCCA has borne the national consumer policy objective in mind. The objective is to 'improve consumer wellbeing through consumer empowerment and protection, to foster effective competition and to enable the confident participation of consumers in markets in which both consumers and suppliers trade fairly.'

23.8 This objective is supported by six operational objectives:

- 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.

23.9 In considering the proposals set out in this RIS, the practical experience of State and Territory agencies in developing, administering and enforcing State and Territory consumer laws has been integral to the analysis of options. Where relevant, previous consultation on, or reviews of, the existing State and Territory provisions have been taken into account.

## Background to the reform of Australia's consumer policy framework

### *The current legislative framework*

23.10 Generic consumer protections for Australian consumers are currently found in 13 separate laws: the TP Act and the *Australian Securities and Investments Act 2001* (Cth) (ASIC Act), which apply nationally, and 11 State and Territory laws dealing with fair trading and consumer protection (FTAs). The Productivity Commission (PC) found that, in a number of respects, while State and Territory laws are generally similar to the TP Act, the provisions are not uniform.<sup>19</sup>

23.11 While there is a high degree of commonality in Australia's national, State and Territory generic consumer protection laws, there is variation between the legislative, policy and enforcement approaches adopted around Australia. This shift away from consistent laws has led to the current approach being more costly for consumers and businesses.

23.12 With this in mind, the PC recommended a national generic consumer law based on the TP Act. The most significant differences between existing jurisdictional consumer protection laws, which are relevant in the context of the best practice reforms discussed in this RIS, are set out below:

- **Objects of the TPA and FTAs:** There are significant differences between the objects provisions of the various Australian consumer laws. Objects provisions can be significant as an aid to judicial interpretation and therefore differences can influence judicial outcomes for consumers seeking to utilise a particular consumer provision. They can also reflect and inform very different approaches to issues of policy development and enforcement.<sup>20</sup>
- **Industry specific regulation:** The PC recognised significant differences in industry specific consumer regulation in the energy, food, credit, tobacco, electrical products and therapeutic goods industries. The PC also found some industry specific legislation is overly prescriptive and unnecessary given the existence of generic consumer protections. Furthermore, changes to industry specific regulation occur often, which creates ongoing complexity

---

19 Productivity Commission (2008) *Review of Australia's Consumer Policy Framework*, vol. 2, 19.

20 Corones and Christensen (2007) *Comparison of Generic Consumer Protection Regulation*, report prepared for the Productivity Commission, 25-6.

and costs to businesses as they attempt to maintain compliance across jurisdictions.<sup>21</sup>

- **Diversity of regulatory approaches:** The diversity of consumer agencies is also reflected in the wide range of regulatory approaches that they adopt. These reflect a range of practical considerations, including cost and the needs of the industry being regulated, but also the regulatory objectives of the organisation concerned, informed by the legislation it is responsible for enforcing.<sup>22</sup> Variable outcomes for consumers occur due to divergent requirements for businesses, differences in enforcement intensity and jurisdictional priorities.<sup>23</sup>

23.13 The *Inter-Governmental Agreement for the Australian Consumer Law* (IGA) requires the Commonwealth to enact changes to the investor protection provisions of the ASIC Act and, to the extent necessary, the *Corporations Act 2001* (Cth), to ensure that they are consistent with the Australian Consumer Law (ACL).

23.14 The IGA does not require the corporations legislation to be identical to the ACL legislation. The IGA reflects that financial products and services will be carved-out of the scope of the ACL as result of the separate legislative arrangements that exist for in respect of financial products and services under the *Corporations Agreement 2002*. The corporations legislation currently contains consumer protection provisions that mirror the consumer protection provisions of the TP Act.

#### ***The current enforcement framework***

23.15 At the national level, the Australian Competition and Consumer Commission (ACCC) is responsible for enforcing the generic consumer protections of the TP Act, while the Australian Securities and Investments Commission (ASIC) monitors and promotes market integrity and consumer protection in relation to financial products and services. The TP Act excludes the provision of financial services from the scope of its provisions.

23.16 There are also eight lead consumer agencies that administer and enforce consumer protection policy in the States and Territories: NSW Fair Trading, Consumer Affairs Victoria (CAV), Queensland Office of Fair Trading (OFT), WA Department of Commerce, SA Office of Consumer and

---

21 Productivity Commission (2008) *Review of Australia's Consumer Policy Framework*, vol. 2, 65, 81-7.

22 Ibid., 227.

23 Ibid., 19.

Business Affairs (OCBA), Tasmanian Office of Consumer Affairs and Fair Trading, ACT Consumer Affairs and Fair Trading and NT Consumer Affairs.

23.17 The division, in terms of jurisdictional and functional responsibilities, between the different enforcement agencies is not always straightforward and has been a long-term source of confusion for consumers and industry alike. In practice, it can result in a duplication of resources as enforcement agencies try to ascertain jurisdiction in overlapping cases.<sup>24</sup>

*The process so far*

23.18 In early 2006, the Banks Taskforce, in *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*, recommended that COAG should, through MCCA, initiate an independent review of Australia's consumer policy framework and its administration.

23.19 On 11 December 2006, the PC began its inquiry into Australia's consumer policy framework. The PC was asked to report on ways to improve harmonisation and coordination of consumer policy, its development and administration across jurisdictions in Australia, avoiding regulatory duplication and inconsistency.

23.20 The PC presented its final report to the Government on 30 April 2008, and it was tabled in the Australian Parliament and published on 8 May 2008. The report included a recommendation that:

the Government implement a new national generic consumer law to apply in all jurisdictions. This law should be based on the consumer protection provisions of the TP Act ... [and] incorporate additional provisions from State and Territory Fair Trading Acts in those cases where the TP Act is generally agreed not to be adequate to deal with a particular generic issue.<sup>25</sup>

23.21 On 26 March 2008, COAG agreed that the BRCWG, in consultation with MCCA, would develop an enhanced consumer policy framework, including legislative and regulatory structures, drawing on the final report of the PC.

23.22 On 15 August 2008, MCCA developed a series of reform proposals for enhancing Australia's consumer policy framework, based on the recommendations in the PC report. These proposals included the

---

24 Corones and Christensen (2007) *Comparison of Generic Consumer Protection Regulation*, report prepared for the Productivity Commission, 21, 22, 130-2.

25 Productivity Commission (2008) *Review of Australia's Consumer Policy Framework*, recommendation 4.1.

establishment of a single national consumer law which is based on existing consumer protection provisions of the TP Act and incorporates ‘appropriate amendments reflecting best practice in State and Territory legislation’.

23.23 The proposals agreed by MCCA were endorsed by the BRCWG and agreed by COAG on 2 October 2008.

### ***Consultation***

23.24 SCOCA released a draft of this RIS for public consultation on 16 November 2009. Twenty submissions were received in response. The views expressed in those submissions are reflected, where appropriate in discussion of the specific proposals in this RIS. Unless otherwise referenced, all references to specific organisations or individuals in this RIS relate to submissions received in response to the consultation draft of this RIS.

23.25 SCOCA released *An Australian Consumer Law: Fair markets — Confident consumers* on 17 February 2009. The paper provided an overview of suggested best practice reforms and sought suggestions on areas where consumer laws could be enhanced by incorporating best practice elements of State and Territory laws.

23.26 SCOCA received 102 submissions from a wide variety of business and consumer stakeholders. While many of these focused on the proposed national unfair contract terms law, a significant proportion also addressed the best practice proposals outlined in the paper. Based on this consultation, the Australian Government has engaged in a process of discussion with State and Territory officials on proposals to be brought forward as part of the ACL.

23.27 On 24 June 2009, the Australian Government introduced the Trade Practices Amendment (Australian Consumer Law) Bill 2009 into the Australian Parliament. The Bill establishes the framework and the unfair contract terms provisions of the ACL and introduces new penalties, enforcement powers and consumer redress provisions into the TP Act. That Bill is currently before the Parliament.

23.28 The Australian Government will introduce into the Australian Parliament a second Bill in early 2010 that will complete the implementation of the ACL. This second Bill will include best practice reforms agreed to by the Commonwealth, States and Territories as described in this RIS. It will also include a new national product safety regulatory framework and the remaining ACL provisions drawn from the current consumer protection and enforcement provisions of the TP Act.



### ***The problem***

23.29 As recommended by the PC, the reforms described in this RIS are intended to modify or augment the existing consumer protection provisions of the TP Act, based on existing best practice provisions in State and Territory consumer laws.

23.30 The proposals to be discussed below have been divided into two groups:

- reforms which create a single, simplified national law (Part B); and
- reforms which reflect best practice among State and Territory laws (Part C).

23.31 In both cases, the proposals are intended to address generic consumer problems, rather than industry specific concerns.

23.32 Each of the reforms covered in this RIS already exist in at least one State or Territory and, in many cases, more than one. A key objective of the decision of COAG to create a single national consumer law was to rationalise, where possible, the generic consumer laws that exist in Australia and to repeal redundant laws that merely duplicate the national provisions or do not provide sufficient additional consumer protection to warrant the associated regulatory burden.

### ***Assessment of options***

23.33 The objective of COAG is to achieve the implementation of a single, national consumer law. However, in doing so, it did not want a 'highest-common-denominator' approach to regulation, based on the adoption of all existing State and Territory provisions. Accordingly, a two-stage approach has been taken in the assessment of these proposals:

- State and Territory governments have nominated those existing provisions that they consider provide a practical consumer benefit in their jurisdiction and which they consider should not be lost to Australian consumers in the implementation of the ACL; and
- the costs and benefits of each reform proposal have been assessed according to the impact it will have in all jurisdictions, including those where that specific regulation currently does not exist.

23.34 In considering and assessing the merits of each proposal for inclusion in the ACL, the following considerations have been taken into account:

- the need to maintain current levels of consumer protection within the context of a generic, national consumer law and to address community expectations;
- the need, in all cases, to minimise and, where possible, reduce business compliance costs under a national consumer law;
- the need to rationalise existing consumer laws as much as possible; and
- the need to achieve national uniformity through the ACL and the adoption of the ACL by all States and Territories.

*Reforms which create a single, simplified national law on a specific issue*

23.35 These reforms relate to those laws that apply in all — or nearly all — jurisdictions, and will:

- create national consistency and replace a variety of State and Territory laws, and
- enhance the current level of consumer protection while minimising business compliance costs.

23.36 In this regard, where there are differences between the TP Act and State and Territory laws, single, simplified national law would result in business compliance cost savings and reduced consumer confusion. The impact of this benefit will vary between proposals in accordance with the significance of the proposal and the extent of any variation that currently exists.

*Reforms which reflect best practice among State and Territory laws*

23.37 These reforms relate to those laws that apply only in one or some jurisdictions and take account of market developments or new regulatory approaches. The application of these reforms as part of the ACL is necessary to:

- promote the creation of a single, simplified national law on a specific issue;
- enhance the clarity and effectiveness of that law by drawing on best practice in existing State and Territory laws; and

- improve protection for all Australian consumers while minimising business compliance costs.

***How we assess the regulatory impact of reforms***

23.38 The potential impacts from these reforms are considered in terms of three general groups: consumers, businesses and governments:

- examples of impacts on consumers are clarity about the nature and scope of their rights and obligations, changes in prices or availability of goods or services, access to legal rights of action, or access to redress;
- examples of impacts on businesses are clarity about the nature scope of their rights and obligations, changes to compliance costs or changed opportunities to market products or otherwise interact with consumers; and
- examples of impacts on governments are changes to the costs of administering and enforcing regulation.

23.39 Reform options are assessed against the status quo. The status quo may involve no regulation, TP Act provisions only, State or Territory regulations only, or a mixture of Commonwealth and State and Territory regulations, as the case may be.

23.40 The status quo does not contemplate the COAG agreement that the default position for consumer protection laws being considered for inclusion in the ACL is to incorporate the TP Act provisions into the ACL, and repeal any corresponding State and Territory laws unless a best practice reform proposal is agreed. Instead, where there are existing TP Act provisions related to a proposal, the TP Act provision being adopted wholly in the ACL would always be considered as an explicit option.

## **Part B        Reforms which create a single, simplified national law**

### **Introduction**

23.41     A number of best practice reform proposals relate to laws that already exist in most, if not all, States and Territories, or already apply to a majority of Australian consumers. For the purposes of this RIS, these will be called ‘national consistency reforms’.

23.42     In recent years, Australia’s consumer product and services markets have increasingly become national in character. For example, in 2007, around 48 per cent of goods and services (measured by turnover) were supplied by firms operating nationally.<sup>26</sup>

23.43     The trend towards national consumer markets and the existence of separate consumer protection laws at the national, State and Territory levels can result in Australian consumers receiving different levels of protection depending on where they live or where they make their purchases.

23.44     National consistency in consumer laws provides a strong argument for a national approach as consumers and businesses would only need to be familiar with a single, national law. It would empower Australian consumers and businesses to participate in national markets with greater confidence, and result in compliance cost savings for businesses as they would only be required to comply with a single national law, instead of multiple regulatory regimes. Consumers would also benefit from access to consistent remedies and legal certainty, regardless of where they reside in Australia.

23.45     All of the options considered in this RIS consist of nationally consistent regulation in all States and Territories through the applied ACL. The introduction of nationally consistent regulation would provide significant compliance cost savings for businesses, which would only have to comply with a single, uniform set of consumer protection provisions. There would also be benefits for consumers through familiarity and consistency of legislation, particularly when purchasing from interstate. Benefits also flow to consumer agencies through easier cross-border enforcement and the ability to issue consistent, national guidance.

23.46     The case for and against national consistency in existing consumer laws generally is outlined in more detail below.

---

26     PC (2008) *Review of Australia’s Consumer Policy Framework*, vol. 2, 51.

<i>Assessing the case for national consistency</i>		
<i>Impact group</i>	<i>Benefit</i>	<i>Cost</i>
Consumers	National consistency in protections for consumers across product and service markets, with greater confidence for consumers in accessing those markets.	Potential for a reduction in targeted consumer protections applicable to the specific circumstances of an individual jurisdiction.
	Business savings due to decreased compliance costs can potentially be passed onto consumers, including in the form of lower prices.	
	Greater clarity due to certainty about which consumer law applies, and allowing for more efficiency in markets, as there is a greater common understanding of the 'ground rules' for activity in the market.	
	Improved access to redress where a breach of the law has occurred, particularly where the conduct occurred across jurisdictions.	
Business	Consistent national regulation for businesses, reducing complexity and compliance costs, by eliminating significant areas of jurisdictional variation. This would provide savings for businesses currently operating nationally, which can be applied to meet business objectives, such as expansion and innovation.	Potential for a reduction in targeted business regulation applicable to the specific circumstances of an individual jurisdiction.
	Provides greater incentives for new entrants due to a simpler regulatory framework.	Transitional costs for businesses in understanding and complying with the new national provisions.
	Greater clarity and certainty in the consumer law, allowing for more efficiency in markets, as there is a greater common understanding of the 'ground rules' for activity in the market.	
Governments	Simpler legislation and greater efficiency in policy development and innovation, reducing the need for duplicative legislative and policy consideration processes.	Less ability to engage in regulation that is targeted to the individual requirements of each jurisdiction.

<i>Assessing the case for national consistency</i>		
<i>Impact group</i>	<i>Benefit</i>	<i>Cost</i>
	New regulation is considered by all jurisdictions, reducing the likelihood that the national law is overly reactive to a very localised problem or short-term circumstances where the costs might outweigh the benefits or the effects would not justify national regulation.	Transitional and coordination costs resulting from implementation and administration of the new, national law.
	Jurisdictions can potentially share and allocate more efficiently the cost of developing policy, and allocate administrative resources more efficiently, potentially providing greater resources to enforcement and conciliation functions.	

23.47 In the light of the benefits and costs listed above, COAG has agreed to proceed with a nationally consistent consumer law. However, the actual impacts of implementing best practice reforms as part of that national law will depend on how those reforms are designed and implemented. Options for specific best practice proposals are discussed in the remainder of this RIS.

## **Proposal 1: Unsolicited selling**

### *Current regulation*

#### *What is unsolicited selling?*

23.48 Unsolicited direct selling (often referred to as door-to-door sales) and telephone sales occur when a trader approaches a consumer directly to offer a product or service for sale, and where a consumer agrees to make a purchase and then enters into an agreement with the supplier, either at the consumer's home or another place that is outside of a retail environment (or not the supplier's usual place of business), or over the phone.

#### *How is unsolicited selling regulated?*

23.49 All States and Territories have specific laws regulating unsolicited sales, including door-to-door sales. Victoria, NSW and South Australia also have specific laws regulating telephone sales. These jurisdictional regimes diverge on various points, including in the details of the rights and responsibilities conferred. They also have their own jurisdiction-specific features, including the extent of coverage of activities that are not undertaken in trade or commerce.

23.50 While there is national legislation regulating the unsolicited selling of certain financial services and products, there is no specific provision dealing with direct or telephone sales in the TP Act. Under the TP Act, unsolicited consumer transactions completed via telephone and face-to-face are treated in the same way as transactions entered into at 'bricks-and-mortar' locations or on the internet. Conduct related to unsolicited selling is subject to the prohibitions against unfair practices in the TP Act, including misleading or deceptive conduct (section 52), false or misleading representations (section 53), harassment and coercion (section 60) and unsolicited goods or services (sections 64 and 65).

23.51 The Do Not Call Register Act 2006 (Cth) (DNCR Act) and Telecommunications (Do Not Call Register) (Telemarketing and Research Calls) Industry Standard 2007 (the Industry Standard) regulate telemarketing, but not the formation of sales contracts by telephone. As at May 2009, 3.5 million numbers were listed on the Do Not Call Register (DNCR). In the year to May 2009, 12,057 complaints were made to the Australian Communications and Media Authority (ACMA) about breaches of the register or associated industry code. The proposals considered in this RIS would not apply to those aspects of telemarketing covered by the DNCR Act or the Industry Standard.

*What is the objective of regulating unsolicited selling practices?*

23.52 The objective of regulation in this area is to promote the operation of fair and efficient markets by providing appropriate consumer protection in situations where the consumer is subject to an added vulnerability or disadvantage due to the nature of the sales process. This is achieved by giving consumers additional rights and protections that are not available in other retail contexts and providing specific obligations for businesses engaged in these sales practices. This may be warranted where aggressive selling techniques (such as high pressure sales) are employed in a non-retail environment, especially where consumers do not have the option of walking away from the situation, such as in their own home, and may feel threatened to agree to an offer simply to put the situation at an end, or where it is unclear that they are entering into a contract, as can occur over the phone.

23.53 Existing State and Territory regulatory mechanisms are intended to reduce:

- the impact of **information asymmetry** between the supplier and consumer, so that consumers can make informed decisions;
- the **incentives for unfair conduct**, by minimising the potential gains to suppliers from engaging in unscrupulous practices, including high-pressure sales techniques; and

- the **impact of unfair conduct**, particularly with respect to vulnerable and disadvantaged consumers, by providing clear avenues for redress other than recourse to the courts.

#### Information asymmetry

23.54 Consumer purchasing decisions occur with reference to information available to the consumer, much of which is provided by the trader. Provided that this information is truthful, and provided that they are in a position to evaluate it properly, consumers can use this information to select products and services which meet their requirements.

23.55 In some situations there is greater likelihood that the decision-making process will be constrained and that this will result in poor consumer choices. In the case of unsolicited sales, the consumer is unlikely to have engaged in a product comparison or sampled the product prior to the unsolicited approach of the trader. Consequently, the decision-making context available to the consumer is largely that which is represented to them by the trader. Information asymmetry compromises the ability of consumers to make the best consumption choices in view of their limited purchasing power.

#### Incentives for unfair conduct

23.56 High-pressure sales techniques, which take advantage of the unequal market power of the participants in an unsolicited transaction, exacerbate the problem of information asymmetry. These sales techniques may involve:

- misleading representations or lack of disclosure of important information;
- inter-personal pressure exerted by sales people; and
- targeting vulnerable consumer groups, including the elderly, consumers with poor understanding of English and the disadvantaged.

23.57 The potential for such conduct may increase where it occurs in a non-public environment, such as a private home, where the consumer may be at a disadvantage from the outset.

#### Impact of unfair conduct

23.58 An effective consumer regulatory regime requires that consumers have access to remedies should problems occur, and that businesses' obligations are made clear where the risk of not specifying these obligations are potentially significant.



23.59 Existing State and Territory unsolicited selling regimes allow for the provision of self-enforcing remedies, such as statutory cooling-off periods and the right to rescind contracts where a consumer has been misled about the identity of a salesperson or their motives for making contact. Such remedies gives consumers the opportunity to obtain adequate information about the goods or services being sold, to access information about the price and quality of similar products, or to understand the contract they have entered into, before finalising an agreement with a supplier.

*What consumer detriment can result from unsolicited selling practices?*

23.60 While direct sales methods may often be convenient for consumers, they can cause inconvenience and can, in some cases, be perceived as threatening, particularly where the approach is unsolicited.

23.61 Australian consumer agencies frequently receive complaints in respect of this form of selling. For example:

- over the last two financial years, CAV received 1,056 complaints and enquiries about unsolicited selling;
- over the last three financial years, NSW Fair Trading received 2,015 complaints and 3,229 enquiries about door-to-door selling and telephone sales;
- over the last two financial years, the South Australian OCBA received 872 complaints and enquiries annually about unsolicited selling generally; and
- the Queensland OFT receives over 125 enquiries per month, on average, about door-to-door sales.

23.62 Industry ombudsman services also receive complaints and enquiries about unsolicited selling:

- the Energy and Water Ombudsman of Victoria received 1,307 complaints about door-to-door and phone sales in the year to June 2007;<sup>27</sup> and
- the Energy and Water Ombudsman of NSW reported a significant increase in complaints about elderly customers concerning unsolicited selling since January 2006.<sup>28</sup>

---

27 Consumer Action Law Centre (CALC) and the Financial & Consumer Rights Council (FCRC) (2007) *Coercion and harassment at the door — Consumer experiences with energy direct marketers*, p 33, <http://www.consumeraction.org.au/downloads/EnergyMarketinginVictoria-Finalv.3.pdf>.

23.63 It is important to recognise that unsolicited selling-related complaints in the energy industry represent a small proportion of the total number of complaints received in that industry. The Energy Retailers Association of Australia Inc (ERAA) noted in its submission on the RIS that door-to-door marketing and telemarketing represent the more efficient and effective approaches to selling energy and to encouraging consumers to switch retailers in fully contestable markets.

23.64 In 2007 the Consumer Action Law Centre (CALC) and the Financial & Consumer Rights Council (FCRC) undertook a study of consumer experiences concerning door-to-door sales practices in the electricity sector.<sup>29</sup> This qualitative study was based on 28 interviews of consumers in urban, regional and rural Victoria who had sought financial counselling at a later time. The case studies noted conduct by the caller in breach of relevant consumer laws which included:

- misleading and deceptive conduct;
- retailers switching customers without consent, including marketing to non-account holders;
- unconscionable conduct; and
- harassment.

23.65 A similar study was undertaken in 2009 by the FCRC,<sup>30</sup> based on 81 case studies from current and recent clients involving electricity, gas and water issues. It found door-to-door marketing techniques to be the largest source of consumer detriment for low income consumers, including the vulnerable such as newly arrived immigrants, people with language or literacy difficulties, those experiencing mental health issues and the disabled. The conduct included the failure of door-to-door sales representatives to:

- gain informed consent;
- provide copies of the sale contract when requested;
- provide pre-contractual information; and
- inform customers of their cooling off and cancellation rights.

---

28 *Newsletter of the Energy and Water Ombudsman of NSW*, September 2006.

29 CALC and FCRC (2007), p.29.

30 FCRC (2009) *Still an Unfair Deal? Reassessing the impacts of energy reform and deregulation on low income and vulnerable consumers*, see [http://www.fcrc.org.au/files/YIDOUVF93M/FCRC\\_Still\\_an\\_Unfair\\_Deal\\_-\\_FINAL\\_REPORT.pdf](http://www.fcrc.org.au/files/YIDOUVF93M/FCRC_Still_an_Unfair_Deal_-_FINAL_REPORT.pdf).

*Previous reviews of unsolicited selling regulation*

23.66 A 2002 National Competition Policy review of the NSW *Door-to-Door Sales Act 1967* found that some of the most vulnerable groups in society continue to encounter undesirable direct selling practices. These were noted to include the elderly (especially older women living alone), consumers with poor understanding of English and the disadvantaged. Many direct selling firms were also found to target particular suburbs or areas, including those with a high percentage of public housing.<sup>31</sup>

23.67 The NSW review also considered that modern telemarketing practices, given the very similar nature of inter-personal pressure exerted by sales people at a customer's front door and on the phone, led to a sufficiently significant and wide-spread incidence of marketplace detriment to warrant regulation.

23.68 A recent CAV paper identified the risk of high pressure sales resulting in poor choices by consumers being greatest in situations characteristic of unsolicited selling, including when:

- consumers do not expect to be approached by the trader, or cannot walk away from the situation;
- traders use moral pressure or try to create an obligation for reciprocity by, for example, providing free gifts;
- the goods are unique so that exactly the same product cannot be purchased elsewhere;
- the goods are complex or unfamiliar so that consumers have more difficulty relying on their own judgement;
- the relationship between the trader and the consumer is not ongoing because the product is an infrequent purchase and/or the trader is not local; and
- the consumer is in a situation in which they are vulnerable or disadvantaged.<sup>32</sup>

---

31 National Competition Policy Review: *Fair Trading Act 1987 and the NSW Door-to-Door Sales Act 1967*, p. 49.  
[http://www.fairtrading.nsw.gov.au/pdfs/About\\_us/ftattdreport.pdf](http://www.fairtrading.nsw.gov.au/pdfs/About_us/ftattdreport.pdf)

32 Consumer Affairs Victoria (2009) *Cooling-off periods in Victoria: their use, nature, cost and implications*, Research Paper no. 12, 12.

### ***Options for Proposal 1***

23.69 The status quo comprises retaining the existing direct/door-to-door and telephone sales regimes of the States and Territories, in addition to the national Do Not Call Register.

23.70 Three options are identified for this proposal, all of which include adopting a single national legislative approach. These options are to be compared with the status quo, which reflects the current regulatory arrangements and has no additional associated costs and benefits. The options are:

- Option A — Prohibit direct and telephone sales through the ACL.
- Option B — Not include any specific provisions regulating direct and telephone sales in the ACL and repeal the existing provisions of State and Territory legislation.
- Option C — Create a single national framework for direct and telephone sales reflecting existing approaches in State and Territory legislation and designed to minimise unnecessary business compliance costs.

### ***Impact analysis***

#### *Option A — Prohibition of direct and telephone sales*

23.71 Option A is a prohibition that would be imposed at a national level on all forms of unsolicited direct and telephone sales. It would not be lawful for a business to approach a consumer directly in any place outside of the business' usual place of business, including by telephone, unless the consumer has previously requested that they do so. The DNCR Act and Industry Standard would continue to apply.

23.72 The prohibition would apply to sales agreements made face-to-face and over the telephone, consistent with the scope of current State and Territory legislation and the DNCR Act.

23.73 The scope of existing State and Territory legislation in relation to what constitutes a unsolicited approach is broadly similar. The common elements of the jurisdictional laws regulating direct and telephone sales are contained in the NSW provisions,<sup>33</sup> which regulate 'direct commerce contracts' where:

---

33 Section 40B of the NSW *Fair Trading Act 1987*.

- negotiations leading to the making of a contract take place between the supplier and the consumer in each other's presence at a place other than the business or trade premises of the supplier or over the telephone; and
- the consumer did not invite the supplier to call at that place or make that telephone call for the purpose of entering into those negotiations.

23.74 In addition, the DNCR Act defines a telemarketing call as a call where:

- having regard to a number of factors, including the content of the call, the presentational aspects of the call and the content that can be obtained using information mentioned in the call;
- it would be concluded that the purpose of the call is, among other things, to offer goods or services.

23.75 The concept of 'unsolicited' is used, but not defined in the DNCR Act.

23.76 The scope of the prohibition would be no greater than that under current State and Territory regulation, and the DNCR Act.

23.77 The current State and Territory Acts, as well as the DNCR Act, contain a range of exemptions. These generally reflect areas where there is alternative industry specific regulation in place, such as the formation of mortgage contracts, or for unsolicited approaches that do not target a particular individual, such as mail-outs or advertisements directed to a substantial section of the public.

23.78 The scope of application of a ban on unsolicited selling would clearly be a key driver of the compliance costs of that approach. Option A would allow for the possibility of some organisations or types of activities to be explicitly exempt from the prohibition having met certain criteria. If such an exemption power was included in the ACL, exemptions would be subject to the *Inter-Governmental Agreement for the Australian Consumer Law* (IGA) voting arrangements on a case by case basis.

23.79 Further consideration would need to be given to the nature of legislative guidance on the exercise of the power. Such guidance could restrict the granting of exemptions to businesses or activities that are subject to industry self-regulation or other factors that reduce the risk of behaviour that is contrary to the intent of the more general provisions of the ACL. Types of industry self-regulation in consumer markets include information campaigns, service charters, internal complaints handling departments and

procedures, accreditation, licensing and membership certification, quality assurance systems, standards, and codes of conduct and dispute resolution schemes.

Option A — Outcome

23.80 Option A would impose a very significant cost for businesses that employ direct selling marketing techniques, which are mostly small business entities. According to the Direct Selling Association of Australia (DSAA), direct selling businesses account for \$1.2 billion a year in sales; and the Australian Direct Marketing Association (ADMA) observes that a study<sup>34</sup> estimated that call centres generated \$2 billion revenue in 2008/09. In addition, almost 67 per cent of the DSAA's members are small business entities with annual retail sales of less than \$5 million. This option would affect particularly those businesses that are unable to offer their goods and/or services other than by way of unsolicited selling.

23.81 Under Option A, all businesses would be banned from selling goods and services through unsolicited sales. Furthermore, all legitimate businesses that currently rely partly or wholly on an unsolicited sales business model and that comply with the relevant State and Territory regulatory requirements would have to cease or restrict their trading using unsolicited selling. Businesses that choose to adopt an alternative selling model would face associated establishment costs, which could potentially be passed on to consumers in the form of higher prices.

23.82 Option A would effectively prevent consumers from purchasing goods and services via unsolicited sales approaches, which represent a very small proportion of all goods and services sold. In 2008-09, for example, the retail sales of members of the DSAA — whose members are estimated to account for over 90 per cent of industry sales — represented approximately 0.5 per cent of total Australian retail trade. The costs to consumers resulting from a prohibition on purchasing goods and services via unsolicited sales would be offset to some extent by eliminating the detriment suffered by consumers as a result of the high pressure sales techniques, however it is difficult to quantify this impact.

23.83 Option A may provide some administrative benefits for consumer agencies as a per se prohibition would be relatively simple to administer. Any benefit to government would be eroded to the extent that exemptions are given and any, further regulatory, requirements are not adhered to by exempt businesses.

---

34 callcentres.net *Australian Contact Centre Industry Benchmarking Report 2009*, see <http://www.callcentres.net/CALLCENTRES/LIVE/me.get?site.sectionsnow&CALL142>.

23.84 In its submission on the RIS, Telstra considered that there is no sound reason to abolish door-to-door or telemarketing sales outright, as doing so would come at an immense cost to businesses who have invested heavily in the capital and resources to use these forms of marketing and do so responsibly in compliance with the various national, State and Territory requirements. An outright ban would also, in Telstra's view, be utterly destructive to the many businesses who supply door-to-door and telemarketing services.

23.85 ERAA's submission stated that Option A would fundamentally undermine the competitive environment which has been created in Australia's retail energy markets. An investigation by the Australian Energy Market Commission in Victoria found that, despite a small number of marketing complaints, there was no systematic problem that would warrant a prohibition of direct marketing; and that the majority of consumers who switch retailers have had a positive experience when engaged by marketers of electricity and gas.<sup>35</sup>

23.86 The Motor Trades Association of Australia (MTAA) considered Option A very restrictive and interventionist, and noted that consumers should be protected from inappropriate conduct. The Financial Counsellors' Association of Queensland, however, supported Option A.

23.87 ADMA noted that it would be extremely concerned if the Government proceeded with prohibiting all unsolicited telephone sales, given that they are a vital part of the Australian economy and underpin the success and growth of many Australian businesses'.

23.88 Optus, which allocates extensive resources, and develops and maintains detailed processes and procedures, to ensure compliance with its regulatory obligations, strongly opposed Option A on the basis that it would unjustifiably impose major negative costs on its business.

*Option B — Not include any specific provisions regulating direct and telephone sales in the ACL and repeal the existing provisions of State and Territory legislation*

23.89 Under Option B, unsolicited direct selling practices would be regulated through the operation of the general consumer protection provisions of the ACL, including prohibitions on conduct that is

---

35 Australian Energy Market Commission (2009) *Review of the Effectiveness of Competition in Electricity and Gas Markets in Victoria-First Draft Report*, 66 and 69, see <http://www.aemc.gov.au/Market-Reviews/Completed/Review-of-the-Effectiveness-of-C ompetition-in-the-Electricity-and-Gas-Retail-Markets-Victoria.html>.

unconscionable, false, misleading or deceptive; and harassment and coercion.

23.90 There have been a small number of cases where the ACCC has taken action under the general consumer protection provisions of the TP Act in relation to door-to-door sales practices. On 19 June 2009, the Federal Court ordered by consent, injunctions for seven years restraining Craftmatic Australia Pty Ltd from engaging in a wide range of conduct that was declared to be misleading and unconscionable, in breach of the TP Act.<sup>36</sup> The ACCC investigation revealed that the company used misleading and unfair tactics to convince elderly people to agree to a home presentation by sales representatives.

23.91 In *ACCC v Lux Pty Ltd* [2004] FCA 926, the Federal Court found that Lux and a sales representative engaged in unconscionable conduct regarding a door-to-door sale to a vulnerable consumer. The court did not find that the conduct constituted harassment and coercion as defined by section 60 of the TP Act.

23.92 Following an investigation into the selling practices of door-to-door and telemarketing sales companies, Benchmark Sales Pty Ltd and Axxess Australia Pty Ltd, the ACCC took action in the Federal Court in 2002. The court made declarations that the companies engaged in conduct that was unconscionable and misleading, in breach of the TP Act, and injunctions restraining similar conduct for 12 months.<sup>37</sup>

#### Option B — Outcome

23.93 Removing current jurisdictional direct/door-to-door and telephone sales regulation under Option B would reduce the compliance costs incurred by businesses currently complying with those regimes and would impose no additional regulatory burden.

23.94 Option B would give consumers the option to purchase goods and services sold through unsolicited sales, but would not be afforded specific protections in respect of this selling method, which are more certain and less costly to enforce than more general consumer protection provisions.

23.95 In his submission on the RIS, Dr David Cousins noted that the specific unsolicited selling laws have been adopted in the States and Territories because the more general provisions relating to misleading or

---

36 *ACCC Door-to-door sellers must clean up act after ACCC action against Craftmatic* (19 June 2009) (see <http://www.accc.gov.au/content/index.phtml/itemId/877681/fromItemId/815456?pageDefinitionItemId=16940>).

37 See <http://www.accc.gov.au/content/index.phtml/itemId/331644>.



deceptive conduct, and coercion and harassment, for example, do not adequately deal with the problems encountered by consumers. The need for specific unsolicited selling regulation was also supported by the MTAA.

23.96 The DSAA, on the other hand, considered that broader consumer protection provisions would suffice for a large percentage of the direct selling market. Optus supported the implementation of Option B for similar reasons, and considered that the greater penalties for breaches of the TP Act than existing provisions related to unsolicited selling would have greater deterrent effect than the latter.

23.97 The impact of removing regulation on enforcement costs is difficult to estimate, as a reduction in enforcement or conciliation proceedings relating to specific unsolicited selling regulation may continue to be borne, at least in part, in respect of increased regulatory activity under the broader consumer protection provisions of the ACL.

*Option C — Create a harmonised framework for direct and telephone sales reflecting best practice in State and Territory legislation, to be included in the ACL*

23.98 Option C would involve introducing a single national regulatory framework for all forms of unsolicited offers and sales that occur in a non-retail environment, either in person or by telephone. This would be based on harmonisation of the current jurisdictional direct/door-to-door and telephone sales regimes, although the DNCR Act and Industry Standard would continue to apply in relation of the making of telemarketing calls.

23.99 One of the key differences between current jurisdictional laws is the variation in the scope of which unsolicited selling practices are subject to regulation, including:

- what constitutes a sale or marketing approach outside of a retail environment;
- the extent to which the regimes place different obligations on different forms of unsolicited selling (for example, face-to-face versus telephone sales); and
- the scope and range of exemptions from the general requirements of the regime.

23.100 Option C could provide a scheme that does not discriminate between different forms of unsolicited selling unless the substance of the potential harm to consumers warrants a different approach. In doing this, it would be necessary to define unsolicited sales in a sufficiently broad way to cover all forms of unsolicited selling approaches, including face-to-face (in

home and other non-retail environments) and telephone sales. A potential approach could be to base the definition on section 40B of the NSW *Fair Trading Act 1987*.

23.101 The NSW provisions regulate contracts where:

- negotiations leading to the making of the contract take place between the supplier and the consumer in each other's presence at a place other than the business or trade premises of the supplier or over the telephone; and
- the consumer did not invite the supplier to call at that place or make that telephone call for the purpose of entering into those negotiations.

23.102 Option C would apply to all goods and services, with the exception of financial products and services to the extent that they are regulated by the *Corporations Act 2001* (Cth). The anti-hawking provisions of the *Corporations Act 2001* prohibit the offering of securities, certain financial products and managed investment products related to unsolicited meetings and telephone calls.

23.103 Option C would allow for the possibility of some organisations or types of activities to be explicitly exempt from regulation having met certain criteria. If such an exemption power was included in the ACL, exemptions would be subject to the IGA voting arrangements on a case by case basis. The Victorian and New South Wales laws, for instance, include a partial exemption for classified advertising from the telephone sales legislation on the basis that the contract is for the supply of a series of advertisements over a period of time, each of which has a publication deadline.

23.104 Further consideration would need to be given to the nature of legislative guidance on the exercise of the power. Such guidance could restrict the granting of exemptions to businesses or activities that are subject to industry self-regulation or other factors that reduce the risk of behaviour that is contrary to the intent of the ACL.

23.105 Option C could apply to solicited sales in circumstances where a consumer initially solicits a supplier for the purpose and expectation of providing, or quoting for, a particular product or service, and when the supplier consequently comes to the consumer's home or otherwise approaches the consumer, the supplier applies high pressure sales techniques to make an unsolicited offer of a related or unrelated product or service. An example of this approach is in section 40B of the NSW FTA. The NSW FTA applies if the consumer did not invite the dealer to call for the purpose of entering negotiations that would lead to a contract for the supply of goods or services.

23.106 Drawing on current jurisdictional approaches, Option C would include the following key provisions:

- Express consumer rights, including:
  - a cooling-off right, exercisable by providing the supplier with a cancellation notice (containing prescribed information) via a wide range of delivery methods;
  - provisions specifying the effect of cancellation under the cooling-off right; and
  - provisions specifying that the consumer can rescind an unsolicited sales agreement after the cooling off period in various circumstances related to breaches by the supplier of certain supplier obligations specified in the regime.
- Express supplier obligations about the way in which consumers are approached, including:
  - permitted hours of visiting and calling consumers; and
  - duties to leave a consumer's premises or end a call when requested by the consumer,

except as set out for telemarketing calls in the DNCR Act and the Industry Standard (see below).

- Express supplier disclosure obligations about the making of contracts, including:
  - formal requirements for valid agreements arising from suppliers approaching consumers by telephone drawing on subsections 67E(1)-(4) of the Victorian FTA — which include requirements to, among other things, provide the full written purchase agreement, which must include particular details of the transaction, within five days;
  - formal requirements for valid agreements arising from suppliers approaching consumers other than by telephone drawing on subsections 61(1)-(2) of the Victorian FTA. A valid agreement would be required to include, for instance, a cooling-off notice and a cancellation notice (containing prescribed information); and
  - at the outset of an approach or call, a requirement to clearly advise the consumer of their purpose and to

display or produce identification containing certain prescribed information.

- Express supplier obligations about post-contractual behaviour, including:
  - prohibitions during the cooling-off period against a supplier supplying goods or services, or accepting trade-in goods; and requiring or accepting payment for goods or services to be supplied;
  - a requirement that a supplier immediately repay money received after the consumer has exercised their cooling off right;
  - prohibitions against a supplier taking action against a consumer for the purpose of recovering amounts allegedly payable under a validly cancelled or terminated unsolicited sales agreement; and
  - prohibitions against a supplier from seeking to avoid provisions concerning a cooling off right or operation of the regime.

23.107 These provisions would take into account that, while the DNCR Act and the Industry Standard do not regulate the formation of sales contracts by telephone, together these:

- prohibit unsolicited telemarketing calls to numbers on the DNCR unless an exception exists (such as consent);
- specify permitted calling times;
- require telemarketers to present Calling Line Identification;
- require telemarketers to terminate calls on request; and
- require telemarketers to provide a significant amount of identification as well as other information at the commencement or during a phone call.

23.108 To avoid regulatory duplication and inconsistency, Option C would therefore regulate telephone agreements to the extent not covered by the DNCR Act and the Industry Standard.

23.109 Option C would also provide that a contravention of any of the supplier obligations would impose civil and criminal liability under the ACL.

23.110 The national framework would also be supported by the consumer protection provisions in the TP Act, which are mirrored in almost all jurisdictions that would be uplifted to form part of the ACL.

23.111 In its submission on the RIS, the DSAA considered that only a very small part of the business operations of its members could be said to potentially hold the mischief sought to be addressed by cooling-off rights. While the fundamentals of direct selling, including network marketing, party plan and doorstep selling, remain, modern direct selling models are converging with other retail models, particularly distance selling. This poses a challenge, according to the DSAA, to adequately define the behaviour that should attract these rights.

#### Option C — Outcome

23.112 After an initial transitional compliance cost, Option C would benefit businesses, particularly those operating across State and Territory borders, by reducing compliance costs through the application of a single, simplified national law in all Australian jurisdictions. Transitional costs could be reduced by the introduction of a national law which broadly adopts the common requirements of existing laws on unsolicited selling and does not adopt a ‘highest common denominator’ approach when taking account of existing State and Territory consumer laws.

23.113 One example of a major cost driver for businesses employing direct marketing techniques is the varying permitted hours of visiting and calling consumers found in current jurisdictional laws. Option C would ensure consistency by taking a common approach to calling hours, such as the approach reflected in the DNCR Act.

23.114 In supporting a new provision that specifically regulates door-to-door and telemarketing sales nationally, Telstra’s submission on the RIS noted that a new provision is unlikely to come at a great cost to business given that regulation in this area is not new.

23.115 Foxtel noted in relation to its direct selling practices that a harmonised framework would enable the company to consistently advise its sales representatives of their obligations and produce uniform training materials, which would lead to more effective compliance and should reduce associated costs. Regarding its telephone sales practices, Foxtel also noted that the company bears significant compliance costs in adhering to the separate Victorian and NSW regulation, and that a national cancellation

notice introduced under Option C would reduce compliance costs for businesses.

23.116 ADMA also provided its qualified support for Option C on the basis that the new law not unfairly or unreasonably restrict direct and telephone sales, noting that the shortcomings of the current approach impose unnecessary cost and regulatory burden on business, particularly for businesses who conduct business in more than one jurisdiction. According to ADMA, this disadvantages consumers as they ultimately bear these unnecessary costs and suffer if a business has been unable to comply with the legislation due to its complexity.

23.117 Option C would benefit consumers by providing for enhanced consumer protection beyond that available for sales undertaken in retail contexts and over the internet. This would be a benefit in situations where unsolicited selling approaches pose greater risks of information asymmetry between suppliers and consumers, or particularly high pressure sales techniques targeting a range of vulnerable consumers, which are unlikely to be captured adequately by the current unfair practices provisions of the TP Act. This could occur where evidence of breaches of the broader consumer protection provisions are difficult to prove based on behaviour that occurs inside a private residence or other non-retail place. It could also provide clear avenues for consumer redress in instances where unfair conduct has taken place.

23.118 These additional consumer protections would be provided in a nationally consistent form with common provisions for all forms of unsolicited sales (including door-to-door and telephone sales). Nationally consistent consumer protection would encourage confidence in national consumer product and service markets.

23.119 A nationally consistent framework would provide indirect benefits for consumers, businesses and consumer agencies by making the unsolicited selling regime easier to understand, to comply with, under which to provide guidance to consumers and businesses, and to enforce.

23.120 This proposal would incur indirect costs associated with any change to regulation, such as loss of familiarity and the need for the government to educate businesses and consumers on the change. However, these costs would be offset by the benefits to government associated with a single national framework, including efficiencies in policy development and consistency in the enforcement approach of consumer agencies.

23.121 In their submissions on the RIS, Option C also received support from the MTAA and the Australian Finance Conference. The DSAA supported a harmonised national framework as well, subject to the exclusion from the harmonised framework of any form of identification requirement,

while FOXTEL's support was subject to not limiting the existing permitted trading hours for door-to-door sales.

### *Consultation*

23.122 SCOCA received 25 public submissions which provided responses to the 'Door-to-door trading and telemarketing' section of *An Australian Consumer Law: Fair markets — Confident consumers*. The submissions reflected a number of key themes, including:

- the need to harmonise regulation across State and Territory borders in order to reduce regulatory burden for operators;
- support for an approach based on models such as the Victorian or NSW FTAs;
- comments on the appropriate length of cooling-off periods and calling hours; and
- some support for industry specific regulation, while some stakeholders were cautious of the need for further regulation of door-to-door trading and telemarketing.

23.123 Harmonisation of the laws regulating door-to-door trading and telemarketing was widely supported by stakeholders, particularly as a way of reducing the regulatory burden for businesses. They identified costs of complying with separate jurisdictional regimes related to: audit requirements; the preparation of different versions of cooling-off notices; the training of sales representatives working in different jurisdictions; the administration of different systems and IT specifications; and the adoption of different internal policies and procedures. For door-to-door sales, one submission estimated that the costs of creating, formatting, reproducing and printing six different versions of a cooling-off notice are extremely high and that a uniform approach would reduce this cost by 70 per cent.

23.124 SCOCA also received 20 submissions in response to a consultation draft of this RIS. Of these 15 commented on unsolicited selling regulation.

23.125 Some consumer organisations favoured an outright ban on unsolicited selling, while some businesses argued that existing more general consumer protections adequately address unscrupulous practices. However, consistent with earlier consultation, most submissions from both business and consumer organisations generally welcomed a single national approach to regulation in this area.

23.126 In addition, some business organisations sought industry-specific exclusions from any unsolicited selling regulation, citing current

industry-specific regulation or the potential for self-regulation. In this regard it is noted that such industry specific regulation applies when expressly excluded, in the context of, rather than instead of, generic regulation.

### ***Conclusion***

23.127 In assessing the merits of each option under Proposal 1, consideration has been had to:

- maintaining current levels of consumer protection within the context of a generic, national consumer law and addressing community expectations;
- minimising and, where possible, reducing business compliance costs under a national consumer law;
- rationalising existing national, State and Territory consumer laws as much as possible; and
- the practical benefits of achieving national uniformity through the ACL and the adoption of the ACL by all States and Territories.

23.128 Option A, prohibiting all forms of unsolicited sales nationally, would carry the greatest impact on businesses, by forcing the end of previously legal, if regulated, business practices, and potentially create further complexity through an exemption regime. It would also potentially reduce consumer welfare, by denying consumers access to a sales method that can be convenient. Offsetting this to some extent, Option A would provide the clearest deterrent to a business engaging in unscrupulous selling practices, albeit at the greatest cost to those businesses engaged in presently legitimate unsolicited selling practices.

23.129 Under Option B, consumers would retain the choice of purchasing goods and services through direct and telephone sales, but would have a lower level of protection than that currently provided. Businesses would benefit through lower regulatory requirements and potentially greater access to consumers, particularly in respect of when they may contact consumers during the week and reduced risk of consumers withdrawing from sales agreements (such as through a regulated cooling-off period). Option B would not address specific concerns about the way in which businesses approach consumers in non-retail environments reducing certainty for both consumers and businesses about their rights and obligations. Option B, however would rely on the more general consumer protection provisions of the ACL to regulate any unscrupulous conduct that may occur in unsolicited selling environments, recognising that the specifics of the manner in which



consumers are approached, and contracts are formed, are not subject to express rules.

23.130 Under Option C, consumers would retain the specific protections that are currently provided by State and Territory unsolicited selling regimes, particularly with respect to the way in which unsolicited approaches are made and sales contracts are formed. Businesses would have to comply with a single regime. However, for those businesses operating in multiple jurisdictions, this may be offset to some extent by the rationalisation of the existing regimes into a single framework. In addition, for businesses operating in only a single jurisdiction, the ACL regime would not represent an increase in regulatory burdens over those currently imposed by the applicable State or Territory regimes.

23.131 While the costs and benefits identified for Option C are difficult to quantify, the merits of regulation under Option C are to be considered in the context of existing regulation in all States and Territories concerning unsolicited selling practices. In this regard, State and Territory governments have expressed strong views about the importance of specific unsolicited trading regulation as a means of addressing unscrupulous trader behaviour at a practical enforcement level and in providing consumers with clear information about their rights. In the consultation process, many business stakeholders have also indicated that a single national regulatory regime under the ACL would be preferable to the status quo, with very few stakeholders advocating a complete removal of regulation in this area (Option B).

23.132 For these reasons, Option C can be supported by all members of MCCA.

23.133 In developing Option C regard has also been had to:

- maintaining an existing consumer protection about which there are strong community views and expectations; and
- introducing a single, simplified national law, which reduces business compliance costs compared to the status quo.

## **Proposal 2: Asserting a right to payment for unsolicited goods and services, and unauthorised directory entries and advertisements**

### *Current regulation*

23.134 Generally, a transaction occurs by agreement between the buyer and the seller. However, in some cases, a trader may approach a person or business directly stating a claim for payment for goods or services which have been provided but were not requested. This practice is commonly

encountered as a scam, known as ‘false billing’, which is directed to small businesses and individual consumers. For example, the publisher of a publication may seek payment for printing of a directory entry or advertisement that had not been requested.

23.135 Section 64 of the TP Act prohibits asserting a right to payment for making an entry in a ‘directory’. While the definition of directory is broad enough to include some advertisements, the intention of the provision is not to provide protection in respect of certain types of publications: the provision aims to prohibit the practice of asserting a right to payment for something that a person has not asked for.

23.136 Most jurisdictions have provisions mirroring section 64 of the TP Act, which prohibits a person from asserting a right to payment for unsolicited goods or services, unless they have reasonable cause to believe they have a right to payment, or for making an entry in a directory without a person’s consent.

23.137 Proposal 2 would extend the operation of section 64 of the TP Act to explicitly cover advertisements under the ACL (that is in NSW, Victoria and, indirectly, in Queensland), and is aimed at ensuring there is not a loophole for asserting a right to payment for an entry in a publication if it cannot, in fact, be defined as a ‘directory’.

23.138 Currently, section 64 of the TP Act and equivalent State and Territory provisions operate on two levels:

- they prohibit a person from asserting a right to payment for goods and services unless it has reasonable cause to believe that there is a right to that payment.
- for directory entries, however, the corporation cannot seek payment from a person unless it has reasonable cause to believe that the person has **authorised** the making of the entry. The person is deemed not to have given such authorisation unless a document containing certain information, and signed by the person (or another authorised representative of the person), has been given to the person before the right to payment was asserted.

23.139 In both cases, the burden of proof rests with the person making the claim to a right to payment.

23.140 Section 64 and the equivalent State and Territory provisions do not apply to some legitimate publications that publish large numbers of advertisements, such as newspapers.

23.141 In NSW, Queensland and Victoria, there are also specific additional provisions that prohibit a supplier from seeking payment for the making of unauthorised advertisements. These are contained, respectively, in section 58A of the NSW FTA, section 52 of the Queensland FTA, and section 27 of the Victorian FTA. There is no equivalent of these provisions in the TP Act.

23.142 The NSW and Queensland provisions also specify that a warning statement must be included on documents that purport to be invoices for unsolicited goods or services, or unauthorised directory entries or advertisements. The requirements for the warning statement are specifically detailed in the provisions.

23.143 In NSW the following statement is required in at least 18 point font on the first page of the unsolicited document or invoice: 'THIS IS NOT A BILL. YOU ARE NOT REQUIRED TO PAY ANY MONEY.'

23.144 These provisions apply in addition to the general requirements relating to misleading and deceptive conduct and false or misleading representations in sections 52 and 53 of the TP Act (and their equivalents in the State and Territory FTAs).

*Evidence of consumer detriment*

23.145 There is some evidence that assertions of right to payment, particularly directed at businesses, occur:

- In the last two financial years, CAV recorded 580 enquiries and 50 complaints in relation to unsolicited goods or services. In one particular instance in 2007, CAV accepted an enforceable undertaking from a company to refrain from billing consumers for unsolicited premium SMS services as part of a telemarketing campaign.
- In the past three financial years, NSW Fair Trading has received 1,023 enquiries and 369 complaints about unsolicited goods and services. In the same period, it received 318 enquiries and 69 complaints about false billing and reports a reduction in complaints since section 58A was incorporated into the NSW FTA. A NSW Fair Trading report in 2003 identified about 170 publications involved in false billing practices, potentially defrauding businesses of \$20 million per year.<sup>38</sup>

---

38 Referred to by the then NSW Minister for Fair Trading, the Hon. Linda Burney MP, in the second reading speech for the Fair Trading (Amendment) Bill 2006 (NSW).

- The Queensland OFT receives over 100 enquiries and 20 complaints a month regarding assertion of a right to payment through false billing. A majority of these complaints are from small businesses about requests for payment for listings in directories or advertising in publications such as magazines.

23.146 In practice, small businesses, rather than individual consumers, are usually the targets of requests for payment for unsolicited directory entries and advertisements. The ACCC's *Scamwatch* website notes that 'a directory entry or unauthorised advertising scam is a scam that targets small businesses, trying to bill you for a listing or advertisement in a magazine, journal or business register/directory.'<sup>39</sup> The majority of the consumer protection provisions of the ACL will apply to businesses in their capacity as consumers. This is consistent with the application of the TP Act and State and Territory FTAs currently.

### ***Options for Proposal 2***

23.147 The status quo comprises a national provision in the TP Act and three jurisdictions (NSW, Queensland and Victoria) with both a provision mirroring the TP Act provision and an additional prohibition on a supplier from seeking payment for the making of an unauthorised advertisement.

23.148 Two options are considered for this proposal, and will be compared with the status quo:

- Option A: Incorporate the current section 64, without amendment, into the ACL.
- Option B: Extend the TP Act provision to apply to unauthorised advertisements and to include a regulation-making power in respect of requirements for the provision of a statement that an unsolicited 'invoice' is not a demand for payment.

### ***Impact analysis***

#### *Option A — Incorporate the current section 64, without amendment, into the ACL*

23.149 Option A would involve repealing the various State and Territory provisions. Section 64 of the TP Act would apply, without amendment, in each State and Territory as a provision of the ACL.

---

39 <http://www.scamwatch.gov.au/content/index.phtml/itemId/694342>.

23.150 The proposed ACL provision would prohibit a person from seeking payment for unsolicited goods or services, or for the making of unauthorised directory entries.

23.151 Section 64 of the TP Act currently provides a broad prohibition on demanding payment for any goods or services unless a corporation believes it has a right to that payment. These broad prohibitions apply to advertisements — in *Rizzo v Fitzgerald* (1988) 19 FCR 175, a person who sent invoices to a business for advertisements in a magazine which the business did not order was found guilty under subsection 64(2A). However, section 64 also provides a slightly different prohibition in respect of directory entries alone — that is, that a corporation shall not assert a right to payment, unless it has reason to believe that the person has authorised the making of the entry (as opposed to merely a belief that the corporation has a right to payment). Section 64 then provides additional rules around when a corporation is deemed to have demanded payment in respect of an unauthorised directory entry. Under Option A, the additional rules that apply to unauthorised directory entries would not apply to advertisements.

23.152 However, telemarketers can employ techniques, such as calling at busy periods, which make it difficult for their targets to remember details of the conversations, which in turn makes it difficult to prosecute offenders.<sup>40</sup> These same techniques are often employed in respect of unauthorised advertisements in a similar manner to directory entries.

*Option A — Outcome*

23.153 Under Option A, businesses in NSW, Queensland and Victoria would lose explicit protection against a supplier seeking payment for unauthorised advertisements. Instead these businesses would need to rely on the more general protections in section 64 of the TP Act in respect of unsolicited services, where they are targeted by unauthorised advertisement scams.

23.154 This option would not increase compliance cost on businesses and would potentially reduce some record-keeping costs for businesses that publish advertisements on behalf of others in NSW, Queensland and Victoria.

23.155 Option B — Extend the TP Act provision to apply to unauthorised advertisements and to include a regulation-making power in respect of requirements for the provision of a statement that an unsolicited ‘invoice’ is not a demand for payment

---

40 See ACCC *Scamwatch: Directories and advertising (false billing)* at <http://www.scamwatch.gov.au/content/index.phtml/itemId/694342>.

23.156 Option B involves including a section in the ACL based on an amended section 64 of the TP Act to include a prohibition on traders seeking payment for unauthorised advertisements, along the lines of the prohibition currently present in NSW, Queensland and Victoria. In addition, the ACL would include a regulation-making power for the Commonwealth Minister in respect of requirements for the provision of a statement that an unsolicited 'invoice' is not a demand for payment, along the lines of those in sections 58 and 58A of the NSW FTA. The relevant State and Territory laws would be repealed.

23.157 Advertisements include those placed in newspapers as well as magazines and other similar publications. Such publications are also the subject of complaints to consumer agencies, in addition to complaints relating to directory entries. Recent examples include complaints received by CAV in relation to companies which publish handbooks, magazines and online media.

23.158 Under Option B, businesses would receive protection against suppliers seeking payment for unsolicited goods or services, or unauthorised directory entries or advertisements. Regulators in all jurisdictions would be able to pursue suppliers on those matters. In addition, as raised by a submission from the Motor Trades Association of Queensland, this Option would ensure that the standing of a third party product or service is not compromised by such an advertisement, and the public would not be misinformed about this product or service. The requirement to include a warning statement on unsolicited invoices would make it easier for consumers and regulators to distinguish between genuine and scam invoices.

23.159 Experience in Queensland suggests that clarifying the application of the provision to unauthorised advertisements can help in the successful enforcement of the provision. In *Bauer v Power Pacific International Media Pty Ltd* [2007] FCA 349, a person and his sons were permanently restrained from undertaking certain business activities after continuing to assert a right to payment for including unauthorised advertisements in certain directories, journals and magazines. Importantly, the Queensland OFT has confirmed that it has not received any representations from legitimate publishers that the relevant Queensland FTA provision disrupts their business activities.

#### Option B — Outcome

23.160 Option B provides additional protection to consumers (including small businesses) across Australia from suppliers who seek payment for unsolicited goods or services, or unauthorised directory entries or advertisements, and there would only be one set of laws governing this area in Australia.

23.161 Option B would have a minimal impact on compliance costs for businesses that publish advertisements on behalf of other businesses, insofar as it would impose specific requirements on such businesses to produce and keep documentary evidence in relation to the authorisation of advertisements. Option B would have no compliance cost impacts on any other businesses.

23.162 Any compliance costs would be further mitigated by retaining the existing exemption in section 64 of the TP Act for legitimate publications that carry out large numbers of advertisements, such as newspapers.

23.163 In addition, the warning statement for unauthorised advertisements would be prescribed in regulations under the ACL, which impose additional compliance costs on businesses outside of NSW. This impact would be minimal as section 64 of the TP Act currently requires (at paragraph 64(5)(e)) that a person is taken to have asserted a right to payment for an unauthorised directory entry if they send any invoice stating the amount of payment without also stating at least as prominently that no claim is made to the payment. Businesses outside of NSW that would have to comply with the additional statement prescribed in the regulations in respect of both directory entries and advertisements, would already have to comply with TP Act requirement in respect of directory entries, which is similar in effect.

### ***Consultation***

23.164 *An Australian Consumer Law: Fair markets — Confident consumers* invited submissions on whether the operation of section 64 of the TP Act could be improved from its current form. Out of 102 submissions received, there was one submission in favour of extending the operation of section 64 of the TP Act to unauthorised advertisements, and none against.

23.165 In response to SCOCA's consultation draft of this RIS, six submissions commented on this proposal. Most submissions favoured the expansion of the current prohibitions in relation to directory entries to also cover advertisements.

### ***Conclusion***

23.166 In assessing the merits of each option under Proposal 2, consideration has been had to:

- maintaining current levels of consumer protection within the context of a generic, national consumer law and addressing community expectations;
- minimising and, where possible, reducing business compliance costs under a national consumer law;

- rationalising existing national, State and Territory consumer laws as much as possible; and
- the practical benefits of achieving national uniformity through the ACL and the adoption of the ACL by all States and Territories.

23.167 There are few, if any, justifications for allowing a business to assert a right to payment from a consumer (including businesses) for unsolicited goods and services. Neither option would impose a significant compliance cost burden on businesses, given that the provision in either form is intended to tackle conduct by certain businesses engaged in a form of scam, rather than legitimate business activities. There are few, if any, justifications for legitimate business conduct along these lines.

23.168 Option A would draw upon existing legislation in the TP Act, which already applies to a large segment of the business sector but would reduce protection available currently in some jurisdictions (NSW, Victoria and Queensland), in respect of scams based on unauthorised advertisements.

23.169 Option B would enhance the existing provision to make it explicit that it is an offence to assert a right to payment for unauthorised advertisements, and for those businesses issuing documents concerning potential payment for the provision of entries in directories or advertisements to require a warning statement as an additional layer of protection for consumers.

23.170 Both options would benefit consumers (including small businesses) by making it clear that purporting to require payment to the inclusion of an unsolicited entry in a directory is against the law. In practice, there is little to distinguish between unsolicited directory entries and advertisements in terms of the types of businesses targeted by these scams. However, imposing the additional clarification concerning unauthorised advertisements, including the requirement for a warning statement on marketing material, makes it easier for consumers and regulators to distinguish between genuine offers and scams.

23.171 NSW Fair Trading, in particular, has found it very useful to have such a provision as it is easier for them to pursue suppliers that are operating scams in breach of the prohibition on asserting a right to payment for unsolicited advertisements.

23.172 For these reasons, Option B can be supported by all members of MCCA.

23.173 In developing Option B regard has been had to:



- enhancing consumer protection and enhancing consumer confidence in the law concerning the seeking of payment for unsolicited goods and services, particularly directory entries and advertisements;
- the minimal impact that this proposal would have on legitimate business activities, except in relation to certain businesses operating scams and similar activities; and
- the existence of current regulation in NSW, Victoria and Queensland, covering the substantial majority of Australian consumers.

### **Proposal 3: Information standards**

#### *Current regulation*

23.174 The TP Act currently provides that the Commonwealth Minister may declare, by regulation, a standard to be a consumer product information standard. Section 65D provides that a corporation must not supply goods that do not comply with a prescribed information standard.

23.175 Section 65D of the TP Act allows such standards to be made in relation to:

23.176 the disclosure of information relating to the performance, composition, contents, methods of manufacture or processing, design, construction, finish or packaging of the goods; and

- the form and manner in which that information is to be disclosed on or with the goods;

as are reasonably necessary to give persons using the goods information as to the quantity, quality, nature or value of the goods. Section 65E provides that the Minister may declare a standard made by Standards Australia or another prescribed body to be an information standard for the purpose of section 65D.

23.177 Section 65D of the TP Act does not cover products that are for export only.

23.178 All jurisdictions, except Tasmania, have a general power to prescribe product information standards with respect to goods. Tasmania has a specific power under its *Flammable Clothing Act 1973* to prescribe how clothing is to be labelled.

23.179 Victoria, Queensland, SA and WA also have a general power to prescribe information standards for services. NSW does not have a general service information standard power but has industry specific powers to prescribe information standards for employment placement services and funeral goods or services.

23.180 Information standards are an example of regulatory intervention to address the market failure associated with information asymmetry. Lack of information on which to base purchasing decisions can lead consumers to make decisions which are not in their best interests. This can apply to services as well as goods. The service sector accounts for a significant share of economic activity in Australia and covers a wide variety of categories including financial services, property and business services, telecommunications, health services, travel and tourism, cultural and recreational services and personal services. Some services are subject to industry-specific regulation whereas others are subject only to the general fair trading laws.

23.181 The misleading and deceptive conduct laws in Australia set a minimum acceptable standard of commercial behaviour. They are reactive, providing for sanctions (for example prosecution and injunctions) and remedies (for example compensation orders) to protect the public when misled or deceived. Information standards, on the other hand, are proactive, requiring a positive standard of information disclosure that the market, on its own, has not provided.

23.182 Currently there are 26 different information standards in Australia — 24 which relate to goods and two which relate to services. Below is a table identifying the information standards currently in place.

<i>Categories</i>	<i>Jurisdiction</i>
Fibre content labelling for	NSW, Queensland, SA, WA, Tas
Care labelling for textiles	Cth, NSW, WA, ACT
Cosmetics	Cth, Queensland
Petrol price signs	NSW
Petrol composition	Vic
Leather goods	Queensland
Footwear	Queensland, SA, WA, Tas
Furniture	Queensland, SA, WA
Tobacco products labelling	Cth
Opals	SA
Builders plates for vessels	WA
Employment placement	NSW
Funeral goods/services	NSW
<b>Total categories: 13</b>	<b>Total information standards: 26</b>

23.183 This RIS considers the impact of including an information standards regulation-making power in the ACL, and not the relative merits of prescribing particular standards.

***Options for Proposal 3***

23.184 The status quo comprises the mixture of TP Act and State and Territory provisions with differing standards relating to goods or, in some cases, goods and services.

23.185 Two options are considered for this proposal, to be compared with the status quo:

- Option A: Incorporate the TP Act information standards power, which applies to goods only, without amendment into the ACL.
- Option B: Include a general power in the ACL to prescribe information standards in relation to both goods and services.

23.186 Both Options A and B would involve including a regulation making power in the ACL and in itself will not create regulatory burdens. There currently exists information standards regulation-making powers in all jurisdictions. At the Commonwealth level, under the TP Act, three information standards are currently in place, and before a new standard can be prescribed a regulation impact analysis is required.

23.187 Under both options, the three current information standards in the TP Act will be included in the ACL and continue to apply nationally, whilst existing State and Territory standards will be assessed to determine whether it is appropriate to 'grandfather' them under the ACL. For a standard to be 'grandfathered' in the ACL it would need to be agreed to by MCCA under the existing consensus voting arrangement. A standard would not be 'grandfathered' unless it is considered appropriate following an assessment by MCCA.

23.188 Under both options, the regulation-making power would be incorporated in the ACL as a general information standards power for goods, and in the case of Option B for goods and services. Currently, the information standards regulation-making power (sections 65D and 65E) are located in the product safety and information provisions of the TP Act, however it would be appropriate to more clearly differentiate the product information standard power from product safety in the ACL.

***Impact analysis***

***Option A — Incorporate the TPA information standards power in the ACL, which applies to goods only***

23.189 Under Option A, it would not be possible for an information standard to be prescribed in respect of services under the ACL. However, it would still be possible for industry specific consumer protection legislation to prescribe information requirements relevant to particular businesses<sup>41</sup>.

23.190 New information standards would be made under the ACL by the Commonwealth Minister. However, each new proposal would be subject to a separate regulation impact assessment at the time it is proposed involving an analysis of its likely impacts, and then subject to the IGA voting requirements. New information standards could only be made in respect to goods and not to services.

**Option A — Outcome**

23.191 Transfer of the TP Act information standards regulation-making power to the ACL would have no direct impact on business compliance costs. Compliance costs under this option would be related to the extent to which existing State or Territory information standards are ‘grandfathered’ and nationalised, and in future with the creation of new standards. Any new standards would be subject to the regulatory impact analysis process. Having a single set of nationally consistent information standards would also reduce compliance costs for businesses.

23.192 Despite the potentially lower costs for business, consumers would not be afforded the protection of any existing State or Territory information standards that are repealed and not ‘grandfathered’ in the ACL, nor information standards for services, should they be required.

***Option B — Include a general power in the ACL to prescribe information standards in relation to both goods and services***

23.193 Under Option B, the ACL would include a more general information standards regulation-making power than that currently in the TP Act, along the lines of that in South Australia, which applies to both goods and services.

---

41 The ACL establishes a generic consumer law. The ACL allows for the continuation of industry specific regulation provided it is not inconsistent with the ACL or alters the effect of the ACL. The IGA requires MCCA to consider the extent of ‘inconsistent with or alters the effect of’ the ACL, including in respect of industry specific regulation, once implementation of the initial text of the ACL legislation is complete.

23.194 The information standard making power in the South Australian *Trade Standards Act 1979* allows information standards to be made that:

- prescribe or regulate the content of information in respect of goods or services, or the manner or form in which information is to be provided in respect of goods or services;
- provide that information of a specified kind is not to be provided in respect of goods or services, or that information in respect of goods or services is not to be provided in a specified manner or form;
- require the provision of specified information in respect of goods or services and prescribe the manner and form in which it is to be provided;
- assign a meaning to information of a specified kind in respect of goods or services; and
- prohibit the alteration or variation of, or any interference with, any information provided in compliance with any regulation.

23.195 Markets for goods and services are inherently subject to asymmetric information; that is, suppliers almost invariably know more about the characteristics of the goods and service being offered for sale than consumers. The information standards power in the TP Act helps to minimise the impact of asymmetric information by requiring information to be disclosed to consumers about the quality and nature of the goods. Information standard requirements provide public benefits by allowing consumers to access information which could affect their health, comfort or safety. For example, the current cosmetics information standard in the TP Act contains ingredient labelling requirements to allow consumers to identify ingredients which they may be allergic to or which may cause adverse reaction. It would not be possible for a consumer to observe these characteristics of a good independently of information provided by the supplier.

23.196 The National Competition Policy *Review of the Fair Trading Act 1987*<sup>42</sup> has found that the product labelling requirements under the NSW information standards power addressed potential information asymmetry by ensuring that appropriate consumer information is attached to certain products, and noted that it may be desirable in the future to amend the NSW

---

42 *National Competition Policy Review — Fair Trading Act 1987 and Door-to-Door Sales Act 1967*, NSW Department of Fair Trading (2002).

fair trading law to provide the flexibility for information standards to be prescribed for services.

23.197 Including an additional power for the Minister to declare information standards for services would enable future action to be taken where considered appropriate. Informed choices through a ready access to clear and accurate information about goods, as well as services, can help to address information asymmetry in the marketplace and thereby contribute to consumer confidence, which is vital for effective market operation. For instance, the funeral service standard in NSW ensures that funeral directors provide consumers (amongst other things) with information about the costs and coverage of their ‘basic funeral’ option (if any), while the employment placement services standard requires employment service providers in NSW to inform consumers (amongst other things) of the prohibition on misleading conduct and the ability to lodge a complaint with NSW Fair Trading.

23.198 New information standards would be made by the Commonwealth Minister under the ACL and would apply nationally. New standards could apply to goods (as in the current TP Act and Option A) or to services (unlike the current TP Act and Option A). Before a new standard can be made it would be subject to a separate regulatory impact assessment and to agreement in accordance with IGA voting processes.

#### Option B — Outcome

23.199 Option B would involve including a general information standards regulation-making power in the ACL, which in itself will not create additional regulatory burdens. Where the power is used to prescribe a new information standard, the impact it will have on business compliance costs would be related to the particular standard prescribed. The compliance costs would be limited to businesses affected by the new standard, and may include needing to adjust existing operations to comply with the new standard. Some of these compliance costs, for instance, the costs associated with attaching new labels to certain goods, may be passed onto consumers. However, there are also potential cost savings for national suppliers in no longer needing to comply with different information requirements between the various jurisdictions. In its submission on the consultation RIS, the MTAA saw national uniformity as a positive development for both businesses and consumers, while a confidential submission welcomed a proposal to nationalise information standards, believing that national standards would ensure uniformity for national retailers.

23.200 The likely costs and cost savings associated with prescribing a new standard would equally apply to both Options A and B. However, in extending coverage to services that could be subject to a standard (as in Option B) a potential benefit for suppliers is that it could reduce damages

claims and other court actions from consumers arising where the dispute relates to absent or inadequate information being provided.

23.201 Option B would provide both the protection of the existing national product information standards, while broadening the scope of coverage to services that could be subject to a standard in the future. Expanding the regulation-making power to cover services would provide the Government with a 'means' to encourage service providers to behave in a certain manner and disclose information about its services that may not be apparent to consumers, should it be required. The power would also help to address information asymmetry in the services sector where, for instance, particular information that should be disclosed to consumers is not, and the market on its own has not been providing this information, where it is required. The services sector accounts for a significant share of economic activity, and cover a variety of categories including financial property, telecommunications, health, travel and tourism, and recreational services. Some of these services are currently subject to industry-specific regulation in the States and Territories.

23.202 The regulation-making power under Option B would allow information standards to apply to goods or services supplied in Australia. The likely benefits of including a power in the ACL of the kind proposed in Option B, which includes nationally consistent coverage and the ability to cover services, would exceed the potential cost to consumers of reduced coverage if any existing State or Territory standards are repealed and not 'grandfathered' in the interim. There was considerable support from the submissions received on the consultation RIS for including services in the coverage of the information standards power. For instance, the MTAA supported Option B and believed there is no reason for services to not form part of the information standards regime, while the Financial and Consumer Rights Council, in offering its support for Option B, believed that it was essential for consumers to be able to access clear and accurate information about goods or services they may wish to purchase.

23.203 The expanded regulation-making power would only be exercised to make a new standard on information requirements for goods or services that are of a particular kind and which the market on its own has not provided. Further, any new standard would not be introduced unless its costs and benefits have been considered under a separate regulatory impact analysis, and approved under the IGA.

23.204 MTA Queensland, which preferred Option B, was of the view that the power should be used where there is evidence that market failure has occurred or self regulation alone has been insufficient to protect industry and consumers.

23.205 The majority of submissions received on the consultation RIS which commented on this proposal, were in favour of Option B for information standards to apply to both goods and services. The Australian Toy Association and Myer did not express support for Option A or Option B, but rather made more general comments on the location of the information standards power in the ACL legislation.

### ***Consultation***

23.206 SCOCA received 10 submissions relating to this proposal in response to the consultation draft of this RIS. Most business and consumer stakeholders considered that the Government should have legislative competence to make information standards in respect of services. However, some businesses cautioned against this power being used too often.

### ***Conclusion***

23.207 In assessing the merits of each option under Proposal 3, consideration has been had to:

- maintaining current levels of consumer protection within the context of a generic, national consumer law and addressing community expectations;
- minimising and, where possible, reducing business compliance costs under a national consumer law;
- rationalising existing national, State and Territory consumer laws as much as possible; and
- the practical benefits of achieving national uniformity through the ACL and the adoption of the ACL by all States and Territories.

23.208 Both options would continue to provide the Commonwealth Minister with the ability to make new information standards in the future, if and when required. This, in itself, would not add to compliance costs. However, a new information standard made pursuant would carry associated compliance burdens.

23.209 Under both options, each new proposal would be subject to a separate regulatory impact assessment on a case-by-case basis to determine if a new standard is warranted, before being subject to the IGA voting arrangements.

23.210 Also common to both options would be a single set of information standards that would apply nationally. This would ensure that consumers



benefit from the additional protections offered by any information standards that are considered necessary. Businesses that operate in more than one jurisdiction would also face reduced regulatory complexity.

23.211 While the impacts of both options are similar, Option B would offer additional flexibility for Governments to respond to situations where information standards may be warranted for certain services. While far less frequent than standards in relation to goods, information standards in relation to certain services do already exist.

23.212 While offering the Commonwealth Minister the ability to prescribe information requirements in respect to both goods or services, new standards would only be made where the circumstances warranted it, for instance, if the market has not been providing the information or consumers' health or welfare may be in jeopardy, and subject to regulatory impact assessments and IGA voting requirements. Further, the power to make information standards already exists in some jurisdictions, such as SA, and in NSW information requirements have been applied to services under industry-specific regulations. Despite information standards for services being prescribed sparingly, those jurisdictions that have the extended power have expressed the view that it has proved to be an effective and useful tool for governments to require certain consumer information to be disclosed where there has been a market failure and industry on its own has failed to provide the information.

23.213 For these reasons, Option B can be supported by all members of MCCA.

23.214 In developing Option B, regard has been had to:

- enhancing consumer protection by extending the potential application of information standards to services;
- ensuring that the exercise of that power is, itself, subject to regulatory impact assessment, so as to minimise any potential regulatory burdens;
- the adoption of a single, national approach to information standards, as they are used in relation to goods and services as agreed by all Australian governments.

## **Part C      Reforms which reflect best practice in State and Territory laws**

### **Introduction**

23.215    A number of best practice reform proposals relate to laws that exist in only some jurisdictions. This is the result of legislative and policy developments by State and Territory governments to deal with specific issues that may have arisen in particular jurisdictions.

23.216    As with the national consistency reforms, the separate consumer protection laws at the national, State and Territory levels can be harmonised or removed to eliminate regulatory duplication and inconsistency. However, as only some jurisdictions have particular regulations, consideration of the factors for and against each proposal is required, including:

- the nature of the problem facing consumers;
- the appropriate policy response to address these consumer issues, including non-regulatory approaches;
- what benefits may result from the change and whether these can be quantified; and
- whether the proposed change is appropriate for inclusion in a law which applies generic consumer protections in all Australian jurisdictions.

23.217    All of the proposals considered consist of nationally consistent regulation in all States and Territories through the applied ACL and the assessment of those proposals has regard to the matters set out on page 5 above. The introduction of nationally consistent regulation would provide significant compliance cost savings for businesses, which would only have to comply with a single, uniform set of consumer protection provisions. This would result in cost savings which should flow through to consumers. There would also be benefits for consumers through familiarity and consistency of legislation, particularly when purchasing from interstate. Benefits also flow to consumer agencies through easier cross-border enforcement and the ability to issue consistent, national guidance.

23.218    The IGA specifies that the Commonwealth, State and Territory parliaments ‘will use best endeavours to repeal, amend or modify any legislation that is inconsistent with or alters the effect of the Australian

Consumer Law'.<sup>43</sup> In accordance with the IGA, there will be a separate review of industry-specific legislation following the full implementation of the ACL.

#### **Proposal 4: Liability of recipient of unsolicited services**

##### *Current regulation*

23.219 Section 65 of the TP Act provides that, subject to certain conditions, a person is not liable to make any payment for any unsolicited goods supplied to them, and is also not liable for loss or damage to the goods unless the loss or damage is a result of a wilful or unlawful act by the person.

23.220 Section 65 of the TP Act complements section 64, which prohibits a person from asserting a right to payment for unsolicited goods and services. Section 65 provides a clear statement of the extent to which a person or businesses in receipt of unsolicited goods can be held liable for those goods.

23.221 Most States and Territories have a provision in their FTAs that mirrors section 65 of the TP Act. In addition, Victoria also has section 26 of the Victorian FTA, which provides similar consumer protection in relation to unsolicited services. This protection against unsolicited services is not replicated in any other jurisdiction.

23.222 Examples of unsolicited services identified by CAV include:

- unsolicited SMS services;
- where a consumer has returned a product (typically electronic goods) for a repair quote and the supplier chooses to perform the repairs without obtaining the consumer's authorisation beforehand; and
- where a consumer requests a particular service to be performed (typically on a motor vehicle or a computer), but the supplier goes beyond what is requested.

23.223 Consumers are particularly disadvantaged in their dealings with suppliers who present them with unsolicited goods or services, particularly where the consumer's rights and obligations in respect of those goods or services are uncertain. This is particularly the case when a trader asserts a right to payment for unsolicited goods or services. It is timely to consider

---

43 Council of Australian Governments (2009). *Inter-Governmental Agreement for the Australian Consumer Law*, 3.2.

whether it would be inconsistent for consumers not to receive protection from the liability for unsolicited services.

23.224 Consumers may also be reluctant to decline an unsolicited service so as not to jeopardise an ongoing relationship with the supplier. In those cases, suppliers are relying on inattention, inaction or non-assertiveness from consumers in order to profit from their activities.<sup>44</sup> This may apply in particular where a business is dealing with another business as a supplier.

***Evidence of consumer detriment***

23.225 In the last two financial years, CAV recorded 849 enquiries and 135 complaints in relation to unsolicited goods and services across a wide range of industries.

23.226 There is evidence that unsolicited services scams are directed at both individual consumers as well as businesses.

- The ACCC, on its *Scamwatch* website, highlights the existence of false billing scams and so called ‘office supply scams’. These are scams it describes as involving ‘a scam that involves you receiving and being charged for goods that you did not order’.<sup>45</sup> Scamwatch also highlights various scams associated with mobile phones, including the provision of unsolicited services such as ring tones, SMS services and scams involving missed calls and text messages which lead to the acquisition of unsolicited services.<sup>46</sup> What is common to these forms of business activity is that they lead to the acquisition of services by consumers when they did not solicit them and are not, in many cases, aware of their acquisition of those services.
- In NSW, the NSW OFT has advised that complaints in relation to unsolicited services generally relate to ‘false billing’ by businesses where the services performed have not been actively sought or authorised. Recently, the NSW Minister for Fair Trading warned consumers of a scam where

---

44 NZ Ministry of Consumer Affairs (2001). *Regulation of Unsolicited Services: Options for Reform*, 6-7.

45 See <http://www.scamwatch.gov.au/content/index.phtml/tag/OfficeSupplyScams>.

46 See <http://www.scamwatch.gov.au/content/index.phtml/tag/RingToneScams>;  
<http://www.scamwatch.gov.au/content/index.phtml/tag/MissedCallsTextMessages>;  
<http://www.scamwatch.gov.au/content/index.phtml/tag/SMSCompetitionTriviaScams>.

false bills are being sent for registering trademarks or brands online<sup>47</sup>.

#### ***Options for Proposal 4***

23.227 The status quo comprises a national provision (section 65 of the TP Act), with most States and Territories mirroring it in their FTAs. Victoria also has an additional section that provides similar consumer protection in relation to unsolicited services.

23.228 Two options are considered for this proposal, and would be compared with the status quo:

- Option A: Include a provision in the ACL based on the existing TP Act provisions only, without amendment.
- Option B: Include a provision in the ACL based on the existing TP Act provisions, amended to cover unsolicited services and limitation of liability as a result of the supply of such services.

#### ***Impact analysis***

##### *Option A — TPA provisions only*

23.229 Option A would involve retaining the existing TP Act provision without amendment. The various State and Territory provisions would be repealed. The proposed ACL provision would ensure that a person is not liable to pay for unsolicited goods from a supplier, and is not liable for the loss or damage to those goods unless the loss or damage is caused by wilful or unlawful action by that person. Despite the repeal of section 26 of the Victorian FTA, it is noted there is still some protection for consumers from unsolicited services under this option, as a person is still prohibited from asserting a right to payment for unsolicited services under subsection 64(2A) of the TP Act, which will be incorporated into the ACL. However, the recipient's liability, in the event that a claim is made, would be uncertain.

##### Option A — Outcome

23.230 Option A would have no significant compliance cost impacts. Businesses dealing with consumers outside of Victoria would face no change in the current regulatory environment.

---

47 The Hon Virginia Judge MP, *Don't get taken in by trademark scams* (Media Release, 6 November 2009).

23.231 For suppliers and consumers in Victoria, there may be some reduction in certainty as to liability for unsolicited services, as this would be a question to be determined on case-by-case basis by a court where a dispute arises.

23.232 Fair trading officers in Victoria would no longer rely on the unsolicited services provisions to pursue suppliers that have charged consumers for unsolicited services, but would instead have to use other provisions, such as the prohibition against asserting a right to payment for unsolicited services, under the ACL. While no prosecutions have been commenced in relation to the Victorian provisions, CAV has indicated that the provisions are useful in their conciliation and dispute resolution activities. Usually, in these instances, CAV would approach a supplier on behalf of a consumer to attempt to resolve a dispute before it is escalated to resolution by the courts, and generally they are successful in doing so.

*Option B — TPA provisions, provisions dealing with unsolicited services and limitation of liability as a result of the supply of such services*

23.233 Section 64 of the TP Act was introduced in 1975 to prevent a trader from asserting a right to payment for unsolicited goods, with the coverage for unsolicited services added in 1977. Unsolicited services was added to section 64 to deal with the practice of tradespeople and repairers doing unrequested work, particularly on private residences, and then demanding payment from the occupier. Section 65, was subsequently introduced in 1986 to supplement the effect of section 64, by providing clarity about liability for damage or loss to goods in situations where goods have already been supplied, as well as liability for payment for the goods themselves.

23.234 Australian markets have evolved in the intervening two decades to become more service-oriented, so it is timely to consider whether it is necessary to expand section 65 to cover unsolicited services also.

23.235 Services do not raise the same issues as goods in respect of the potential for loss or damage to the services themselves after they have been provided, nor is it possible for an unsolicited service to be returned to the supplier after it has been provided. However, the provision of unsolicited services can still give rise to concerns about liability for loss or damage to a consumer's or a third party's property as a result of the provision of unsolicited services. In addition, while the TP Act and most equivalent State and Territory FTA provisions currently prevent a person from asserting a right to payment for unsolicited services that they have provided, they do not provide any guidance on whether a consumer is actually liable to pay for that service if a request for payment has been made.

23.236 In its submission to the consultation RIS, Telstra commented that the Victorian provision on unsolicited services does not appear to have any

meaningful or practical effect on business practices, as it has not been relied upon in court or tribunal cases. While this is true, the experience of CAV is that the provision is very useful in their conciliation and dispute resolution work, which provides consumers with a quicker and less costly method of resolving a dispute with suppliers.

23.237 For these reasons, under Option B, the existing section 65 of the TP Act would be incorporated into the ACL. In addition, a provision similar to the Victorian provision, which excuses a person from liability to pay for unsolicited services, or for loss or damage resulting from the supply of those services, would also be incorporated into the ACL.

#### Option B — Outcome

23.238 The compliance cost impact of option B would be limited to businesses that provide unsolicited services in anticipation of receiving payment for those services. Even for these businesses, such costs would be likely to be minimal as expanding section 65 for the purposes of the ACL to provide limitation on liability for the receipt of unsolicited services would clarify the legal position only. In the absence of this amendment, it is not clear that a recipient of unsolicited services would be liable for those services, as this would be decided by a court on a case-by-case basis in the event of a dispute.

23.239 Under Option B, consumers across Australia would benefit from a clear statutory rule that they are not liable to pay for unsolicited services. In addition, consumers would also be protected against a liability arising as a direct result of the supply of such services, rather than just the services themselves. This would remove an inconsistency in most consumer protection laws, which currently protects consumers from liability for unsolicited goods, but not unsolicited services.

#### *Consultation*

23.240 *An Australian Consumer Law: Fair markets — Confidential consumers* invited submissions on whether section 65 of the TP Act should be extended to services. Nine submission commented on this proposal. Consumer organisations and representatives of the legal profession supported extending section 65 to services.

23.241 SCOCA received six submissions in relation to this proposal in response to a consultation draft of this RIS. Generally business and consumer organisations did not object to the extension of section 65 of the TP Act to cover services. In this regard consumer organisations pointed to the increasing significance of services in the economy.

23.242 One business stakeholder indicated that the current Victorian provision has little practical effect, on the grounds that it is not often litigated.

***Conclusion***

23.243 In assessing the merits of each option under Proposal 4, consideration has been had to:

- maintaining current levels of consumer protection within the context of a generic, national consumer law and addressing community expectations;
- minimising and, where possible, reducing business compliance costs under a national consumer law;
- rationalising existing national, State and Territory consumer laws as much as possible; and
- the practical benefits of achieving national uniformity through the ACL and the adoption of the ACL by all States and Territories.

23.244 There are few, if any, legitimate business justifications for making a consumer liable for goods or services they did not contract for. The proposals would make it clear to consumers that they have no liability in such circumstances and that there is a clear negative potential consequence for traders in supplying unsolicited goods or services.

23.245 Neither option would impose a significant compliance cost on legitimate businesses, given that the provision in either form is intended to tackle conduct by certain businesses engaged in a form of scam, rather than legitimate business activities. Option A would draw upon existing legislation in the TP Act.

23.246 Option B would enhance the existing provision to make it explicit that it is an offence to assert a right to payment for the provision of unsolicited goods and services. While there are some arguments to suggest that aspects of this practice may be able to be dealt with under other generic provisions, an explicit provision of this sort has been often used in Victoria to assist in conciliation and dispute resolution, providing consumers with a quicker and less costly method of resolving a dispute with suppliers. In CAV's view, the existence of an explicit provision facilitates knowledge of the law by both consumers and businesses and encourages the resolution of disputes in a way which is preferable to taking action in a court or tribunal, which would be desirable in a national regulatory framework.



23.247 Both options would benefit consumers (including small businesses) by making it clear that purporting to require payment to the provision of unsolicited goods and services is against the law. However, Option B draws on legislative and enforcement experience that has proven effective in dealing with scam activity in some jurisdictions, most notably Victoria.

23.248 For these reasons, Option B can be supported by all members of MCCA.

23.249 In developing Option B regard has been had to:

- enhancing consumer protection and confidence in the enforcement of the law concerning the provision of unsolicited goods and services;
- the minimal impact that this proposal would have on legitimate business activities; and
- the adoption of a single, national approach to the law in this respect, and its enforcement nationally by all consumer agencies, as agreed by all Australian governments.

## **Proposal 5: Standards of disclosure for information under the Australian Consumer Law**

### *Current regulation*

23.250 The PC has previously recommended that information disclosed to a consumer should be comprehensible, with a focus on content, clarity and form of disclosure, in order to facilitate good consumer decision-making.<sup>48</sup>

23.251 Victoria and SA have mandatory minimum disclosure requirements for consumer documents. Section 163 of the Victorian FTA requires that a consumer document:

- must be easily legible;
- to the extent that it is printed or typed, must use a minimum 10 point font; and
- must be clearly expressed.

23.252 Subsection 163(1) of the Victorian FTA defines a ‘consumer document’ to mean a consumer contract, or a statement, notice or other

---

48 PC (2008) *Review of Australia’s Consumer Policy Framework*, recommendation 11.1.

document required by the Victorian FTA. A 'consumer contract' is defined in section 3 of the Victorian FTA as an agreement, whether or not in writing and whether of specific or general use, to supply goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption, for the purposes of the ordinary personal, domestic or household use or consumption of those goods or services.

23.253 SA also has similar requirements in section 17 of the *Consumer Transactions Act 1972* (SA), which provides that a provision of a consumer contract that is either:

- hand-written and is not clear and legible; or
- is printed in a typeface or dimensions that do not comply with the regulations,

is unenforceable.

23.254 The definition of a consumer contract in the SA legislation is different to that in the Victorian legislation, but would capture a similar range of agreements.

23.255 In addition, other Commonwealth and State and Territory consumer laws contain specific minimum disclosure requirements for particular documents, although they do not provide a general requirement for disclosure. For example, under the *Corporations Acts 2001*, Financial Services Guides are required to comply with Part 7.7 of that Act, which specifies information that needs to be included, such as details of the entity providing the services, remuneration provided to the entity and related entities, and dispute resolution systems.

23.256 The Victorian and SA requirements impose a basic, minimum standard, requiring material information about goods and services to be provided to consumers upon request. It sets a positive standard of conduct required from suppliers, rather than relying only on negative prohibitions in other provisions of the law, such as misleading and deceptive conduct, which may be enlivened where a document is sufficiently unclear to be misleading. Under the Victorian provisions, where a document is found to be unclear or illegible, the regulator can apply to a court or tribunal to prohibit the supplier from using that provision in the same or similar terms in other consumer documents.

#### *Evidence of consumer detriment*

23.257 CAV has advised that section 163 of the Victorian FTA is often used in conjunction with the Victorian unfair contracts terms provisions. In the last two financial years, CAV has received 153 enquiries and 11 written

complaints that involve section 163 of the Victorian FTA. As an example, a membership agreement form was found to have a clause that was not clearly expressed (see *Director of Consumer Affairs Victoria v Craig Langley Pty Ltd and Matrix Pilates & Yoga Pty Ltd* [2008] VCAT 482 and VCAT 1332). The companies in question were restrained from using that clause in future membership agreements.

### ***Options for Proposal 5***

23.258 The status quo comprises the standard of disclosure requirements in section 163 of the Victorian FTA, with no specific requirements in the TP Act.

23.259 Three options are considered, and would be compared with the status quo:

- Option A: Not adopting standard of disclosure requirements in the ACL.
- Option B: Adopting a requirement that documents specifically required to be provided under the ACL must be clear and legible.
- Option C: Adopting a requirement that all consumer documents must be clear and legible.

### ***Impact analysis***

#### ***Option A — Not adopting standard of disclosure requirements in the ACL***

23.260 Option A would involve the repeal of section 163 of the Victorian FTA, as part of Victoria's application of the ACL, as well as the repeal of section 17 of the South Australian Consumer Contracts Act.

23.261 Option A provides a consistent set of national consumer protection laws in relation to the requirements for content in consumer documents. However, consumers in Victoria and South Australia would lose their current protection and would have to rely on other, more generic consumer protection laws for redress should they encounter suppliers that attempt to use consumer documents which are not clear or are illegible. It has also been suggested that the current laws prohibiting misleading or deceptive conduct do not ensure that all disclosure documents adequately highlight all of the important information about products.<sup>49</sup>

---

49 Financial Ombudsman Service (2009) *Submission to the An Australian Consumer Law: Fair markets — Confident consumers paper*, page 5.

Option A — Outcome

23.262 This option would have a minimal impact on compliance costs. Businesses in Victoria and South Australia may face lower compliance costs to the extent that they do not have to consider the possibility of a challenge to their continued use of a particular form of drafting in consumer documents, and the option also would not affect the range of documents that must be provided by businesses. However, this potential reduction in compliance costs would be limited by the fact that businesses would not be relieved of the more general requirement to ensure they do not breach the prohibition against misleading and deceptive conduct which currently exists in all jurisdictions' consumer protection laws and will be included in the ACL.

23.263 Option A would impose a higher burden on consumers in Victoria and South Australia that seek to address the use of an unclear form of drafting in a consumer document that has been presented to them by a supplier. In such cases a court would need to be satisfied that the lack of clarity is sufficient to be misleading or deceptive, rather than unclear. The option would also prevent a regulator from seeking a court or tribunal order to require a supplier to alter the drafting a document that is held to be unclear or illegible.

*Option B — Adopting a requirement that documents specifically required to be provided under the ACL must be clear and legible*

23.264 Under Option B, the provisions in section 163 of the Victorian FTA would be incorporated, in principle, into the ACL, and would apply to documents expressly required to be provided under the ACL only. However, the font size requirement in section 163 would not be adopted under the ACL. Documents which would be required to be given under the ACL include a cancellation form under the proposed unsolicited selling regime and the requirements for receipts and itemised bills.

23.265 Consumer contracts, and all other documents that are not expressly required to be provided under the ACL, would not be subject to the general clarity and legibility requirements.

23.266 A distinct rationale for this approach can be drawn where Parliament has expressly considered that particular documents (those required under the ACL) are important and must be provided to consumers. In this case, an additional requirement that such documents are clear and legible would accord with the importance that Parliaments have placed on them.

23.267 Businesses that are not trading in Victoria or South Australia may incur compliance costs to ensure that their consumer documents comply with

the requirements under this option, to the extent that they do not already do so. However, this would be mitigated to some extent by allowing for less prescriptive requirements as to the clarity of consumer documents (such as minimum type font) than currently required by the South Australia and Victorian provisions.

23.268 Documents should be legible for consumers with normal eyesight, and a specific requirement on font might be unnecessarily restrictive, depending on the circumstances of the situation, and a submission to the consultation RIS has suggested that an appropriate benchmark for a document that is clear and legible is that it should be readily understood by persons in the environment where it would be given to the consumer, such as a shop or an office. Prescribing a specific font requirement may not be appropriate for every situation, although a submission to the consultation RIS suggested that there is no evidence that the font size requirements have caused undue restriction on business practices in Victoria.

23.269 Compliance costs could also be mitigated through the provision by consumer regulators of guidance on what is considered 'clear and legible' in consumer documents required to be provided under the ACL.

#### Option B — Outcome

23.270 Option B would imply a reduction in compliance costs for businesses currently operating in Victoria and SA, similar to those for Option A, but reduced to the extent that regulation in respect of documents expressly required under the law would remain.

23.271 Additional compliance costs would be imposed on businesses that are not currently subject to the Victorian or SA provisions. These additional compliance costs would be limited to a small number of documents and would be unlikely to be significant. Businesses would also need to familiarise themselves with regulators' and courts' interpretations of the clarity and legibility requirements, in order to minimise the potential for documents to be held not to meet these criteria. In the event that a document is held to be unclear or illegible, a business would incur costs in redrafting that document.

23.272 Under Option B, prescribed documents required to be given under the ACL must be clear and legible, providing more certainty for consumers on their rights and businesses on their responsibilities, compared to the current situation which relies on generic protection in relation to, for example, misleading or deceptive conduct. The potential compliance burden of Option B for businesses is lowered by a less prescriptive approach than mandating a particular font size for text in consumer documents, such as in the Victorian FTA currently.

23.273 While there is no specific regulation in this area in the TP Act, the general prohibition against misleading or deceptive conduct would already imply the need for documents provided in accordance with regulation to be clear and legible. Consequently, the benefits to consumers of Option B would not be as great as if there was no regulation in this area. However, the costs to businesses of implementing the new requirements would be reduced. Furthermore, as businesses are required to implement the ACL, the costs of this requirement in addition to the implementation of the requirement for the issuing of certain documents under the ACL would mean that these costs are incremental, at most.

*Option C — Adopting a requirement that all consumer documents must be clear and legible*

23.274 Option C is similar to Option B, but extends the coverage of the proposed laws to all consumer documents, rather than just those required under the ACL. This would effectively replicate the current Victorian and SA provisions. The number of documents covered by this option is clearly greater than those covered by Option B.

23.275 It is noteworthy that MCCA has also proposed that the ACL contain a law regulating unfair contract terms (legislation to implement this proposal is currently before the Australian Parliament)<sup>50</sup>. The proposed unfair contract terms law would require a court to consider the extent to which a term is transparent in determining whether or not a term in a standard form consumer contract is unfair (and consequently cannot be enforced). Transparency for the purposes of the UCT law includes the concepts of legibility and clarity.

23.276 The requirement for clarity and legibility would overlap to some extent with the proposed unfair contract terms law, but would still have a substantive additional effect in relation to:

- terms of consumer documents that are not standard form contracts (and hence would not be covered by the unfair contract terms regime); and
- the test of transparency is not determinative of unfairness in the UCT legislation, so a separate legislative test relating to clarity and legibility would provide a more certain means of addressing terms in standard-form contracts that are not clear.

---

50 Trade Practices Amendment (Australian Consumer Law) Bill 2009.

23.277 A regulator would be able to apply to a court or tribunal to have a document or part of a document declared to be unclear or illegible. In the event of such a declaration a supplier could be required to cease using that document or part of a document expressed in those terms in future.

#### Option C — Outcome

23.278 This option would impose additional compliance costs for businesses operating outside of Victoria or SA, but would imply no change for businesses operating within those jurisdictions.

23.279 Similar to Option B, businesses would need to familiarise themselves with regulators' and courts' interpretations of the clarity and legibility requirements, in order to minimise the potential for documents to be held not to meet these criteria. In the event that a document is held to be unclear or illegible, a business would incur costs in redrafting that document.

23.280 As with Options A and B, the impact of this additional burden, such as the redrafting of documents to comply with the clarity and legibility requirements, is likely to be small as businesses would already need to consider the potential for challenge to their documents on the grounds that they are misleading. In addition, businesses that are not attempting to mislead or deceive their customers would generally need to give at least some consideration to the drafting of their documents to ensure they are clear and legible as a matter of commercial imperative.

23.281 Compliance costs for businesses could be mitigated to some extent by removing the prescriptive requirements in the Victorian and South Australian provisions for typed documents to be of a prescribed font size.

23.282 Under Option C, consumers would benefit from a more certain course of action where they consider a document, such as a consumer contract, or an invoice, is unclear or is not legible. The provision of such documents may restrict consumers' ability to understand their rights or obligations under contracts, or to keep records of transactions through bills and receipts.

23.283 While there is no specific regulation in this area in the TP Act, the general prohibition against misleading or deceptive conduct would already imply the need for documents to be clear and legible. Consequently, the additional benefit to consumers provided by Option C would be limited.

#### ***Consultation***

23.284 *An Australian Consumer Law: Fair markets — Confident consumers* invited submissions on whether there should be a minimum standard for documents in the ACL. Out of 102 submissions, 11 were in

favour of establishing some form of minimum standard for documents in the ACL, three were against, and four suggested having regard to existing laws and regulations on documents and disclosure before imposing any further requirements on businesses.

23.285 SCOCA received six submissions in relation to this proposal in response to a consultation draft of this RIS. Both business and consumer organisations were generally supportive of the principle that documents should be clear and legible and had no objection to a legislative requirement to this effect. However, consumer organisations were more supportive of applying the requirement to all consumer documents, not just those required by the ACL.

23.286 Some business groups considered that consumers are already adequately protected by the general prohibitions on misleading and deceptive conduct.

### ***Conclusion***

23.287 In assessing the merits of each option under Proposal 5, consideration has been had to:

- maintaining current levels of consumer protection within the context of a generic, national consumer law and addressing community expectations;
- minimising and, where possible, reducing business compliance costs under a national consumer law;
- rationalising existing national, State and Territory consumer laws as much as possible; and
- the practical benefits of achieving national uniformity through the ACL and the adoption of the ACL by all States and Territories.

23.288 All three options examined for this proposal would provide a net benefit for the economy compared to the status quo. All three options would provide nationally consistent rules in relation to the content in documents given to consumers.

23.289 Option A does so by relying on the existing generic provisions in the TP Act, which would only provide consumer protection in situations where there is misleading and deceptive conduct.



23.290 Options B and C provide specific requirements for the clarity and legibility of documents, which do not require the additional requirement for the documents to have the effect of misleading or deceiving the consumer.

23.291 CAV's experience in Victoria with this provision is that, while aspects of a lack of clarity in documents may be covered by existing generic protections, such as provisions relating to misleading and deceptive conduct and unfair contract terms, and the specific Victorian FTA provision does not result in many prosecutions at the court level, the existence of a specific provision is very useful for conciliation and dispute resolution activities.

23.292 A simple rule that requires a document to be clear and legible:

- creates an expectation as to the standard of conduct required of businesses;
- is a concept which is easy for all parties to understand; and
- serves to improve consumers' confidence in taking issue with unclear or illegible documents provided by businesses, thus reducing the need for formal intervention by a regulator.

23.293 Option B limits the application of the proposal to documents required under the ACL only, reducing the compliance cost of this provision to an incremental cost in addition to the need to comply with requirements to provide certain documents under the ACL. Option C covers a much wider range of consumer documents and a consequently higher compliance cost.

23.294 For these reasons, Option B can be supported by all members of MCCA.

23.295 In developing Option B regard has been had to:

- making clear the required standard of disclosure by businesses in documents required to be provided under the ACL;
- minimising business compliance costs by applying a single, non-prescriptive standard to the form and content of such documents; and
- the adoption of a single, national approach to the law in this respect, and its enforcement nationally by all consumer agencies, as agreed by all Australian governments.

## **Proposal 6: The provision of bills and receipts**

### *Current regulation*

23.296 The provision of a bill or a receipt to a consumer is a way of ensuring they are informed about the goods and services they receive, and provides evidence of the existence and basic elements of a transaction when a dispute occurs.

23.297 Generally, a bill is a document which is provided to a consumer after goods or services have been supplied but have not been paid for, while a receipt is provided after goods or services have been paid for.

23.298 There are no specific requirements for bills and receipts in the TP Act. However, the Commonwealth goods and services tax (GST) law requires tax invoices to be provided in relation to 'taxable supplies'. Taxable supplies cover a large majority of consumer goods and services.

23.299 Currently, the GST law requires that an invoice includes the Australian Business Number and name of the supplier, the words 'tax invoice' stated prominently, the date of issue of the tax invoice, and the price and description of the taxable supply being sold. If the total amount on the tax invoice is \$1,000 or more, the invoice must also include the ABN and name of the recipient, and a brief description and quantity of the goods or services supplied.

23.300 Section 161A of the Victorian FTA provides the right for a consumer to request an itemised bill within 30 days of receiving a bill or account for services performed by a supplier. The same section also provides an obligation for businesses to provide a 'proof of transaction' for purchases of more than \$50, and the right for a consumer to request this proof if the purchase is valued at \$50 or less.

23.301 Both 'itemised bill' and 'proof of transaction' are terms which are defined in section 161A of the Victorian FTA, which describes what information each should contain:

- An 'itemised bill' specifies how costs to perform a particular service are calculated, including, where applicable, the hourly rate and number of hours comprising the labour component, a list of the various materials used, and the amount charged for each item.
- A 'proof of transaction' identifies the supplier, the date of the supply and the goods or services supplied to a consumer.

23.302 The Victorian FTA also prohibits a person from charging for an itemised bill, to ensure that a person is not charged for providing something they are required to provide by law.

23.303 There is significant overlap between the receipts requirements under the Victorian FTA and the Commonwealth's tax invoice requirements under the GST law.

**Table 23.1 Comparison of receipts requirements under the GST law and section 161A of the Victorian FTA**

	<i>GST Law</i>	<i>Section 161A of the Victorian FTA</i>
Applicable to	Taxable supplies	All goods and services
Transaction of \$50 or less	No requirement.	Consumers may request a 'proof of transaction'. A proof of transaction must contain: <ul style="list-style-type: none"> <li>• the identity of the supplier;</li> <li>• the date of the supply; and</li> <li>• the goods or services supplied to the purchaser.</li> </ul> A proof of transaction may be a tax invoice under the GST law, a cash register receipt, a lay-by agreement, or a confirmation of receipt number provided in a telephone or internet transaction.
Transaction of more than \$50 but less than \$75.	No requirement.	As above, except that consumers <b>must</b> be provided with such a document, even if they do not request it.

	<i>GST Law</i>	<i>Section 161A of the Victorian FTA</i>
Transaction of more than \$75 <sup>51</sup> but less than \$1,000	Consumers must be provided with a document which contains: <ul style="list-style-type: none"> <li>• the ABN of issuing entity;</li> <li>• the price and description of the good;</li> <li>• the words 'tax invoice' stated prominently;</li> <li>• the date of issue of the tax invoice; and</li> <li>• the name of the supplier.</li> </ul>	As above.
Transaction of \$1,000 or more	As above, plus the document must also contain the following details: <ul style="list-style-type: none"> <li>• the name of the recipient;</li> <li>• the address/ABN of the recipient;</li> <li>• a brief description of each good; and</li> <li>• for each description, quantity supplied.</li> </ul>	As above.
Itemised Bills for services	No requirement.	Where a consumer is received a bill or account from a supplier for services supplied, a purchaser to whom the services were supplied may request an itemised Bill. A supplier must provide an itemised bill within 7 days. An itemised bill must provide an account of how the costs are calculated and include, where applicable: <ul style="list-style-type: none"> <li>• the hourly rate and number of hours comprising the labour component; and</li> <li>• a list of the various materials used and the amount charged for each item.</li> </ul>

---

51 This threshold is set by the *A New Tax System (Goods and Services Tax) Amendment Regulations 2007 (No. 1)*, and took effect from 1 July 2007.

### Evidence of consumer detriment

23.304 Bills and receipts are useful as evidence in claims made by consumers about statutory conditions and warranties, as evidence of the transaction is usually required by either the trader or the relevant dispute resolution body. Similarly, disputes with tradespeople and other common tribunal and lower court consumer cases will generally be assisted by reference to clear evidence of the existence and basic elements of a transaction.

23.305 In the last two financial years, CAV has received 5,411 enquiries and 1,102 written complaints relating to overcharging. The right to obtain bills, in particular, would assist consumers in determining whether they have been overcharged.

### ***Options for Proposal 6***

23.306 The status quo comprises the requirements for bills and receipts in the Victorian FTA, as well as the tax invoice requirements in the GST law.

23.307 Three options are considered, and would be compared with the status quo:

- Option A: No requirement in the ACL, and retaining the requirements for tax invoices in the GST law.
- Option B: Adopt a requirement for bills and receipts in the ACL, in addition to the requirements for tax invoices in the GST law.
- Option C: Adopt a requirement for bills and receipts in the ACL, limited to those transactions for goods and services not already covered by the GST law.

### ***Impact analysis***

#### *Option A — No requirement in the ACL, and retaining the requirements for tax invoices in the GST law*

23.308 Option A would involve the repeal of section 161A of the Victorian FTA. This provides a nationally consistent regime (under the GST law) in relation to receipts, and also removes the regulatory duplication that currently exists for receipts, but there would be no specific regulation in relation to bills.

23.309 Victorian consumers would lose the protection of laws designed to ensure they receive a bill or receipt, but the tax invoice requirements under the GST law would continue to apply.

Option A — Outcome

23.310 Compliance costs for businesses operating in Victoria would be reduced. In particular, record-keeping costs might be reduced to the extent that a business cannot be compelled to provide detailed accounts of invoices to consumers. This reduction in compliance costs would be limited to a great extent by:

- the continued need to provide tax invoices for taxable supplies pursuant to the GST law;
- the commercial imperative to keep accurate records of supplies of goods and services made;
- general record-keeping requirements imposed by other legislation, including income tax legislation; and
- the potential of having to provide documentary evidence of transactions for the purposes of tribunal or court proceedings in the event of a dispute with a consumer.

23.311 There would be no compliance cost impacts on businesses outside of Victoria.

23.312 The option would impose a reduction in certainty for consumers in Victoria in relation to their right to a bill or receipt. For example, where a supplier provides an invoice for services rendered that only quotes a total figure for payment, a consumer would have no right to demand a more detailed account. Where a supplier refuses to provide an account voluntarily, a consumer's only recourse if they are concerned that the amount they are being charged does not appropriately reflect the services rendered, would be to commence tribunal or court proceedings.

*Option B — Adopt a requirement for bills and receipts in the ACL, in addition to the requirements for tax invoices in the GST law*

23.313 Option B would incorporate the provisions in section 161A of the Victorian FTA into the ACL. This includes the definitions for 'itemised bill' and 'proof of transaction' that currently exist in that section.

23.314 This aspect of section 161A of the Victorian FTA aims to enhance the ability of consumers to enforce their rights if they have been incorrectly or excessively charged for services rendered. It is designed to encourage service providers to engage in honest and fair billing practices. It assists with the enforcement of other provisions of consumer law by enabling consumers to obtain proof of a transaction if a dispute arises after purchase. The Motor Trades Association of Queensland's submission to the consultation RIS agreed with this, pointing out that recourse under warrants

or guarantees is in many cases based on the descriptions of equipment parts and work itemised in the bill or receipt, and it is in the interests of both consumers and suppliers to have bills or receipts that can be used as evidence in such claims.

23.315 In relation to bills, consumers would have the right to request an itemised bill within 30 days of receiving a bill for services from a supplier. The supplier must provide the itemised bill upon such a request, and it must contain the details currently set out in the definition of 'itemised bill' in section 161A of the Victorian FTA. The provision would also prohibit a person from charging for an itemised bill, to ensure that a person is not charged for providing something they are required to provide by law.

23.316 In relation to receipts, a supplier would have to provide receipts to consumers where the price of a good or service is \$50 or more. A receipt must be provided to consumers upon request where the value of the good or service is less than \$50. The tax invoice requirements under the GST law would continue to apply to goods and services that are taxable supplies, and that would satisfy the definition of 'proof of transaction' as it currently exists in the Victorian FTA.

23.317 Under this Option, consumers would receive an itemised bill (upon request) or receipt where appropriate, and this is an important part of informing consumers about what goods or services they are receiving from a supplier. This also allows evidence on transactions to be presented to tribunals and lower courts in a straightforward manner, as the relevant bill or receipt would contain sufficient information for use in those forums.

23.318 For businesses, this option would impose very minor compliance costs, as most businesses would already be set up to produce bills and receipts, and it would simply be a matter of ensuring that the correct information is being included on those bills and receipts. Indeed, submissions to the consultation RIS by Optus and Integral Energy have suggested that some industries already have requirements for bills which are stricter and more prescriptive than what is proposed under this Option.

#### Option B — Outcome

23.319 Under Option B, consumers across Australia would have the right to receive a bill (for services, upon request) or receipt (for goods or services). This should assist consumers to prove that they have a right to, for example, access after-sales support or make warranty claims.

23.320 However, the drawback to this option is that the proposed requirements in the ACL would overlap with existing requirements under the GST law. The extent to which this overlap would create compliance burdens would depend on the extent to which the information required to be

disclosed on a receipt differs from that required to be included on a tax invoice. Based on the current provisions in the Victorian FTA, this overlap would not be significant. However, future changes to either the ACL requirements, or changes to the GST law (which would be outside the scope of the ACL) could lead to inconsistencies and greater compliance burdens.

*Option C — Adopt a requirement for bills and receipts in the ACL, limited to those transactions for goods and services not already covered by the GST law*

23.321 Under Option C, the basic requirement under section 161A of the Victorian FTA would be incorporated into the ACL, as it is for Option B, but only insofar as there are not already requirements under the GST laws. The current Victorian requirements for a ‘proof of transaction’ would have overlapped with the tax invoice requirements under the GST law.

23.322 The GST law would be carved-out expressly from the ACL requirements. This would quarantine any future changes to the GST provisions from creating compliance burdens due to inconsistencies between the ACL and GST legislation. This proposal does not suggest any changes to the GST law.

23.323 For receipts, the Victorian requirements for ‘proof of transaction’ would be extended under the ACL to all goods and services with a value of \$50 or more which are not already covered by the GST law.

23.324 The provision would also prohibit a person from charging for an itemised bill, to ensure that a person is not charged for providing something they are required to provide by law.

23.325 Similar to Option B, businesses would only incur minor compliance costs with this Option, as they should already be able to produce bills and receipts.

Option C — Outcome

23.326 The benefits and costs of Option C are similar to those under Option B. However, Option C would provide certainty that any potential future inconsistencies that arise between the receipt requirements of the GST law and the ACL would not result in additional compliance costs for businesses.

23.327 The implementation cost of this option for businesses should be minimal, as requirements to issue receipts already exist under the GST law, and the information requirements would be consistent.



### **Consultation**

23.328 *An Australian Consumer Law: Fair markets — Confident consumers* invited submissions on whether a consumer should have the right to request an itemised bill from a supplier of services. Of 102 submissions received, seven were in favour of requiring suppliers to provide an itemised bill to consumers on request, two were against, and three suggested having regard to existing laws and regulations on bills and receipts before imposing any further requirements on businesses.

23.329 SCOCA received seven submissions in relation to this proposal in response to a consultation draft of this RIS. Most business organisations did not see the need for the ACL to include provisions relating to bills and receipts.

23.330 Some submissions noted that certain industries, such as telecommunications and the energy sector, already have prescriptive requirements regarding the content to be included in bills to customers.

### **Conclusion**

23.331 In assessing the merits of each option under Proposal 6, consideration has been had to:

- maintaining current levels of consumer protection within the context of a generic, national consumer law and addressing community expectations;
- minimising and, where possible, reducing business compliance costs under a national consumer law;
- rationalising existing national, State and Territory consumer laws as much as possible; and
- the practical benefits of achieving national uniformity through the ACL and the adoption of the ACL by all States and Territories.

23.332 Option A would impose no additional compliance costs to businesses, as they would not have any additional compliance requirement to issue bills and receipts. However, this imposes a cost on consumers in circumstances where a dispute may exist about a supply of goods and services, because:

- they do not have a right to require the provision of clear evidence of the existence of a transaction and its basic elements;

- they would be compelled to rely on less easily verifiable and less relevant information to evidence a transaction, which may not be cost or time-effective in disputes about low value goods or services; and
- a lack of clear evidence may either create, or escalate, the nature of disputes about the supply of goods or services.

23.333 Option B would carry an additional regulatory risk that future changes to the GST legislation, which is clearly separate from the ACL legislation, would automatically impose additional compliance burden on businesses not currently subject to the requirements of section 161A of the Victorian FTA. In respect of bills, the proposal is to not require compliance with prescriptive requirements for the content of such documents, and therefore any additional cost would be borne by those businesses currently not providing any or much detail about the provision of goods and services to consumers.

23.334 Option C would impose a small additional compliance burden, as it would not impose any additional requirements where there is already compliance under the national GST law, and would only require compliance with the new requirements in the ACL in respect of receipts for non-taxable supplies. Similarly, in respect of bills, the proposal is to not require compliance with prescriptive requirements for the content of such documents, and therefore any additional cost would be borne by those businesses currently not providing any or much detail about the provision of goods and services to consumers.

23.335 In addition, CAV has indicated that the existence of this provision in the Victorian FTA, while not often used in court cases, has facilitated their conciliation and dispute resolution activities, and has been very useful in ensuring that suppliers are clear about what they are offering to consumers, and that consumers have a written record of this so that disputes can be resolved quickly and more easily when they arise. These proposal also meets the objective of obtaining a single national consumer law, while minimising to the extent possible the regulatory impact.

23.336 For these reasons, Option C can be supported by all members of MCCA.

23.337 In developing Option C regard has been had to:

- the provision of an additional tool for consumers that already exists in one jurisdiction (Victoria) and that can serve to reduce the complexity of enforcement or dispute actions, particularly in respect of the provision of services;

- minimising the business compliance costs by ensuring that disclosure obligations for receipts extend no further than the existing GST law, which applies nationally, and disclosure obligations for bills are minimal and non-prescriptive; and
- the adoption of a single, national approach to the law in this respect, and its enforcement nationally by all consumer agencies, as agreed by all Australian governments.

## **Proposal 7: Lay-by sales**

### *Current regulation*

23.338 A lay-by is a method of sale where a consumer purchases a good by paying amounts to the supplier over a period of time and takes delivery of the good when it is fully paid for. Depending on their nature, goods may be held by the supplier for the consumer, may be made in accordance with the consumer's requirements, or may be ordered by the supplier in time to be delivered to the consumer when the lay-by is completed.

23.339 There is no specific regulation of lay-by sales in the TP Act. However, conduct in respect of lay-by sales agreements is subject to the generic provisions of the TP Act, such as those prohibiting misleading or deceptive conduct (section 52), false or misleading representations (section 53), or harassment and coercion (section 60). Lay-by sales agreements would also become subject to the national unfair contract terms law, subject to passage of the Trade Practices Amendment (Australian Consumer Law) Bill 2009 by the Parliament, to the extent they are consumer contracts in a standard form.

23.340 The ACT, NSW and Victoria have specific provisions that regulate lay-by sales. While the requirements vary significantly between each jurisdiction, these provisions specify:

- requirements for terms and conditions governing lay-by sale agreements;
- cancellation procedures by the consumer and supplier;
- issues relating to cancellation charges; and
- rules around the availability of goods.

23.341 Lay-by sales agreements are a common method of payment and provide an alternative to credit or hire purchase as a means of financing the purchase of a consumer good. Lay-by is a common form of purchasing by consumers, and is prevalent in both large and small retail businesses.

Currently, all State and Territory agencies issue guidance in the form of factsheets for consumers and businesses about lay-by sales agreements.

23.342 As with all transactions that involve payment or part-payment prior to delivery of goods, consumers and businesses face risks in entering into lay-by sales agreements. Before lay-by sales were regulated in Victoria, a report by the Consumer Advocacy and Financial Counselling Association of Victoria<sup>52</sup> identified the key issues associated with lay-by sales as:

- the supplier cancelling a lay-by without informing the purchaser;
- goods being unavailable;
- the supplier going into liquidation;
- the denial of any refund if the purchaser sought to cancel because of changed circumstances;
- general confusion about terms and conditions; and
- default by the purchaser.

*Evidence of consumer detriment*

23.343 In Victoria, there were approximately 1,000 enquiries from members of the public to CAV on lay-by sales between 2007 and 2009, with around 30 of those enquiries needing dispute resolution action.

23.344 NSW Fair Trading received 368 complaints between 1 January 2004 and 31 May 2009 regarding lay-by sales.

*Options for Proposal 7*

23.345 The status quo comprises the ACT, NSW and Victorian provisions regulating lay-by sales in their respective jurisdictions. The generic consumer protection provisions of the TP Act would apply in other jurisdictions in relation to lay-by sales.

23.346 Two options are considered, and would be compared with the status quo:

- Option A: No specific regulation of lay-by sales agreements in the ACL.

---

52 The Consumer Advocacy and Financial Counselling Association of Victoria (1994) *Why Lay-by?*

- Option B: Adopt basic lay-by sales rules in the ACL, drawing on key principles in existing State and Territory legislation.

### ***Impact analysis***

#### *Option A — No specific regulation of lay-by sales agreements in the ACL*

23.347 Option A would involve the repeal of the ACT, NSW and Victorian provisions specifically regulating lay-by sales. The current generic consumer protection provisions in the TP Act would continue to provide protection to consumers in respect of misleading, deceptive or unconscionable conduct engaged in by suppliers who offer lay-by sales, but would not provide for statutory remedies.

23.348 The national unfair contract terms law, which is currently before the Australian Parliament, would also apply to terms in most lay-by sales agreements, if that law is passed. That law renders a term of a standard form consumer contract void if it is declared by a court to be unfair. The unfair contract terms law also only imposes negative obligations on a supplier (that is, a supplier **cannot** do certain things) rather than positive obligations (that is, a supplier **must** do certain things), and would not provide statutory remedies in the event of a term being found to be unfair (instead, remedies would need to be determined by a court).

23.349 Withdrawal of ACT, NSW and Victorian legislation could be supported by national guidance on lay-by sales regulation. Currently all jurisdictions provide guidance for consumers on lay-by sales agreements. In jurisdictions that do not have lay-by sales legislation (WA, Qld, Tas, SA, NT), this guidance addresses key concerns that consumers should be aware of before entering into lay-by sales arrangements, including that the specific terms of the arrangement are not regulated in that jurisdiction and may vary, and point out how general requirements of the consumer laws may apply. The guidance issued in NSW, Victoria and the ACT refers to the more detailed requirements that apply in those jurisdictions.

#### Option A — Outcome

23.350 Option A provides a consistent set of national consumer protection laws in relation to lay-by sales in Australia. This outcome, however, relies upon the use of general provisions in the ACL, rather than specific regulations on lay-by sales, as is currently the case in the ACT, NSW and Victoria.

23.351 Compliance costs on businesses would be reduced for those businesses operating in NSW, Victoria and the ACT, due to the repeal of lay-by sales regulation. Current compliance costs in respect of lay-by-sales

are difficult to estimate and would vary between NSW, Victoria and the ACT. However, based on submissions received by SCOCA, the ACT legislation is currently the most prescriptive and the compliance cost savings there would be greatest. For example, Hunt & Hunt, in making a submission on behalf of a number of suppliers and retailers noted that the ACT legislation prohibits a business from accepting more than 20 per cent of the total payment without providing a consumer with an opportunity to physically inspect the actual goods. This poses a particular problem for retailers that have no retail shopfront or physical presence.

23.352 Offsetting a potential reduction in compliance costs to some extent, businesses would still be required to comply with the general consumer protection provisions of the TP Act in respect of lay-by sales agreements. Potentially, there would be a reduction in certainty in relation to the requirements a business must comply with in respect of lay-by sales agreements. The Australasian Compliance Institute (ACI) stated in their submission to the February 2009 consultation paper that an absence of regulation in this area is a regulatory gap. A submission to the same consultation paper by the Australian Retailers Association (ARA) stated that ARA members reported much lower levels of complaints in jurisdictions with regulation of lay-by sales than those jurisdictions without.<sup>53</sup>

23.353 The ACI noted the potential for suppliers to impose unreasonable terms (involving lay-by charges and periods, and cancellation policies and charges) upon consumers in a lay-by sales environment and that absence of any regulation in this area is a gap<sup>54</sup>. In his submission to SCOCA, in favouring the more prescriptive requirements that currently exist in Victoria, Dr David Cousins noted that lay-by sales are often used by those on low incomes or who are vulnerable as an alternative to credit.

23.354 The contractual remedies available for breach of a lay-by sales agreement are unlikely to be well understood by most consumers. Lack of understanding of the law by consumers and businesses may lead to an increase in disputation regarding lay-by sales agreements, especially in tribunals and lower courts. Increased disputation would increase costs for businesses, consumers and government dispute resolution bodies. The provision of national guidance could mitigate the loss of clarity for consumers, but providing practical information about how contract law is likely to apply in respect of common disputes arising under lay-by sales agreements.

---

53 Australian Retailers Association (2009). Submission to *An Australian Consumer Law: Fair markets — Confident consumers*, 17.

54 Australasian Compliance Institute, submission to *An Australian Consumer Law: Fair Markets — Confident Consumers*, p.32.

*Option B — Adopt basic lay-by sales rules in the ACL, drawing on key principles in existing State and Territory legislation*

23.355 Under Option B, specific principles-based regulation of lay-by sales would be incorporated into the ACL, based on elements in different State and Territory provisions. The relevant provisions in the ACT, NSW and Victoria would be repealed.

23.356 The existing lay-by provisions in NSW, Victoria and the ACT vary greatly in the level of prescription they include. Submissions to SCOCA from Telstra, Hunt and Hunt and a confidential other noted a preference for principles-based regulation that avoids the more prescriptive requirements of the Victorian and, in particular, the ACT models.

23.357 The key principles underpinning lay-by sales under this model would be:

- **Agreements must be in writing.** This would provide a minimum level of evidence of an agreement and reduce the potential for dispute.
- **Consumers can cancel before delivery of the goods.** This would provide a clear statement of a consumer's cancellation rights, but would be counter-balanced by the potential of cancellation charges (see below).
- **Businesses can cancel before final payment is received.** This would make it clear that there is a reciprocal cancellation right for businesses.
- **In the event of cancellation by either party, the consumer is entitled to a full refund of amounts paid.** This would provide an explicit right that businesses may not withhold money from a consumer.
- **In the event of cancellation by the consumer, the consumer may be required to pay a cancellation charge reflecting the business's reasonable costs.** Businesses may incur costs in commencing a lay-by sales agreement.

23.358 A definition of lay-by sales agreement would be necessary, as the lay-by sales regulation would be targeted at a specific form of agreement, rather than other forms of financing a purchase. Drawing on current jurisdictional approaches, a lay-by sales agreement is an agreement whereby:

- payment is made in three or more instalments (where a deposit counts as one instalment); and

- the consumer takes delivery only after final payment is made.

#### Option B — Outcome

23.359 Businesses in jurisdictions other than the ACT, NSW and Victoria would face additional compliance burdens in adhering to a lay-by sales framework. However, these burdens are likely to be minimal, as businesses which chose to offer lay-by sales in an unregulated environment can be expected to have documented the agreement in order to protect their own interests and provided storage facilities where necessary. The main costs for businesses would be seeking advice on compliance with the legislation and amending agreement documentation to include information about cancellation rights and the cancellation fee. These costs are transitional.

23.360 Providing a clear statutory remedy will reduce disputation and businesses that previously operated in an unregulated environment will benefit from reduced dispute resolution costs.

23.361 Consumer agencies would need to develop national guidance on how the proposed model would operate across Australia, but given the prevalence of such guidance currently, this would potentially be useful for both Options A and B.

#### ***Consultation***

23.362 *An Australian Consumer Law: Fair markets — Confidential consumers* invited submissions on whether there should be a regime regulating lay-by sales in the ACL. Of 102 submissions received, eight were in favour of including a lay-by sales regime in the ACL and two were against.

23.363 Seven of the submissions received in response to the consultation draft of this RIS commented on lay-by sales. Most submissions from business and consumer stakeholders supported nationally consistent regulation, with business particularly concerned that any regulation should be principles based. Some business stakeholders expressed particular concern if the ACL was to include a provision similar to the ACT legislation.

#### ***Conclusion***

23.364 In assessing the merits of each option under Proposal 7, consideration has been had to:

- maintaining current levels of consumer protection within the context of a generic, national consumer law and addressing community expectations;



- minimising and, where possible, reducing business compliance costs under a national consumer law;
- rationalising existing national, State and Territory consumer laws as much as possible; and
- the practical benefits of achieving national uniformity through the ACL and the adoption of the ACL by all States and Territories.

23.365 Both options would result in the rationalisation of existing divergent legislative approaches to lay-by sales across Australia. However, based on submissions received by SCOCA, it is difficult to differentiate between the practical impacts that these two approaches would have on businesses and consumers.

23.366 There is evidence that the existing NSW and Victorian laws are applied nationally by national retailers and there is some evidence that clarity in the law (while carrying compliance costs for businesses) may be related to fewer consumer complaints, which carry their own costs for businesses.

23.367 The effect of regulation in NSW and Victoria is extended to some extent by regulators issuing their own guidance, which is generally consistent along the lines of the NSW regulation (which is the least prescriptive of the three current regimes).

23.368 The likely differences between the two would relate to smaller and regionally-based businesses, which may have regard only to guidance issued by their jurisdictional regulator.

23.369 Option A would provide a result in clear regulatory compliance cost savings for businesses, although the impact of this option on consumers is difficult to estimate, as there would be reduced clarity about the key elements of lay-by sales transactions and they would be required to use other, more general provisions in the ACL to obtain redress.

23.370 Option B provides for some regulation of lay-by sales transactions, with some compliance, but would provide greater certainty for both consumers and businesses in their rights and obligations in this area. This is particularly the case during the time period between the two parties entering into a lay-by sales agreement and the consumer receiving the goods, as this is where most of the disputes occur. Statutory remedies are the clear benefit for consumers. The potential for fewer complaints from consumers would be a benefit for businesses, although businesses would also be able to minimise the potential for consumer complaints through their own internal policies.

23.371 Option A would provide the least regulatory impact. However, those State and Territory agencies currently administering lay-by sales regulation, particularly NSW Fair Trading and CAV, have clearly advocated the utility of nationally applicable basic rules about lay-by sales (that is, Option B) as being useful in:

- making clear the expectations of both consumers and businesses about the basic elements of lay-by transactions, while minimising compliance costs; and
- facilitating the resolution of any disputes over lay-by sales agreements without resort to court or tribunal processes.

23.372 Similar comments were also made by business stakeholders in their submissions on the consultation RIS, particularly those operating national businesses, who would prefer a single a national approach to this regulation.

## **Proposal 8: Dual pricing**

### *Current regulation*

23.373 The TP Act prohibits misleading and deceptive conduct (section 52) and false or misleading representations of price (section 53(e)). While both of these provisions apply to pricing, the alleged contraventions do not provide for any automatic redress mechanisms for consumers, where relatively minor contraventions (which may not warrant prosecution through a court process) have occurred.

23.374 NSW and the ACT have an additional provision that applies to pricing. These provisions (section 40 of the NSW FTA and section 22 of the ACT FTA) require that, if a person displays goods with more than one price appended, they must not sell the goods at the higher price. The NSW provision has been in force for around 30 years.

23.375 These provisions do not seek to address ‘was/now’ pricing that is alleged to be misleading, but simply provide that if a business displays more than one price to goods, including electronic scanning, those goods cannot be sold to the consumer at a higher price than the lowest of the displayed prices (however, businesses retain their right to withdraw the item from sale if they choose). The dual pricing provisions are, in some respects, self-enforcing, as they provide a clear rule if multiple prices are appended to goods.

### *Evidence of consumer detriment*

23.376 Between 2005 and August 2009, NSW Fair Trading recorded 365 enquiries and 192 complaints about dual pricing. Since March 2006, CAV

received 44 enquiries and 18 complaints between July 2007 and June 2009 related to dual pricing. For the financial year 2008-2009, the Queensland OFT received 84 complaints that have been identified as dual pricing or double ticketing. A number of State and Territory fair trading offices also conduct price scanning audits annually which often reveal high levels of scanner error.

### ***Options for Proposal 8***

23.377 The status quo comprises no specific regulation of dual pricing at the national level, but with regulation in NSW and the ACT.

23.378 Two options will be considered for this proposal, to be compared with the status quo:

- Option A: No specific regulation of dual pricing.
- Option B: Where more than one price for goods is displayed, prohibit selling at higher than the lowest of the prices.

### ***Impact analysis***

#### ***Option A — No specific regulation of dual pricing***

23.379 Option A involves retaining the TP Act provisions that apply to false or misleading pricing representations, but no specific regulation of dual pricing under the ACL, as is currently the case in NSW and the ACT. When their goods have multiple prices appended, businesses have the option to sell at whichever price they choose, if the consumer still wants to purchase it, or withdraw the item from sale.

23.380 Telstra supports Option A, citing that existing prohibitions on misleading and deceptive conduct and false or misleading representations adequately protect consumers. It also noted that consumer empowerment would be limited and that consumers would not be guaranteed the lowest price given that a supplier retains the right to withdraw the item from sale. A confidential submission also considered there is no need for dual pricing provisions, citing the existing TP Act provisions on misleading and deceptive conduct and false or misleading representations, as well as the existence of a number of industry codes of relevance to pricing. It also noted that retailers often honour the lowest price anyway.

#### **Option A — Outcome**

23.381 Option A would have a minimal impact on compliance costs. Although businesses in NSW and the ACT would not have to comply with the dual pricing regulation, there would continue to be incentives to ensure dual pricing does not occur, including:

- commercial pressures not to annoy consumers through confusing multiple price representations; and
- industry-specific requirements such as the Scanning Code of Practice<sup>55</sup>.

23.382 Option A may reduce consumer empowerment in NSW and the ACT to the extent that a business refuses to honour a lower price representation where multiple representations are made. Other prohibitions on misleading or deceptive conduct and false or misleading representations would continue to protect consumers in such situations, but would be considerably more cumbersome, costly and uncertain for consumers to enforce.

*Option B — Where more than one price for goods is displayed, prohibit selling at higher than the lowest of the prices*

23.383 Option B is to include in the ACL a specific prohibition on the sale of goods with multiple displayed prices at a price higher than the lowest of the prices.

23.384 The NSW FTA refers to ‘appended’ prices which includes a price that is, among other things, annexed, affixed, stamped on, used in connection with the goods on a display, encoded, published in a catalogue (while the catalogue is current) and in any other way represented in a manner from which it may reasonably be inferred that the price represented is a price applicable to the goods.

23.385 The NSW FTA provision was reviewed when the *National Competition Policy Review of the Fair Trading Act 1987* was undertaken in 2000. The review report concluded that:

‘The dual pricing provision does not appear to have any impact on competition, since it applies to all NSW retailers. The provision does not appear to impose any unwarranted costs on traders, given that it is a matter of good business practice to ensure that products and coding systems are accurate. Incorrect pricing would increase the level of customer complaints a trader receives, thereby increasing complaint handling costs’.<sup>56</sup>

---

55 The Scanning Code of Practice is a voluntary code that applies to the supermarket industry. Under the code, supermarkets that are signatories to the code are required to ensure the price accuracy of their check-out systems and self pricing procedures. The code is maintained by the Australian Retailers Association.

56 NSW Office of Fair Trading (2002), *National Competition Policy Review: Fair Trading Act 1987 & Door to Door Sales Act 1967*, 38-9.

23.386 A dual pricing provision would only relate to selling prices, so as not to conflict with other requirements such as trade measurement regulation and the unit pricing requirements of the *Retail Grocery Industry (Unit Pricing) Code of Conduct*. In an earlier submission to *An Australian Consumer Law: Fair markets — Confident consumers*, the Australian Retailers Association suggested that the ACL provides an opportunity to address dual pricing on a national basis. It also suggested that complaints relating to items outside the scope of the supermarkets' Voluntary Code of Practice for Computerised Checkout Systems were becoming increasingly common.

23.387 The Motor Trades Association of Queensland's submission, in supporting Option B, noted that consideration should be given to the effect of dual pricing where only a single price is displayed on a product in a particular store, but where another store of the same chain in a different State sold the goods for a different price. The intention of the provision is that the rules would only apply within the area in which the particular representations were made. That is, generally only to tickets on an item within a store, unless a State-wide or national catalogue was issued.

23.388 The Motor Trades Association of Australia also supported Option B, suggesting in their submission that the general misleading conduct provisions are not targeted enough to deal with dual pricing.

23.389 If a supplier does not wish to sell the product at the lowest appended price, they retain their right to withdraw the item from sale. This protects suppliers from loss due to error (where an incorrect price has inadvertently been displayed) or attempted fraud (where a price label from a cheaper product has been placed onto a higher value product by a consumer).

#### Option B — Outcome

23.390 Under Option B, businesses operating outside of NSW and the ACT would incur some additional costs associated with understanding the new requirement and possibly adjusting store policies in relation to resolving complaints raised by consumers about multiple, different price representations for the same goods. These costs would be reduced to some extent by the presence of alternative pressures (outlined at Option A — Outcome) for businesses to ensure their pricing practices are clear and accurate.

23.391 Option B would provide some benefit to consumers by providing a clear right that businesses cannot demand a higher payment where multiple price representation are made. This is particularly relevant in situations where a certain price is labelled on the shelf, but a higher price scans at the check-out. Dual pricing provisions might also benefit vulnerable consumers by creating an easy to remember rule that if the business wants to sell goods

they must sell them at the lowest appended price, independent of any concerns about misleading conduct. This is likely to be easier for consumers to self-enforce than conceptually more complex breaches such as misleading and deceptive conduct.

23.392 The impact of this proposal on the marketplace is not likely to be high. This assertion is supported by the Motor Trades Association of Australia's belief that dual pricing provides a useful avenue for redress that is easily understood by business and consumers, and that there are not likely to be any further, unidentified, costs. Dual pricing would, however, create a norm of pricing behaviour that would be easily understood by both businesses and consumers and be self-enforcing. This would discourage 'sloppy over-ticketing'—a point made in the submission by Dr Cousins (who supported Option B). A submission from the Motor Trades Association of Queensland also supported Option B, suggesting that dual pricing can cause unfair competition in relation to suppliers who price correctly, and would be confusing for consumers. The Financial and Consumer Rights Council's submission also preferred Option B as providing greater consumer protection and limiting confusion.

#### ***Consultation***

23.393 *An Australian Consumer Law: Fair markets — Confident consumers* raised the question of whether the ACL should include a dual pricing provision such as that found in NSW. Submissions that commented on this issue were divided. Consumer groups and some retailers supported the proposal being in the ACL, citing that consumers should be availed of the lower price that is displayed. However, other submissions suggested that the existing prohibitions on misleading and deceptive conduct and false or misleading representations adequately protected consumers from misleading pricing.

23.394 SCOCA received six submissions in relation to this proposal in response to a consultation draft of this RIS. Business organisations were divided on whether the general prohibition on misleading and deceptive conduct is sufficient to address dual pricing practices.

#### ***Conclusion***

23.395 In assessing the merits of each option under Proposal 8, consideration has been had to:

- maintaining current levels of consumer protection within the context of a generic, national consumer law and addressing community expectations;

- minimising and, where possible, reducing business compliance costs under a national consumer law;
- rationalising existing national, State and Territory consumer laws as much as possible; and
- the practical benefits of achieving national uniformity through the ACL and the adoption of the ACL by all States and Territories.

23.396 Retaining the existing TP Act provisions only as in Option A has merits, through national consistency and existing protections from misleading conduct. However, it still allows for confusion to exist over the legal status of goods with two marked prices, as consumers and businesses may have differing expectations or understandings of their rights in these circumstances. This confusion can have costs to consumers and businesses in resolving disputes about goods with two marked prices, through the time taken to resolve the dispute and loss of confidence in retailers' pricing.

23.397 Option B would promote clarity in situations where consumers feel they have been misled into a transaction (either deliberately or through error) through multiple prices indicated on a good. Given that the measure is easy to understand and comply with, it would only impose low compliance costs for business, since businesses would retain their right to withdraw the good from sale. This would allow the status quo, or similar, in NSW and the ACT to continue, and impose a minimal transitional compliance cost in other jurisdictions, given that many businesses apply this approach through industry-led regulation.

23.398 NSW Fair Trading has indicated that, while the dual pricing provision is rarely the subject of significant enforcement or court action, the provision is an extremely useful tool in NSW, both in providing for clarity in the marketplace and for conciliation of disputes between traders and consumers when they arise. The provision creates a clear, unambiguous rule that consumers and businesses can understand and refer to, while causing little or no costs to businesses, and also serves to facilitate the adoption of consistent national consumer law.

23.399 The simple nature of the rule also assists in providing consumers with advice. Advice based on a simple, unambiguous rule can be much more effective than that which relies on a much more abstract concept such as misleading and deceptive conduct or false or misleading representations. There is little need for argument or disputes in relation to this provision, as a consumer simply brings the pricing to a retailer's attention, notes the simple rule and the retailer must either sell at the lower price or withdraw the item from sale until the pricing is corrected.

23.400 For these reasons, Option B can be supported by all members of MCCA.

23.401 In developing Option B regard has been had to the adoption of a single, national approach to the law in this respect, and its enforcement nationally by all consumer agencies, as agreed by all Australian governments.

## **Proposal 9: Offering gifts and prizes**

### *Current regulation*

23.402 Section 54 of the TP Act currently prohibits a corporation from offering gifts, prizes or other free items, in connection with the supply or possible supply or promotion by any means of goods or services, with the intention of not providing them or not providing them as offered.

23.403 Section 16 of the Victorian FTA provides a similar prohibition based on the intention of the supplier, but also contains a second subsection which provides that the person is guilty of an offence if such an offer is made and the person 'does not within a reasonable time from the making of the offer provide a gift, prize or item which is in accordance with the offer'.

23.404 Regulation in this area seeks to deter traders from luring customers or clients with offers of gifts and prizes which they do not intend to honour and provides an incentive for traders to engage in fair conduct in relation to gifts and prizes that can help to contribute to consumer confidence in traders generally.

23.405 If a trader fails to provide gifts and prizes as offered it could have negative effects, including:

- giving the business an unfair competitive advantage over competitors that attract sales with genuine offers;
- reducing consumer confidence in future representations by all businesses; and
- causing the consumer significant costs in following-up to try and receive the offered gifts or prizes or make complaints to regulators.

### *Evidence of consumer detriment*

23.406 The provision of gifts and prizes is an area of concern for consumers.



- In the last two financial years, CAV recorded 761 enquiries and 447 written complaints about the supply of gifts and prizes, including related misrepresentations.
- In the same period, the Queensland OFT has received 168 complaints about gifts and prizes.
- The SA OCBA received 161 complaints from 1 July 2007 to 30 June 2009, but also notes that this represents an increase in complaints relating to this issue. This is particularly the case in relation to cash-back offers, where such offers are increasingly handled by third parties which can create further delays and difficulties for consumers accessing their money.
- The WA Department of Commerce has also received 83 complaints concerning cash-back offers and incentive schemes over the past three years and has taken action about this form of conduct in the past.<sup>57</sup>

23.407 The ACCC publishes guidance in relation to offering gifts and prizes on its website and in its publication *Advertising and selling*<sup>58</sup> and has taken action on a number of occasions in relation to concerns about gifts and prizes.<sup>59</sup>

#### *Options for Proposal 9*

23.408 The status quo comprises a national, intent-based provision (section 54 TP Act) and one jurisdiction with both the intent-based provision and an additional requirement to provide the gifts or prizes within a reasonable time.

23.409 Three options are considered, to be compared with the status quo:

- Option A: Incorporate the current section 54, without amendment, into the ACL.

---

57 WA DOCEP *Consumers Warned About Discount Travel* (20 September 2001) [http://www.commerce.wa.gov.au/Corporate/Media/statements/2001/September/Consumers\\_Warned\\_Abo.html](http://www.commerce.wa.gov.au/Corporate/Media/statements/2001/September/Consumers_Warned_Abo.html).

58 <http://www.accc.gov.au/content/index.phtml/itemId/815464>;  
<http://www.accc.gov.au/content/index.phtml/itemId/303213>.

59 <http://www.accc.gov.au/content/index.phtml/itemId/88088/fromItemId/378014>;  
<http://www.accc.gov.au/content/item.phtml?itemId=871667&nodeId=22b681fa2f9c9f0fd34e03d0c33707b1&fn=Undertaking.pdf>; *Australian Competition and Consumer Commission v Nationwide News* (1996) ATPR 41-519.

- Option B: Replace the intent-based TP Act provision with a requirement to provide gifts and prizes, as offered, within a reasonable time; and
- Option C: Add to the intent-based TP Act provision to include a separate requirement to provide gifts and prizes, as offered, within a reasonable time.

### ***Impact analysis***

#### ***Option A — Incorporate the current section 54, without amendment, into the ACL***

23.410 Option A would involve retaining the existing TP Act provision without change. The intent-based provision in the current section 54 of the TP Act, which allows consumer agencies to act as soon as it is apparent that the business does not intend to provide the gift or prize, would be retained in the ACL. The Victorian FTA provision would be repealed as part of Victoria's adoption of the ACL.

#### **Option A — Outcome**

23.411 Option A would preserve the prohibition on disingenuously offering gifts or prizes, where the business could gain the promotional benefits of the offer, but has no intention to provide them. The Motor Trades Association of Queensland's submission supported Option A but did not provide reasons for doing so. A submission from Telstra also supported this Option, considering the 'reasonable time' element to be unnecessary.

23.412 While all Australian consumers and businesses would benefit from consistent regulation, in Victoria, a business that genuinely intends to provide the prize but does not provide it, as offered, for a very long period would no longer be specifically required by the consumer law to provide it within a reasonable time.

#### ***Option B — Replace the intent-based TPA provision with a requirement to provide gifts and prizes, as offered, within a reasonable time***

23.413 Option B would remove the TP Act prohibition of offering a gift or prize without intending to provide it, and create a prohibition on the supplier failing to provide gifts and prizes, as offered, within a reasonable time. These requirements are already present in the Victorian FTA and, as such, many businesses are already subject to these requirements if they trade in Victoria.

23.414 Telstra's submission supports Option A. However, it further notes that it could support Option B only if it was clear that, if a seller communicated the timeframe for providing the gift or prize at the time the

consumer qualified for the gift or entered the competition, then compliance with that timeframe would be considered providing it within a reasonable time.

23.415 The intention of the provision would be to accept a stated time as being a reasonable time if communicated at the time the consumer qualified for a gift or entered a competition. However, if a supplier specified no time initially but attempted to specify the time after the consumer had been informed they had won the prize, they would not be able to rely on that as being a reasonable time in all circumstances.

23.416 The provision would not apply to a situation where a person could not provide the gifts or prizes as offered or within a reasonable time based on a mistake of fact or the failure of a third party on which they reasonably relied upon.

23.417 The removal of the requirement that the person intended to provide the gifts or prizes would remove the ability to act quickly if an intention not to supply was apparent, potentially to the detriment of consumers (for example, in instances where a trader goes out of business or there is evidence that goods do not exist or the supply is impossible). The submission from Dr Cousins asserts that Option B would provide equally timely protections to those available under the intent-based provisions but it is not suggested why this would be the case.

23.418 The fact that a very long time has elapsed may be relevant in trying to establish that a person does not intend to provide gifts or prizes. However, delay in itself is unlikely to be sufficient to prove that a person intended not to provide the gift or prize at the time of the offer. The actual intention of the defendant has to be proved<sup>60</sup>.

23.419 A trader who genuinely intends to provide a gift or prize at the time it is offered, but subsequently decides not to deliver the gift or prize to the consumer, does not contravene section 54 of the TP Act. In the case of *TPC v Calderton Corp Pty Ltd*<sup>61</sup> a trader formed the intention not to provide gifts and prizes only after a competition had commenced (when it became apparent that the competition results would not be favourable to the trader). The trader breached section 54 in that case only because it continued to operate the competition (and continued to offer prizes) after the requisite intention had been formed. Had the trader ceased the competition based on the unfavourable results and refused to provide prizes to the original entrants, there would have been no breach of section 54. Under the

---

60 *Australian Competition and Consumer Commission v Nationwide News* (1996) ATPR 41-519.

61 (1994) ATPR 41-306.

Victorian model, prosecution would be possible for a failure to supply the gifts or prizes within a reasonable time. Given this, the Australian Finance Conference suggested that it would have no objection to either Option B or C.

Option B — Outcome

23.420 Option B adds both potential benefits and costs for consumers. The fact that the test is one based on reasonableness will ensure that the provision does not become too onerous on businesses. Reasonableness will be based on the court's interpretation of what is reasonable in the circumstances, not necessarily what a consumer may contend is reasonable. While supporting Option A, Telstra noted that if a reasonable time element was added, it should not be defined to allow maximum flexibility in the circumstances of each case.

23.421 Some of the potential costs for suppliers are able to be offset through exclusions for certain situations where failure to supply as offered or within a reasonable time is beyond the control of the supplier. Option B was supported as the preferred option in the submission by Dr Cousins, who asserted that the effect, rather than the intention that was the key consideration for consumers. It should be noted, however, that Dr Cousins' comments did not address Option C at all, which is a combination of Options A and B.

23.422 While Option B would have benefits and costs for consumers, many of the benefits could be offset to some extent through the loss of the intent-based cause of action which can be taken at any time following the offer. Option B would also incur indirect costs associated with any change to regulation, such as loss of familiarity and the need for the government to educate businesses and consumers.

*Option C — Add to the intent-based TPA provision to include a separate requirement to provide gifts and prizes, as offered, within a reasonable time*

23.423 Option C would add to the current section 54 of the TP Act by including an additional prohibition based on the act of a supplier not providing gifts and prizes, as offered, within a reasonable time, which creates distinct ways of contravening the provision.

23.424 As discussed in Option B, this prohibition is already present in the Victorian FTA. It would not apply to a situation where a person could not provide the gifts or prizes as offered, within a reasonable time based on a mistake of fact or the failure of a third party on which they reasonably relied upon.

### Option C — Outcome

23.425 The retention of the existing provision provides the ability for a consumer to seek the assistance of the law where a person makes an offer they do not intend to fulfil. For a business that does not intend to mislead a consumer by offering but not providing the gifts or prizes, there is no cost of the continuing application of this contravention.

23.426 Option C, as discussed under Option B above, provides both potential benefits and costs. The majority of costs for businesses could be avoided by taking all reasonable steps to ensure that they provide the gifts and prizes offered within a reasonable time, and certain defences would be available. The Motor Trades Association of Australia stated in its submission that it could support Option C, but noted that additional record-keeping costs could be incurred. The Financial and Consumer Rights Council also preferred this option as providing the highest consumer protection.

23.427 There would be benefits where the provision can help consumers receive the gift or prize in a timely manner, having regard to all the circumstances. While there are potential costs for businesses, those costs would only be borne by those that are at fault for an unreasonable delay in providing the gifts or prizes or for providing the gifts or prizes different to those promised.

### *Consultation*

23.428 *An Australian Consumer Law: Fair markets — Confident consumers* raised the question of whether the ACL should include a further 'reasonable time' requirement for provision of gifts and prizes. Nearly all respondents that addressed the issue were in favour of an extension of the TP Act provision along the lines of the Victorian FTA provision, as outlined in Option C.

23.429 SCOCA received six submissions in relation to this proposal in response to a consultation draft of this RIS. Most submissions from both business and consumer organisations were in favour of including a reasonable time test, however one business stakeholder suggested that this should only apply where the supplier has not specified a timeframe upfront.

### *Conclusion*

23.430 In assessing the merits of each option under Proposal 9, consideration has been had to:

- maintaining current levels of consumer protection within the context of a generic, national consumer law and addressing community expectations;
- minimising and, where possible, reducing business compliance costs under a national consumer law;
- rationalising existing national, State and Territory consumer laws as much as possible; and
- the practical benefits of achieving national uniformity through the ACL and the adoption of the ACL by all States and Territories.

23.431 There would be benefits from Option A as businesses operating nationally would be familiar with that requirement and would incur no additional compliance costs. However, Victorian consumers would no longer have the benefit of the statutory requirement to have the offered gift or prize provided within a reasonable time and consumers in the rest of Australia would not have a specific statutory right to receive them within a reasonable time.

23.432 Option B could lead to a reduction of consumer protection in situations where, prior to the passage of a reasonable time, for some other reason it becomes clear that a business does not intend to offer a gift or prize. In this situation a consumer would be unable to take action until after the passage of a 'reasonable' time. This option would also have a cost to business of complying with a new regulatory approach to this area, particularly for those businesses which do not already operate in Victoria where this requirement already exists.

23.433 Option C would benefit consumers through a broader scope to pursue a trader that the consumer believed had either: taken an unreasonably long time to provide the gifts or prizes they had offered, or where they are not provided as offered; or, did not intend to provide them at all. This approach would have some compliance costs for businesses that do not already operate in Victoria through the new reasonable time-based requirement; however, the fact that the requirement is based on the concept of reasonableness should, in itself, help to ensure that the requirement is not too onerous.

23.434 Noting the general level of support for Option C in submissions (including from some businesses), the overall compliance costs of this option are likely to be low. Businesses that engage in honest, open use of promotions such as gifts and prizes should experience very low or no costs from this proposal being implemented. The only businesses that would see a restriction on the use of gifts and prizes as promotional tools would be those

businesses that exploit consumers' desire to receive free items and subsequently either make consumers wait a very long time to receive them or do not bother providing them at all.

23.435 CAV have also indicated that this is an effective provision in Victoria, as the likelihood of obtaining redress for consumers who have not received gifts or prizes is substantially increased. This is because the focus of a proceeding is on what is a reasonable time in the circumstances, rather than (as under the TP Act provisions) the more difficult to establish intention or knowledge of a supplier at the time when the offer was made. Option C would also serve to facilitate enforcement of a prohibition that currently exists in the TP Act, particularly in tribunals and lower courts as part of a single national law, rather than in the Federal Court.

23.436 On balance, Option C can be supported by all members of MCCA.

23.437 In developing Option C regard has been had to:

- enhancing consumer protection and confidence in the enforcement of the law concerning the promises made about and the provision of gifts and prizes to consumers;
- the minimal impact that this proposal would have on legitimate business activities; and
- the adoption of a single, national approach to the law in this respect, and its enforcement nationally by all consumer agencies, as agreed by all Australian governments.

## **Proposal 10: Accepting payment without intending to supply**

### *Current regulation*

23.438 Section 58 of the TP Act prohibits a corporation from accepting payment or other consideration for goods or services where, at the time of the acceptance, the corporation:

- intends not to supply the goods or services;
- intends to supply materially different goods or services; or
- there are reasonable grounds, of which the corporation is aware or ought reasonably to be aware, for believing the corporation will not be able to supply the goods in the time specified or, if no time is specified, within a reasonable time.

23.439 The NSW FTA contains a section in substantially the same terms as section 58 of the TP Act. Section 19 of the Victorian FTA prohibits a person who accepts payment or other consideration for the supply of goods or services from:

- failing to supply all the goods or services within the period specified by the person or, if no period is specified, within a reasonable time; or
- supplying goods or services that are materially different.

23.440 Consumers expect to receive goods and services that they pay for. Non-receipt of goods and services can be particularly distressing for consumers and cause them direct and indirect financial losses. It is particularly concerning where a trader accepts payment without ever intending to supply goods and services.

*Evidence of consumer detriment*

23.441 There is evidence that there is concern over the way in which goods and services are supplied, and whether they are in fact supplied:

23.442 NSW Fair Trading has received on average over the last three years 734 enquiries and 504 complaints. Over that period 14 per cent of these matters were referred to the Consumer, Trader & Tenancy Tribunal.

- CAV received 4,140 enquiries and 1,744 written complaints in relation to non-supply, delays in supply and allegations of an intention to not supply in 2008-09. This represents a significant increase from the 3,159 enquiries and 1,424 written complaints in 2007-08. Complaints relating to non-delivery or late delivery of goods ranked in the top 10 complaints in the 2008 CAV research paper *Consumer confidence and market experience study*. An example of enforceable undertakings in relation to section 19 of the Victorian FTA against Mr Steven Xerri, following concerns about failure to supply goods as ordered.<sup>62</sup>
- The Queensland OFT receives on average 760 complaints a year relating to the supply of goods or services generally.

---

62 [http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV\\_Enforceable\\_Undertakings\\_2007/\\$file/steven%20xerri.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Enforceable_Undertakings_2007/$file/steven%20xerri.pdf).



- The SA OCBA also received 516 complaints relating to the non-supply of goods and services from 1 July 2007 to 30 June 2009.

23.443 The ACCC, on its Scamwatch website, highlights the existence of door-to-door sales and home maintenance scams. These are scams it describes as involving ‘promoting goods or services that are not delivered or are of a very poor quality’.<sup>63</sup> Scamwatch also highlights various scams associated with mobile phones, including the acceptance of payment for services associated with internet transactions and mobile phone services.<sup>64</sup> What is common to these forms of business activity is that they can involve the acceptance of payment when there is no intention of supplying the goods or services.

23.444 The ACCC has taken enforcement action under section 58 of the TP Act on a number of occasions, including against Commercial and General Publications Pty Ltd, ADT Security and Blue Book Directories Ltd (in liquidation).<sup>65</sup> A recent enforcement example of the Victorian provision being pursued can be found in a case against Robert Ewan Day of Grove Construction Services, where Mr Day was convicted of six counts of failing to provide services following the collapse of his conveyancing business.<sup>66</sup>

#### ***Options for Proposal 10***

23.445 The status quo comprises a national provision (TP Act) that is mirrored in all jurisdictions, except Victoria, which has a provision based on a requirement to supply within the specified time or, if no time is specified, within a reasonable time.

23.446 Three options will be considered for this proposal, to be compared with the status quo:

- Option A: Incorporate the current section 58, without amendment, into the ACL.
- Option B: Replace the TP Act provision with: a requirement to supply within the specified time or, if no time is specified,

---

63 See <http://www.scamwatch.gov.au/content/index.phtml/tag/HomeMaintenanceScams>.

64 See <http://www.scamwatch.gov.au/content/index.phtml/tag/RingToneScams>;  
<http://www.scamwatch.gov.au/content/index.phtml/tag/MissedCallsTextMessages>;  
<http://www.scamwatch.gov.au/content/index.phtml/tag/SMSCompetitionTriviaScams>.

65 <http://www.accc.gov.au/content/index.phtml/itemId/88221/fromItemId/378014>;  
<http://www.accc.gov.au/content/index.phtml/itemId/551738/fromItemId/465054>;  
<http://www.accc.gov.au/content/index.phtml/itemId/322909/fromItemId/378008>.

66 *R v Day* [2009] VSC 266 (31 July 2009).

within a reasonable time; and a prohibition on supplying materially different goods or services.

- Option C: Add to the TP Act provision: a requirement to supply within the specified time or, if no time is specified, within a reasonable time; and a prohibition on supplying materially different goods or services.

### ***Impact analysis***

#### *Option A — Incorporate the current section 58, without amendment, into the ACL*

23.447 Option A would involve retaining the existing TP Act provision without significant change. The intent-based provision in the current section 58 of the TP Act would be retained in the ACL. The Victorian provision would be repealed as part of Victoria's adoption of the ACL.

23.448 This prohibition allows the consumer agencies to act as soon as it may become apparent that the business did not intend to provide the goods or services.

#### Option A — Outcome

23.449 Option A would preserve the prohibition on accepting payment where the business has no intention to provide them or intends to provide them in a materially different form to what was agreed. The Motor Trades Association of Queensland supported Option A as representing a reasonable approach, but did not give reasons why it should be preferred over Options B or C. Telstra also supported Option A, suggesting that intention should remain the key aspect of this provision, and that the proposed amendments in Options B & C would interfere with contractual arrangements and that there are many legitimate reasons a business may fail to supply and that contractual remedies may be available.

23.450 Option A would create benefits for consumers and business through nationally consistent regulation, but could also have potential costs for some Victorian consumers (as opposed to the status quo) in circumstances where goods or services are not provided within a reasonable time, or where different goods are provided.

#### *Option B — Replace the TPA provision with: a requirement to supply within the specified time or, if no time is specified, within a reasonable time; and a prohibition on supplying materially different goods or services*

23.451 Option B would replace the current section 58 of the TP Act with requirements in the ACL to deliver within a reasonable time and not to

supply materially different goods or services. These requirements are already present in the Victorian FTA and, as such, many businesses are already subject to this requirement if they trade in that jurisdiction and may, where they operate nationally, apply the same standard elsewhere.

23.452 The Victorian offence provision is subject to defences of reasonable mistake, the act or omission of another person where the defendant had taken reasonable precautions to avoid the contravention. This option would see these defences retained in the ACL provision.

23.453 Removal of the intent-based TP Act requirement would mean that failure to supply can only be challenged after: a reasonable time has elapsed (even where it is apparent there is no intention to make the supply; or, where something other than what was offered is supplied). A 2002 National Competition Policy review of the NSW FTA found that taking action under the NSW equivalent of section 58 of the TP Act has sometimes proved to be difficult in practice, due to the problem of proving in retrospect that a trader was aware that goods or services would not be supplied.<sup>67</sup>

23.454 The submission from Dr Cousins suggested that the key outcome for consumers was that they receive their goods or services in a timely manner, and recommended Option B, suggesting that the intent-based requirement added little enforcement benefit beyond those provided by Option B.

#### Option B — Outcome

23.455 Option B provides both potential benefits and costs for consumers through providing a different type of protection. Option B could provide greater certainty for consumers purchasing goods, knowing that they have a specific statutory right of challenge for unreasonable delay or where they did not receive what they ordered. Businesses may also need to be particularly careful to ensure that their supplies are not subject to unreasonable delays and that they supply what is ordered.

23.456 The Victorian model was applied by the Victorian Supreme Court in the case of *Cousins v Merringtons*<sup>68</sup>. The Court found that the trader had accepted payment but failed to supply prescription spectacles and contact lenses within the time specified or within a reasonable time. The trader in that case had also breached section 19 of the Victorian FTA by providing incorrect prescriptions to consumers after accepting payment, such services being materially different to those to which the agreement to supply related.

---

67 Department of Fair Trading, 2002, *National Competition Policy Review: Fair Trading Act 1987 & Door to Door Sales Act 1967*, Sydney, p.68.

[http://www.fairtrading.nsw.gov.au/pdfs/About\\_us/ftadtdreport.pdf](http://www.fairtrading.nsw.gov.au/pdfs/About_us/ftadtdreport.pdf).

68 [2007] VSC 542.

Pursuing redress for the consumer under the TP Act would have been more difficult as the intention to provide incorrect lenses at the time the payment was accepted would have needed to be proven.

23.457 The broader nature of section 19 has allowed CAV to provide more effective dispute resolution in a higher number of cases than would have been the case under a provision which requires the trader's intention to not supply to be proven. Prohibiting failure to supply, as ordered, within a reasonable time can be more effective in negotiating with a trader to resolve a dispute, because they would be unable to simply (honestly or otherwise) rely on an assertion that they intended to supply the goods or services as a justification to refuse to negotiate with the consumer or regulator.

23.458 Some of the potential costs for suppliers are able to be offset through exclusions for situations where failure to supply is beyond the control of the supplier. The fact that the reasonable time test is one based on reasonableness would ensure that the provision does not become too onerous on business. Reasonableness would be based on the court's interpretation of what is reasonable in the circumstances, not necessarily what a consumer may contend is reasonable. There would also be defences available for situations where the failure to provide the goods or services within a reasonable time or as offered is due to a mistake of fact or reasonable reliance on another person. The requirements to provide goods or services as offered would also not apply if a consumer agreed to accept replacement goods or services.

23.459 However, the removal of the requirement that the person intend to provide the goods or services would remove the ability to act quickly if an intention not to supply as ordered was apparent, potentially to the detriment of consumers.

*Option C — Add to the TPA provision: a requirement to supply within the specified time or, if no time is specified, within a reasonable time; and a prohibition on supplying materially different goods or services*

23.460 Option C would add to the current section 58 of the TP Act by creating additional prohibitions based on the act of a supplier accepting payment but not supplying goods or services within a reasonable time, or supplying something materially different to what was agreed. This option would result in many of the benefits outlined in Option B, without the costs associated with the removal of the existing TP Act requirements.

#### Option C — Outcome

23.461 Under Option C, the retention of the existing provision provides the ability for a consumer to seek the assistance of the law where a person

makes an offer they do not intend to fulfil. For a business that does not intend to mislead a consumer by failing to provide the goods or services, there is no cost associated with the continuing application of this contravention.

23.462 The addition of the requirements to supply as ordered and within a reasonable time, as discussed under Option B above, adds both potential benefits and costs. The majority of costs for businesses could be avoided by taking all reasonable steps to ensure that they provide, within a reasonable time, the goods or services for which they accept payment.

23.463 There would be benefits for Option C where the provision would help consumers receive their goods or services, as ordered, in a timely manner, having regard to all the circumstances. Unreasonable delays can cause detriment to consumers both directly and through loss of confidence in the market. The Financial and Consumer Rights Council preferred this option, suggesting it provided the highest level of consumer protection, including in relation to scams. The Motor Trades Association of Australia indicated in its submission that it prefers Option C.

### ***Consultation***

23.464 *An Australian Consumer Law: Fair markets — Confident consumers* raised the question of whether the ACL should include a provision requiring supply within a ‘reasonable time’. In the five submissions that addressed the issue, businesses generally did not favour the extension, preferring to leave delays or failure to supply as a matter of contract, whereas consumer groups and some smaller businesses generally suggested that specific statutory relief should be provided for unreasonable delay.

23.465 SCOCA received five submissions (three from business organisations and two from consumer organisations) in relation to this proposal in response to a consultation draft of this RIS. Consumer organisations noted that enforcement of the intent-based provisions is unwieldy and, in this regard, a stricter test is more effective.

### ***Conclusion***

23.466 In assessing the merits of each option under Proposal 10, consideration has been had to:

- maintaining current levels of consumer protection within the context of a generic, national consumer law and addressing community expectations;

- minimising and, where possible, reducing business compliance costs under a national consumer law;
- rationalising existing national, State and Territory consumer laws as much as possible; and
- the practical benefits of achieving national uniformity through the ACL and the adoption of the ACL by all States and Territories.

23.467 There would be benefits from Option A, the retention in the existing TP Act provision only (which is based on the intention or knowledge of ability to provide), as businesses nationally would be familiar with that requirement. However, Victorian consumers would no longer have access to the specific statutory entitlement to have their goods or services provided within a reasonable time.

23.468 Option B — replacing the intent or knowledge-based requirements with a requirement based on reasonable time — could create a reduction of consumer protection during the interim period if it is clear a business does not intend to provide the goods or services, but where a reasonable time has not elapsed to allow a consumer to take action. This option would also have a cost to business of complying with a new regulatory approach to this area, particularly for those businesses which do not already operate in Victoria where this requirement already exists.

23.469 Option C would benefit consumers by providing a broader scope to pursue a trader that the consumer believed had either: taken an unreasonably long time to provide the goods or services they had offered, or where they are not provided as offered; or, did not intend to provide them at all. This approach would have some compliance costs for businesses that do not already operate in Victoria through the new reasonable time-based requirement; however, the fact that the requirement is based on the concept of reasonableness should, in itself, help to ensure that the requirement is not too onerous. Through the concept of reasonableness and defences relating to things outside the supplier's control, this option would have minimal compliance costs for businesses that genuinely attempt to provide goods and services to consumers as offered and in a timely manner — as most businesses do.

23.470 CAV have also indicated that this is an effective provision in Victoria, as the likelihood of obtaining redress for consumers who have not received goods or services is substantially increased. This is because the focus of a proceeding is on what is a reasonable time in the circumstances, rather than (as under the TP Act provisions) the more difficult to establish intention or knowledge of a supplier at the time when the agreement was made. Option C would also facilitate the enforcement of a prohibition that

currently exists in the TP Act, particularly in tribunals and lower courts as part of a single national law, rather than in the Federal Court.

23.471 On balance, Option C can be supported by all members of MCCA.

23.472 In developing Option C regard has been had to:

- enhancing consumer protection and confidence in the enforcement of the law concerning the promises made about and the provision of goods and services to consumers;
- the minimal impact that this proposal would have on legitimate business activities; and
- the adoption of a single, national approach to the law in this respect, and its enforcement nationally by all consumer agencies, as agreed by all Australian governments.

## **Proposal 11: False or misleading representations**

### *Current regulation*

23.473 Section 52 of the TP Act prohibits conduct, in trade or commerce, that is misleading or deceptive or that is likely to mislead or deceive. Section 52 is broadly framed and does not attract civil or criminal penalties. Section 53 of the TP Act provides specific prohibitions on certain false and misleading representations in relation to the supply or possible supply of goods or services. Section 53 attracts criminal penalties.

23.474 Section 14 of the Victorian FTA provides an additional prohibition on representations that purport to be a testimonial, or that are about a testimonial, from being false or misleading in any material particular. The Victorian provision also puts a burden on the person accused of using a false or misleading testimonial to either adduce evidence to the contrary or, in relation to a body corporate, prove that the testimonial or statement is not false or misleading.

23.475 In Australia, CAV has received 10 complaints about false or misleading testimonials since 2007 and has undertaken a number of prosecutions of such conduct.<sup>69</sup> In 2007, the ACCC took action against Mr

---

69 See Cedar Club International Pty Ltd of Thornbury, see *CAV 2001-2002 Annual Report* p.64 (See [http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV\\_Publications\\_Annual\\_Report\\_2002/\\$file/of\\_about\\_AR\\_2002.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Annual_Report_2002/$file/of_about_AR_2002.pdf)). In 2003, the Victorian Minister for Consumer Affairs the on John Lenders MP noted that false testimonials were a common

Ian Turpie and others for their involvement in conduct that involved the provision of a false testimonial about erectile dysfunction treatments by the Advanced Medical Institute.<sup>70</sup> Similarly, WA DOCEP has taken action in relation to false testimonials.<sup>71</sup>

23.476 In 2007, the ACCC, as part of the International Consumer Protection Enforcement Network (ICPEN), took part in an international internet sweep on the topic 'Who can you trust (online)? Targeting testimonials, guarantees (trustmarks) and endorsements'.<sup>72</sup> Australian consumer agencies such as the ACCC, Fair Trading NSW and CAV also list warnings for consumers about misleading testimonials on their websites<sup>73</sup>.

23.477 The US Federal Trade Commission has recently highlighted false testimonials as a problem in this context by issuing guidance in October 2009, including specific guidance covering endorsements by consumers, celebrities and experts.<sup>74</sup>

23.478 Testimonials can provide consumers with confidence in a product on the basis that another person (particularly a celebrity or well-known person) is satisfied with the goods or services in question. Consequently, false or misleading representations that purport to be a testimonial or that are about a testimonial can have a detrimental impact on consumers as they may be induced into buying something based largely or wholly on their belief in the testimonial.

### *Options for Proposal 11*

23.479 The status quo comprises a national provision (TP Act) prohibiting certain misleading or false representations, the elements of which are

---

feature of scams: *Consumers beware of top 5 scams* (5 September 2003) at [http://www.legislation.vic.gov.au/domino/Web\\_Notes/newmedia.nsf/798c8b072d117a01ca256c8c0019bb01/b6e319c9121aea89ca256d9a007fd122!OpenDocument](http://www.legislation.vic.gov.au/domino/Web_Notes/newmedia.nsf/798c8b072d117a01ca256c8c0019bb01/b6e319c9121aea89ca256d9a007fd122!OpenDocument).

70 See ACCC *Federal Court declares Advanced Medical Institute's advertising 'misleading'* at <http://www.accc.gov.au/content/index.phtml/itemId/758911>.

71 WA DOCEP *Dodgy website testimonials earn trader \$20,000 fine* (23 January 2006)

See

[http://www.commerce.wa.gov.au/Corporate/Media/statements/2006/January/Dodgy\\_website\\_testim.html](http://www.commerce.wa.gov.au/Corporate/Media/statements/2006/January/Dodgy_website_testim.html).

72 <http://www.accc.gov.au/content/index.phtml/itemId/799577/fromItemId/622303>.

73 <http://www.accc.gov.au/content/index.phtml/itemId/815373>;

[http://www.fairtrading.nsw.gov.au/About\\_us/News\\_and\\_events/Media\\_releases/2007\\_media\\_releases/20071004onlinescams.html](http://www.fairtrading.nsw.gov.au/About_us/News_and_events/Media_releases/2007_media_releases/20071004onlinescams.html);

[http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV\\_Publications\\_Computers\\_Internet\\_Factsheets/\\$file/scams.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Computers_Internet_Factsheets/$file/scams.pdf).

74 [www.ftc.gov/opa/2009/10/endortest.shtm](http://www.ftc.gov/opa/2009/10/endortest.shtm).



mirrored in all jurisdictions, but with an extra provision in Victoria that relates to testimonials.

23.480 Three options will be considered for this proposal, to be compared with the status quo:

- Option A: Incorporate the current section 53 of the TP Act, without amendment, into the ACL.
- Option B: Add to the TP Act provision a separate prohibition on representations that purport to be a testimonial, or that are about a testimonial, from being false or misleading; and
- Option C: Option B, but with an evidentiary burden on a person alleged to have made a false or misleading testimonial or representation about a testimonial.

#### ***Impact analysis***

##### *Option A — Incorporate the current section 53, without amendment, into the ACL*

23.481 Option A would involve retaining the existing TP Act section 53 in the ACL without significant change. The Victorian provision dealing specifically with testimonials would be repealed, as part of Victoria's adoption of the ACL.

23.482 The general prohibition on conduct that is misleading or deceptive (based on section 52 of the existing TP Act) in the ACL would apply to representations about testimonials. However, contraventions of this provision would not attract civil or criminal penalties that are associated with the more specific prohibition on false and misleading representations. Telstra's submission supported Option A, citing adequate coverage by existing sections 52 and 53 of the TP Act. The Motor Trades Association of Australia also supported Option A, but noted that it did not see any reason why testimonials should not be listed in this provision, even though it would already be covered by section 52.

##### Option A — Outcome

23.483 This proposal would create benefits for consumers and business through nationally consistent regulation, but would also have potential costs for some Victorian consumers (as opposed to the status quo) if section 53 TP Act does not cover false or misleading use of testimonials as broadly as subsection 14(1) of the Victorian FTA.

23.484 This proposal would have no additional compliance cost impacts on businesses, since the general prohibition on misleading or deceptive claims currently applies in every Australian jurisdiction without exception.

*Option B — Add to the TPA provision a separate prohibition on representations that purport to be a testimonial, or that are about a testimonial, from being false or misleading*

23.485 Option B would see the ACL contain both a provision based on section 53 TP Act and on subsection 14(1) of the Victorian FTA. The provision would include a separate prohibition on representations that purport to be a testimonial, or that are about a testimonial, from being false or misleading.

23.486 The provision would not only prohibit fake testimonials, but also the misleading use of a testimonial; for instance, quoting a notable celebrity's genuine quote and then claiming that it was made about a product when it was, in fact, not made.

23.487 The submission from Dr Cousins suggests that the inclusion of specific reference to testimonials in this provision would simply reflect the concerns that have existed in relation to testimonials in recent years, citing the areas of health, weight loss and property investment.

Option B — Outcome

23.488 The costs to businesses of a specific prohibition would be minimal. The vast majority of businesses would use genuine testimonials, and need only be sure that they are using them in a manner that is not misleading. Misleading representations about testimonials are already unlawful under section 52 of the TP Act, but do not attract punitive penalties.

23.489 Businesses would not be restricted in any way in relation to their use of genuine testimonials. Businesses that currently only use testimonials that are accurate could benefit to the extent that an explicit prohibition on false or misleading testimonials would deter other businesses from making such representations and hence gain an unfair competitive advantage.

23.490 A specific prohibition on false or misleading representations in relation to testimonials would mean that consumers could be more confident that testimonials are more likely to be genuine, and in instances where they are not, action could be more easily taken.

*Option C — Option B, but with an evidentiary burden on a person alleged to have made a false or misleading testimonial or representation about a testimonial*

23.491 As with Option B, Option C would place a specific prohibition on making false or misleading representations that purports to be a testimonial or that are about a testimonial, but would be augmented to require someone accused of breaching the provision to adduce evidence (in court) that the testimonial was not false (or misleading as the case may be), or else the representation would be deemed to be misleading.

23.492 As such, failure to adduce evidence that a claim was not false or misleading would result in the claim being deemed to be misleading. This burden would be evidentiary only (that is, require a person to put evidence before the court) and would not place a persuasive or legal burden on the respondent to *prove* they had reasonable grounds. Testimonials can be distinguished from other representations, as whether or not they are true, or being used in a genuine manner, they are only likely to be in the knowledge of the respondent and the person making the testimonial statement. As such, an evidentiary onus on the respondent would ensure that all relevant information is put before the court.

23.493 Dr Cousins did not support the evidentiary onus, suggesting that the new substantiation notice power would provide for much the same outcome. It should be noted, however, that substantiation notices would not assist private parties, as they are only available to the regulators. In contrast, the Financial and Consumer Rights Council strongly supported this Option, in particular because of the improvements to the ease of taking action that the evidentiary onus would provide.

#### Option C — Outcome

23.494 Option C would place an additional burden on a business accused of making a false or misleading representation that purported to be a testimonial or that was about a testimonial, but the burden would not be high. A business making a genuine representation should easily be able to adduce evidence that the testimonial is real and/ or accurate by producing relevant evidence verifying the testimonial.

23.495 The introduction of an evidentiary onus on the person making the representation would ensure that action taken by both consumers and consumer agencies in relation to testimonials is made easier. In the absence of a reverse onus, the regulator would have difficulty ascertaining whether a testimonial is real and/or accurate without the use of extensive information gathering powers, which themselves would impose compliance costs on businesses accused of making false or misleading representations about testimonials.

### ***Consultation***

23.496 *An Australian Consumer Law: Fair markets — Confident consumers* raised the question of whether the ACL should include an expanded prohibition on false or misleading representations. Some types of representation listed there are not proposed to be included in the ACL. Of the eight submissions covering this issue, generally speaking, businesses considered that the existing section 53 was broad enough. Consumer groups generally argued that, in some cases, extensions are justified to ensure adequate protection for consumers.

23.497 SCOCA received five submissions commenting on false or misleading testimonials in response to a consultation draft of this RIS. Consumer respondents indicated that a prohibition on false or misleading testimonials would respond to a growing area of concern.

### ***Conclusion***

23.498 In assessing the merits of each option under Proposal 11, consideration has been had to:

- maintaining current levels of consumer protection within the context of a generic, national consumer law and addressing community expectations;
- minimising and, where possible, reducing business compliance costs under a national consumer law;
- rationalising existing national, State and Territory consumer laws as much as possible; and
- the practical benefits of achieving national uniformity through the ACL and the adoption of the ACL by all States and Territories.

23.499 Option A would ensure that consumers and businesses remain protected from misleading and deceptive conduct (including in relation to testimonials) through the equivalent of section 52 of the TP Act in the ACL, as well as other specific types of false or misleading representations currently in section 53 of the TP Act. While this option still results in nationally consistent regulation, there would be no specific prohibition on false or misleading representations regarding testimonials.

23.500 The introduction of a specific new prohibition on making a false or misleading representation concerning a testimonial under Option B would ensure that consumers and consumer agencies are better equipped to take action in this area because of a specifically targeted provision. There should

not be a burden on businesses that make genuine representations in respect of testimonials, as to prove that a testimonial is genuine and honestly used, the business should retain both evidence of the original testimonial, and in many cases is likely to be able to contact the person who made the testimonial for corroboration.

23.501 CAV has advised that the inclusion of a specific reference to testimonials, combined with an evidentiary burden that a respondent would have to discharge in court, provides a significantly more effective means of pursuing false or misleading testimonials. This is because testimonials are potentially extremely misleading and are also particularly difficult to investigate if the person suggested to have made the testimonial statement cannot be located. The intention of this provision is not to further regulate businesses using genuine testimonials, but to assist in enforcing the law against businesses engaging in misleading behaviour through using testimonial statements.

23.502 Option C would have all the likely net benefits of Option B, but the requirement on the person making the representation regarding a testimonial to adduce evidence in support of the representation would provide for more effective and efficient court-based proceedings without significant costs to business. Consumers and consumer agencies would be able to more easily ensure that the maximum available evidence is before a court to determine whether a representation that purports to be a testimonial or is about a testimonial is false or misleading. Option C would also facilitate enforcement of a prohibition that currently exists in the TP Act, particularly in tribunals and lower courts as part of a single national law, rather than in the Federal Court.

23.503 On balance, Option C can be supported by all members of MCCA.

23.504 In developing Option C regard has been had to:

- enhancing consumer protection and confidence in the enforcement of the law concerning the use of false testimonials by traders;
- the minimal impact that this proposal would have on legitimate business activities; and
- the adoption of a single, national approach to the law in this respect, and its enforcement nationally by all consumer agencies, as agreed by all Australian governments.

***Clarifying amendment to section 53***

23.505 Section 53 of the TP Act has been amended a number of times since 1974, including in 1977 and 1986. The framing of the specific prohibitions refer variously to representations that are false and misleading, only false, or only misleading. The explanatory memoranda also use ‘false’ and ‘false or misleading’ interchangeably, indicating that the differences in the legislation may not have been deliberate.

23.506 There appears no reason why, over time, the additional ‘misleading’ element has been introduced for later subsections of the provision, but some of the earlier subsections remain only as prohibiting ‘false’ representations. As an example, a business is prohibited from making false or misleading representations about whether goods have spare parts available, but is only prohibited from making false representations about whether those goods are new; there seems to be no policy reason for this distinction.

23.507 The section could be redrafted to ensure that both false and misleading representations of the types in the section are prohibited. While the scope of parts of section 53 would be widened, most misleading representations would already be covered by the section 52 prohibition on misleading and deceptive conduct, so additional prohibitions by extending some parts of the section to misleading representations as well as false should not provide significant compliance burdens for business, but the potential consequences of non-compliance would be greater.

## **Part D      Implementation and Review**

23.508    In October 2008, COAG agreed to the implementation of a national consumer law, based on the TP Act and enacted by application legislation in each of the States and Territories. The ACL is to be implemented by 1 January 2011, in accordance with the COAG NPA timeline.

23.509    Amendments to the TP Act to implement any of the proposals contained in this RIS would constitute part of the implementation of the ACL, to be effected through a Bill to be introduced in the Australian Parliament in early 2010.

23.510    In accordance with the IGA, the enforcement and administration of the ACL, including the operation of the measures discussed in this RIS, will be reviewed within seven years of its commencement.<sup>75</sup>

---

75    Council of Australian Governments (2009). *Inter-Governmental Agreement for the Australian Consumer Law*, para 23.





---

## **C**hapter 24

# **Regulatory Impact Statement: The Australian Consumer Law — Aspects of the new national product safety law**

---

### **Introduction**

24.1 The Regulation Impact Statement (RIS) set out below was prepared for the consideration of the Ministerial Council on Consumer Affairs at its 4 December 2009 meeting.

24.2 The RIS was considered by the Office of Best Practice Regulation (OBPR) and passed on 30 November 2009. The RIS was given the OBPR reference number 10203.

### **Part A Background**

#### **Introduction**

24.3 This Regulation Impact Statement (RIS) addresses the case for making a number of legislative amendments to the existing provisions of the *Trade Practices Act 1974* (TP Act), as part of their incorporation into the Australian Consumer Law (ACL) to give effect to some of the recommendations of the Productivity Commission's (PC) 2006 Research Report, *Review of the Australian Consumer Product Safety System* (PC Report).

24.4 If implemented, the recommendations considered in this RIS would require legislative amendments to the product safety and information provisions and enforcement provisions of the TP Act (Division 1A of Part V and Division 3 of Part VC of the TP Act).

24.5 In May 2008, at the request of the Council of Australian Governments (COAG), the Ministerial Council on Consumer Affairs (MCCA) developed a model for reform of Australia's consumer product safety regulatory framework. This decision responded in part to the PC Report and involves:

- the Commonwealth assuming responsibility for making permanent product bans and safety standards;
- the States and Territories retaining their power to issue interim bans; and
- national, State and Territory agencies sharing responsibility for enforcing the national product safety law.

24.6 MCCA agreed in principle to implement the majority of the PC's recommendations as part of this reform process. In July 2008, COAG, through the Business Regulation and Competition and Working Group (BRCWG), endorsed the model agreed by MCCA for product safety reform.<sup>76</sup>

24.7 This RIS describes the problem which has given rise to the need for a number of the PC's legislative recommendations, the objectives of these reforms, options for achieving these objectives, the costs and benefits of these options, the results of consultation undertaken on the options, and how the proposed reform will be reviewed after implementation. This RIS draws on the findings of the PC Report.

## **Background**

24.8 In March 2005, the then Parliamentary Secretary to the Treasurer requested the PC to examine options for reforming Australia's general consumer product safety system. This system consists of the product safety provisions of the TP Act and the equivalent provisions in the State and Territory Fair Trading Acts, along with the administration and enforcement of those provisions and other non-regulatory activities conducted by governments to achieve consumer product safety objectives.

24.9 The terms of reference for the research study required the PC to assess the effectiveness of current regulatory arrangements in addressing product safety-related market failures. The PC was also asked to examine the direct and indirect economic and social costs and benefits of each of the reform options presented in the 2004 MCCA discussion paper, *Review of the Australian Product Safety System*.<sup>77</sup>

24.10 The PC released its report in January 2006. The report's findings and recommendations included options for creating more clearly defined roles for the Commonwealth and the States and Territories with respect to

---

76 COAG Communiqué of 3 July 2008, see [http://www.coag.gov.au/coag\\_meeting\\_outcomes/2008-07-03/index.cfm](http://www.coag.gov.au/coag_meeting_outcomes/2008-07-03/index.cfm).

77 Available at [www.consumer.gov.au](http://www.consumer.gov.au).

generic consumer product safety regulation (referred to in this RIS as framework reforms). The PC also recommended a number of specific legislative amendments to enhance the effectiveness of the TP Act, which could be implemented independently of the national model for product safety regulation (referred to in this RIS as non-framework reforms). This RIS examines the case for implementing the non-framework reforms only.

24.11 If the non-framework recommendations of the PC are implemented, the proposed legislative amendments would form part of the broader reforms agreed to by COAG on 2 October 2008 to implement an ACL.<sup>78</sup>

---

78 COAG Communiqué of 2 October 2008, see [http://www.coag.gov.au/coag\\_meeting\\_outcomes/2008-10-02/index.cfm](http://www.coag.gov.au/coag_meeting_outcomes/2008-10-02/index.cfm).

## **Part B Options for Reform**

24.12 This RIS deals only with the non-framework legislative reforms recommended by the PC. These recommendations relate to amendments to existing provisions of the TP Act, which will form the basis of the national product safety law, which will, in turn, form part of the ACL.

### **The problem**

24.13 Responsibility for regulating consumer product safety in Australia is shared between the Australian, State and Territory governments. Due to the limitations on the Commonwealth's powers under the *Australian Constitution*, the TP Act only applies to corporations and to businesses engaged in interstate trade, operating in one of the Territories, or operating through post or telecommunications technology. This limitation does not extend to the States and Territories. However, jurisdictional legislation only applies to situations within the legislative reach of the Commonwealth to the extent that it is not inconsistent with the TP Act.

24.14 While the objectives of all jurisdictions are very similar, the individual statutes vary in a number of significant ways between jurisdictions. This can result in variations in the interpretation and enforcement of similar legislation.

24.15 The TP Act product safety provisions have not been updated comprehensively since they were introduced in 1986. The PC noted that there is considerable scope to improve the existing system of regulation to make it more efficient, effective and responsive. Given the decision of COAG to create a new national system of product safety regulation, which is to be based on the TP Act and implemented by the end of 2010, it is timely to consider whether the scope and range of product safety regulation under the TP Act is appropriate.

### **Objectives of government action**

24.16 Product safety regulation plays a necessary and important role in identifying and removing unsafe products from the market through recalls, bans, safety standards and public warnings. Consumers should be able to purchase goods and services that meet their safety expectations. Unsafe products should be readily detected, reported, and, if necessary, removed from the market and consumers should be able to obtain redress and compensation where appropriate.

24.17 Product safety regulation should not hinder the efficient operation of markets in safe consumer products by imposing unnecessary costs on businesses or unduly limiting the ability of businesses to supply products

with varying price/quality levels demanded by consumers. The primary objective of product safety regulation is to promote consumer confidence in the market through eliminating risks that cannot be mitigated by market forces alone and, in doing so, to enhance demand. There are also savings in health and welfare costs for individuals and the community associated with improved product safety regulation, which impacts broadly across the community since most citizens and businesses regularly engage in consumer transactions. Accordingly, product safety regulation can be most effective when regulators are able to act proactively in a nationally consistent and clear manner.

### **The existing law**

24.18 Currently, all nine Australian governments have responsibility for regulating product safety. The relevant product safety provisions at the Commonwealth level are contained in Division 1A of Part V and Division 3 of Part VC of the TP Act. The key regulatory provisions within the TP Act include the power to issue warning notices on goods (section 65B), the power to ban the supply of goods (section 65C), the power to establish product safety standards (sections 65C and 65E), the power to establish product information standards (sections 65D and 65E) and the power to order product recalls (section 65F). All of these powers are vested in the relevant Commonwealth Minister. In addition, suppliers must notify the Minister of all voluntary safety related product recalls (section 65R).

24.19 All of the States and Territories have fair trading legislation containing product safety provisions that are similar, but not identical to, the provisions of the TP Act. Policy making and enforcement under these Acts is undertaken by the relevant State or Territory fair trading agency or equivalent.

24.20 The TP Act also establishes a statutory liability regime for manufacturers and importers of defective goods. Part VA of the TP Act provides for statutory rights of action against a manufacturer or importer who supplies defective goods and, as a result of that defect, a consumer suffers injury, loss or damage. A good is considered to be defective for the purposes of Part VA if their safety is not such as persons are generally entitled to expect. Part VA serves a distinct, complementary purpose to Parts V and VC. It provides an avenue to recover damages after an incident has occurred, whereas the regulatory provisions in Parts V and VC are designed to reduce the risk of consumer product related injury from occurring in the first instance.

### **Proposed reforms**

24.21 There are two options to respond to the PC's recommendations:

- implement the recommendations by amending or augmenting the established product safety legislative provisions in the TP Act; or
- not implement the recommendations and maintain the existing product safety provisions in the TP Act.

24.22 Alternative, non-regulatory or quasi-regulatory approaches would not be appropriate in the context of the existing legislative product safety regulatory system.

24.23 The specific non-framework recommendations of the PC, which are the subject of this RIS, are set out below.

- Recommendation 7.1: Governments should amend consumer product safety provisions in all jurisdictions to cover services related to the supply, installation and maintenance of consumer products.
- Recommendations 6.1 and 8.1: The threshold test for bans and recalls should cover all goods of a kind which, under normal or reasonably foreseeable conditions of use, will or may cause injury to any person.
- Recommendation 9.3: Governments should require suppliers to report to the appropriate regulator, products which have been associated with serious injury or death.
- Recommendation 11.2: Governments should have the power to undertake a recall directly where no supplier can be found to undertake such a recall.

24.24 The specific reform proposals are described in more detail in Part C below, as part of the impact analysis.

## Part C Impact Analysis

24.25 In this Part, the respective costs and benefits of either implementing the PC's recommendations by legislative means, or not implementing them at all, are examined for each of the four recommendations.

24.26 In its report, the PC recognised the difficulty of this task, citing the paucity of data and research available in Australia that could assist with assessing product related injury costs across the country and the size and nature of the problem posed by unsafe consumer products.<sup>79</sup>

24.27 The changes discussed in this RIS would apply to the legislative framework for product safety actions. The actual costs and benefits of these changes would depend on the number of regulatory actions actually taken (that is, the number of individual bans, standards and recalls undertaken).

24.28 Currently, the Australian Government has 11 active product bans and approximately 35 mandatory product safety and information standards in place under the TP Act. These numbers may grow slightly with the transfer of existing State and Territory bans and standards to the Commonwealth under a national product safety regime, but it is unlikely that the changes discussed in this RIS would lead to a proportionately large increase in regulatory actions.

24.29 In addition, the Australian Government's regulatory impact analysis requirements apply to the development of mandatory standards, including the preparation of individual Regulation Impact Statements before any such standard can be made.

### PC Recommendation 7.1

24.30 The PC recommended that governments should amend consumer product safety provisions in all jurisdictions to cover services related to the supply, installation and maintenance of consumer products.

#### *Background*

24.31 The product safety provisions in Division 1A, Part V of the TP Act currently relate only to the safety of consumer 'goods'. Division 1A contains a comprehensive set of provisions dealing with the publication of warning notices in relation to goods, the establishment of mandatory safety and information standards for goods, the banning of unsafe goods,

---

79 Other, non-legislative recommendations of the PC are being implemented to address the future paucity of data.

compulsory recalls of unsafe goods and the requirement to notify the Minister of voluntary safety related recalls. The TP Act is silent on the safety of services. Other consumer protection provisions of the TP Act relate to services, including sections 52, 53 and 74, but none of these directly deal with the provision of unsafe services.

24.32 Services may be unsafe because of the nature of the service itself, or because of the relationship between the service and a particular good, such as the installation of looped blind cords within easy reach of small children and infants. The PC examined existing legislative approaches to safety of services in some States and Territories, as well as overseas approaches. Some jurisdictions, including Victoria, Queensland and South Australia, have consumer product safety laws that apply to services.

24.33 The PC concluded that there would be net benefits in extending the reach of product safety legislation in some situations to cover the safety of services. This implies that governments would have the power to issue warning notices on services, to introduce safety standards for services, to introduce information standards for services and to ban certain services considered unsafe. The PC concluded that these powers should only apply to limited situations relating to the supply, installation and maintenance of consumer goods, as the provision of these services have the greatest potential to render an otherwise safe good unsafe.

***Option A: Amend the TPA to extend the consumer product safety provisions to services related to the supply, installation and maintenance of consumer goods***

24.34 Implementation of this recommendation would be achieved by amendments to the existing product safety provisions of the TP Act to allow the Minister to publish warning notices in relation to services, to prescribe mandatory safety and information standards for services, and to ban certain unsafe services where appropriate. The administrative provisions of the TP Act, which relate to the existing product safety provisions, such as information gathering, review and penalty provisions, would also apply in respect of services.

24.35 This amendment would allow the national product safety law to be applied fully to situations where there is an underlying consumer product which, although in itself is not dangerous, may pose a danger to sections of the community as a result of how the product is supplied, installed or maintained.

***Costs and benefits to suppliers***

24.36 Suppliers may incur higher compliance costs in ensuring that their product related service meets any relevant safety or information standards



introduced. Suppliers may also lose business where a service is banned. There would be initial transition costs associated with understanding new requirements and implementing new systems and processes, with ongoing costs associated with meeting new standards, if any. The nature of these costs would be similar to those already imposed by the regulation of goods.

24.37 However, evidence from Australian jurisdictions where product safety regulation already covers services indicates that the number of bans or mandatory standards for services would be low compared with bans and standards for goods. Further, standards introduced by the Commonwealth in respect of goods are supported by regulatory impact analysis, including consideration on a case-by-case basis of the compliance costs, and a similar process would apply before a new standard was to be introduced for services. The PC also noted in its report that services which pose the greatest consumer hazards are already covered by sector-specific regulatory arrangements (that is electrical product and equipment safety) and would not be likely to be affected by this amendment.<sup>80</sup>

24.38 The relatively narrow scope of the PC's recommended amendment (that is to services related to the supply, installation and maintenance of consumer products) would also contribute to minimising compliance costs for businesses. An alternative suggested by the PC is to extend the product safety provisions to cover all services (including those not related to a good). Currently, some State and Territory product safety laws extend to the safety of all services. However, evidence gathered by the PC indicated that in practice these provisions have not been applied to services unrelated to the supply of consumer goods.<sup>81</sup>

#### *Costs and benefits to consumers*

24.39 Although impossible to quantify, consumers would benefit from the potential for government action in respect of unsafe services, when justifiable bans are introduced; and improved safety of services, when mandatory service standards are introduced. These measures have the potential to reduce consumers' exposure to unreasonable risks of injury from unsafe services relating to consumer products. Examples of potentially unsafe services include the unsafe installation of blind and curtain cords which create a strangulation hazard for young children, the installation of highly flammable material as insulation in roof cavities, and the incorrect installation of heat lamps in ceilings creating a fire hazard. There have been a number of avoidable deaths of young children in Australia from strangulation on incorrectly installed blind and curtain cords. The PC noted

---

80 Productivity Commission (2006) *Review of the Australian Consumer Product Safety System*, Australian Government, Canberra, pages 155 and 163.

81 PC (2006) pages 161 and 163.

there was a paucity of data relating to injuries and property losses arising from unsafe services.

24.40 In his submission on the consultation RIS, Dr David Cousins noted that not extending coverage to all services would reduce protection for consumers in those jurisdiction where product safety laws currently cover services, such as in Victoria, Queensland and SA. Myer, on the other hand, favoured limiting coverage to consumer product related services and not all services.

24.41 While it is acknowledged that not applying the product safety requirements to all services, including non-product related services like tourism and repair services, may potentially leave consumers of those services exposed to safety risks, some of these service sectors are currently subject to industry-specific regulation in the States and Territories. Extending the product safety requirements to cover product related services would offer consumers with protection which was previously absent at the Commonwealth level under the TP Act. It should also reduce the business compliance burden by limiting the requirements to those services which are related to the supply, installation or maintenance of a consumer product, rather than to all services.

24.42 The benefits to consumers would potentially be offset by any corresponding increase in the prices of services or lack of availability of services or service providers. The prices of services may be pushed up where service providers are required by law to increase the time or effort to ensure that a service is provided lawfully. However, these effects would be limited to only a few categories of services which are capable of posing risks to consumers. Experience with safety of services regulation in those jurisdictions where it currently exists indicates that this power would not be used often.

*Costs and benefits to governments*

24.43 The PC noted that the number of instances of regulatory action in relation to services is likely to be relatively limited. Accordingly, costs to government associated with considering and implementing regulatory interventions in respect of safety of services would be small compared to the costs of regulating the safety of goods. Evidence of the infrequent use of safety of services powers in those jurisdictions that have them supports this view.<sup>82</sup>

---

82 PC (2006) page 159.

24.44 Selective and soundly-based use of this power would meet the reasonable expectations of consumers that regulators can act to help ensure the safety of services.

***Option B: No change to the TPA***

24.45 Currently, Division 1A of Part V of the TP Act relates only to product safety and product information in respect of goods. Not amending the product safety provisions in the TP Act would mean that the safety of goods only would be regulated. In the absence of any amendments, consumer regulators would not be able to take action on behalf of consumers in relation to safety of services issues.

*Costs and benefits to suppliers*

24.46 To not introduce powers to issue warning notices, bans or mandatory standards for services related to the supply, installation and maintenance of consumer products (that is, to maintain the status quo) would essentially be cost neutral to suppliers. Suppliers of services would continue to make their own assessments and decisions about the safety of their services, and the current sanctions and remedies in place (sections 52, 53 and 74 of the TP Act) would continue to apply.

24.47 Suppliers may benefit from being able to provide and perform services to their own standards (provided they meet consumers' perceptions of an acceptable standard) without the risk of a ban on the service, even if it is unsafe. However, suppliers may be subject to potential legal action if injuries or property losses arise. The common law duty of care in tort and rising insurance premiums are also strong deterrents to potential providers of unsafe services.

24.48 Maintaining the existing system, within a national product safety regime, would lead to reduced coverage in some jurisdictions across Australia. State and Territory product safety legislation that currently applies to services would need to be narrowed in order to apply the national law.

*Costs and benefits to consumers*

24.49 In the absence of a power to regulate the safety of services, consumers would need to continue to rely on section 74 of the TP Act, which implies a warranty into contracts that services will be performed with due care and skill, as well as actions under the common law. However, because section 74 is an implied term in consumer contracts, consumers can only rely on private court action to recover any loss or injury caused as a result of a breach of this term, rather than an action under the TP Act brought by the ACCC.

24.50 Some protection is also provided to consumer services under sections 52 and 53 of the TP Act, which prohibit misleading or deceptive conduct and false or misleading representations, although these provisions do not directly address underlying safety concerns with services.

*Costs and benefits to governments*

24.51 Not extending the product safety powers to cover services would be cost neutral to governments.

24.52 While governments would avoid the costs associated with investigations, policy development, compliance strategies and enforcement actions relating to unsafe services, without these amendments regulators would not be able to respond in an appropriately targeted way to instances of services-related deaths and injuries. Consumer criticism could also be expected if laws did not meet the reasonable expectation of consumers of protection from unsafe service delivery. Although governments could still take action regarding the underlying product, such action may be poorly targeted where the safety of the product is compromised by the performance of a related service.

*Conclusion*

24.53 While recognising that there were limited instances of safety problems related to services which were not already addressed by specific safety regimes, the PC concluded that there would be an overall benefit from extending the product safety provisions of the TP Act to cover services related to the supply, installation and maintenance of consumer goods.

24.54 Given the effective use of similar powers within some Australian jurisdictions, it would be preferable to adopt Option A and incorporate the PC's recommended amendment into the national product safety legislation.

**PC Recommendations 6.1 and 8.1**

24.55 The PC recommended that the threshold test for bans and recalls should cover all goods of a kind which, under normal or reasonably foreseeable conditions of use, will or may cause injury to any person.

*Background*

24.56 Currently, the product safety provisions of the TP Act permit the Minister to ban or recall goods which are unsafe due a defect in the product itself. It is unclear whether the Minister may ban or recall products that pose a significant threat to consumer safety as a result of their misuse. Some products pose a significant hazard to consumers not because they are defective but because they have a high probability of causing injury through

the behaviour of the user. For instance, where a person uses a product in a manner which, whilst not its normal or intended use, nevertheless should have been reasonably foreseen, then the product should be supplied in a form that can remain safe in circumstances of their 'reasonably foreseeable use'. An example of this is a child playing with a toy and putting it in his mouth.

24.57 The PC argued that the concept of 'reasonably foreseeable use' is already part of the regulatory environment in some Australian jurisdictions (Victoria, New South Wales and Western Australia) and is embedded in common law. The PC viewed such amendments as materially contributing to reducing injuries associated with the use of consumer products. The PC has estimated that the vast majority (generally greater than 90 per cent) of consumer product related deaths and serious injuries are caused by the behaviour of the user of the product and not because the product is defective. Incorporating this concept into product safety regulation would not mean that the number of bans and standards would increase proportionately.

24.58 Implementation of this recommendation would expressly recognise product hazards arising in the course of a reasonably foreseeable use of a consumer product to be appropriate grounds for introducing a ban on the supply of a specific product or to order the recall of the product.

***Option A: Amend the TPA to apply the recommended threshold test to bans and recalls***

24.59 The concept of 'reasonably foreseeable use' would be expressly included in the threshold test for the exercise of the power to ban goods (section 65C), to order the recall of goods (section 65F) or to issue a warning notice in respect of a good (section 65B). The Minister would have the power to ban or recall goods which are assessed as unsafe in the course of their intended use or 'reasonably foreseeable use'. Such circumstances may arise if a consumer uses a product in a manner which, while not the primary or normal use of the product, should nevertheless have been foreseen, and the product causes an injury as a result.

24.60 The amendment would ensure that the ban and mandatory recall powers are consistent with the 'duty of care' principle in common law negligence and the safety standard embodied in the Part VA (Product Liability) of the TP Act.<sup>83</sup>

24.61 Both the Australian Toy Association (ATA) and a confidential submission on the consultation RIS noted that currently, under the TP Act, the Commonwealth Minister is able to make a product ban or recall in

---

83 Section 75AC(2)(e) provides that a factor in determining the safety of a defective good includes 'what might reasonably be expected to be done with or in relation to them'.

circumstances where goods ‘will or may cause injury’, and viewed this was broad enough to cover situations of consumer misuse. While this may be the case, in the process of amending the TP Act there would be utility in taking the opportunity to clarify in the law that the Minister has the ability to introduce a ban or recall not only in circumstances where a normal or intended use of a product may cause injury, but also in situations where a reasonably foreseeable misuse of a product may result in injury.

*Costs and benefits to suppliers*

24.62 The PC noted in its report that ‘the same preventative measures that [suppliers] would take to avoid potential [product] liability suits would also protect them from government action to withdraw their product from the market’.<sup>84</sup> These measures include knowing any safety risks associated with their products, reducing such risks through product design, research and testing, and providing adequate instructions and warnings to address any residual risks. Few product bans have been made, and the test of ‘reasonable foreseeable use’ proposes a fairly limited expansion in the circumstances of when the government can conduct a ban or recall on unsafe goods.

24.63 However, suppliers may incur additional costs if uncertainty about the definition of ‘reasonably foreseeable’ misuse leads to overcautious approaches to product design and distribution. A confidential submission on the consultation RIS considered that ‘reasonably foreseeable’ would not create certainty for consumers and businesses, and that suppliers could incur additional costs if an ‘over zealous approach’ is taken by the regulator. This concern could be mitigated through clear legislative drafting and timely guidance issued by regulators to suppliers. Further, the courts are familiar with the concept of ‘reasonably foreseeable’ in relation to the requisite ‘standard of care’ in common law negligence actions.

*Costs and benefits to consumers*

24.64 Consumers would benefit from improved product design, product information and product warnings that would result from suppliers’ knowledge that their product would be banned or recalled if it will or may cause injury under conditions of ‘reasonably foreseeable use’.

24.65 Consumers may face some reduction in the availability of consumer products resulting from price increases that may be passed by suppliers who incur additional costs in design and manufacture of their products, or in educating consumers about appropriate uses of their products. This may be a particular disadvantage for consumers that use existing products strictly in accordance with their normal or intended use.

---

84 PC (2006) page 149.

24.66 Amending the threshold test for bans and recalls to incorporate the concept of ‘reasonably foreseeable’ use or misuse would provide the Commonwealth Minister with the ability to introduce a ban or recall products in appropriate circumstances. In itself, this amendment would not capture a large number of products, such as the improper use of kitchen appliances, should it not be required.

24.67 This was a concern expressed by Myer in its submission on the consultation RIS. Myer also suggested limiting the recommendation to children, since adults should be expected to assess the risks before using products in an unintended manner. Limiting the scope of the threshold test would restrict the flexibility of the Minister to make bans and recalls in situations where misuse of a particular product is reasonably foreseeable and, in the process, reduce consumer protection.

*Costs and benefits to governments*

24.68 This recommendation would allow regulators in all jurisdictions to take appropriate action when a product poses an unacceptably high risk to consumer safety as a result of its ‘reasonably foreseeable use’. Regulatory actions in respect of reasonably foreseeable use would be likely be in addition to the total product safety actions (bans, recalls and mandatory standards) currently undertaken.

24.69 Regulators may also face increased expectations from consumers to act where goods are associated with injuries or property damage. Such expectations would need to be managed through clear guidance to suppliers and consumers on the interpretation of ‘reasonably foreseeable’.

***Option B: No change to the TPA***

24.70 Currently, Division 1A of Part V of the TP Act empowers the Minister to declare specific goods to be unsafe, and hence ban their supply or order the supplier to recall the goods, if it appears to the Minister that the goods ‘will or may cause injury to a person’. The ‘will or may cause injury to a person’ test allows some latitude in determining whether a product poses a danger. The phrase ‘may cause injury’ calls for a judgement to be made in respect of likelihood or probability that an injury event may occur with a causal link to a particular consumer product. In the absence of any amendments, such judgements would continue to be made, drawing on any available injury evidence and the experience and judgement of policy advisors and the Minister. However, it would not be clear that the reasonably foreseeable misuse of a product constitutes sufficient grounds for a ban or recall.

*Costs and benefits to suppliers*

24.71 Suppliers would benefit from the status quo by continuing to make their own assessments of the safety of their products under normal or other foreseeable conditions of use, and also make their own judgments about the level of information and warnings to provide with their products. Further, maintaining the status quo would be cost neutral to suppliers, who would be exposed to the same product related injury risks (and consequential product liability claims or other legal action), and the same regulatory intervention risks that currently exist.

*Costs and benefits to consumers*

24.72 In the absence of including ‘reasonably foreseeable use’ in the threshold test for bans and mandatory recalls, regulators may not be able to act when a product poses a danger when used in ways other than its primary purpose. This may lead to the exposure of consumers, particularly vulnerable or disadvantaged consumers, to unreasonable risk of injury. A related cost to consumers would be that suppliers may be less motivated to provide clear use instructions and warnings with their products, which again may result in a small increase in injuries.

*Costs and benefits to governments*

24.73 Maintaining the status quo would be cost neutral for the government.

***Conclusion***

24.74 The PC concluded that there were net benefits in revising the threshold test for bans and compulsory recalls under the TP Act to explicitly allow for ‘reasonably foreseeable use’. Adopting Option A and making the PC’s recommended amendment would contribute to reducing injuries associated with the use of consumer products.

24.75 Overseas experience where regulators have the power to ban or recall products subject to ‘reasonably foreseeable use’ indicates only a small number of requests for regulators to take action. Within Australia, the Victorian, NSW and WA agencies already have the power to ban or recall products because of their foreseeable use.

**PC Recommendation 9.3**

24.76 The PC recommended that the Government amend the TP Act to require suppliers to report products which have been associated with serious injury or death.



### ***Background***

24.77 Currently, the TP Act requires that suppliers must report to the Minister, within two days, when they undertake a voluntary product recall on safety grounds. State and Territory legislation also contains reporting requirements to State regulatory agencies. Before making a decision to take action as significant as a voluntary recall, a supplier would usually undertake extensive internal investigations, which may take some time to complete. Currently, there are no other formal requirements for suppliers to report potential or actual issues with the safety of their products to product safety regulators. This lack of early reporting by businesses reduces the opportunity for regulators to take timely actions to protect consumers from unsafe products, which may lead to an unsafe good remaining on the market for a longer time than would otherwise be the case.

24.78 The PC examined the case for requiring businesses, in certain circumstances, to provide information on the safety of products they supply, such as when a consumer makes a complaint directly to the supplier. This would give regulators access to more timely information about potential safety hazards.

24.79 The PC recommended creating a new requirement for a supplier to report to the Minister if they become aware that a product they have supplied has been associated with a serious injury or death. The PC favoured a definition of serious injury as any injury requiring admission to a hospital as this would provide a clear, objective trigger for the reporting requirement.<sup>85</sup> Consistent with the current reporting requirement for voluntary recalls, a time limit of two days would be appropriate for reporting such events to the Minister after the supplier becomes aware of the injury or death.

24.80 There would be no requirement for the supplier to substantiate the report or to admit that their product was either at fault or even a contributing factor. The product need not be the direct cause of the serious injury or death or the only cause; it is only necessary for the product to be 'associated' with the injury or death to trigger the reporting requirement. Consumer behaviour and/or environmental factors are often contributing elements to product related deaths or injuries.

24.81 An alternative suggested by the PC would be to require businesses to report any product associated with a successful product liability claim or multiple out-of-court settlements. This option has similar benefits and costs of the obligation to report products which have been associated with serious injury or death.<sup>86</sup> While this option would provide governments with some

---

85 PC (2006) page 224.

86 PC (2006) page 225.

useful information, it is unlikely to significantly improve the responsiveness of the current regime and, thereby, to reduce the incidence of consumer injury. Often it would take some time after the consumer is injured before a product is the subject of a successful liability claim or out-of-court settlement. During this period, it is likely that regulators would have discovered the danger of the product from other sources.

***Option A: Introduce a new legislative requirement for suppliers to report products associated with serious injury or death***

24.82 To implement this recommendation a new mandatory reporting requirement would be imposed on suppliers to report to the Minister, in writing in a timely manner, when they become aware that a product they have supplied has been associated with the serious injury or death of a person.

*Costs and benefits to suppliers*

24.83 The policy objective in introducing a mandatory reporting requirement is to ensure that regulators are informed about serious injuries and fatalities that could be related to a defect or characteristic in a product in the market. The new information would enable regulators to conduct further investigations to identify emerging hazards or risky products, to take appropriate regulatory action (if any) to remove the product from the market, and to help prevent similar injuries or fatalities from arising in the future.

24.84 Introducing this additional reporting requirement would lead to suppliers incurring compliance costs associated with forming judgements about what information needs to be reported, including establishing internal reporting mechanisms to ensure that information subject to the reporting requirement is identified in a timely way. However, provided that the reporting requirement is framed with clearly designed triggers for reporting information, the compliance costs of meeting this requirement would be low. The cost of producing and providing each report to government would be straightforward and should be relatively inexpensive.

24.85 A confidential business submission raised concerns with how the reporting requirement would apply in relation to motor vehicles. It noted that the nature of motor vehicle usage means that motor vehicles may be associated with cases of serious injuries or fatalities, which would impose significant additional costs on participants in the automotive supply chain to comply with the requirement. Specifically, the submission raised concerns with how 'associated with', 'becomes aware' and 'serious injuries' would be defined in the law. The submission pointed out that given the nature of consumer usage of motor vehicles and that vehicles are invariably involved in accidents requiring hospital admission, reporting every accident would be required even if the vehicle was not a contributing factor to the accident.

24.86 The ATA also expressed concerns that the ‘associated with’ test could be too broad and would carry overly onerous burdens on suppliers and government.

24.87 In drafting the legislation, the reporting requirement (including the term ‘associated with’) would be clearly framed to not apply to situations where the injury or fatality is clearly not related, or very unlikely to be related, to a defect in the product or to a product failure, but instead could, for instance, have arisen by user behaviour, environmental factors (such as the weather), external influences (such as alcohol or another person) or a combination of these. For example, many road accidents are not related to a defect in motor vehicles, while most sporting injuries are unrelated to sporting equipment, clothing or footwear that was being used at the time of the injury. The ATA, for instance, cited the example of injury caused by tripping over a toy, while the Motor Trades Association of Australia (MTAA) observed that many motor vehicle accidents may have resulted from operator error and that the safety of the vehicle was not in question.

24.88 That said, in situations where there is a possibility that an accident may be related to a defect in the product or to a product failure, such as with motor vehicles, sporting equipment or footwear, then a supplier of such product would need to report this to the regulator. There would be potentially significant regulatory burdens of not framing the requirement tightly, including the term ‘associated with’. These burdens would fall on suppliers in terms of compliance costs, as well as regulators in terms of administrative costs.

24.89 One submission on the consultation RIS also pointed out that the automotive industry currently operates under a voluntary code of practice, developed by the Federal Chamber of Automotive Industries, which imposes requirements and procedures for the conduct of automotive product safety recalls.

24.90 There were also submissions received on the consultation RIS on this recommendation expressing confusion over how the trigger of ‘becomes aware’ would apply in practice, and if information received indirectly, such as through the media, would need to be reported.

24.91 For instance, the ATA queried whether the reporting requirement would be triggered if the information became known to an employee or to more senior staff. In drafting this requirement the law would be clearly framed to make it clear that a supplier would be required to report every time they receive information (that is ‘becomes aware’) that a product has been ‘associated with’ a serious injury or fatality, regardless of the source of that information. This includes receiving information from a medical, insurance or media report or from a direct consumer complaint to a call centre or a customer service agent.

24.92 There would be no requirement on suppliers to investigate or monitor the safety of products they supply. Rather, the requirement would be to report once the supplier ‘becomes aware’ that their product has been ‘associated with’ a death or serious injury. This would avoid imposing additional compliance burdens for business. In addition, only being required to report to the one (Commonwealth) Minister under the national consumer law arrangements (and not being required to also report to State or Territory authorities where the product is sold in more than one jurisdiction) would help minimise compliance costs.

24.93 Some of the submissions received on the consultation RIS also expressed confusion about who in the supply chain would be required to report to the regulator; for instance, the retailer, manufacturer, distributor or repairer of the relevant product. The reporting requirement would require all participants in the supply chain of the associated product to report the required information to the regulator.

24.94 The ATA, for example, noted that this would be burdensome for suppliers and could result in multiple reporting of the same incident. While it is acknowledged that this could result in a duplication of information being reported and could impose additional compliance costs for suppliers and administrative costs for regulators, to prevent similar accidents in future, it is important that adequate information is communicated to the regulator, even if it is reported more than once and from a different source.

24.95 In circumstances where a particular supplier (such as a small trader) is no longer operating, to avoid the situation of information about potentially risky products not being reported to the regulator, all suppliers should be required to report the necessary information even if it may result in duplication.

24.96 Adopting the PC’s definition of ‘serious injury’ as those injuries requiring hospital admission could provide a relatively clear-cut trigger for the reporting requirement and should reduce the compliance burden for business. The submission on the consultation RIS from Mr John Wood stated, however, that in more regional areas and in territories, hospital admissions may not be an option and treatment by a doctor or nurse may be the only practical recourse. To address this point, careful consideration would need to be given in drafting the law to ensure that injuries considered ‘serious’ enough to warrant reporting to the regulator, but that do not necessarily result in hospitalisation, are reported.

24.97 The ATA considered that the reporting time frame of the proposed two days was very short and that more time should be provided for suppliers to verify information and investigate incidences before reporting. The time frame to report the required information to the regulator would commence once the supplier ‘becomes aware’ that one of its product is ‘associated with’

a serious injury or death. This would exclude the time for suppliers to verify whether they should report certain information to the regulator. Further, suppliers would not be required to investigate the products they supply.

24.98 Resulting regulatory or other action taken by government in response to these notifications, such as a recall, may generate costs for business, but such action would only be taken after a thorough product risk assessment and when clearly necessary to protect consumers. All new product safety standards introduced by the Commonwealth in respect of goods must be supported by regulatory impact analysis on a case-by-case basis. Information received by the Commonwealth under the reporting requirement would be subject to the information protection requirements in Part XII of the TP Act.

24.99 Suppliers may benefit from this reporting requirement where any necessary remedial action is negotiated with regulators and such action reduces the supplier's future product liability exposure.

*Costs and benefits to consumers*

24.100 There would be no identifiable costs flowing to consumers from introducing this reporting requirement.

24.101 Consumers would benefit from the potential for improved responsiveness by regulators to emerging product hazards. Unsafe products would be more readily identified and appropriate action would be taken to remove product hazards from the market or to warn consumers of the risks associated with the use, or misuse, of a product.

24.102 Costs and benefits to governments

24.103 An additional reporting requirement may place significant enforcement obligations on regulators and would be likely to require a substantial administrative infrastructure to process and assess the reports. Such obligations would include acknowledging reports, capturing and analysing data, conducting appropriate product safety investigations and assessments, negotiating with suppliers where necessary, exchanging information and liaising with other regulators, and undertaking regulatory or non-regulatory interventions where justified. These obligations may also require additional resources for regulators. Further, there could be duplication and multiple reporting of the same information relating to one product by various sources throughout the supply chain (retailers, manufacturers and importers). It is difficult to ascertain the number of unique product related incidents that would be reported under this requirement.

24.104 Government would benefit from the improved quality and nature of product data received, which would allow regulators to improve responses to product safety issues. Government would also benefit from implementing measures towards addressing reasonable consumer expectations about its role in regulating product safety.

***Option B: No change to the TPA***

24.105 Currently, the only statutory reporting requirement for suppliers in respect of product safety relates to voluntary recall actions initiated by the supplier under section 65R of the TP Act. Section 65R provides that where a corporation voluntarily takes action to recall goods because the goods will or may cause injury to any person, the corporation must, within 2 days of taking that action, report this to the Minister. All notified recalls are posted on the Product Recalls Australia website, thus making recall information available to all interested parties, including consumers, regulators and suppliers.

*Costs and benefits to suppliers*

24.106 No change to the product safety legislative reporting requirements is expected to be cost neutral to suppliers. No required reporting of deaths and injuries associated with consumer products would subject suppliers to the same product liability risks that they are currently subject to.

24.107 The benefits to suppliers of not having to report products that have been associated with serious injury or death would include avoiding minor information collection and reporting costs, and possibly avoiding the risk of regulatory action which may impact on the continued supply of a product.

*Costs and benefits to consumers*

24.108 Consumers would continue to rely on the ability of regulators to gather intelligence on unsafe products through existing mechanisms, including consumer complaints to regulators, media reports, injury data research, supplier liaison and general market surveillance. However, suppliers often have better information than regulators about the safety of their products and market incidents relating to their own products.

24.109 There would be no identifiable benefits to consumers of maintaining the status quo. Maintaining the status quo may prevent any opportunity for realising the potentially significant safety benefits from introducing a mandatory reporting obligation.

*Costs and benefits to governments*

24.110 Regulators would continue to rely on secondary sources for information about the incidence of consumer product related accidents.

### ***Conclusion***

24.111 Following an analysis of costs and benefits and having regard to possible disincentives if reporting requirements were too onerous, the PC concluded that there were benefits to requiring suppliers to report to the government products (supplied by them) which have been associated with serious personal injury or death, and that non-compliance with the requirement should carry appropriate financial penalties.

24.112 The PC's view was that a tightly defined mandatory reporting requirement should limit business compliance costs and was likely to be a cost effective way of enhancing the ability of regulators to identify the most hazardous consumer products early. Nonetheless, the PC noted the uncertainty of the potential benefits and costs and, accordingly, that the operation of this requirement would need to be reviewed within three years after implementation.<sup>87</sup>

24.113 The potential exists to improve consumer product safety by adding a hazard identification system to the data sources available and providing governments with more timely and comprehensive information to improve the responsiveness of the regulatory regime for injury prevention. It also encourages businesses to be more mindful of safety in the design, production and marketing of their products.

24.114 Submissions received on this recommendation were broadly supportive of the policy objective for introducing a mandatory reporting requirement, although many expressed concerns about how the requirement would apply in practice and commented on the lack of clarity in how the consultation RIS presented the requirement. It is acknowledged that, in respect of this recommendation, the consultation RIS did not provide detail on the intended scope and application of the reporting requirement.

24.115 In drafting the product safety provisions and the reporting requirement, the framing of the requirement would be more clearly defined to clarify for suppliers the 'triggers' for the requirement, including:

- under what circumstances the requirement would apply;
- the information that would be required to be reported;
- the time in which information would need to be reported; and
- those who would be subject to the requirement.

---

87 PC (2006) pages 225 and 226.

24.116 A balance would need to be struck between framing the reporting requirement tightly to minimise the potential for imposing significant regulatory burdens on both suppliers and regulators; and ensuring there is enough flexibility in the scope of the requirement to ensure that adequate information would be reported to regulators to take appropriate regulatory action (if required) to prevent future accidents.

24.117 The additional regulatory burdens would potentially be offset by the corresponding benefits of strengthening consumer protection in the area of product safety, which would include ensuring that adequate information is reaching regulators for the purposes of investigating potentially dangerous products, and taking appropriate action in order to prevent similar injuries or deaths from occurring in the future.

## **PC Recommendation 11.2**

24.118 The PC recommended that the Australian Government amend the TP Act to give express power to the government to undertake a recall directly where no supplier can be found to undertake such a recall.

### ***Background***

24.119 The PC considered the issue of ‘orphan goods’, that is, goods on the market for which a supplier (such as a manufacturer, importer or wholesaler) cannot be identified or no longer exists as a legal entity. Instances have arisen in the past where such goods are found to be unsafe and a recall would clearly be justified. However, there is no identifiable supplier responsible for the product that could undertake a recall. The PC recommended that, in such circumstances, governments should have the express power to undertake appropriate recall action to remove the hazardous product from the market. Such recall action would be expected to be conducted by the ACCC, and could include appropriate notices to consumers about the defective goods, the hazards presented and procedures for the safe disposal of the goods.<sup>88</sup>

### ***Option A: Amend the TPA to give the regulator power to undertake a recall where no supplier can be found***

24.120 A new express power would be included in Division 1A of Part V of the TP Act to allow the Minister (through the ACCC) to conduct a product recall in cases where a recall is considered necessary because of the potential or actual safety risk of a product, but a supplier for the product does not exist

---

88 The Product Recalls Australia website ([www.recalls.gov.au](http://www.recalls.gov.au)) currently provides a list of products which have been the subject of a product safety recall either voluntarily by the supplier or under a mandatory order.



or cannot be identified to conduct the recall. The nature of the recall action that would be undertaken would be determined on a case-by-case basis.

*Costs and benefits to suppliers*

24.121 The express power for the government to conduct a recall would only be exercised where a supplier (that is manufacturer, importer or wholesaler) cannot be found or no longer exists, and the recall is expected to have no impact on upstream suppliers (manufacturers or importers).

24.122 Downstream suppliers, such as retailers, would benefit from the government managing the recall process rather than leaving individual suppliers to liaise with customers. Suppliers may also derive some benefit from the expected increase in consumer confidence in the safety of products in the market generated by such a power.

*Costs and benefits to consumers*

24.123 There would be no identifiable costs to consumers by providing the government with an express power to conduct a recall in circumstances where a supplier cannot be identified.

24.124 Consumers would benefit from the greater flexibility of regulators to provide a place for consumers to return products that would need to be recalled, particularly where disposal of those products may be hazardous. A confidential submission on the consultation RIS noted the benefits for consumers of seeking to achieve product safety irrespective of the ongoing presence of the supplier.

*Costs and benefits to governments*

24.125 The Government would bear the costs of conducting the product recall where a supplier cannot be identified or no longer exists as a legal entity. These costs could be managed on a case-by-case basis through the conditions and arrangements set by the Government for conducting the recall, commensurate with the effective removal of the defective product from the market. However, there may be mixed results when a large percentage of products remain in consumer hands after the recall process.

24.126 In such circumstances, significant government resources may be required to undertake the recall, with no certainty regarding the success of the recall. The decision to undertake a recall would consider on a case-by-case basis the potential outcomes and the associated costs and benefits.

***Option B: No change to the TPA***

24.127 The absence of an express power to conduct a recall means that the Government would need to rely on existing tools such as a warning notice (under section 65B of the TP Act) and/or media releases to alert consumers to the product hazard and provide advice on the appropriate action to avoid potential associated injuries.

*Costs and benefits to suppliers*

24.128 The absence of an express power for the Government to conduct a recall would leave retailers and other downstream suppliers with the existing uncertainty of how to deal with products they have supplied for which there is some consumer demand for a recall action, possibly in response to a warning notice issued by a regulator.

*Costs and benefits to consumers*

24.129 The costs to consumers of no express power for the Government to conduct a recall are associated with injuries which may arise due to a defective product remaining on the market because no supplier exists to recall it. There would be no readily identifiable benefits to consumers of not including an express recall power.

*Costs and benefits to governments*

24.130 By not recalling defective goods in the absence of an identified supplier, governments could be criticised for failing to meet the reasonable expectations of consumers of protecting from products which will or may cause injury.

*Conclusion*

24.131 The PC considered the lack of an express power for governments to conduct a recall in circumstances where no supplier could be identified as a significant gap in the current range of available powers to effectively address hazardous products and protect consumers from continuing exposure to such hazards.

24.132 There is a likely qualitative net benefit to consumers and governments of introducing this power since most of the costs of this measure would be borne by government and these costs can be managed on a case-by-case basis. On this basis, Option A is to be preferred.

## Consultation

### *PC consultation*

24.133 Consumer product safety regulation is of broad interest within the community, including suppliers, consumers and regulators at all levels of government. The PC undertook extensive public consultation in developing the recommendations discussed in this RIS, including through the publication of a draft report. A brief summary of participants' views on the proposed areas for reform is provided below. Further information about the PC's study processes, including transcripts of hearings and copies of written submissions, is available at [www.pc.gov.au](http://www.pc.gov.au).

*Amend the threshold test for bans and recalls to cover goods of a kind which, under normal or reasonably foreseeable conditions of use, will or may cause injury to any person.*

24.134 There was considerable support from consumer groups and the ACCC for broadening the threshold test to explicitly cover foreseeable use and not just normal or intended uses for a product.

24.135 Some participants, mainly industry and business groups, did not believe any change to the current wording was warranted and that the current system had been working well. There were also some concerns about the uncertainty in the definition of 'reasonably foreseeable misuse', and the potential that action could be taken too frequently or in an unnecessary manner to impose substantial costs on business.

*Amend the consumer product safety provisions to cover services related to the supply, installation and maintenance of consumer products.*

24.136 There was some support from consumer groups and within government for a limited extension of the TP Act to cover particular ancillary services that have a bearing on the safety performance of a product.

*Amend the TPA to require suppliers to report products which have been associated with serious injury or death.*

24.137 Some participants considered the current reporting requirements (through voluntary recalls) were sufficient and working effectively to provide for appropriate reporting of proven identifiable and significant risks, and that any further requirement would be onerous on business.

24.138 On the other hand, consumer groups were concerned that maintaining the status quo through voluntary reporting would continue to result in critical safety information not reaching the public.

*Amend the TPA to give the government express power to undertake a recall directly where no supplier can be found.*

24.139 Consumer groups argued for the government to be more involved during the recall process. Some participants noted incidents where the hazard justified a recall but there was no supplier to be found to recall the defective good, a problem identified in the electrical products area.

***MCCA and SCOCA consultation***

24.140 Prior to the PC study process, during 2004 MCCA undertook its own public review of product safety regulation. A number of the recommendations of the PC's report were also examined in the MCCA review. Further information about MCCA's study, including copies of written submissions, is available at [www.consumer.gov.au](http://www.consumer.gov.au).

24.141 A consultation RIS on the proposed areas of reform (based on the PC's four non-framework legislative recommendations), was released by the Standing Committee of Officials of Consumer Affairs (SCOCA) on 16 November 2009 for public comments. A total of seven submissions were received on the consultation RIS. Further information about the consultation RIS, including copies of written submissions, is available at [www.treasury.gov.au](http://www.treasury.gov.au).

24.142 The majority of submissions on the consultation RIS supported adopting Recommendation 11.2 (direct recalls by the Government where the supplier cannot be found), while most were in support of Recommendations 6.1 and 8.1 (amending the threshold test for bans and recalls to cover reasonably foreseeable use) and Recommendation 7.1 (extending the product safety provisions to product related services). Although all submissions agreed with the policy for introducing a provision similar to Recommendation 9.3 (mandatory reporting requirement), some expressed concerns with how the proposed reform would operate in practice in terms of clarity of its intended scope and application.

## **Part D      Implementation and review**

24.143    In October 2008, COAG agreed to create a national consumer law, based on the TP Act and enacted by application legislation in each of the States and Territories. The national consumer law is to be implemented by the end of 2010. The national consumer law will incorporate implementation of the product safety reforms agreed by COAG in July 2008.

24.144    Any amendments to the product safety provisions along the lines outlined in this RIS would form part of legislation to implement the national consumer law. The operation of these provisions would be reviewed within five years of their being made, in accordance with the Government's usual policy for reviewing all new regulations made within five years.

24.145    The PC recommended that a review of the mandatory reporting provisions (Recommendation 9.3) should be conducted within three years of its introduction. This review would provide an opportunity to consider whether the reporting requirement should remain, and if so, whether to refine its scope, timing and form after some practical experience of its operation.



---

# **Chapter 25**

## **Regulatory Impact Statement: The Australian Consumer Law — A national consumer guarantees law**

---

### **Introduction**

25.1 The Regulation Impact Statement (RIS) set out below was prepared for the consideration of the Ministerial Council on Consumer Affairs at its 4 December 2009 meeting.

25.2 The RIS was considered by the Office of Best Practice Regulation (OBPR) and passed on 30 November 2009. The RIS was given the OBPR reference number 10953.

### **Part A: Background**

#### **Introduction**

25.3 This Regulation Impact Statement (RIS) has been prepared by the Ministerial Council on Consumer Affairs (MCCA). Its purpose is to assist MCCA to make decisions regarding reforms to the laws in Australia that imply conditions and warranties into consumer contracts for the supply of goods and services. To achieve this, the RIS assesses the impact of various options for regulating specific rights that are applicable to all consumer contracts.

25.4 Two studies by the Standing Committee of Officials of Consumer Affairs (SCOCA) National Education and Information Advisory Taskforce (NEIAT) have provided evidence of difficulties experienced by consumers and businesses under the current regulatory arrangements in both understanding their rights and obligations and in their practical application.<sup>89</sup> The Productivity Commission's 2008 *Review of Australia's Consumer Policy Framework* (PC Review) also considered statutory implied conditions

---

89 NEIAT, *Warranties and Refunds, Research Paper No. 1*, October 2008; NEIAT, *National Baseline Study on Warranties and Refunds, Research Paper No. 2*, October 2009.

and warranties and recommended that the adequacy of existing legislation related to implied conditions and warranties should be examined<sup>90</sup>. In response to that recommendation, the Commonwealth Consumer Affairs Advisory Council (CCAAC) was commissioned to conduct a comprehensive review of law in this area. CCAAC published an issues paper titled *Consumer rights: Statutory implied conditions and warranties* (the Issues Paper) in July 2009 and conducted a public consultation process to develop recommendations to government for reforms to laws on implied conditions and warranties in consumer contracts.

25.5 Evidence presented by the PC, NEIAT and CCAAC shows that the existing legislative arrangements for implied terms in consumer contracts are unduly complex, leading to uncertainty for consumers and businesses. The current mode of regulation in this area, namely implying terms into consumer contracts, is difficult for consumers and businesses to understand and practically utilise. Further, the fact that 15 laws of the States, Territories and the Commonwealth currently imply such terms into consumer contracts leads to additional costs for businesses that trade in more than one jurisdiction and precludes a national approach to educating consumers about their rights.

25.6 The RIS considers a range of options for addressing complexity, uncertainty and excessive regulatory burdens in this area of the law. The objective of government action concerning statutory conditions and warranties is identified as providing consumers with a minimum level of protection in all transactions for the acquisition of goods and services while minimising complexity, uncertainty and the cost burden of regulation. The RIS concludes that legislating to provide for a national system of statutory consumer guarantees is the most appropriate option given the objectives of government action.

25.7 The preferred option is consistent with the decision of the Council of Australian Governments (COAG) to proceed with the Australian Consumer Law (ACL). In addition, the preferred option is consistent with findings made by CCAAC. Thirty-three submissions were received in response to publication of the issues paper by CCAAC. CCAAC considered these submissions and provided a final report to the Australian Government recommending the repeal of the existing system of implied conditions and warranties, included in the *Trade Practices Act 1974* (TP Act) and the State and Territory Fair Trading Acts, and their replacement with a system of statutory consumer guarantees.

25.8 The RIS discusses the impact of implementing the CCAAC recommendations, including the costs and benefits of moving from a system

---

90 See pages 173-177 of the PC Review.



of implied conditions and warranties to statutory consumer guarantees. Given that the proposal does not involve a change in the substantive rights and obligations of businesses or consumers, the only cost is transitional in nature. On the other hand, the benefits of reduced complexity and uncertainty will be enduring, as will be the reduced costs of compliance for businesses, particularly those businesses that trade in more than one State or Territory of Australia.

## Assessing the problem

### *The current environment*

25.9 Consumers play a vital role in promoting well-functioning markets. Purchases by consumers send signals to suppliers who compete for business based on cost and quality. Competition between suppliers improves the productivity of the Australian economy and provides benefits for consumers in terms of lower prices, improved quality and increased variety in the goods and services available in the marketplace. These outcomes, however, rely on consumers being well informed and sufficiently confident to act on available information about the quality of goods and services being offered in the marketplace. A key contributor to consumer confidence is ready access to clear and accurate information about the characteristics of goods and services.<sup>91</sup> This allows consumers to obtain what they expect from a purchase, or failing that, to seek redress by way of warranty or other claims against suppliers.

25.10 Driven by technological change and globalisation, markets are becoming increasingly complex. Markets have become more globalised as consumers increasingly engage in cross-border transactions. Consumers increasingly respond to price and quality signals by seeking supplies outside of their local area or outside of Australia. More widespread use of the internet in the home, assisted by financial innovation and low cost postal services, is increasingly allowing consumers to purchase goods and services with little regard to geography. Businesses trading within only one jurisdiction are increasingly rare, as are consumers without access to geographically distant markets for goods and services.

### *Warranties for consumers*

25.11 A warranty is a promise extended by the supplier of a good or service to the purchaser stating the extent to which the supplier guarantees the quality or performance of the good or service. A warranty typically also

---

91 GK Hadfield, R Howse, and MK Trebilcock, 'Information-Based Principles for Rethinking Consumer Protection Policy' (1998) 21 *Journal of Consumer Policy* 131 at 150.

provides for certain remedies in the event that the good or service does not meet the guaranteed standard of quality or performance. There are currently two basic types of warranties — statutory implied conditions and warranties (implied terms), and manufacturer’s voluntary (or express) warranties.

*Statutory implied terms*

25.12 In Australia, the TP Act, State and Territory fair trading laws, and State and Territory sale of goods laws imply certain rights and obligations into contracts for the sale of goods and services to consumers. These can be categorised as:

- ‘conditions’ — which are essential terms of the contract that are so important to the purpose of the contract that, if breached, will allow a consumer to cancel the contract and seek a refund and compensation for any loss or damage suffered; or
- ‘warranties’ — which are less significant terms that if breached, will generally allow consumers to seek compensation for any loss or damage suffered, but will not allow them to terminate the contract.

*Summary of implied conditions and warranties regulation in Australia*

25.13 Statutory conditions and warranties are currently regulated by a network of inter-linked, but complex, national, State and Territory laws.

Commonwealth legislation

25.14 Part V, Division 2 of the TP Act implies conditions and warranties into consumer contracts. The provisions apply only to sale of goods by corporations to consumers. The application of the provisions is limited by the definition of ‘consumers’ in section 4B of the TP Act, which defines consumer by reference to the price of goods purchased and the type of goods. In general terms, the effect of this provision is to apply the relevant law to purchases of goods by consumers where the price of the goods is less than the currently prescribed amount of \$40,000 or where the goods are of a type ordinarily acquired for ‘personal, domestic or household use or consumption’.

25.15 The TP Act applies the following implied conditions and warranties to all supplies of goods by a corporation to consumers:

- A condition that the supplier has the right to sell the goods (paragraph 69(1)(a)).

- A warranty that the consumer will enjoy quiet possession of the goods (paragraph 69(1)(b)).
- A warranty that the goods are free from any undisclosed charge or encumbrance (paragraph 69(1)(c)).
- A condition that the goods supplied by description correspond with the description (subsection 70(1)).
- A condition that goods are of merchantable quality (subsection 71(1)).
- A condition that goods are fit for a purpose that the consumer makes known to the supplier (subsection 71(2)).
- A condition that the goods correspond to a sample (section 72).

25.16 The TP Act applies the following conditions and warranties to all supplies of services by a corporation to consumers:

- A warranty that services will be rendered with due care and skill (subsection 74(1)).
- A warranty that any goods supplied in connection with services — other than services of a professional nature provided by a qualified architect or engineer — will be reasonably fit for the purpose for which they were supplied (subsection 74(1)).
- A warranty that services — other than services of a professional nature provided by a qualified architect or engineer — will be reasonably fit for any particular purpose that the consumer makes known to the supplier (subsection 74(2)).
- A warranty that services — other than services of a professional nature provided by a qualified architect or engineer — are of such a nature and quality that they can be reasonably expected to achieve any particular result that the consumer desires to achieve and makes known to the supplier (subsection 74(2)).

25.17 Remedies are generally not provided for in the TP Act in respect of breaches of statutory implied conditions or warranties. Consumers are required to enforce their rights in tribunals or courts as breaches of contract. Section 75A provides a right of rescission in respect of a breach of a

condition implied into a contract by Part V, Division 2 of the TP Act. This right of rescission allows a consumer to obtain a refund if one of the conditions (but not the warranties) outlined above is breached. The right to rescind is limited to a 'reasonable time' after the consumer has had a reasonable opportunity to inspect the goods.

#### State and Territory legislation

25.18 State and Territory legislation implies substantially the same terms and conditions into contracts as are provided for in the TP Act. State and Territory legislation applies to the sale of goods by natural persons (including sole traders and partnerships) as well as corporations. **Appendix A** provides a table listing the relevant provisions in the Commonwealth and in each State and Territory. **Appendix B** provides a tabular comparison of Australian conditions and warranties provisions.

25.19 There are many minor variations between the laws applicable in each State and Territory. While these minor differences are so multifarious that a full exposition is beyond the scope of this document, some examples reveal the extent of the problem<sup>92</sup>.

- While Victoria, WA and SA apply a \$40,000 monetary threshold to consumer goods in a similar way to that which applies under the TP Act, NSW, Queensland and the NT do not apply a threshold. In relation to the implied terms relating to supply by description or sample, the NSW, WA and NT provisions apply if a supply is in the course of a business whereas the SA and Victorian legislation apply to all supplies. The SA legislation also applies implied terms related to quality and fitness for purpose to all sales, whereas all other jurisdictions apply these terms only to sales in the course of a business. In Victoria, the implied terms applying to services are conditions, rather than warranties, as in all other jurisdictions.
- There are also minor differences in the extent to which implied terms can be excluded, particularly in relation to recreational services, where there are minor differences in the definition of that term across jurisdictions. Further, WA, Victoria and NT allow liability to be limited in respect of goods not of a kind ordinarily acquired for personal, domestic or household use or consumption, whereas the other

---

92 Pages 19 to 26 of the CCAAC report provides a more comprehensive analysis of the differences between the laws in each State and Territory.

jurisdictions do not allow for limitation of liability in such circumstances.

#### Manufacturers' voluntary warranties

25.20 Manufacturers often provide voluntary warranties to customers for their products. A voluntary warranty is commonly offered for electronic goods, whitegoods, mobile phones and motor vehicles, and often for a period ranging from one to five years. A manufacturer's voluntary warranty sets out the terms and conditions under which the manufacturer agrees to repair or replace the product or refund the purchase price should the product fail. These warranties are usually in writing and subject to time limits and other conditions.

25.21 The terms and conditions of manufacturers' voluntary warranties are generally not the subject of regulation. Manufacturers, therefore, have absolute discretion as to whether such warranties are provided and in relation to any applicable terms and conditions. However, if provided, a voluntary warranty creates a contract between the consumer and the manufacturer and the buyer has the right to take private legal action against the manufacturer if the warranty is not honoured.

#### ***Problems with the existing law***

25.22 Recent studies have identified three key problems with the current statutory implied terms regime, which collectively could result in a failure of the regime to provide consumers with the desired protections.<sup>93</sup> The identified problems are:

- lack of clarity in the legislation;
- lack of awareness of the law on the part of consumers and suppliers; and
- difficulties experienced by consumers who seek to enforce their rights.

25.23 These problems combine to reduce incentives for suppliers to comply with the law.

---

93 See, for example, ACCC 2004 *Warranties and Refunds*, Canberra; NEIAT 2008 *Warranties and Refunds*, Research Paper No. 1, Melbourne; NEIAT 2009, *National Baseline Study on Warranties and Refunds*, Research Paper No. 2, Melbourne; CCAAC 2009, *Consumer rights: Statutory implied conditions and warranties*, Issues Paper, Canberra.

Complexity and uncertainty in the existing law

25.24 Some of the ambiguity and complexity associated with the current provisions has resulted from the way the law has developed over time. The origins of the implied terms lies in the English common law, which was codified in the United Kingdom's *Sales of Goods Act 1893* and adopted by the Australian colonies in the late 19th century. The implied terms in the UK were never intended to act as a broader consumer protection regime.

25.25 The adoption of the UK model in each Australian jurisdiction has also resulted in 15 separate pieces of legislation across the country (in Fair Trading Acts (FTAs) or Sale of Goods Acts (SGAs), or both), leading to significant compliance costs for businesses attempting to operate in the national marketplace. The archaic terminology used, such as 'merchantable quality', has failed to provide the consumers with clear and meaningful guidance on the essence of the law. Hence, current laws are not only fragmented and inconsistent, but they also lack clarity for consumers and suppliers.

25.26 Given the existence of considerable anecdotal evidence, and some statistical evidence, that the existing system of implied conditions and warranties does not work well to serve the interests of consumers or businesses, NEIAT was commissioned to conduct a comprehensive study of warranties and refunds in Australia. NEIAT published its *Baseline Study for Statutory Warranties and Refunds* (NEIAT study) in October 2009 (see the box on page 8 for summary of the methodology and results of the NEIAT study).

25.27 Part of the uncertainty experienced by consumers and traders may be explained by a lack of awareness of consumers' statutory rights. However, even in cases where it appears traders are aware of these rights, the evidence suggests that they are often unaware of the applicable remedies, and of what their responsibilities are in terms of providing the relevant redress. This may be a result of existing laws failing to clearly set out the obligations that arise in the event of a breach of consumers' statutory rights.

25.28 Some of the features of the current law which contribute to its uncertainty are as follows:

- the existing statutory implied terms regime is based on the law of contract;<sup>94</sup>

---

94 CCAAC 2009, *Consumer rights: Reforming statutory implied conditions and warranties, Final Report* (CCAAC Final Report), page 33.

- the existing regime fails to explicitly set out all the rights and remedies that flow from a breach of a term;<sup>95</sup>
- it is unclear how the implied terms of ‘fit for purpose’ and ‘merchantable quality’ are to be applied;<sup>96</sup>
- the definition of ‘consumer’ varies across the different Acts;<sup>97</sup>
- there are differences between the various Acts on whether the implied consumer rights can be modified or excluded;<sup>98</sup> and
- there are complex interactions between the SGAs, FTAs and the TP Act.<sup>99</sup>

25.29 The differences and interactions between the various Acts add to complexity, uncertainty and compliance costs. Further, it is unreasonable to expect consumers to understand the differences (or, indeed, that there are differences at all) between an implied term that is a ‘condition’ and a ‘warranty’, or the differences between jurisdictions on the scope and application of some of the implied terms and the definition of ‘consumer’.

25.30 Changes in the consumer environment have placed further pressure on the adequacy of the current state of the law. Technological changes and changing methods of purchase, such as online shopping, have created electronic platforms for bringing buyers and sellers into contact and have revolutionised the way they interact.<sup>100</sup> The associated benefits of these changes, such as increased access to markets and to a variety of products, have arisen alongside other issues like increasing complexity both within products and markets, a wider variety of consumer needs and higher consumer expectations.

#### Consumers’ awareness of their statutory rights

25.31 The complexity of the law has also contributed to a widespread lack of consumer awareness of their statutory implied rights. If a consumer is unable to understand the legislation that is applicable to their situation, it is unlikely that they will be fully aware of their rights.

---

95 CCAAC Final Report, page 33.

96 CCAAC Final Report, page 33.

97 CCAAC Final Report, page 43.

98 CCAAC Final Report, page 25.

99 CCAAC Final Report, page 11.

100 For some recent overseas studies see Federal Trade Commission, Bureau of Consumer Protection, *Consumer Protection in the Global Electronic Marketplace* (September 2000) and Office of Fair Trading, *Internet Shopping, An OFT market study* (June 2007).

25.32 Many consumers are not aware that the rights granted under the statutory implied terms regime are attached to the contract the consumer has with the supplier. Consumers often do not realise that in purchasing goods or services from a supplier they are entering into a contract which carries obligations for both parties, and the contract law implications of the differences between an implied condition and an implied warranty in terms of redress options. Further, consumers may not understand the differences between statutory warranties, voluntary warranties and extended warranties. The coexistence of statutory warranties, manufacturers' voluntary warranties and extended warranties can add to the complexity and uncertainty in the current law, blurring the boundaries of statutory rights and the additional rights granted by retailers and manufacturers.<sup>101</sup>

25.33 It may, therefore, come as a surprise to many consumers to learn that, in the event of a dispute with a retailer, they are currently required to enforce their contract rather than seek redress under the law. Many consumers lack sufficiently comprehensive knowledge of the law of contract to know how to enforce their rights, or lack the resources to obtain expert advice to do so.

---

101 Consumer Affairs Victoria 2009, *Warranties and refunds in the electronic goods, white goods and mobile telephone industries*.



***NEIAT 2009: National Baseline Study on Warranties and Refunds***

***Methodology***

The NEIAT study had two stages:

- A qualitative phase — a series of five group discussions with consumers, an online bulletin board involving 66 consumers, and a small sample of qualitative in-depth interviews — 12 with traders and two with indigenous consumers.
- A quantitative phase — three separate telephone surveys with key ‘audiences’, including consumers (3,023 people aged 16 and over across Australia), retailers (500 retailers of target goods) and manufacturers/importers (123 from across Australia, also focussing on target goods).

The focus of the research was on three markets for ‘target goods’ — white goods, electronic goods and mobile telephones.

***Key findings***

- Virtually all persons surveyed (93 per cent) were recent buyers of the target goods.
- More than half of those surveyed (51 per cent) had experienced problems with such products in the past two years.
- The average consumer facing product problems experienced 2.15 problems during the previous two years, resulting in an estimate of more than 18 million problems occurring in the total Australian population during a two year period.
- Out-of-pocket costs for the Australian population were estimated at \$1.9 billion over the two years leading up to the survey, or 17 per cent of the original cost of the target goods.
  - Replacement items accounted for approximately two-thirds of the out of pocket expenses.
  - Repairs made up 19 per cent of out of pocket expenses.
  - Follow up costs, mentioned by those surveyed as being ‘given the run around’ by traders, amounted for more than \$300 million per annum.
- Australian consumers were estimated to have spent an average of 5.7 hours addressing each problem with target goods or more than 100 million hours over 2 years, representing an implied cost to consumers of an additional \$1.2 billion per year.
- Consumers who were better informed about their rights spent 39 per cent less time addressing problems than uninformed consumers.
- Total costs to Australian businesses associated with problems with target goods were estimated at more than \$700 million per year, made up of \$370 million for retailers and \$340 million for manufacturers and importers.
- Almost one-half of consumers knew of no consumer protections other than manufacturers’ voluntary warranties.
- Fifty-seven per cent of retailers and 47 per cent of manufacturers/importers knew of no consumer protections other than manufacturers’ voluntary warranties.

25.34 The NEIAT study suggests that a key problem with the current statutory implied terms regime is a lack of awareness by consumers and suppliers of their rights and obligations. For instance, less than 20 per cent of Australians are able to demonstrate actual knowledge and understanding of their basic consumer rights in federal or State legislation.<sup>102</sup> The NEIAT study also found that seven in ten consumers, after reading a succinct definition of statutory warranties, were not aware such rights existed.<sup>103</sup>

25.35 While consumer agencies in Australia have released a range of publications in an attempt to educate consumers and suppliers about their statutory rights and responsibilities in relation to the implied terms, the continued level of complaints and inquiries on product problems made to consumer agencies suggests that the lack of consumer awareness remains an issue. If consumers were more aware of their rights and the available remedies, they would likely take their issues directly to consumer tribunals rather than complaining to consumer agencies. The level of complaints is also likely to result from the lack of awareness demonstrated by manufacturers and retailers, as a common understanding of the law by business and consumers would otherwise reduce the scope for disputes.

25.36 Further, the NEIAT study demonstrates that retailers, manufacturers and importers lack awareness and understanding of the law. It indicates that 57 per cent of retailers and 47 per cent of manufacturers were not aware that consumers were entitled to any remedies beyond those for breach of the manufacturer's warranty.<sup>104</sup> Further, one in five traders did not consider that they were subject to any legal obligation to give refunds on faulty products when sought by consumers.<sup>105</sup> In addition, 15 per cent of retailers thought that, beyond the manufacturer's express warranty, the only available protection for consumers was their own insurance.<sup>106</sup>

#### *Difficulty in enforcement*

##### Personal enforcement

25.37 The lack of consumer awareness of their rights and the lack of awareness of the obligations of suppliers can lead to consumers failing to successfully enforcing their rights. The contractual remedies available for breach of an implied term may elude consumers who lack adequate knowledge of the law of contract. Failure by consumers to seek redress due to complexity in the law has a twofold impact on incentives for suppliers. Suppliers have less incentive to ensure that the goods and services that they

---

102 NEIAT study, page ix.

103 NEIAT study, page 69.

104 NEIAT study, page 53.

105 NEIAT study, page 53.

106 NEIAT study, page 52.

supply are of adequate quality and less incentive to honour their obligations when consumers bring defects in those goods and services to their attention.

25.38 The implied terms of Part V, Division 2 of the TP Act vest consumers with contractual rights to remedy and the statutory rights of Division 2A vest consumers with direct rights to compensation. Therefore, it is for consumers themselves to enforce these rights, the role of consumer agencies being largely limited to ensuring consumers are armed with accurate information about their rights. Such rights must be enforced in consumer tribunals or the courts. These types of enforcement action impose significant costs on consumers. In particular, the opportunity cost of personal time foregone is a significant deterrent to enforcement action by consumers.

25.39 Professor Carter indicated, in his submission to CCAAC, that consumers will very rarely go to court to enforce their rights under an implied statutory term or statutory right. He indicated that rights and remedies should be so clear and unambiguous that formal legal action to enforce rights and seek remedies becomes unnecessary.<sup>107</sup>

#### Coordination problems

25.40 It may sometimes be the case that a retailer engages in a systemic breach of consumer rights. The Consumer Action Law Centre (CALC) suggested that this might occur because ‘of some comfort on the part of traders, that failing to honour their obligations — even misleading consumers — will lead to cost savings without any risk of regulatory action’.<sup>108</sup> That is, since the likelihood of consumers personally enforcing their rights is small, there may be little incentive for unscrupulous retailers to comply with their implied contractual obligations. CALC suggests that there is evidence of this in the practice of retailers referring consumers back to manufacturers and denying liability.

25.41 Where a retailer acts in such a manner there are likely to be a number of consumers harmed by that conduct. Ordinarily, there would be an incentive for harmed consumers to band together and bring a common action — to the extent possible — for any systemic breach by retailers. However, given the rights arising under implied terms are inextricably linked with the individual contracts entered into between retailers and consumers, coordinated action may be difficult to achieve.

---

107 Submission to CCAAC, <http://www.treasury.gov.au/documents/1614/PDF/Freehills.pdf>.

108 Submission to CCAAC, [http://www.treasury.gov.au/documents/1614/PDF/Consumer\\_Action\\_Law\\_Centre.pdf](http://www.treasury.gov.au/documents/1614/PDF/Consumer_Action_Law_Centre.pdf).

Enforcement by consumer agencies

25.42 The difficulty in crafting a scheme whereby consumer agencies are empowered to act for breaches of implied terms and statutory rights lies in the nature of those provisions. The provisions are expressed as positive obligations, and if those obligations are not met this gives rise to a right to a remedy. By way of contrast, consumer agencies are generally asked to enforce negative obligations, where certain conduct is prohibited and, if the conduct is engaged in, this may attract both remedies and penalties.

## **Part B: Reform proposals**

### **Objectives of government action**

25.43 The primary objective of government action in this area is to promote well-functioning markets for consumer goods and services through effective regulation of the terms applicable to consumer purchases of goods and services.

25.44 A free-market economy emphasises the benefits of markets behaving in a way in which resources are allocated efficiently. The efficient allocation of resources is critical in maximising consumer welfare. When this does not occur a market failure exists and there may be a need for government intervention to improve outcomes for the community, the environment, businesses and the wider economy.

25.45 Markets for goods and services are subject to asymmetric information; the supplier of goods or services almost invariably knows more about the quality of what is being offered than does the prospective purchaser. Regulation of the terms applicable to purchases of goods and services by consumers seeks to address a market failure that would otherwise arise as a result of asymmetric information. Consumer warranties ameliorate the impact of asymmetric information by giving consumers a right of redress in the event that products are defective. Suppliers also benefit from effective laws, as consumers are willing to pay higher prices for goods and services when they are confident they have the protection of a warranty.

25.46 The PC Review recommended that the adequacy of existing laws relating to implied terms should be examined as part of the development of the new national consumer law.<sup>109</sup> The PC indicated that inconsistency across jurisdictions made the statutory implied terms regime less effective as consumers were not well informed in relation to their rights.

25.47 Evidence collected and presented by NEIAT indicates that consumers who are well informed about their rights were able to address problems experienced with goods in 39 per cent less time than those consumers who were less informed.<sup>110</sup> Given that NEIAT estimated a cost to consumers of over \$2 billion per annum<sup>111</sup> as a result of problems with white goods, mobile telephone and electronic goods alone, the scope for government action in this area to improve the wellbeing of consumers is considerable. In addition, effective law in this area is essential for

---

109 Recommendation 8.1, PC Report, 2008.

110 NEIAT study, page 21.

111 NEIAT study, page 22.

well-functioning markets, efficient resource allocation and improved economic productivity.

***Reducing complexity and uncertainty in the law***

25.48 The NEIAT study presented evidence that consumers and businesses experience difficulties understanding, complying with and enforcing their rights and obligations under the existing laws. Accordingly, an important objective of government action is to reduce complexity of the existing law. It is expected that reduced complexity would provide benefits for consumers and businesses. Achievement of this objective would enhance consumer wellbeing by providing improved access to redress when a product does not meet the standard required by law. Professor Carter, in his submission to CCAAC, indicated that, under the current law, consumers are required to argue for contractual rather than statutory remedies against retailers, which ‘relies too much on legal analysis’.<sup>112</sup>

25.49 Reduced complexity also benefits businesses by way of clearer requirements and reduced compliance costs. Simplified law in this area is expected to reduce compliance costs businesses incur in seeking legal advice and performing administrative tasks that relate to complying with their obligations under the law, particularly if they operate in more than one jurisdiction. Further, a single nationally consistent law would help to achieve the objective of reduced complexity in this area by improving consumer and supplier certainty regarding protections and obligations under the law, regardless of location.

25.50 Harmonising and clarifying the law can help raise consumer and business awareness, understanding of the law and encourage enforcement of consumer rights. For instance, by removing difficult concepts like ‘conditions’, ‘warranties’ and ‘merchantable quality’, and providing for more clearly stated remedies that flow from failures.

25.51 There is widespread support for clarifying the existing implied terms in this way. The Australian Industry Group, in its submission to CCAAC, noted that ‘terms such as merchantable quality are poorly or only partially understood by consumers. This situation is, we suggest, the root of disputes between suppliers and consumers’.<sup>113</sup>

---

112 Submission to CCAAC, <http://www.treasury.gov.au/documents/1614/PDF/Freehills.pdf>.

113 Submission to CCAAC, [http://www.treasury.gov.au/documents/1614/PDF/Australian\\_Industry\\_Group.pdf](http://www.treasury.gov.au/documents/1614/PDF/Australian_Industry_Group.pdf).

***Improving consumers' awareness of their rights***

25.52 Increasing the knowledge and awareness of consumers and suppliers, together with clearer rights, obligations and enforcement mechanisms, is fundamental to reducing consumer detriment.

25.53 Existing campaigns by consumer agencies to improve consumer awareness of the implied terms are necessarily fragmented, due to differences between the 15 various Acts that apply across Australia. For instance, there are currently eight different sets of information being distributed to consumers in the States and Territories relating to refund policies. The policy rationale for the law dealing with refunds is basically the same in each jurisdiction, but the exact content of the law differs, leading to the need for subtle differences in the information distributed in each jurisdiction.

25.54 The PC Review concluded that 'most consumers are not fully aware of the protections and redress options available under the implied warranty provisions'.<sup>114</sup> It recommended that consumer agencies in Australia 'raise awareness among consumers and suppliers about the statutory rights and responsibilities conferred by the implied warranties and conditions in the generic consumer law'.<sup>115</sup>

25.55 Further, the NEIAT study demonstrated that when consumers had a greater understanding of statutory rights it lowered consumer detriment. In relation to the average number of hours different groups of consumers spent on addressing their product problems, they ranged from 3.7 hours for consumers with a detailed knowledge of their rights, to 5.8 hours for consumers with partial awareness and as high as 6.1 hours for consumers with no awareness at all.<sup>116</sup>

***Effective enforcement mechanisms***

25.56 In order for consumer protection laws to be effective they must be enforceable. Inexpensive and consistent enforcement mechanisms are particularly important in this area as consumers often have limited resources, compared to businesses, to access legal representation or other private sources for advice and assistance.

25.57 Government action to simplify legislation, and ensure it is nationally consistent, will also help improve enforcement by enhancing consumer awareness of their rights and avenues for redress. Mechanisms for

---

114 PC 2008, vol. 1, page 36.

115 *ibid.*, Recommendation 8.1.

116 NEIAT study, page 23.

enforcing the statutory guarantees must be accessible if they are to be effective. Rights only carry substance insofar as they are backed by effective remedies. If consumers have no means of securing timely and cost-effective remedies, their rights are, ultimately, of little value.

25.58 Reducing complexity in the law promises to improve the ability of businesses to understand their obligations and the ability of consumers to enforce their rights. For example, the NEIAT study found that 20 per cent of retailers and 22 per cent of manufacturers and importers did not consider that consumers had a statutory right to a refund for faulty products.<sup>117</sup> The policy of consumer protection not only encompasses protecting consumers from unfair business practices but also ensuring that consumers are getting what they are paying for and are able to seek redress when they encounter problems.

### **Options that may achieve the objectives of government action**

25.59 Three options have been considered in order to best achieve the objectives of government action set out above.

#### ***Option A: Status quo***

25.60 Option A would involve retaining the 15 different Acts that imply conditions and warranties into consumer contracts across all Australian jurisdictions. This would involve no legislative amendments.

#### ***Option B: Increase education on the existing law***

25.61 As a significant problem identified with the existing law relates to limited awareness, this option would involve increased efforts to educate consumers and business about their rights and obligations under the existing statutory implied terms regimes. Under Option B, there would be no legislative amendments.

#### ***Option C: Uniform regulation by way of statutory consumer guarantees***

25.62 Option C would involve the Commonwealth, the States and Territories introducing a single set of nationally consistent provisions that would provide consumers with statutory guarantees of their rights in consumer sale contracts. The Commonwealth would repeal the implied terms provisions in the TP Act and introduce a set of consumer guarantee provisions that would apply to consumer contracts in the Australian Consumer Law, which would be applied by the States and Territories. The States and Territories would apply this law by referring to the

---

117 NEIAT study, page 75.



Commonwealth law in their relevant statutes. These laws would continue to be enforceable in State and Territory tribunals and courts.

## **Part C: Impact analysis**

### **Option A: Status quo**

25.63 Under Option A, the existing system of 15 national, State and Territory laws would continue to apply to provide for implied conditions and warranties in consumer contracts.

#### *Benefits*

25.64 Maintaining the status quo would offer no benefits compared to existing arrangements.

#### *Costs*

25.65 Numerous recent studies, including the NEIAT study that has been quoted extensively in part one of this RIS, have identified three key problems with the current implied terms regime, which collectively can fail to provide consumers with the intended rights and remedies. Lack of clarity in legislation, lack of awareness of the law on the part of consumers, retailers and manufacturers, and difficulties experienced by consumers seeking to enforce their rights all combine to provide little incentive for retailers and manufacturers to comply with the law.

25.66 The existing law, applied by 15 different Acts across Australia, is complex with many consumers and suppliers either unaware that statutory implied terms exist or are uncertain about their rights and obligations. Consumers' lack of awareness means they are not enforcing warranties effectively, and therefore likely to be experiencing losses which are not being properly compensated by the suppliers of faulty goods. In addition differences in requirements between jurisdictions impose additional compliance costs on businesses.

25.67 As set out in more detail in part one of this RIS, existing law is not contributing as much to consumer wellbeing as might be possible under alternative arrangements. Consumers experience detriment under existing laws when they are unable to obtain redress in respect of failures by suppliers to comply with their obligations.

25.68 Effective terms applicable to purchases of goods and services are also important for the functioning of markets. The identified deficiencies in the existing law means it is not effectively addressing a market failure created by asymmetric information in the market for goods and services. If suppliers believe that they can supply defective goods or services without the threat of effective enforcement action by consumers the average quality of goods in the market place will be lower than otherwise would be the case. If

consumers lack the ability to distinguish between low quality and high quality goods due to asymmetric information, then the average price of goods and services will be lower than would otherwise be the case. To some extent, high quality goods will be outpriced and eliminated from the market as the price that can be charged is lower than would otherwise be charged for high quality goods. Effective laws providing for consumer guarantees can avoid this 'race to the bottom'.

### **Option B: Increase education on the existing law**

25.69 Option B would involve consumer agencies and government increasing their consumer and trader education activities regarding implied terms in consumer contracts. This might involve, amongst other things:

- production of pamphlets and other written information for distribution to consumers and traders regarding implied conditions and warranties;
- television, radio, newspaper and magazine advertisements regarding implied conditions and warranties;
- announcements and media releases by consumer ministers regarding implied conditions and warranties; and
- maintenance of websites and consumer telephone assistance centres that provide information to consumers and traders on implied conditions and warranties and other consumer issues.

#### ***Benefits***

25.70 Increased education on the existing law would seek to ameliorate the problems identified by CCAAC and NEIAT that relate to lack of awareness of the existing law. As noted in part A of this RIS, consumer agencies in Australia have released a range of publications in an attempt to educate consumers and suppliers about their statutory rights and responsibilities in relation to the implied terms. Successful efforts to educate consumers would have benefits for individual consumers who are better able to enforce their rights and for businesses who more readily understand their obligations under implied conditions and warranties in consumer contracts. If businesses and consumers can be encouraged to have a common understanding of the law the level of disputation involving consumer contracts might be reduced. Fewer disputes would reduce costs for businesses, consumers and government tribunals established to mediate or adjudicate disputes.

25.71 Also as noted in more detail in part A of this RIS, improved enforcement of consumer rights would have a flow-on effect to incentives

for suppliers to provide consumers with high quality goods and services and to provide consumers with redress when goods or services are not of the required quality.

### *Costs*

25.72 The main cost of this approach would be those involved in developing education campaigns for governments. If education is to be effective, consumers and businesses would also incur costs devoting time to engaging with education campaigns. Whilst the confidence level around estimates is low, the business costs calculator<sup>118</sup> indicates that the cost of additional education campaigns on the existing law would average \$160 per business per year. This is based on an assumption that one person in each business devotes two hours four times per year to engaging with education campaigns on statutory implied conditions and warranties.

25.73 The complexity of the existing law is currently a major constraint on the effectiveness of existing and future education campaigns. Given the differences which exist between jurisdictions it is not possible to implement a single national education campaign to deal with the existing law in order to effectively provide guidance and to raise awareness amongst consumers and suppliers. This limits the economies of scale and scope for education campaigns relating to consumer rights.

25.74 Submissions to CCAAC provided significant anecdotal evidence that education campaigns alone will not address the problems with the existing law. As indicated in part A of this RIS, the existing law has been in place since the late 19th and early 20th centuries and has been the subject of many education campaigns by regulators over those years. Consumer groups, such as CHOICE, have also sought to educate consumer about their warranty rights. Evidence from the NEIAT study, quoted extensively in part A of this RIS, indicates that these education campaigns have not been as effective as might be desired.

## **Option C: Uniform regulation**

25.75 Option C would create a single law that would apply across Australia. In substance, the same rights and obligations would apply as exist under the current implied terms regime in the TP Act.

---

118 The business cost calculator is an IT-based tool developed by the Australian Government to help identify and calculate the compliance costs of regulatory proposals. It provides an automated and standard process for quantifying compliance costs of regulation on business using activity-based costing methodology.

25.76 Each existing implied condition or warranty would be converted into a more clearly expressed statutory guarantee, which would avoid the complexity arising from the current implication of terms into contracts, the use of archaic legal concepts and terms in the legislation and the many minor variations between the existing variety of national, State and Territory laws.

25.77 The following provides an outline of the new provisions that would form part of the ACL.

*A national consumer guarantees law*

25.78 Consumers would have the benefit of the following statutory guarantees in respect of the supply of goods:

- A guarantee as to title — that the supplier has the right to sell the goods, the goods are free from any undisclosed security and the consumer has the right to undisturbed possession of the goods.
- A guarantee as to acceptable quality — that the goods are fit for all purposes for which goods of that type are commonly supplied, acceptable in appearance and finish, free from defects, safe and durable.
- A guarantee that goods are reasonably fit for any particular purpose that the consumer makes known to the supplier.
- A guarantee that goods comply with their description.
- A guarantee that goods comply with a sample provided or shown to the consumer.
- A guarantee that repairs and spare parts are reasonably available for a reasonable period.

25.79 Consumers would have the benefit of the following statutory guarantees in respect of the supply of services:

- A guarantee that services will be carried out with reasonable care and skill.
- A guarantee that services will be reasonably fit for any particular purpose that the consumer makes known to the supplier.
- A guarantee that services are of such a nature and quality that they can be reasonably expected to achieve any particular

result that the consumer desires to achieve and makes known to the supplier.

- A guarantee that services will be completed within a reasonable time.

*Remedies for failure to comply with guarantees*

25.80 Remedies available to consumers where a supplier has failed to comply with a consumer guarantee would be clearly set out in the law. Different remedies would be available against the suppliers of goods compared to the manufacturers of goods.

25.81 The guarantees as to title, acceptable quality, fitness for purpose and compliance with sample would be enforceable against the suppliers of goods. The following remedies would apply in respect of the failure of any goods to comply with a relevant guarantee:

25.82 The consumer may require the supplier to remedy the failure within a reasonable time.

- Where the supplier fails or refuses to remedy a failure the consumer may reject the goods or have the failure remedied elsewhere and obtain from the supplier all reasonable costs incurred in having the failure remedied.
- In respect of a failure of a substantial character or where the failure cannot be remedied, the consumer may reject the goods or obtain damages from the supplier in respect of the reduction in value of the goods.

25.83 The guarantees as to acceptable quality, compliance with description and availability of repairs and spare parts would be enforceable against the manufacturers of goods. Consumers would be entitled to seek damages from manufacturers of goods in respect of any failure of goods to comply with the aforementioned guarantees.

25.84 In respect of any failure of services to comply with the relevant guarantees, consumers would be able to require the supplier to remedy the failure within a reasonable time or have the failure remedied elsewhere and recover the costs of doing so when the supplier refuses or neglects to remedy the failure, or does not do so within a reasonable time. Where a failure is not capable of being remedied the consumer would be able to cancel the contract and seek damages from the supplier.

*Redrafting the law for clarity*

25.85 Archaic or ambiguous concepts, such as ‘merchantable quality’ and ‘encumbrance’ would be replaced by modernised terms that are easier for consumers and businesses to understand. The term merchantable quality would be replaced with ‘acceptable quality’. The term ‘encumbrance’ would be replaced by ‘undisclosed security interest’. Other minor terminology changes would also be made to enhance clarity of the law, in accordance with current Commonwealth drafting practices. The policy intent of such changes is to enhance clarity of the law without changing its effect or application.

*Application of guarantees to online auctions*

25.86 Application of the law to online auctions would be clarified, potentially by providing for a definition of ‘auction’ for the purposes of statutory consumer guarantees.

25.87 The policy intent of excluding suppliers who sell by way of auctions from the requirement to provide consumers with rights of redress is no longer being satisfied due to technological change. Recent court decisions, such as *Peter Smythe v Vincent Thomas* [2007] NSWSC 844 have considered the meaning of the term ‘auction’, and whether that term can be applied to auctions such as those conducted online between buyers and sellers without the intervention of an auctioneer. The courts have decided that online auctions conducted in that way fall within the definition of auction. Accordingly, the auction exclusion in the TP Act would exempt traders, including those with a significant physical store presence in Australia, from the obligation to provide consumers with the usual protections when they sell goods by way of online auctions.

25.88 The proposed amendment to the TP Act would continue to exempt traditional auctions conducted with the assistance of an auctioneer from the obligation to provide consumer guarantees. Statutory guarantees would apply to auctions conducted without an auctioneer.

*Enforcement powers for consumer agencies*

25.89 Consumer agencies would be provided with a new power to enforce consumer guarantees on behalf of consumers in circumstances where such action would provide a public benefit. This power would take a similar form to section 75AQ of the TP Act and would allow consumer agencies to commence a representative action on behalf of one or more persons if it has obtained the written consent of each of the persons.

25.90 In accordance with existing practice of consumer agencies, it is expected that this new power would be exercised only in circumstances where there has been a blatant breach of the law, significant and widespread

public detriment, or the potential for successful action to have a worthwhile deterrent effect.

### ***Benefits***

25.91 Statutory guarantees would have a number of advantages over implied conditions and warranties. Statutory guarantees would be directly enforceable as breaches of the ACL, whereas the existing statutory provisions are indirectly enforceable as breaches of terms implied into consumer contracts. Accordingly, remedies would be set out in the ACL, whereas existing law requires consumers to pursue remedies as breaches of contractual terms. Both characteristics of consumer guarantees would make it easier for consumers and businesses to understand the law as it applies to their individual circumstances.

25.92 An additional advantage of statutory consumer guarantees, when compared to implied conditions and warranties, relates to improving the ability of consumers and businesses to understand the law. The rights, obligations and applicable remedies for failure to meet obligations in respect of consumer purchases of goods or services would all be set out in the ACL. Consumers and businesses would no longer require an understanding of contract law, the meaning of ‘implied terms’ or the distinction between ‘warranties’ and ‘conditions’ in order to comply with the law or to enforce their rights.

25.93 As noted for Option B, improved understanding of the law by consumers and businesses, in this case due to simplified and uniform regulation, promises to reduce disputation regarding consumer contracts. Reduced disputation would lead to cost savings for businesses, consumers and government dispute resolution bodies.

25.94 In the event that disputes occur under a system of national statutory consumer guarantees, consumers would have improved access to justice. As rights and obligations would be more readily understood by consumers they would face fewer difficulties enforcing their rights. Consumers and community organisations would experience reduced costs as there would be less need for consumers to seek expert assistance in order to enforce their rights in tribunals or Courts.

25.95 NEIAT estimated that the cost to consumers of warranty claims, in relation to mobile telephones, white goods and electronic goods alone, amounts to over \$2 billion per annum.<sup>119</sup> A further cost of \$700 million per annum was incurred by retailers, manufacturers and importers.<sup>120</sup>

---

119 NEIAT study, page 22.

120 NEIAT study, pages 24 and 26.



Significantly, 55 per cent of the cost to consumers, 40 per cent of the cost to retailers and 28 per cent of the cost to manufacturers and importers relate to time taken to resolve warranty issues.<sup>121</sup> Accordingly, clarifying the law to make it easier for business and consumers to understand has the potential to significantly reduce the cost of warranty claims for consumers and businesses. For example, a 20 per cent reduction in the time taken by consumers and businesses to resolve warranty issues would result in a benefit of over \$200 million per annum.

25.96 The move to a single national law on terms for consumer purchases of goods and services would be used as an opportunity to clarify ambiguous and archaic terms in the law. Consideration would be given to modernised and simplified drafting to aid comprehension of the law by business and consumers. Such simplification would be more difficult without a national approach to law in this area, as 15 separate Acts would require amendment to clarify terms and such amendment would need to be co-ordinated across nine governments.

25.97 This option would reduce compliance costs for businesses and uncertainty of redress options for consumers that are associated with the differences between jurisdictions. In addition, a single national law would create the possibility of a national education campaign that would benefit from economies of scale and scope when compared to State-based consumer education efforts. Moving to a single harmonised system would help to reduce the complexity in the law that results from the multi-layered and fragmented nature of the current law, and reduce duplication in terms of laws and education.

25.98 New Zealand enacted laws to provide for statutory consumer guarantees in 1993. The stark contrast between New Zealanders' understanding of their rights and that of Australian consumers demonstrates the benefits of a system based on statutory, rather than implied contractual, rights. According to the *National Consumer Survey 2009*, 67 per cent of New Zealanders were able to name a piece of consumer protection legislation,<sup>122</sup> 84 per cent correctly indicated that they would be eligible for a replacement, refund or repair of a faulty product<sup>123</sup> and only 16 per cent of consumers indicated that they are not confident that the New Zealand legislation would protect them if they have a problem.<sup>124</sup> The October 2009 NEIAT study of Australian consumers, whilst not directly comparable, indicated that 46 per cent of consumers did not know that statutory

---

121 NEIAT study, pages 22, 25 and 26.

122 NZ Ministry of Consumer Affairs 2009, *National Consumer Survey 2009*, A Colmar Brunton Report, page 5.

123 NZ Ministry of Consumer Affairs 2009, page 3.

124 NZ Ministry of Consumer Affairs 2009, page 5.

protections exist in addition to manufacturer and retailer warranties<sup>125</sup> and 57 per cent of retailers did not know that consumers had rights to repair or refund beyond express warranties.<sup>126</sup>

25.99 Consideration of the evidence on consumer awareness from Australia and New Zealand would tend towards the conclusion that statutory guarantees are more readily understood by consumers. Accordingly, it is expected that amendment of law to provide for statutory guarantees would result in increased action by consumers to enforce their rights to repairs and refund in respect of faulty goods and services. Warranty claims by consumers against retailers and manufacturers are a zero sum game, as payments by businesses equal receipts by customers. A net benefit is likely to result from increased warranty claims by consumers as perverse incentives for suppliers to sell poor quality goods and avoid their responsibilities in relation to consumer claims will be more adequately addressed.

25.100 The NEIAT study indicated that 81 per cent of Australian consumers did not seek advice from anyone when a supplier did not provide redress in respect of a faulty product.<sup>127</sup> The NEIAT study considered the cost to business of dealing with protracted consumer warranty claims. Dealing with such claims in respect of electronic goods, mobile telephones and whitegoods cost retailers an average of \$28,500 per year.<sup>128</sup> Forty per cent of such costs arose from staffing implications of dealing with warranty claims.<sup>129</sup> It might be expected that such costs will be reduced if the law is more readily understood by consumers and businesses, as disputes will be less likely to be protracted.

25.101 Anecdotal evidence suggests that some extended warranties are costly compared to the benefits they offer. For example, the CALC noted 'extensive problems' with the marketing of extended warranties to consumers.<sup>130</sup> The CCAAC report indicated that the lack of awareness of statutory rights is contributing to the 'growing uptake of extended warranties by consumers'.<sup>131</sup> Further, ACCC complaints data reveals that a total of 255 complaints and inquiries were made in relation to extended warranties between January 2006 and September 2008. Improved awareness of statutory rights might be expected to improve the wellbeing of consumers by

---

125 NEIAT study, page 51.

126 NEIAT study, page 53.

127 NEIAT study, page 44.

128 NEIAT study, pp. 24.

129 NEIAT study, pp. 25.

130 Submission to CCAAC,  
[http://www.treasury.gov.au/documents/1614/PDF/Consumer\\_Action\\_Law\\_Centre.pdf](http://www.treasury.gov.au/documents/1614/PDF/Consumer_Action_Law_Centre.pdf).

131 CCAAC report, page 81.

limiting purchases of extended warranties in circumstances where their cost outweighs the benefits offered.

25.102 The proposed amendment providing for a definition of ‘auction’ will ensure parity of treatment irrespective of the mode of sale of goods and services and would ensure that consumers receive the benefit of a warranty irrespective of the mode of purchase. Businesses that sell goods by way of online auctions will be required to provide statutory consumer guarantees in the same way that businesses that sell goods in shops are required to provide statutory consumer guarantees. As explained earlier in this section, warranties play an important role in addressing a market failure that would result from asymmetric information in the market for goods and services. Extending statutory guarantees to online auctions will improve the functioning of that market in the same way as statutory implied conditions and warranties improve the functioning of in-person physical markets. Consumers will benefit from obtaining the right to seek redress when they do not receive the promised benefits from the purchase of a good or service. Businesses will achieve some benefits as a result of higher prices being achieved for goods and services.

25.103 Whilst the costs of moving to a national system of consumer guarantees are largely transitional, the benefits, in terms of reduced complexity, uncertainty and access to justice for consumers, will be enduring.

#### *Costs*

25.104 The main costs with this option will be borne by governments in terms of legislative amendments to create a uniform set of consumer guarantees, and the costs of educating consumers and suppliers of the changes.

25.105 Given that in substance there is no substantive difference between the protections provided for under the existing implied terms regime in the TP Act and the proposed consumer guarantees regime under the national law, both the transitional costs and compliance costs for businesses would be relatively minimal. Transitional costs for suppliers, if any, would involve moving to a single consumer protection model for consumer sale contracts from one which applied to the jurisdiction they were operating in (as well as the TP Act if there were any differences between the two).

25.106 In relation to the application of statutory consumer guarantees to online auction websites, businesses will incur costs only to the extent that they are required to remedy faults in products that they sell to consumers. These costs will be exactly the same as if goods were sold in a shop. The costs associated with repairs and replacement goods will be exactly offset by

the benefits achieved by consumers from receiving repaired goods or replacement goods.

25.107 Whilst the level of confidence around estimates is low, the business cost calculator indicates that the average cost per business of moving to uniform regulation would be \$75 (or \$150 million across the economy). The main costs for business involved in the change would be seeking advice on the new law and redrafting standard contracts to refer to the new law. Only a small minority of businesses would be involved in these activities. This estimated cost compares favourably to an estimate of a benefit of \$1.5 to \$4.5 billion per year made by the PC for the ACL as a whole. While the PC did not separately estimate the benefit of moving to a national system of consumer guarantees, it represents a significant part of the ACL and therefore likely represents a significant portion of this aggregate benefit.

## **Consultation**

25.108 On 26 July 2009, the Minister for Competition Policy and Consumer Affairs, the Hon Dr Craig Emerson MP, released an Issues Paper, *Consumer rights: Statutory implied conditions and warranties*, on behalf of CCAAC. The Issues Paper explored and posed questions about the adequacy of the current laws on implied terms and the need, if any, for amendments to improve existing laws and to empower regulators to ensure compliance with these laws.

25.109 The Issues Paper also considered some related matters, like 'lemon laws' which seek to protect consumers where goods repeatedly fail to meet expected standards, the interaction of extended warranties with laws on implied terms, and other possible means to improve the operation of the existing laws on implied terms in Australia.

25.110 Interested parties were invited to comment on the paper and written submissions closed on 24 August 2009. In response to the Issues Paper, CCAAC received 33 submissions from a range of stakeholders, including individual consumers, consumer agencies, consumer advocate bodies, regulators, industry peak bodies, consumer legal centres, academics, law firms and businesses.

25.111 CCAAC held a roundtable with State and Territory consumer agencies on 21 August 2009. A targeted consultation process was also undertaken based on written submissions. CCAAC met with seven stakeholders on 7 September 2009 and 8 September 2009 and conducted teleconferences with four stakeholders on 16 and 17 September 2009. Stakeholders consulted in person had a wide range of interests in consumer issues and included regulators, industry peak bodies, retailers and

individuals. A representative sample of comments received by CCAAC is provided below.

***Comments made by consumers and consumer groups***

25.112 CHOICE cited a survey that indicated that ‘only about half’ of respondents understood the idea of a statutory warranty, that consumers should receive clear information about their statutory rights at the point of sale and that this might be achieved by signage at the point of sale. CHOICE also indicated that consumers should be targeted with information from consumer agencies and that breaches of consumer rights should be met with vigorous enforcement action by consumer agencies.

25.113 CHOICE also stated that the use of the term ‘warranty’ may be problematic as it has multiple possible meanings. CHOICE suggested the use of the terms ‘primary protections’ and ‘secondary protections’ instead of conditions and warranties, respectively. CHOICE considered that consumers should be given the opportunity to purchase extended warranties other than when they purchase goods.

25.114 CALC stated:

...it is time to consider policy responses other than merely increasing information and education to consumers and traders, given the significant and systematic nature of the problem.<sup>132</sup>

and

...national harmonisation and clarification of Australia’s laws regarding statutory conditions and warranties. The New Zealand Consumer Guarantees Act 1993 provides an example of how this could be done by removing the difficult concepts such as the differences between conditions and warranties and simply providing for more clearly stated remedies that flow from failures to comply with guarantees.<sup>133</sup>

***Comments made by business and business-related groups***

25.115 The Australian Industry Group indicated that:

---

132 Submission to CCAAC,  
[http://www.treasury.gov.au/documents/1614/PDF/Consumer\\_Action\\_Law\\_Centre.pdf](http://www.treasury.gov.au/documents/1614/PDF/Consumer_Action_Law_Centre.pdf).

133 Submission to CCAAC,  
[http://www.treasury.gov.au/documents/1614/PDF/Consumer\\_Action\\_Law\\_Centre.pdf](http://www.treasury.gov.au/documents/1614/PDF/Consumer_Action_Law_Centre.pdf).

terms such as merchantable quality are poorly or only partially understood by consumers. This situation is, we suggest, the root of disputes between suppliers and consumers.<sup>134</sup>

25.116 The Australian Retailers Association indicated that auction sales should be subject to the same warranties as other purchases and that the definition of recreational services in the TP Act is sufficient. The Retailer Traders Association of WA Inc. also indicated that auction sales should be subject to the same warranties as other purchases.

25.117 The Australian Industry Group indicated that standard auctions where the buyer can inspect goods should be 'buyer beware' but, in the case of on-line auctions where the consumer is not able to inspect the goods, there is a need for greater consumer protection.

25.118 The Australian Automotive Aftermarket Association indicated that reform in this area cannot be focussed on more consumer education as, in their opinion, consumers are victims of deliberate and coordinated misinformation. This leads purchasers of automobiles to believe that express warranties are the only means of redress in respect of faults with automobiles.

#### *Comments made by others*

25.119 Professor Carter indicated that:

...very little is said in [Part V, Division 2 of the TP Act] about consumer rights and remedies. To a large extent, these are based on common law, that is implied by law. In fact, [Part V, Division 2] does not explain the distinction between conditions and warranties by reference to consumer rights. That is left to the sale of goods legislation and the common law...ideally both the existence and content of all consumer rights and remedies should be expressed in detail in the consumer protection regime.<sup>135</sup>

25.120 The Law Council of Australia indicated that it:

...would welcome proposals aimed at clarifying the application of the existing regime...introducing narrow and prescriptive regimes would not be helpful or practical and would likely result in greater complexity and confusion for consumers and suppliers. Laws which are simply drafted and broadly applicable are preferable, particularly in the

---

134 Submission to CCAAC, [http://www.treasury.gov.au/documents/1614/PDF/Australian\\_Industry\\_Group.pdf](http://www.treasury.gov.au/documents/1614/PDF/Australian_Industry_Group.pdf).

135 Submission to CCAAC, <http://www.treasury.gov.au/documents/1614/PDF/Freehills.pdf>.

context of consumer goods, as they are able to adapt to evolving technologies and changes in reasonable consumer expectations.<sup>136</sup>

25.121 The Australian Finance Conference indicated that there is a need for a national legislative framework. The Australian Finance Conference also indicated that there is a need to recognise the tiered nature of selling to ensure that the law is appropriately tailored to the relationships between manufacturers, suppliers, financiers, insurers and customers.

25.122 NEIAT was recently commissioned by consumer agencies to conduct a national study of warranties and refunds. It published its final report in October 2009. As noted in the preface to the final report, it was intended to inform the review of statutory warranties and refunds for the ACL. Further details of the NEIAT study are provided in Part A of this RIS.

25.123 Overall, written submissions and comments made during consultation were supportive of legislative action to provide for statutory consumer guarantees.

## **Conclusion and recommended option**

25.124 Given the considerable problems identified with the existing system of 15 national, State and Territory laws that imply terms into consumer contracts, Option A of maintaining the status quo is not the most preferred option. A preliminary case for government action was made out by the PC Review. The NEIAT study revealed evidence that consumers experience costs of over \$2 billion per annum in relation to problems experienced with a subset of goods comprising mobile telephones, white goods and electronics.

25.125 NEIAT presented further evidence that consumers who are informed about their rights spend significantly less time seeking remedies in respect to problems experienced with goods. Accordingly, government action to improve awareness of consumers with respect to implied conditions and warranties would generate considerable benefits that are likely to exceed the transitional costs of any such action.

25.126 Given that improving consumer awareness of their rights is a key element of the objectives of government action in this area, Option B considered whether further education campaigns dealing with implied conditions and warranties is the best solution to the identified problem. Consideration of this option reveals that complexity and inconsistencies in

---

136 Submission to CCAAC,  
[http://www.treasury.gov.au/documents/1614/PDF/Law\\_Council\\_of\\_Australia.pdf](http://www.treasury.gov.au/documents/1614/PDF/Law_Council_of_Australia.pdf).

the existing law is a key constraint on the efficacy of further education campaigns on the existing law.

25.127 Additional education efforts would impose costs on governments in relation to the production of education materials and costs on consumer and businesses in terms of time spent engaging with additional education efforts by consumer agencies. Costs of education efforts based on the existing law are greater than would be the case under a single national law, as State and Territory consumer agencies do not benefit from the economies of scale and scope that would apply to a national education campaign based on a nationally consistent approach to terms applicable to consumer contracts.

25.128 Evidence, from the NEIAT study and other studies of implied terms in consumer contracts, that a significant proportion of consumers and traders have no knowledge of statutory protections in this area, despite past education efforts of consumer agencies and consumer representative bodies, suggests that additional education efforts are unlikely to be sufficient to address the identified problem. Given evidence that education efforts have been of limited effect in the past, it is unlikely that the cost of additional education efforts can be justified based on the current complex and inconsistent set of provisions.

25.129 Option C is the preferred option. The \$2.5 billion per annum in costs being incurred by consumers, retailers, manufacturers and importers in relation to the repairs, replacement items, incidental costs and time involved in warranty claims, as evidenced in the NEIAT study, suggest that government action in this area has the potential to generate significant net benefits.

25.130 A single national law providing for consumer guarantees instead of implied conditions and warranties promises to form a basis for nationally consistent education campaigns on consumer guarantees. Such education campaigns would benefit from economies of scale and scope associated with a national approach. Consumer guarantees would be easier for consumers to understand compared to implied conditions and warranties. Education campaigns would, therefore, have the potential to be more effective.

25.131 Levels of disputation are likely to be reduced if consumers and traders share a common understanding of their respective rights and obligations. Disputes that do arise would be more readily resolved under a law that is more explicit about the terms applicable to consumer contracts.

25.132 A move to legislate for statutory guarantees would also provide an opportunity to modernise and simplify the drafting of the relevant provisions, further enhancing the ability of consumers and traders to understand the law.



25.133 Application of statutory consumer guarantees to online auction websites is expected to result in a net benefit in the same way as statutory consumer guarantees provide a net benefit in respect of the sale of goods and services by other methods. The payments flowing between businesses and consumers in respect of faulty goods and services will be a zero-sum game — payments by businesses exactly equal receipts by consumers. A net benefit will result from the incentive created for suppliers to strive to provide goods that are of the highest possible quality to avoid warranty claims. If consumers were left to bear the costs of repairing goods that are faulty when sold, a perverse incentive would exist to minimise costs of production at the expense of quality, even if quality could be improved at minimal cost.

25.134 Each of the identified benefits of Option C is enduring in nature, whilst the costs are one-off and transitional. The benefits of Option C exceed the costs by the largest margin when compared to Options A and B, leading to Option C being the preferred option.

## **Part D: Implementation and review**

25.135 Any amendments to the implied terms provisions in the TP Act would form part of the broader Australian consumer law. In October 2008, COAG agreed to create a national consumer law, based on the TP Act and enacted via application legislation in each of the States and Territories. In accordance with the *National Partnership Agreement to Deliver a Seamless National Economy*, the national consumer law is to be implemented by the end of 2010 and commence from 1 January 2011. To meet this timeframe, reforms to implied terms would be incorporated into the second Trade Practices Amendment (Australian Consumer Law) Bill, which is expected to be introduced into the Australian Parliament in early 2010.

25.136 Reforms to implied terms will be reviewed together with the review of the *Intergovernmental Agreement for the Australian Consumer Law*, which COAG has agreed will take place seven years after the IGA has operated.

## Appendix A

### Australian statutory conditions and warranties provisions

	<i>Cth</i>	<i>NSW</i>	<i>QLD</i>	<i>VIC</i>	<i>WA</i>	<i>SA</i>	<i>TAS</i>	<i>NT</i>	<i>ACT</i>
	<i>TPA</i>	<i>FTA</i>	<i>SGA</i>	<i>FTA</i>	<i>FTA</i>	<i>CTA</i>	<i>SGA</i>	<i>CAFTA</i>	<i>SGA</i>
<b>Implied conditions and warranties</b>									
Right to sell the goods, the goods are unencumbered and the consumer has the right to quiet enjoyment	69	40O	15	32G 32GA	36 12 (SGA)	6	17	62	17
Goods will comply with their description	70	40P	16	32H	37 13 (SGA)	6(3)	18	63	18
Goods will be of merchantable quality and fit for the purpose	71	40Q	17	32I 32A	38 14 (SGA)	6(4)	19	64	19
Goods will comply with a sample	72	40R	18	32HA	39 15 (SGA)	6(4)(b)	20	65	20
Services will be rendered with due care and skill and goods supplied with the service will be fit for purpose; services will be fit for the purpose	74	40S	-	32J 32JA	40	7	-	66	-
<b>Exclusion of implied terms</b>									
Choice of laws clause; laws of other jurisdictions	67	-	-		4(3)	3	-	-	-
Contract terms that attempt to exclude, restrict or modify the application of implied conditions and warranties	68	40M	-	32L	34	8	-	68	-
Limited liability for breach of certain conditions or warranties	68A	-	-	32MA	35	-	-	69	-
Limited liability in relation to supply of recreational services	68B	40M(3)	-	32N	-	-	-	68A	-
<b>Rights of action against manufacturers and importers</b>									
Actions in respect of unsuitable goods	74B	40U	-	-	-	-	-	73	-

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

	<i>Cth</i>	<i>NSW</i>	<i>QLD</i>	<i>VIC</i>	<i>WA</i>	<i>SA</i>	<i>TAS</i>	<i>NT</i>	<i>ACT</i>
	<i>TPA</i>	<i>FTA</i>	<i>SGA</i>	<i>FTA</i>	<i>FTA</i>	<i>CTA</i>	<i>SGA</i>	<i>CAFTA</i>	<i>SGA</i>
Actions in respect of false descriptions	74C	40V	-	-	-	-	-	74	-
Actions in respect of goods of unmerchantable quality	74D	40W	-	-	-	-	-	75	-
Actions in respect of non-correspondence with samples	74E	40X	-	-	-	-	-	76	-
Failure to provide facilities for repairs or parts	74F	40Y	-	-	-	-	-	77	-
Non-compliance with express warranty	74G	40Z	-	-	-	-	-	78	-
Right of seller to recover against manufacturer or importer	74H	40ZA	-	-	-	-	-	79	-
Time for commencing actions — three years	74J	40ZB	-	-	-	-	-	80	-
Application of Division cannot be excluded	74K	40ZC	-	-	-	-	-	81	-
Limitation of liability of manufacturer to seller	74L	-	-	-	-	-	-	82	-

*CTA: Consumer Transactions Act 1972 (SA)*

## Appendix B

### Comparison of Australian Statutory conditions and warranties provisions

	<i>Cth</i>	<i>NSW</i>	<i>Qld</i>	<i>Vic</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>NT</i>	<i>ACT</i>
	<i>TPA</i>	<i>FTA</i>	<i>SGA</i>	<i>FTA</i>	<i>FTA</i>	<i>CTA/MWA<sup>137</sup></i>	<i>SGA</i>	<i>CAFTA</i>	<i>SGA</i>
Terms can be excluded	x	x	✓	x	x	x	✓	x	✓
Liability can be limited	✓	x	✓	✓	✓	✓	✓	✓	✓
The provisions apply to all sellers or suppliers (regardless of whether corporation or natural person)	x	✓	✓	✓	✓	✓	✓	✓	✓
The provisions apply to sale by auction	x	x	✓	✓	x	x	✓	x	✓
The provisions apply to private sales <sup>138</sup>	x	x	✓	✓ <sup>139</sup>	x	✓	✓	x	✓
The provisions apply for the benefit of all buyers	x	x	✓	x	x	x	✓	x	✓

137 Includes *Manufacturers' Warranties Act 1974* (SA), which specifically provides for non-excludable manufacturer warranties.

138 The implied terms of title, encumbrance and quiet enjoyment still apply to private sales in jurisdictions where the other warranties do not.

139 In the *Fair Trading Act 1999* (Vic), the implied terms of quality and fitness and regarding service need to be in the course of business, otherwise the implied terms will apply to private sales.

	<i>Cth</i>	<i>NSW</i>	<i>Qld</i>	<i>Vic</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>NT</i>	<i>ACT</i>
	<i>TPA</i>	<i>FTA</i>	<i>SGA</i>	<i>FTA</i>	<i>FTA</i>	<i>CTA/MWA<sup>140</sup></i>	<i>SGA</i>	<i>CAFTA</i>	<i>SGA</i>
The provisions are limited to 'consumer' goods or consumers <sup>141</sup>	✓	✓	✗	✓	✓	✓	✗	✓	✗
The provisions apply to commercial road vehicles	✓	✗	✓	✗	✓	✓	✓	✓	✓
The provisions apply to supply of goods by lease, hire or exchange	✓	✓	✗	✓	✓	✓	✗	✓	✗
The provisions are limited to 'consumer' services or consumers	✓	✓	✗	✓	✓	✓	✗	✓	✗
The implied terms apply (or cannot be limited) in relation to:									
(a) services provided by qualified architects or engineers	✗	✗	-	✗	✗	✗ <sup>142</sup>	-	-	-
(b) recreational services	✗	✗	-	✗	✗	✗	-	✗	-

140 Includes *Manufacturers' Warranties Act 1974* (SA), which specifically provides for non-excludable manufacturer warranties.

141 Under the TP Act and the State and Territory legislation, the provisions implying terms are either limited to 'consumers' or to certain types of contracts. In the TP Act and WA legislation a 'consumer' is a buyer of goods and services the price of which does not exceed \$40,000 or (if the price exceeds \$40,000) where the goods or services are of a kind ordinarily acquired for personal, domestic or household use. In Victoria, the implied terms apply to certain contracts but the effect of their application is the same as under the TP Act. In NSW the implied terms only apply to goods or services of a kind ordinarily acquired for personal, domestic or household use and in SA the provisions apply to contracts for the supply of goods and services which do not exceed \$40,000. In the NT, the definition of 'consumers' is broad but the implied terms cannot be excluded, limited or restricted in the case of goods or services of a kind ordinarily acquired for personal, domestic or household use.

142 The CTA and Regulations list certain services that are captured by the CTA, however, not all services of qualified architects or engineers may be captured.

	<i>Cth</i>	<i>NSW</i>	<i>Qld</i>	<i>Vic</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>NT</i>	<i>ACT</i>
	<i>TPA</i>	<i>FTA</i>	<i>SGA</i>	<i>FTA</i>	<i>FTA</i>	<i>CTA/MWA<sup>140</sup></i>	<i>SGA</i>	<i>CAFTA</i>	<i>SGA</i>
(c) services in respect of insurance, transport and storage for business	x	✓	-	x	x	✓	-	-	-
There is a statutory remedy for breach	✓	✓	x	✓	✓	✓	x	✓	x





---

# *Index*

---

## **Schedule 1: The Australian Consumer Law**

<i>Bill reference</i>	<i>Paragraph number</i>
Item 1: Chapter 1, section 1	2.9, 10.163
Item 1: Chapter 1, section 2	2.10, 3.12, 4.20, 6.102, 6.104, 6.182, 6.196, 6.209, 6.221, 6.238, 6.408, 8.38, 10.19, 10.20, 10.164, 11.32, 12.19, 14.19, 15.92, 16.16, 16.29, 16.30
Item 1: Chapter 1, subsection 3(5)	2.13
Item 1: Chapter 3, Part 3-2, Division 1	2.14
Item 1: Chapter 3, Part 3-2, Division 2	2.14
Item 1: Chapter 3, Part 3-2, Division 3	2.14
Item 1: Chapter 3, Part 3-2, Division 4, section 101	2.14
Item 1: Chapter 1, section 14	2.14
Item 1: Chapter 5, Part 5-5, Division 1	2.14
Item 1: Chapter 2, Part 2-2	2.15
Item 1: Chapter 2, Part 2-2, section 21(1)	2.15
Item 1: Chapter 1, section 3	2.18, 2.23, 10.48
Item 1: Chapter 1, paragraph 3(1)(a)	2.19
Item 1: Chapter 1, paragraph 3(1)(b)	2.19
Item 1: Chapter 1, subsection 3(2)	2.20
Item 1: Chapter 1, subsection 3(3)	2.21
Item 1: Chapter 1, section 4	2.24
Item 1: Chapter 1, section 4	2.28
Item 1: Chapter 3, Part 3-3	2.30, 2.31
Item 1: Chapter 3, Part 3-4	2.30, 2.31
Item 1: Chapter 3, Part 4-3	2.30, 2.31
Item 1: Chapter 1, Subsection 5(1)	2.30
Item 1: Chapter 1, Subsection 5(2)	2.31
Item 1: Chapter 1, Subsection 6(1)	2.33, 2.34

Item 1: Chapter 3, Parts 3-2 and 5-4	2.37
Item 1: Chapter 3, Part 3-5	2.37
Item 1: Chapter 1, Part 5-3	2.37
Item 1: Chapter 1, paragraph 7(1)(a)	2.40
Item 1: Chapter 1, paragraph 7(1)(b)	2.40
Item 1: Chapter 1, paragraph 7(1)(c)	2.40
Item 1: Chapter 1, paragraph 7(1)(d)	2.40
Item 1: Chapter 1, paragraph 7(1)(e)	2.40
Item 1: Chapter 1, paragraph 7(2)(a)	2.41
Item 1: Chapter 1, paragraph 7(2)(b)	2.42
Item 1: Chapter 1, subsection 7(3)	2.43
Item 1: Chapter 1, section 8	2.44
Item 1: Chapter 5, Part 5-3	2.45, 6.113
Item 1: Chapter 1, subsection 9(1)	2.46, 12.15
Item 1: Chapter 1, subsection 9(2)	2.47, 12.16
Item 1: Chapter 1, subsections 9(3) and 9(4)	2.48
Item 1: Chapter 3, Part 3-1, Division 2, sections 40 and 43	2.49
Item 1: Chapter 1, subsection 10(1)	2.50
Item 1: Chapter 1, subsection 10(2)	2.52
Item 1: Chapter 1, section 11	2.55
Item 1: Chapter 1, section 12	2.57
Item 1: Chapter 1, subsection 13(a)	2.59
Item 1: Chapter 1, subsection 13(b)	2.60
Item 1: Chapter 5, Part 5-5	2.62
Item 1: Chapter 1, subsection 14(1)	2.62
Item 1: Chapter 1, subsection 14(2)	2.63
Item 1: Chapter 1, section 15	2.64
Item 1: Chapter 1, subsection 16(1)	2.65
Item 1: Chapter 1, subsection 16(2)	2.66
Item 1: Chapter 1, section 17	2.67
Item 1: Chapter 2, Part 2-1, subsection 18(1)	3.7
Item 1: Chapter 2, Part 2-1, subsection 18(2)	3.8
Item 1: Chapter 5, Part 5-2	3.10

---

Item 1: Chapter 5, Part 5-1, Division 1	3.17, 4.24, 4.40, 4.58, 6.134, 6.157, 6.169, 6.187, 6.201, 6.214, 6.226, 6.243, 6.255, 6.275, 6.288, 6.325, 6.339, 6.354, 6.380, 6.390, 6.401, 6.410, 6.419, 8.88, 9.27, 10.205, 11.35
Item 1: Chapter 5, Part 5-1, Division 2	3.17, 4.24, 4.40, 4.58, 6.134, 6.157, 6.169, 6.187, 6.201, 6.214, 6.226, 6.243, 6.255, 6.275, 6.288, 6.325, 6.339, 6.354, 6.380, 6.390, 6.401, 6.410, 6.419, 8.88, 9.27, 10.205, 11.35
Item 1: Chapter 5, Part 5-1, Division 3	3.17, 4.24, 4.40, 4.58, 6.134, 6.157, 6.169, 6.187, 6.201, 6.214, 6.226, 6.243, 6.255, 6.275, 6.288, 6.325, 6.339, 6.354, 6.380, 6.390, 6.401, 6.410, 6.419, 8.88, 9.27, 10.205, 11.35
Item 1: Chapter 5, Part 5-2, Division 2	3.17, 4.24, 4.40, 4.58, 5.87, 6.134, 6.157, 6.169, 6.187, 6.201, 6.214, 6.226, 6.243, 6.255, 6.275, 6.288, 6.325, 6.339, 6.354, 6.380, 6.390, 6.401, 6.410, 6.419, 8.88, 9.27, 10.205, 11.35
Item 1: Chapter 5, Part 5-2, Division 3	3.17, 4.24, 4.40, 4.58, 6.134, 6.157, 6.169, 6.187, 6.201, 6.214, 6.226, 6.243, 6.255, 6.275, 6.288, 6.325, 6.339, 6.354, 6.380, 6.390, 6.401, 6.410, 6.419, 8.88, 9.27, 10.205, 11.35

Item 1: Chapter 5, Part 5-2, Division 4, Subdivision A	3.17, 4.24, 4.40, 4.58, 6.134, 6.157, 6.169, 6.187, 6.201, 6.214, 6.226, 6.243, 6.255, 6.275, 6.288, 6.325, 6.339, 6.354, 6.380, 6.390, 6.401, 6.410, 6.419, 8.88, 9.27, 10.205, 11.35
Item 1: Chapter 5, Part 5-2, Division 4, Subdivision B	3.17, 4.24, 4.40, 4.58, 6.134, 6.157, 6.169, 6.187, 6.201, 6.214, 6.226, 6.243, 6.255, 6.275, 6.288, 6.325, 6.339, 6.354, 6.380, 6.390, 6.401, 6.410, 6.419, 8.88, 9.27, 10.205, 11.35
Item 1: Chapter 5, Part 5-2, Division 5, section 246	3.17, 4.24, 4.40, 4.58, 6.134, 6.157, 6.169, 6.187, 6.201, 6.214, 6.226, 6.243, 6.255, 6.275, 6.288, 6.325, 6.339, 6.354, 6.380, 6.390, 6.401, 6.410, 6.419, 8.88, 9.27, 10.205, 11.35
Item 1: Chapter 2, Part 2-1, section 19	3.19
Item 1: Chapter 2, Part 2-1, subsections 19(2)-(4)	3.21
Item 1: Chapter 2, Part 2-1, subsections 19(5) and (6)	3.22
Item 1: Chapter 2, Part 2-2, subsection 20(1)	4.19
Item 1: Chapter 5, Part 5-2, Division 1, section 224	4.23, 4.39, 4.57, 6.133, 6.156, 6.168, 6.186, 6.200, 6.213, 6.225, 6.242, 6.254, 6.274, 6.287, 6.324, 6.338, 6.353, 6.379, 6.389, 6.400, 6.409, 6.418, 7.78, 7.82, 7.85, 8.87, 9.26, 14.38, 14.39
Item 1: Chapter 2, Part 2-2, subsection 20(2)	4.27
Item 1: Chapter 2, Part 2-2, subsection 21(1)	4.28
Item 1: Chapter 2, Part 2-2, subsections 21(5) and 21(6)	4.30
Item 1: Chapter 2, Part 2 2, subsection 21(7)	4.33
Item 1: Chapter 2, Part 2-2, subsection 21(1)	4.34

Item 1: Chapter 2, Part 2-2, subsection 21(2)	4.35
Item 1: Chapter 2, Part 2-2, subsection 21(3)	4.36
Item 1: Chapter 2, Part 2-2, paragraph 21(4)(a)	4.37
Item 1: Chapter 2, Part 2-2, paragraph 21(4)(b)	4.38
Item 1: Chapter 2, Part 2-2, subsections 22(1), (6) and (7)	4.43
Item 1: Chapter 2, Part 2-2, paragraphs 22(1)(a) and (b)	4.45
Item 1: section 2	4.45
Item 1: Chapter 2, Part 2-2, subsection 22(2)	4.46, 4.51
Item 1: Chapter 2, Part 2-2, subsection 22(3)	4.48, 4.52
Item 1: Chapter 2, Part 2-2, subsection 22(8)	4.49
Item 1: Chapter 2, Part 2-2, subsection 22(1)	4.50
Item 1: Chapter 2, Part 2-2, subsection 22(4)	4.53
Item 1: Chapter 2, Part 2-2, paragraph 22(5)(a)	4.54
Item 1: Chapter 2, Part 2-2, paragraph 22(5)(b)	4.55
Item 1: Chapter 2, Part 2-3, subsections 23(1) and (2)	5.17
Item 1: Chapter 2, Part 2-3, section 2 and subsection 23(3)	5.18
Item 1: Chapter 2, Part 2-3, section 2	5.20, 5.78
Item 1: Chapter 2, Part 2-3, section 28	5.21, 5.76
Item 1: Chapter 2, Part 2-3, section 2 and subsection 24(1)	5.22
Item 1: Chapter 2, Part 2-3, paragraph 24(1)(a)	5.23
Item 1: Chapter 2, Part 2-3, section 2, paragraph 24(1)(b)	5.25
Item 1: Chapter 2, Part 2-3, subsection 24(4)	5.26
Item 1: Chapter 2, Part 2-3, paragraph 24(1)(c)	5.29
Item 1: Chapter 2, Part 2-3, subsection 24(2)	5.35
Item 1: Chapter 2, Part 2-3, paragraph 24(2)(a)	5.36
Item 1: Chapter 2, Part 2-3, section 1 and subsection 24(3)	5.37
Item 1: Chapter 2, Part 2-3, paragraph 24(2)(b)	5.41
Item 1: Chapter 2, Part 2-3, subsection 25(1)	5.42
Item 1: Chapter 2, Part 2-3, paragraphs 25(1)(a)-(m)	5.43
Item 1: Chapter 2, Part 2-3, paragraph 25(1)(n)	5.46
Item 1: Chapter 2, Part 2-3, section 26(1)	5.58
Item 1: Chapter 2, Part 2-3, paragraph 26(1)(a)	5.59
Item 1: Chapter 2, Part 2-3, section 2, paragraph 26(1)(b) and subsection 26(2)	5.62
Item 1: Chapter 2, Part 2-3, paragraph 26(1)(c)	5.71
Item 1: Chapter 2, Part 2-3, subsections 27(1) and 27(2)	5.72
Item 1: Chapter 2, Part 2-3, subsection 27(2)	5.74

Item 1: Chapter 2, Part 2-3, subsection 28(1)	5.77
Item 1: Chapter 2, Part 2-3, section 28(2)	5.80
Item 1: Chapter 2, Part 2-3, subsection 28(3)	5.82
Item 1: Chapter 2, Part 2-3, section 2	5.83
Item 1: Chapter 5, Part 5-2, Division 5, section 249	5.85, 15.119
Item 1: Chapter 5, Part 5-2, Division 3	5.87
Item 1: Chapter 5, Part 5-2, Division 4	5.87
Item 1: Chapter 2, Part 2-3, section 2, subsection 232(3), subparagraph 237(1)(a)(ii) and paragraph 238(1)(b)	5.89
Item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(a)	6.101, 6.109
Item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(b)	6.101, 6.114
Item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(c)	6.101, 6.110
Item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(d)	6.101, 6.115
Item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(e)	6.101, 6.120
Item 1: Chapter 3, Part 3-1, Division 1, subsection 29(1)(f)	6.101
Item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(g)	6.101, 6.116
Item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(h)	6.101, 6.117
Item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(i)	6.101, 6.118
Item 1: Chapter 3, Part 3-1, Division 1, subsection 29(1)(j)	6.101, 6.111
Item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(k)	6.101, 6.112
Item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(l)	6.101, 6.119
Item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(m)	6.101, 6.126
Item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(n)	6.101, 6.128
Item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(1)(f)	6.120
Item 1: Chapter 3, Part 3-1, Division 1, paragraphs 29(e) and (f)	6.121
Item 1: Chapter 3, Part 3-1, Division 1, paragraphs 29(2)-(3)	6.122
Item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(3)(a)	6.124
Item 1: Chapter 3, Part 3-1, Division 1, paragraph 29(3)(b)	6.125
Item 1: Chapter 4, Part 4-1, section 151	6.130
Item 1: Chapter 4, Part 4-6, section 207	6.132, 6.155, 6.167, 6.185, 6.199, 6.212, 6.224, 6.241, 6.253, 6.273, 6.286, 6.323, 6.337, 6.352, 6.378, 6.388, 6.399, 8.86, 9.25, 10.203

Item 1: Chapter 4, Part 4-6, section 208	6.132, 6.155, 6.167, 6.185, 6.199, 6.212, 6.224, 6.241, 6.253, 6.273, 6.286, 6.323, 6.337, 6.352, 6.378, 6.388, 6.399, 8.86, 9.25, 10.203, 13.25
Item 1: Chapter 4, Part 4-6, section 209	6.132, 6.155, 6.167, 6.185, 6.199, 6.212, 6.224, 6.241, 6.253, 6.273, 6.286, 6.323, 6.337, 6.352, 6.378, 6.388, 6.399, 8.86, 9.25, 10.203
Item 1: Chapter 3, Part 3-1, Division 1, subsection 30(1)	6.138
Item 1: Chapter 3, Part 3-1, Division 1, paragraph 30(1)(a)	6.139, 6.140
Item 1: Chapter 3, Part 3-1, Division 1, paragraph 30(1)(b)	6.139, 6.141
Item 1: Chapter 3, Part 3-1, Division 1, paragraph 30(1)(c)	6.139, 6.142
Item 1: Chapter 3, Part 3-1, Division 1, paragraph 30(1)(d)	6.139, 6.143
Item 1: Chapter 3, Part 3-1, Division 1, paragraph 30(1)(e)	6.139, 6.144
Item 1: Chapter 3, Part 3-1, Division 1, paragraph 30(1)(f)	6.139
Item 1: Chapter 3, Part 3-1, Division 1, paragraph 30(1)(g)	6.139, 6.145, 6.146
Item 1: Chapter 4, Part 4-1, section 152	6.153
Item 1: Chapter 3, Part 3-1, Division 1, subsection 31	6.160
Item 1: Chapter 4, Part 4-1, section 153	6.165
Item 1: Chapter 3, Part 3-1, Division 1, subsection 32(1)	6.172
Item 1: Chapter 3, Part 3-1, Division 1, subsections 32(1)(c)-(d)	6.173
Item 1: Chapter 3, Part 3-1, Division 1, section 32	6.174
Item 1: Chapter 3, Part 3-1, Division 1, subsection 32(2)	6.175, 6.177
Item 1: Chapter 3, Part 3-1, Division 1, subsection 32(3)	6.178
Item 1: Chapter 3, Part 3-1, Division 1, subsection 32(4)	6.179
Item 1: Chapter 4, Part 4-1, section 154	6.183
Item 1: Chapter 3, Part 3-1, Division 1, section 33	6.191
Item 1: Chapter 4, Part 4-1, section 155	6.197
Item 1: Chapter 3, Part 3-1, Division 1, section 34	6.204
Item 1: Chapter 4, Part 4-1, section 156	6.210
Item 1: Chapter 3, Part 3-1, Division 1, subsection 35(1)	6.217
Item 1: Chapter 3, Part 3-1, Division 1, subsection 35(2)	6.218
Item 1: Chapter 4, Part 4-1, section 157	6.222
Item 1: Chapter 3, Part 3-1, Division 1, subsections 36(1)-(3)	6.229

Item 1: Chapter 3, Part 3-1, Division 1, subsection 36(4)	6.230
Item 1: Chapter 3, Part 3-1, Division 1, paragraph 36(4)(a)	6.231
Item 1: Chapter 3, Part 3-1, Division 1, paragraph 36(4)(b)	6.232
Item 1: Chapter 3, Part 3-1, Division 1, subsection 36(5)	6.233
Item 1: Chapter 3, Part 3-1, Division 1, subsection 36(6)	6.234
Item 1: Chapter 3, Part 3-1, Division 1, subsection 36(7)	6.235
Item 1: Chapter 4, Part 4-1, section 158	6.239
Item 1: Chapter 3, Part 3-1, Division 1, subsection 37(1)	6.246
Item 1: Chapter 3, Part 3-1, Division 1, subsection 37(2)	6.247
Item 1: Chapter 4, Part 4-1, section 159	6.251
Item 1: Chapter 3, Part 3-1, Division 1, subsection 38(1)	6.258
Item 1: Chapter 3, Part 3-1, Division 1, subsections 38(2)-(4)	6.259
Item 1: Chapter 3, Part 3-1, Division 1, subsections 20(5) and (6)	6.260
Item 1: Chapter 4, Part 4-1, Division 2, section 160	6.261
Item 1: Chapter 3, Part 3-1, Division 2, subsection 39(1)	6.263
Item 1: Chapter 3, Part 3-1, Division 2, subsection 39(2)	6.264
Item 1: Chapter 3, Part 3-1, Division 2, subsections 39(3) and (4)	6.265
Item 1: Chapter 3, Part 3-1, Division 2, subsection 39(5)	6.266
Item 1: Chapter 3, Part 3-1, Division 2, subsection 39(6)	6.267
Item 1: Chapter 1, section 2	6.268
Item 1: Chapter 4, Part 4-1, section 161	6.271
Item 1: Chapter 3, Part 3-1, Division 2, subsections 40(1) and (2)	6.278
Item 1: Chapter 3, Part 3-1, Division 2, subsection 40(3)	6.279
Item 1: Chapter 3, Part 3-1, Division 2, subsection 40(4)	6.280
Item 1: Chapter 1, section 10	6.281
Item 1: Chapter 4, Part 4-1, section 162	6.284
Item 1: Chapter 3, Part 3-1, Division 2, subsection 41(1)	6.292
Item 1: Chapter 3, Part 3-1, Division 2, subsection 41(4)	6.293
Item 1: Chapter 3, Part 3-1, Division 2, subsection 41(5)	6.294
Item 1: Chapter 3, Part 3-1, Division 2, subsection 41(2)	6.295
Item 1: Chapter 3, Part 3-1, Division 2, subsection 41(3)	6.296
Item 1: Chapter 3, Part 3-1, Division 2, subsection 43(1)	6.304
Item 1: Chapter 3, Part 3-1, Division 2, subsection 43(2)	6.307
Item 1: Chapter 3, Part 3-1, Division 2, subsections 43(2)	6.308
Item 1: Chapter 1, section 10	6.309
Item 1: Chapter 3, Part 3-1, Division 2, subsections 43(4)	6.310
Item 1: Chapter 3, Part 3-1, Division 2, subsections 43(1) and (2)	6.313



Item 1: Chapter 3, Part 3-1, Division 2, subsection 43(3)	6.314, 6.315
Item 1: Chapter 3, Part 3-1, Division 2, subsection 43(5)	6.317
Item 1: Chapter 3, Part 3-1, Division 2, subsection 43(6)	6.318
Item 1: Chapter 4, Part 4-1, section 163	6.321
Item 1: Chapter 3, Part 3-1, Division 3, subsections 44(1) and (2)	6.329
Item 1: Chapter 3, Part 3-1, Division 3, subsection 44(3)	6.330
Item 1: Chapter 3, Part 3-1, Division 3, section 45	6.331
Item 1: Chapter 3, Part 3-1, Division 3, section 46	6.332
Item 1: Chapter 4, Part 4-1, section 164	6.335
Item 1: Chapter 3, Part 3-1, Division 4, subsection 47(1)	6.342
Item 1: Chapter 3, Part 3-1, Division 4, subsection 47(2)	6.344
Item 1: Chapter 3, Part 3-1, Division 4, subsection 47(3)	6.345
Item 1: Chapter 3, Part 3-1, Division 4, paragraph 47(4)(a)	6.346
Item 1: Chapter 3, Part 3-1, Division 4, paragraph 47(4)(b)	6.347
Item 1: Chapter 3, Part 3-1, Division 4, paragraphs 47(4)(c)-(d)	6.348
Item 1: Chapter 3, Part 3-1, Division 4, subsection 47(5)	6.349
Item 1: Chapter 4, Part 4-1, section 165	6.350
Item 1: Chapter 3, Part 3-1, Division 4, subsection 48(1)	6.357
Item 1: Chapter 3, Part 3-1, Division 4, subsection 48(2)	6.359
Item 1: Chapter 3, Part 3-1, Division 4, subsection 48(3)	6.360
Item 1: Chapter 3, Part 3-1, Division 4, subsection 48(4)	6.362
Item 1: Chapter 3, Part 3-1, Division 4, subsection 48(5)	6.363
Item 1: Chapter 3, Part 3-1, Division 4, paragraphs 48(6)(a) and (b)	6.364
Item 1: Chapter 3, Part 3-1, Division 4, paragraph 48(6)(c)	6.365
Item 1: Chapter 3, Part 3-1, Division 4, subsection 48(7)	6.366
Item 1: Chapter 4, Part 4-1, section 166	6.376
Item 1: Chapter 3, Part 3-1, Division 5, section 49	6.383
Item 1: Chapter 4, Part 4-1, section 167	6.386
Item 1: Chapter 3, Part 3-1, Division 5, subsection 50(1)	6.393
Item 1: Chapter 3, Part 3-1, Division 5, subsection 50(2)	6.395
Item 1: Chapter 4, Part 4-1, section 168	6.397
Item 1: Chapter 3, Part 3-2, Division 4, subsection 100(1)	6.404
Item 1: Chapter 3, Part 3-2, Division 4, subsections 100(2) and (3)	6.405
Item 1: Chapter 3, Part 3-2, Division 4, subsection 100(4)	6.406
Item 1: Chapter 3, Part 3-2, Division 4, subsection 100(5)	6.408
Item 1: Chapter 3, Part 3-2, Division 4, subsection 101(1)	6.413, 6.414
Item 1: Chapter 3, Part 3-2, Division 4, subsections 101(2) and (3)	6.415

Item 1: Chapter 3, Part 3-2, Division 4, subsection 101(4)	6.416
Item 1: Chapter 3, Part 3-2, Division 4, subsections 101(5)	6.417
Item 1: Chapter 3, Part 3-2, Division 1, section 64	7.17
Item 1: Chapter 3, Part 3-2, Division 1, section 67	7.17
Item 1: Chapter 3, Part 3-2, Division 1, subsection 51(1)	7.18
Item 1: Chapter 3, Part 3-2, Division 1, subsection 51(2)	7.19
Item 1: Chapter 3, Part 3-2, Division 1, subsection 51(3)	7.20
Item 1: Chapter 3, Part 3-2, Division 1, subsection 52(1)	7.21
Item 1: Chapter 3, Part 3-2, Division 1, subsection 52(2)	7.22
Item 1: Chapter 3, Part 3-2, Division 1, subsection 52(3)	7.23
Item 1: Chapter 3, Part 3-2, Division 1, subsection 53(1)	7.24
Item 1: Chapter 3, Part 3-2, Division 1, subsection 53(2)	7.27
Item 1: Chapter 3, Part 3-2, Division 1, subsection 54(1)	7.28
Item 1: Chapter 3, Part 3-2, Division 1, subsection 54(2)	7.29
Item 1: Chapter 3, Part 3-2, Division 1, subsection 54(3)	7.30
Item 1: Chapter 3, Part 3-2, Division 1, subsection 54(4)	7.33
Item 1: Chapter 3, Part 3-2, Division 1, subsection 54(5)	7.33
Item 1: Chapter 3, Part 3-2, Division 1, subsection 54(6)	7.36
Item 1: Chapter 3, Part 3-2, Division 1, subsection 54(7)	7.38
Item 1: Chapter 3, Part 3-2, Division 1, subsection 55(1)	7.40
Item 1: Chapter 3, Part 3-2, Division 1, subsection 56(1)	7.44
Item 1: Chapter 3, Part 3-2, Division 1, subsection 56(2)	7.45
Item 1: Chapter 3, Part 3-2, Division 1, subsection 56(3)	7.46
Item 1: Chapter 3, Part 3-2, Division 1, paragraph 57(1)(c)	7.47
Item 1: Chapter 3, Part 3-2, Division 1, paragraph 57(1)(d)	7.48
Item 1: Chapter 3, Part 3-2, Division 1, paragraph 57(1)(e)	7.49
Item 1: Chapter 3, Part 3-2, Division 1, subsection 57(2)	7.50
Item 1: Chapter 3, Part 3-2, Division 1, section 58	7.51
Item 1: Chapter 3, Part 3-2, Division 1, section 59	7.53
Item 1: Chapter 3, Part 3-2, Division 1, paragraph 63(a)	7.56
Item 1: Chapter 3, Part 3-2, Division 1, paragraph 63(b)	7.58
Item 1: Chapter 3, Part 3-2, Division 1, section 60	7.59
Item 1: Chapter 3, Part 3-2, Division 1, subsection 61(1)	7.60
Item 1: Chapter 3, Part 3-2, Division 1, subsection 61(2)	7.61
Item 1: Chapter 3, Part 3-2, Division 1, subsection 61(3)	7.62
Item 1: Chapter 3, Part 3-2, Division 1, section 62	7.63
Item 1: Chapter 3, Part 3-2, Division 1, section 65	7.67

Item 1: Chapter 3, Part 3-2, Division 1, subsection 66(1)	7.69
Item 1: Chapter 3, Part 3-2, Division 1, subsection 66(2)	7.71
Item 1: Chapter 3, Part 3-2, Division 4, section 102	7.73
Item 1: Chapter 3, Part 3-2, Division 4, subsection 102(3)	7.74
Item 1: Chapter 3, Part 3-2, Division 4, section 103	7.76
Item 1: Chapter 4, Part 4-2, Division 1, section 169	7.77, 13.14
Item 1: Chapter 4, Part 4-2, Division 4, section 191	7.81
Item 1: Chapter 4, Part 4-2, Division 1, section 193	7.84
Item 1: Chapter 5, Part 5-4, Division 1, section 258	7.89, 7.97
Item 1: Chapter 5, Part 5-4, Division 1, paragraph 260(a)	7.90
Item 1: Chapter 5, Part 5-4, Division 1, paragraph 260(b)	7.90
Item 1: Chapter 5, Part 5-4, Division 1, paragraphs 260(c) and (d)	7.90
Item 1: Chapter 5, Part 5-4, Division 1, paragraph 260(e)	7.90
Item 1: Chapter 5, Part 5-4, Division 1, subsection 258(7)	7.91
Item 1: Chapter 5, Part 5-4, Division 1, paragraph 258(2)(a)	7.92
Item 1: Chapter 5, Part 5-4, Division 1, section 261	7.93
Item 1: Chapter 5, Part 5-4, Division 1, subparagraph 258(2)(b)(i)	7.94
Item 1: Chapter 5, Part 5-4, Division 1, subsection 258(4)	7.95
Item 1: Chapter 5, Part 5-4, Division 1, subsection 258(5)	7.96
Item 1: Chapter 5, Part 5-4, Division 1, section 263(5)	7.98
Item 1: Chapter 5, Part 5-4, Division 1, Section 263	7.100
Item 1: Chapter 5, Part 5-4, Division 1, section 264	7.101
Item 1: Chapter 5, Part 5-4, Division 1, section 265	7.105
Item 1: Chapter 5, Part 5-4, Division 1, section 266	7.107
Item 1: Chapter 5, Part 5-4, Division 1, section 267	7.108
Item 1: Chapter 5, Part 5-4, Division 1, paragraph 268(a)	7.109
Item 1: Chapter 5, Part 5-4, Division 1, paragraph 268(b)	7.109
Item 1: Chapter 5, Part 5-4, Division 1, paragraph 268(c)	7.109
Item 1: Chapter 5, Part 5-4, Division 1, paragraph 268(d)	7.109
Item 1: Chapter 5, Part 5-4, Division 1, paragraph 268(e)	7.109
Item 1: Chapter 5, Part 5-4, Division 1, paragraph 267(2)(a)	7.110
Item 1: Chapter 5, Part 5-4, Division 1, paragraph 267(2)(b)(i)	7.111
Item 1: Chapter 5, Part 5-4, Division 1, subsection 270(3)	7.111
Item 1: Chapter 5, Part 5-4, Division 1, section 269	7.112
Item 1: Chapter 5, Part 5-4, Division 1, subsection 268(4)	7.113
Item 1: Chapter 5, Part 5-4, Division 1, subsection 268(3)	7.114
Item 1: Chapter 5, Part 5-4, Division 1, subsection 269(3)	7.114

Item 1: Chapter 5, Part 5-4, Division 1, section 270	7.116, 7.117
Item 1: Chapter 5, Part 5-4, Division 2, subsections 271(1), 271(2), 271(3) and 271(5)	7.119
Item 1: Chapter 5, Part 5-4, Division 2, paragraph 272(1)(a)	7.120
Item 1: Chapter 5, Part 5-4, Division 2, paragraph 272(1)(b)	7.121
Item 1: Chapter 5, Part 5-4, Division 2, Subsection 272(2)	7.122
Item 1: Chapter 5, Part 5-4, Division 2, Subsection 272(3)	7.122
Item 1: Chapter 5, Part 5-4, Division 2, subsection 271(6)	7.123
Item 1: Chapter 5, Part 5-4, Division 2, paragraph 271(2)(a)	7.124
Item 1: Chapter 5, Part 5-4, Division 2, subsection 271(2)(b)	7.125
Item 1: Chapter 5, Part 5-4, Division 2, paragraph 271(2)(c)	7.126
Item 1: Chapter 5, Part 5-4, Division 2, section 273	7.127
Item 1: Chapter 5, Part 5-4, Division 3, subsection 274(2)	7.130
Item 1: Chapter 5, Part 5-4, Division 3, subsection 274(1)	7.131
Item 1: Chapter 5, Part 5-4, Division 3, section 274	7.132
Item 1: Chapter 5, Part 5-4, Division 3, subsection 274(4)	7.133
Item 1: Chapter 5, Part 5-4, Division 3, section 275	7.135
Item 1: Chapter 5, Part 5-4, Division 3, section 277	7.139
Item 1: Chapter 3, Part 3-2, Division 2, subsection 69(1)	8.8
Item 1: Chapter 3, Part 3-2, Division 2, paragraph 69(1)(a)	8.10
Item 1: Chapter 1, sections 2 and 3	8.10
Item 1: Chapter 3, Part 3-2, Division 2, paragraph 69(1)(b)	8.11
Item 1: Chapter 3, Part 3-2, Division 2, paragraph 69(1)(c)	8.13
Item 1: Chapter 3, Part 3-2, Division 2, paragraph 69(2)	8.16
Item 1: Chapter 3, Part 3-2, Division 2, paragraph 69(1)(d)	8.17
Item 1: Chapter 3, Part 3-2, Division 2, paragraph 69(1)(d)(ii)	8.18
Item 1: Chapter 3, Part 3-2, Division 2, subsections 69(3) and (4)	8.19
Item 1: Chapter 3, Part 3-2, Division 2, section 70	8.20
Item 1: Chapter 3, Part 3-2, Division 2, section 71	8.24
Item 1: Chapter 3, Part 3-2, Division 2, section 72	8.25
Item 1: Chapter 3, Part 3-2, Division 2, sections 73, 74, 75 and 76	8.26
Item 1: Chapter 3, Part 3-2, Division 2, sections 73, 74 and 75	8.27
Item 1: Chapter 3, Part 3-2, Division 2, paragraphs 73(1)(b) and (c)	8.28
Item 1: Chapter 3, Part 3-2, Division 2, paragraph 73(1)(a)	8.30
Item 1: Chapter 3, Part 3-2, Division 2, subsection 73(2)	8.31
Item 1: Chapter 3, Part 3-2, Division 2, section 74	8.33
Item 1: Chapter 3, Part 3-2, Division 2, subsection 75(1)	8.34

Item 1: Chapter 3, Part 3-2, Division 2, subsection 75(2) and paragraph 75(3)(a)	8.35
Item 1: Chapter 3, Part 3-2, Division 2, paragraph 73(3)(b)	8.36
Item 1: Chapter 3, Part 3-2, Division 2, section 82	8.38
Item 1: Chapter 3, Part 3-2, Division 2, subsection 76(a)	8.39
Item 1: Chapter 3, Part 3-2, Division 2, subsections 76(b) and (c)	8.40
Item 1: Chapter 3, Part 3-2, Division 2, subsections 76(d)	8.41
Item 1: Chapter 3, Part 3-2, Division 2, section 77	8.42
Item 1: Chapter 3, Part 3-2, Division 2, subsections 78(1) and (2)	8.43
Item 1: Chapter 3, Part 3-2, Division 2, subsection 78(3)	8.44
Item 1: Chapter 3, Part 3-2, Division 2, sections 79, 80 and 81	8.45
Item 1: Chapter 3, Part 3-2, Division 2, sections 79 and 81	8.46
Item 1: Chapter 3, Part 3-2, Division 2, section 80	8.47
Item 1: Chapter 3, Part 3-2, Division 2, subsection 82(1)	8.48
Item 1: Chapter 3, Part 3-2, Division 2, paragraphs 82(3)(a) and (b)	8.49, 8.50
Item 1: Chapter 3, Part 3-2, Division 2, paragraph 82(3)(c)	8.51
Item 1: Chapter 3, Part 3-2, Division 2, paragraph 82(3)(d)	8.53
Item 1: Chapter 3, Part 3-2, Division 2, paragraphs 82(3)(c) and (d)	8.55
Item 1: Chapter 3, Part 3-2, Division 2, paragraph 82(3)(e)	8.56
Item 1: Chapter 3, Part 3-2, Division 2, subsections 82(1) and (6)	8.57
Item 1: Chapter 3, Part 3-2, Division 2, subsection 82(4)	8.58
Item 1: Chapter 3, Part 3-2, Division 2, subsection 82(5)	8.59
Item 1: Chapter 3, Part 3-2, Division 2, subsection 82(2)	8.60
Item 1: Chapter 3, Part 3-2, Division 2, subsection 83(1)	8.61
Item 1: Chapter 3, Part 3-2, Division 2, subsection 83(2)	8.62, 8.63
Item 1: Chapter 3, Part 3-2, Division 2, subsection 83(3)	8.64
Item 1: Chapter 3, Part 3-2, Division 2, section 85	8.66
Item 1: Chapter 3, Part 3-2, Division 2, subsection 85(1)	8.67
Item 1: Chapter 3, Part 3-2, Division 2, subsection 85(2)	8.68
Item 1: Chapter 3, Part 3-2, Division 2, subsection 85(3), (4) and (5)	8.69
Item 1: Chapter 3, Part 3-2, Division 2, subsection 85(6)	8.70
Item 1: Chapter 3, Part 3-2, Division 2, section 86(1)	8.71
Item 1: Chapter 3, Part 3-2, Division 2, subsections 86(1)(d) and (e)	8.72
Item 1: Chapter 3, Part 3-2, Division 2, subsection 86(2) and (3)	8.74
Item 1: Chapter 3, Part 3-2, Division 2, sections 84 and 87	8.75
Item 1: Chapter 3, Part 3-2, Division 2, section 88	8.76
Item 1: Chapter 3, Part 3-2, Division 2, subsection 89(1)	8.77

Item 1: Chapter 3, Part 3-2, Division 2, subsections 89(2) and (3)	8.78
Item 1: Chapter 3, Part 3-2, Division 2, section 90	8.79
Item 1: Chapter 3, Part 3-2, Division 2, sections 91 and 92	8.80
Item 1: Chapter 3, Part 3-2, Division 2, section 93	8.81
Item 1: Chapter 3, Part 3-2, Division 2, section 94	8.82
Item 1: Chapter 3, Part 3-2, Division 2, section 95	8.83
Item 1: Chapter 4, Part 4-1, sections 170-186	8.84
Item 1: Chapter 3, Part 3-2, Division 3, subsections 96(3) and (4)	9.9
Item 1: Chapter 3, Part 3-2, Division 3, subsections 96(1) and (2)	9.10
Item 1: Chapter 3, Part 3-2, Division 3, subsection 97(1)	9.12
Item 1: Chapter 3, Part 3-2, Division 3, section 98	9.14
Item 1: Chapter 3, Part 3-2, Division 3, subsections 99(1) and (2)	9.18
Item 1: Chapter 3, Part 3-2, Division 3, subsection 99(3)	9.19
Item 1: Chapter 3, Part 3-2, Division 3, subsection 97(3)	9.20
Item 1: Chapter 3, Part 3-2, Division 3, subsection 97(2)	9.22
Item 1: Chapter 4, Part 4-2, Division 3, subsections 188(1), 189(1), 189(3), 190(1) and 191(1)	9.23
Item 1: Chapter 3, Part 3-3, Division 1, subsection 104(1)	10.16, 10.18
Item 1: Chapter 3, Part 3-3, Division 1, subsections 104 (1) and (2)	10.21
Item 1: Chapter 3, Part 3-3, Division 1, subsections 104(2) and 104(3)	10.25
Item 1: Chapter 3, Part 3-3, Division 1, subsection 104(2)	10.27
Item 1: Chapter 3, Part 3-3, Division 1, subsection 104(3)	10.28
Item 1: Chapter 3, Part 3-3, Division 1, paragraph 105	10.29
Item 1: Chapter 3, Part 3-3, Division 1, paragraph 105(1)(b)	10.31
Item 1: Chapter 3, Part 3-3, Division 1, subsection 105(2)	10.32
Item 1: Chapter 3, Part 3-3, Division 1, sections 106 and 107	10.34
Item 1: Chapter 3, Part 3-3, Division 1, subsections 106(3) and (4)	10.35
Item 1: Chapter 3, Part 3-3, Division 1, subsection 106(4)	10.36
Item 1: Chapter 3, Part 3-3, Division 1, subsection 106(5)	10.37
Item 1: Chapter 3, Part 3-3, Division 1, subsection 106(6)	10.39
Item 1: Chapter 3, Part 3-3, Division 1, subsections 106(7) and 107(3)	10.40
Item 1: Chapter 3, Part 3-3, Division 1, subsection 108	10.44
Item 1: Chapter 3, Part 3-3, Division 2	10.45
Item 1: Chapter 3, Part 3-3, Division 1, paragraph 109(1)(a)	10.49
Item 1: Chapter 3, Part 3-3, Division 1, subsection 109(1)	10.51
Item 1: Chapter 3, Part 3-3, Division 1, paragraph 109(1)(b)	10.53, 10.54

Item 1: Chapter 3, Part 3-3, Division 1, paragraph 109(2)(a)	10.56
Item 1: Chapter 3, Part 3-3, Division 1, subsection 109(2)	10.58
Item 1: Chapter 3, Part 3-3, Division 1, paragraph 109(2)(b)	10.60, 10.61
Item 1: Chapter 3, Part 3-3, Division 1, subsection 110(1)	10.63
Item 1: Chapter 3, Part 3-3, Division 1, subsection 110(2)	10.64
Item 1: Chapter 3, Part 3-3, Division 1, subsection 110(3)	10.65
Item 1: Chapter 3, Part 3-3, Division 1, subsection 111(1)	10.66
Item 1: Chapter 3, Part 3-3, Division 1, subsection 111(2)	10.67, 10.68
Item 1: Chapter 3, Part 3-3, Division 1, subsection 111(3)	10.70, 10.71
Item 1: Chapter 3, Part 3-3, Division 1, subsection 111(4)	10.72
Item 1: Chapter 3, Part 3-3, Division 1, subsection 111(5)	10.74
Item 1: Chapter 3, Part 3-3, Division 1, subsection 111(6)	10.75
Item 1: Chapter 3, Part 3-3, Division 1, subsection 112(1)	10.77, 10.78, 10.79
Item 1: Chapter 3, Part 3-3, Division 1, subsection 112(2)	10.80
Item 1: Chapter 3, Part 3-3, Division 1, subsection 113	10.81
Item 1: Chapter 3, Part 3-3, Division 1, paragraph 113(a)	10.82
Item 1: Chapter 3, Part 3-3, Division 1, paragraph 113(b)	10.84
Item 1: Chapter 3, Part 3-3, Division 2, section 114	10.85
Item 1: Chapter 3, Part 3-3, Division 2, subsections 114(1) & (2)	10.86
Item 1: Chapter 3, Part 3-3, Division 2, subsection 114(1)	10.88, 10.89
Item 1: Chapter 3, Part 3-3, Division 2, subsection 114(2)	10.90, 10.91
Item 1: Chapter 3, Part 3-3, Division 2, section 115	10.92
Item 1: Chapter 3, Part 3-3, Division 2, subsection 116	10.93
Item 1: Chapter 3, Part 3-3, Division 2, paragraph 117(a)	10.94
Item 1: Chapter 3, Part 3-3, Division 2, paragraph 117(b)	10.95
Item 1: Chapter 3, Part 3-3, Division 2, subsection 118(1)	10.96, 10.97
Item 1: Chapter 3, Part 3-3, Division 2, subsection 118(2)	10.97
Item 1: Chapter 3, Part 3-3, Division 2, subsection 118(3)	10.97
Item 1: Chapter 3, Part 3-3, Division 2, sections 110 and 115	10.98, 10.106
Item 1: Chapter 3, Part 3-3, Division 2, subsection 118(4)	10.99
Item 1: Chapter 3, Part 3-3, Division 2, subsection 118(5)	10.100
Item 1: Chapter 3, Part 3-3, Division 2, subsection 118(6)	10.101
Item 1: Chapter 3, Part 3-3, Division 2, subsection 118(7)	10.103
Item 1: Chapter 3, Part 3-3, Division 2, subsections 119(1) and (2)	10.105
Item 1: Chapter 3, Part 3-3, Division 2, subsection 119(2)	10.107
Item 1: Chapter 3, Part 3-3, Division 2, section 120	10.109
Item 1: Chapter 3, Part 3-3, Division 2, section 121	10.110

Item 1: Chapter 3, Part 3-3, Division 2, subsection 121(2)	10.112
Item 1: Chapter 3, Part 3-3, Division 3	10.113
Item 1: Chapter 3, Part 3-3, Division 3, section 122	10.114
Item 1: Chapter 3, Part 3-3, Division 3, paragraph 122(1)(b)	10.115
Item 1: Chapter 3, Part 3-3, Division 3, paragraph 122(1)(c)	10.116
Item 1: Chapter 3, Part 3-3, Division 3, subsection 122(2)	10.117
Item 1: Chapter 3, Part 3-3, Division 3, subsection 122(3)	10.119
Item 1: Chapter 3, Part 3-3, Division 3, subsection 122(1)	10.120
Item 1: Chapter 3, Part 3-3, Division 3, subsection 123(1)	10.122, 10.123
Item 1: Chapter 3, Part 3-3, Division 3, subsection 123(1)(c)	10.124
Item 1: Chapter 3, Part 3-3, Division 3, subsection 123(2)	10.125
Item 1: Chapter 3, Part 3-3, Division 3, subsection 123(3)	10.126
Item 1: Chapter 3, Part 3-3, Division 3, subsection 123(4)	10.127
Item 1: Chapter 3, Part 3-3, Division 3, subsection 124(2)	10.128
Item 1: Chapter 3, Part 3-3, Division 3, subsection 124(3)	10.129
Item 1: Chapter 3, Part 3-3, Division 3, subsection 124(4)	10.130
Item 1: Chapter 3, Part 3-3, Division 3, subsection 125(1)	10.131
Item 1: Chapter 3, Part 3-3, Division 3, subsections 125(1) & (3)	10.132
Item 1: Chapter 3, Part 3-3, Division 3, subsection 125(2)	10.133
Item 1: Chapter 3, Part 3-3, Division 3, subsection 125(4)	10.134
Item 1: Chapter 3, Part 3-3, Division 3, section 126	10.135, 10.136, 10.137
Item 1: Chapter 3, Part 3-3, Division 3, subsections 127(1) and (2)	10.138
Item 1: Chapter 3, Part 3-3, Division 3, subsection 127(3)	10.139, 10.140
Item 1: Chapter 3, Part 3-3, Division 3, subsection 127(4)	10.141
Item 1: Chapter 3, Part 3-3, Division 3, Subdivision B	10.143
Item 1: Chapter 3, Part 3-3, Division 3, subsection 128(2)	10.144
Item 1: Chapter 3, Part 3-3, Division 3, subsection 128(3)	10.144
Item 1: Chapter 3, Part 3-3, Division 3, subsection 128(1)	10.145
Item 1: Chapter 3, Part 3-3, Division 3, subsection 128(5)	10.147
Item 1: Chapter 3, Part 3-3, Division 3, subsection 128(6)	10.148
Item 1: Chapter 3, Part 3-3, Division 3, subsections 128(4) & (7)	10.149
Item 1: Chapter 3, Part 3-3, Division 4, section 129	10.151
Item 1: Chapter 3, Part 3-3, Division 4, subsections 129(1) and (2)	10.152
Item 1: Chapter 3, Part 3-3, Division 4, subsection 129(1)	10.153
Item 1: Chapter 3, Part 3-3, Division 4, subsection 129(2)	10.154
Item 1: Chapter 3, Part 3-3, Division 4, subsection 130(1)	10.155, 10.157



Item 1: Chapter 3, Part 3-3, Division 1	10.156
Item 1: Chapter 3, Part 3-3, Division 4, subsection 130(2)	10.158
Item 1: Chapter 3, Part 3-3, Division 5	10.159
Item 1: Chapter 3, Part 3-3, Division 5, subsection 131(1)	10.160
Item 1: Chapter 3, Part 3-3, Division 5, subsection 131(3)	10.167
Item 1: Chapter 3, Part 3-3, Division 5, paragraph 131(2)(a)	10.168
Item 1: Chapter 3, Part 3-3, Division 5, paragraph 131(2)(b)	10.169
Item 1: Chapter 3, Part 3-3, Division 5, paragraph 131(1)(b)	10.173
Item 1: Chapter 3, Part 3-3, Division 5, subsection 131(4)	10.174
Item 1: Chapter 3, Part 3-3, Division 5, paragraph 131(2)(c)	10.175
Item 1: Chapter 3, Part 3-3, Division 5, paragraph 131(2)(d)	10.176
Item 1: Chapter 3, Part 3-3, Division 5, paragraph 131(5)	10.177
Item 1: Chapter 3, Part 3-3, Division 5, subsections 131(1) and (2)	10.182
Item 1: Chapter 3, Part 3-3, Division 5, subsection 131(1)	10.183
Item 1: Chapter 3, Part 3-3, Division 5, subsection 131(6)	10.186
Item 1: Chapter 3, Part 3-3, Division 5, section 132	10.186
Item 1: Chapter 3, Part 3-3, Division 5, section 131	10.187
Item 1: Chapter 3, Part 3-3, Division 5, subsection 132(3)	10.190
Item 1: Chapter 3, Part 3-3, Division 5, paragraph 132(2)(a)	10.191
Item 1: Chapter 3, Part 3-3, Division 5, paragraph 132(2)(b)	10.191
Item 1: Chapter 3, Part 3-3, Division 5, paragraph 132(2)(c)	10.191
Item 1: Chapter 3, Part 3-3, Division 5, paragraph 132(2)(d)	10.191
Item 1: Chapter 3, Part 3-3, Division 5, subsection 132(1)	10.192, 10.195
Item 1: Chapter 3, Part 3-3, Division 5, subsection 132(4)	10.194
Item 1: Chapter 3, Part 3-3, Division 5, subsection 132(5)	10.196
Item 1: Chapter 3, Part 3-3, Division 5, paragraph 133(b)	10.197
Item 1: Chapter 3, Part 3-3, Division 5, paragraph 133(a)	10.198
Item 1: Chapter 4, Part 4-3, sections 194, 195 197, 198 and 199	10.199
Item 1: Chapter 4, Part 4-3, section 196	10.200
Item 1: Chapter 4, Part 4-3, sections 200, 201 and 202	10.201
Item 1: Chapter 3, Part 3-4, section 134	11.13
Item 1: Chapter 3, Part 3-4, subsection 134(1)	11.15, 11.18, 11.19
Item 1: Chapter 3, Part 3-4, section 135	11.20
Item 1: Chapter 3, Part 3-4, paragraph 135(1)(a)	11.21
Item 1: Chapter 3, Part 3-4, paragraph 135(1)(b)	11.22
Item 1: Chapter 3, Part 3-4, subsection 135(1)	11.23, 11.26
Item 1: Chapter 3, Part 3-4, subsection 135(2)	11.24

Item 1: Chapter 3, Part 3-4, section 136 and 137	11.27
Item 1: Chapter 3, Part 3-4, subsections 136(1) and 137(1)	11.28
Item 1: Chapter 3, Part 3-4, subsections 136(2) and 137(2)	11.28
Item 1: Chapter 3, Part 3-4, subsection 136(2)	11.28
Item 1: Chapter 3, Part 3-4, subsections 136(1), (2) and (2) and 137(1) and (2)	11.28
Item 1: Chapter 3, Part 3-4, subsection 136(5)	11.29
Item 1: Chapter 3, Part 3-4, subsection 136(6)	11.30
Item 1: Chapter 3, Part 3-4, subsection 136(7)	11.31
Item 1: Chapter 3, Part 3-4, subsections 136(8) and 137(3)	11.34
Item 1: Chapter 3, Part 3-5, Division 1	12.13, 12.14
Item 1: Chapter 1, subsection 9(3)	12.17
Item 1: Chapter 1, subsection 9	12.18
Item 1: Chapter 1, section 7	12.20
Item 1: Chapter 3, Part 3-5, Division 1, subsection 138(1)	12.21
Item 1: Chapter 3, Part 3-5, Division 1, paragraph 138(1)(a)	12.21
Item 1: Chapter 3, Part 3-5, Division 1, subsection 138(2)	12.22
Item 1: Chapter 3, Part 3-5, Division 1, subsection 138(3)	12.23
Item 1: Chapter 3, Part 3-5, Division 1, subsection 139 (1)	12.24
Item 1: Chapter 3, Part 3-5, Division 1, paragraph 139(1)(a)	12.24
Item 1: Chapter 3, Part 3-5, Division 1, subsection 139(2)	12.25
Item 1: Chapter 3, Part 3-5, Division 1, subparagraph 139(1)(d)(ii)	12.26
Item 1: Chapter 3, Part 3-5, Division 1, subparagraph 139(1)(e)	12.27
Item 1: Chapter 3, Part 3-5, Division 1, subparagraph 140(1)	12.28
Item 1: Chapter 3, Part 3-5, Division 1, paragraph 140(1)(a)	12.28
Item 1: Chapter 3, Part 3-5, Division 1, subsection 140(2)	12.29
Item 1: Chapter 3, Part 3-5, Division 1, paragraph 140(1)(c)	12.30
Item 1: Chapter 3, Part 3-5, Division 1, subparagraph 140(1)(d)	12.31
Item 1: Chapter 3, Part 3-5, Division 1, subsection 141(1)	12.32
Item 1: Chapter 3, Part 3-5, Division 1, subsection 141(1)(a)	12.32
Item 1: Chapter 3, Part 3-5, Division 1, subsection 141(2)	12.33
Item 1: Chapter 3, Part 3-5, Division 1, paragraph 141(1)(d)	12.34
Item 1: Chapter 3, Part 3-5, Division 1, paragraph 141(1)(e)	12.35
Item 1: Chapter 3, Part 3-5, Division 1, section 142	12.36
Item 1: Chapter 3, Part 3-5, Division 1, paragraph 142(a)	12.37
Item 1: Chapter 3, Part 3-5, Division 1, subparagraph 142(a)(i)	12.39
Item 1: Chapter 3, Part 3-5, Division 1, paragraph 148(1)(b)	12.40

Item 1: Chapter 3, Part 3-5, Division 1, subsection 148(1)	12.41
Item 1: Chapter 3, Part 3-5, Division 1, subsection 148(2)	12.42
Item 1: Chapter 3, Part 3-5, Division 1, subsection 148(3)	12.42
Item 1: Chapter 3, Part 3-5, Division 1, subsection 142(c)	12.43
Item 1: Chapter 3, Part 3-5, Division 1, subsection 142(d)	12.45
Item 1: Chapter 3, Part 3-5, Division 1, subsection 143(1)	12.46
Item 1: Chapter 3, Part 3-5, Division 1, subsection 143(2)	12.47
Item 1: Chapter 3, Part 3-5, Division 1, section 144	12.48
Item 1: Chapter 3, Part 3-5, Division 1, section 145	12.49
Item 1: Chapter 3, Part 3-5, Division 1, section 146	12.50
Item 1: Chapter 3, Part 3-5, Division 1, subsection 147(1)	12.51, 12.52
Item 1: Chapter 3, Part 3-5, Division 1, subsection 147(2)	12.55
Item 1: Chapter 3, Part 3-5, Division 1, subsection 149(1)	12.57
Item 1: Chapter 3, Part 3-5, Division 1, subsection 149(2)	12.58
Item 1: Chapter 3, Part 3-5, Division 1, subsection 150(1)	12.59
Item 1: Chapter 3, Part 3-5, Division 1, subsection 150(2)	12.60
Item 1: Chapter 4, Part 4-1, Division 1, section 151	13.9
Item 1: Chapter 4, Part 4-1, Division 1, section 152	13.9
Item 1: Chapter 4, Part 4-1, Division 1, section 153	13.9
Item 1: Chapter 4, Part 4-1, Division 1, section 154	13.9
Item 1: Chapter 4, Part 4-1, Division 1, section 155	13.9
Item 1: Chapter 4, Part 4-1, Division 1, section 156	13.9
Item 1: Chapter 4, Part 4-1, Division 1, section 157	13.9
Item 1: Chapter 4, Part 4-1, Division 1, section 158	13.9
Item 1: Chapter 4, Part 4-1, Division 1, section 159	13.9
Item 1: Chapter 4, Part 4-1, Division 2, section 161	13.9
Item 1: Chapter 4, Part 4-1, Division 2, section 162	13.9
Item 1: Chapter 4, Part 4-1, Division 2, section 163	13.9
Item 1: Chapter 4, Part 4-1, Division 2, section 164	13.9
Item 1: Chapter 4, Part 4-1, Division 2, section 165	13.9
Item 1: Chapter 4, Part 4-1, Division 2, section 166	13.9
Item 1: Chapter 4, Part 4-1, Division 2, section 167	13.9
Item 1: Chapter 4, Part 4-1, Division 2, section 168	13.9
Item 1: Chapter 4, Part 4-1, Division 1, paragraph 160(1)(a)	13.10
Item 1: paragraph 160(1)(b)	13.10
Item 1: subsections 160(2) to (4)	13.12
Item 1: Chapter 4, Part 4-2, Division 2, section 170	13.14

Item 1: Chapter 4, Part 4-2, Division 2, section 172	13.14
Item 1: Chapter 4, Part 4-2, Division 2, section 173	13.14
Item 1: Chapter 4, Part 4-2, Division 2, section 174	13.14
Item 1: Chapter 4, Part 4-2, Division 2, section 175	13.14
Item 1: Chapter 4, Part 4-2, Division 2, section 176	13.14
Item 1: Chapter 4, Part 4-2, Division 2, section 177	13.14
Item 1: Chapter 4, Part 4-2, Division 2, section 178	13.14
Item 1: Chapter 4, Part 4-2, Division 2, section 179	13.14
Item 1: Chapter 4, Part 4-2, Division 2, section 180	13.14
Item 1: Chapter 4, Part 4-2, Division 2, section 181	13.14
Item 1: Chapter 4, Part 4-2, Division 2, section 182	13.14
Item 1: Chapter 4, Part 4-2, Division 2, section 183	13.14
Item 1: Chapter 4, Part 4-2, Division 2, section 184	13.14, 13.15
Item 1: Chapter 4, Part 4-2, Division 3, section 188	13.14
Item 1: Chapter 4, Part 4-2, Division 3, section 189	13.14
Item 1: Chapter 4, Part 4-2, Division 3, section 190	13.14
Item 1: Chapter 4, Part 4-2, Division 3, section 191	13.14
Item 1: Chapter 4, Part 4-2, Division 4, section 192	13.14
Item 1: Chapter 4, Part 4-2, Division 4, section 193	13.14
Item 1: Chapter 4, Part 4-2, Division 2, section 185	13.16
Item 1: Chapter 4, Part 4-2, Division 2, section 186	13.17
Item 1: Chapter 4, Part 4-2, Division 2, section 187	13.18
Item 1: Chapter 4, Part 4-3, Division 1, section 194	13.19
Item 1: Chapter 4, Part 4-3, Division 1, section 195	13.19
Item 1: Chapter 4, Part 4-3, Division 1, section 196	13.19
Item 1: Chapter 4, Part 4-3, Division 2, section 196	13.19
Item 1: Chapter 4, Part 4-3, Division 2, section 198	13.19
Item 1: Chapter 4, Part 4-3, Division 3, section 199	13.19
Item 1: Chapter 4, Part 4-3, Division 3, section 200	13.19
Item 1: Chapter 4, Part 4-3, Division 3, section 201	13.19
Item 1: Chapter 4, Part 4-3, Division 4, section 202	13.19
Item 1: Chapter 4, Part 4-4, section 203	13.20
Item 1: Chapter 4, Part 4-4, section 204	13.20
Item 1: Chapter 4, Part 4-5, section 205	13.21
Item 1: Chapter 4, Part 4-5, section 206	13.21
Item 1: Chapter 4, Part 4-6, subsections 209(a) and 209(b)	13.26
Item 1: Chapter 4, Part 4-6, subsection 209(c)	13.27

Item 1: Chapter 4, Part 4-6, paragraphs 210(1)(a) and 211(1)(a)	13.28
Item 1: Chapter 4, Part 4-6, paragraphs 210(1)(b) and 211(1)(b)	13.28
Item 1: Chapter 4, Part 4-6, subparagraphs 210(1)(c)(i) and 210(1)(d)(i);	13.29
Item 1: Chapter 4, Part 4-6, paragraphs 210(1)(c)(ii) and 210(1)(d)(ii)	13.29
Item 1: Chapter 4, Part 4-6, subsections 210(2) and 211(2)	13.31
Item 1: Chapter 4, Part 4-7, section 212	13.33
Item 1: Chapter 4, Part 4-7, section 213	13.34
Item 1: Chapter 4, Part 4-7, section 214	13.35
Item 1: Chapter 4, Part 4-7, section 215	13.36
Item 1: Chapter 4, Part 4-7, section 216	13.37
Item 1: Chapter 5, Part 5-1, Division 1, section 218	14.20
Item 1: Chapter 5, Part 5-1, Division 1, subsection 218(2)	14.21
Item 1: Chapter 5, Part 5-1, Division 1, subsections 218(3)-(4)	14.22
Item 1: Chapter 5, Part 5-1, Division 2, subsection 219(1)	14.23
Item 1: Chapter 5, Part 5-1, Division 2, paragraph 219(1)(a)	14.24
Item 1: Chapter 5, Part 5-1, Division 2, section 219(1)(b)	14.24
Item 1: Chapter 5, Part 5-1, Division 2, paragraph 219(1)(c)	14.24
Item 1: Chapter 5, Part 5-1, Division 2, paragraph 219(2)(a)	14.25
Item 1: Chapter 5, Part 5-1, Division 2, paragraph 219(2)(b)	14.25
Item 1: Chapter 5, Part 5-1, Division 2, paragraph 219(2)(c)	14.25
Item 1: Chapter 5, Part 5-1, Division 2, section 219	14.26
Item 1: Chapter 5, Part 5-1, Division 2, subsection 219(3)	14.28
Item 1: Chapter 5, Part 5-1, Division 2, subsection 219(4)	14.29
Item 1: Chapter 5, Part 5-1, Division 2, subsection 219(5)	14.30
Item 1: Chapter 5, Part 5-1, Division 2, paragraph 219(6)(a)	14.31
Item 1: Chapter 5, Part 5-1, Division 2, paragraph 219(6)(b)	14.31
Item 1: Chapter 5, Part 5-1, Division 2, paragraph 219(6)(c)	14.31
Item 1: Chapter 5, Part 5-1, Division 2, section 220	14.32
Item 1: Chapter 5, Part 5-1, Division 2, subsections 221(1) & (2)	14.33
Item 1: Chapter 5, Part 5-1, Division 2, subsection 221(3)	14.35
Item 1: Chapter 5, Part 5-1, Division 2, subsection 222(1)	14.36
Item 1: Chapter 5, Part 5-1, Division 2, subsection 222(2)	14.37
Item 1: Chapter 5, Part 5-1, Division 3, paragraph 223(1)(a)	14.42
Item 1: Chapter 5, Part 5-1, Division 3, paragraph 223(1)(b)	14.42
Item 1: Chapter 5, Part 5-2, Division 1, subparagraph 224(1)(a)(i)	15.28

Item 1: Chapter 5, Part 5-2, Division 1, subparagraph 224(1)(a)(ii)	15.28
Item 1: Chapter 5, Part 5-2, Division 1, subparagraph 224(1)(a)(iii)	15.28
Item 1: Chapter 5, Part 5-2, Division 1, subparagraph 224(1)(a)(iv)	15.28
Item 1: Chapter 5, Part 5-2, Division 1, subparagraph 224(1)(a)(v)	15.28
Item 1: Chapter 5, Part 5-2, Division 1, subparagraph 224(1)(a)(vi)	15.28
Item 1: Chapter 5, Part 5-2, Division 1, subparagraph 224(1)(a)(vii)	15.28
Item 1: Chapter 5, Part 5-2, Division 1, subparagraph 224(1)(a)(viii)	15.28
Item 1: Chapter 5, Part 5-2, Division 1, subparagraph 224(1)(a)(ix)	15.28
Item 1: Chapter 5, Part 5-2, Division 1, subparagraph 224(1)(a)(x)	15.28
Item 1: Chapter 5, Part 5-2, Division 1, subparagraph 224(1)(b)-(f)	15.29
Item 1: Chapter 5, Part 5-2, Division 1, subsection 224(4)	15.30
Item 1: Chapter 5, Part 5-2, Division 1, subsection 224(2)	15.31
Item 1: Chapter 5, Part 5-2, Division 1, subsection 224(3)	15.32
Item 1: Chapter 5, Part 5-2, Division 1, subsection 224(3), Items 1 and 2	15.33
Item 1: Chapter 5, Part 5-2, Division 1, subsection 224(3), Item 3	15.34
Item 1: Chapter 5, Part 5-2, Division 1, subsection 224(3), Item 4	15.37
Item 1: Chapter 5, Part 5-2, Division 1, subsection 224(3), Item 5	15.39
Item 1: Chapter 5, Part 5-2, Division 1, subsection 224(3), Item 6	15.41
Item 1: Chapter 5, Part 5-2, Division 1, subsection 224(3), Item 7	15.43
Item 1: Chapter 5, Part 5-2, Division 1, subsection 224(3), Item 8	15.45
Item 1: Chapter 5, Part 5-2, Division 1, subsection 224(3), Item 9	15.47
Item 1: Chapter 5, Part 5-2, Division 1, subsection 224(3), Item 10	15.48
Item 1: Chapter 5, Part 5-2, Division 1, subsection 224(3), Item 11	15.49
Item 1: Chapter 5, Part 5-2, Division 1, subsection 224(3), Item 12	15.50
Item 1: Chapter 5, Part 5-2, Division 1, subsection 224(3), Item 13	15.51
Item 1: Chapter 5, Part 5-2, Division 1, subsection 224(3), Item 14	15.52
Item 1: Chapter 5, Part 5-2, Division 1, subsection 224(3), Item 15	15.53
Item 1: Chapter 5, Part 5-2, Division 1, subsection 225(1)	15.55
Item 1: Chapter 5, Part 5-2, Division 1, subsection 225(2)	15.56
Item 1: Chapter 5, Part 5-2, Division 1, subsection 225(3)	15.57
Item 1: Chapter 5, Part 5-2, Division 1, subsection 225(4)	15.58
Item 1: Chapter 5, Part 5-2, Division 1, section 226	15.60
Item 1: Chapter 5, Part 5-2, Division 1, section 227	15.61
Item 1: Chapter 5, Part 5-2, Division 1, section 228	15.62
Item 1: Chapter 5, Part 5-2, Division 1, section 229	15.63
Item 1: Chapter 5, Part 5-2, Division 1, section 230	15.64

Item 1: Chapter 5, Part 5-2, Division 1, section 231	15.65
Item 1: Chapter 5, Part 5-2, Division 2, section 232	15.66
Item 1: Chapter 5, Part 5-2, Division 2, subsection 232(3)	15.67
Item 1: Chapter 5, Part 5-2, Division 2, subsection 232(2)	15.68
Item 1: Chapter 5, Part 5-2, Division 2, subsection 232(4)	15.69
Item 1: Chapter 5, Part 5-2, Division 2, subsection 232(7)	15.69
Item 1: Chapter 5, Part 5-2, Division 2, subsection 232(6)	15.70
Item 1: Chapter 5, Part 5-2, Division 2, section 233	15.71
Item 1: Chapter 5, Part 5-2, Division 2, section 234	15.72
Item 1: Chapter 5, Part 5-2, Division 2, subsection 234(2)	15.73
Item 1: Chapter 5, Part 5-2, Division 2, section 235	15.74
Item 1: Chapter 5, Part 5-2, Division 2, section 236	15.75
Item 1: Chapter 5, Part 5-2, Division 3, subsection 236(2)	15.76
Item 1: Chapter 5, Part 5-2, Division 4, subsection 237(1)	15.78
Item 1: Chapter 5, Part 5-2, Division 4, subsection 238(1)	15.79
Item 1: Chapter 5, Part 5-2, Division 4, subsections 238(2)	15.80
Item 1: Chapter 5, Part 5-2, Division 4, subsections 238(3)	15.81
Item 1: Chapter 5, Part 5-2, Division 4, section 243	15.82, 15.103
Item 1: Chapter 5, Part 5-2, Division 4, paragraph 243(a)	15.83
Item 1: Chapter 5, Part 5-2, Division 4, paragraph 243(b)	15.83
Item 1: Chapter 5, Part 5-2, Division 4, paragraph 243(c)	15.83
Item 1: Chapter 5, Part 5-2, Division 4, paragraph 243(d)	15.83
Item 1: Chapter 5, Part 5-2, Division 4, paragraph 243(e)	15.83
Item 1: Chapter 5, Part 5-2, Division 4, paragraph 243(f)	15.83
Item 1: Chapter 5, Part 5-2, Division 4, paragraph 243(g)	15.83
Item 1: Chapter 5, Part 5-2, Division 4, paragraph 243(h)	15.83
Item 1: Chapter 5, Part 5-2, Division 4, section 244)	15.85
Item 1: Chapter 5, Part 5-2, Division 4, section 245	15.86
Item 1: Chapter 5, Part 5-2, Division 4, section 239	15.94
Item 1: Chapter 5, Part 5-2, Division 4, subsection 239(2)	15.95
Item 1: Chapter 5, Part 5-2, Division 4, subsection 239(3)	15.96
Item 1: Chapter 5, Part 5-2, Division 4, subsection 242(1)	15.97
Item 1: Chapter 5, Part 5-2, Division 4, subsection 239(4)	15.98
Item 1: Chapter 5, Part 5-2, Division 4, subsections 240(1) and (2)	15.99
Item 1: Chapter 5, Part 5-2, Division 4, subsections 240(3)	15.100
Item 1: Chapter 5, Part 5-2, Division 4, subsections 241(1)	15.101
Item 1: Chapter 5, Part 5-2, Division 4, subsections 241(3)	15.102

Item 1: Chapter 5, Part 5-2, Division 4, subsection 243(a)	15.104
Item 1: Chapter 5, Part 5-2, Division 4, subsection 243(b)	15.104
Item 1: Chapter 5, Part 5-2, Division 4, subsection 243(c)	15.104
Item 1: Chapter 5, Part 5-2, Division 4, subsection 243(d)	15.104
Item 1: Chapter 5, Part 5-2, Division 4, subsection 243(e)	15.104
Item 1: Chapter 5, Part 5-2, Division 4, subsection 243(f)	15.104
Item 1: Chapter 5, Part 5-2, Division 4, subsection 243(g)	15.104
Item 1: Chapter 5, Part 5-2, Division 4, subsection 243(h)	15.104
Item 1: Chapter 5, Part 5-2, Division 5, subsection 246	15.105
Item 1: Chapter 5, Part 5-2, Division 5, subsection 246(1)	15.106
Item 1: Chapter 5, Part 5-2, Division 5, subsection 246(2)(a)	15.107
Item 1: Chapter 5, Part 5-2, Division 5, subsection 246(2)(b)	15.109
Item 1: Chapter 5, Part 5-2, Division 5, subsection 246(2)(c)	15.111
Item 1: Chapter 5, Part 5-2, Division 5, subsection 246(2)(d)	15.112
Item 1: Chapter 5, Part 5-2, Division 5, section 247	15.113
Item 1: Chapter 5, Part 5-2, Division 5, section 247(2)	15.114
Item 1: Chapter 5, Part 5-2, Division 5, section 248	15.116
Item 1: Chapter 5, Part 5-2, Division 5, subsection 248(2)	15.118
Item 1: Chapter 5, Part 5-2, Division 6, section 251	15.122
Item 1: Chapter 5, Part 5-2, Division 6, section 252	15.124
Item 1: Chapter 5, Part 5-2, Division 6, section 254	15.126
Item 1: Chapter 5, Part 5-2, section 254	16.14
Item 1: Chapter 5, Part 5-2, section 258	16.15
Item 1: Chapter 5, Part 5-2, subsection 255(1)	16.19, 16.40, 16.43, 16.47, 16.48
Item 1: Chapter 5, Part 5-2, subsection 257(1)	16.21
Item 1: Chapter 5, Part 5-2, subsection 257(2)	16.22
Item 1: Chapter 5, Part 5-2, subsection 255(2)	16.23, 16.49
Item 1: Chapter 5, Part 5-2, paragraph 255(3)(a)	16.24
Item 1: Chapter 5, Part 5-2, paragraph 255(3)(b)	16.25
Item 1: Chapter 5, Part 5-2, subsection 256(1)	16.27, 16.28, 16.33
Item 1: Chapter 5, Part 5-2, paragraph 256(2)(a)	16.31
Item 1: Chapter 5, Part 5-2, paragraph 256(3)(a)	16.32
Item 1: Chapter 5, Part 5-2, paragraph 256(2)(b)	16.35
Item 1: Chapter 5, Part 5-2, paragraph 256(3)(b)	16.36
Item 1: subsection 256(1)	16.37
Item 1: Chapter 5, Part 5-2, paragraph 256(2)(c)	16.38



Item 1: Chapter 5, Part 5-2, paragraph 256(3)(c)	16.39
Item 1: Chapter 5, Part 5-2, subsection 255(4)	16.41
Item 1: Chapter 5, Part 5-2, subsection 255(5)	16.45
Item 1: Chapter 5, Part 5-2, subsection 255(7)	16.51
Item 1: Chapter 5, Part 5-2, subsection 255(8)	16.52
Item 1: Chapter 5, Part 5-2, subsection 255(9)	16.53
Item 1, Chapter 1, section 2	19.35, 19.36
Item 1: section 14	20.13
Item 1: section 2	20.13
Item 1: subsection 278(1)	20.14
Item 1: subsection 278(2)	20.16
Item 1: section 279	20.17
Item 1: subsection 280(1)	20.18
Item 1: subsections 280(2)-(3)	20.19
Item 1: subsections 280(4)-(6)	20.20
Item 1: section 281	20.21
Item 1: section 282	20.22
Item 1: section 283	20.23
Item 1: subsections 284(1) & (4)	20.24
Item 1: subsection 284(2)	20.25
Item 1: section 285	20.26
Item 1: section 286	20.27
Item 1: section 287(1)	20.28
Item 1: section 287(2)	20.29

## Schedule 2: Application of the Australian Consumer Law

<i>Bill reference</i>	<i>Paragraph number</i>
Item 1, subsection 131E(1)	17.23
Item 1, subsection 131E(2)	17.25
Item 1, subsection 131E(3)	17.26
Item 1, section 131F	17.27
Item 1, sub section 131G(1)	17.28
Item 1: Part XI, subsection 139G(2)	5.47
Item 1, section 131G(2)	17.29
Item 1, section 140A	17.30

Item 1, section 140	17.31, 17.32, 17.33, 17.36
Item 1, section 140	17.34, 17.35
Item 1, sections 140 & 140B	17.38
Item 1, section 140C	17.40
Item 1, section 140D	17.42
Item 1, sections 140E and 140G	17.44
Item 1, subsections 140F(1) and (6)	17.45
Item 1, subsection 140F(2)	17.46
Item 1, subsection 140F(3)	17.47
Item 1, subsections 140F(4) and (5)	17.48
Item 1, section 140H	17.49
Item 1, section 140J	17.50
Item 1, section 140K	17.52
Item 1: section 137(1) & (2)	18.10
Item 1: section 137(3)-(5)	18.11
Item 1: section 137B	18.12
Item 1: sections 137C(1) & 137E(1)	18.13
Item 1: sections 137C(2) & 137E(2) & (3)	18.14
Item 1: section 137D	18.16
Item 1: subsections 137K(1) & (2)	18.17
Item 1: subsection 137K(3)	18.18
Item 1: section 137K(4)	18.19
Item 1: section 137K (5)	18.20
Item 1: section 137L	18.21
Item 1: section 137M(1)	18.22
Item 1: section 137M(2)	18.23
Item 1: section 138	18.25
Item 1: section 138A	18.26
Item 1: section 138B	18.27
Item 1: section 138C	18.28
Item 1: section 138D	18.29
Item 1: section 138E	18.30
Item 1: section 139	18.31
Item 1: section 139A(1) & (3)	18.32
Item 1: section 139A(2)	18.33
Item 1: section 139A(4) & (5)	18.34

Item 1: sections 139B & 139C	18.35
Item 1: section 139D & 139E	18.36
Item 1:section 139F	18.37
Item 1:section 139G	18.38
Item 1: Part XI, Division 5	7.79, 7.83, 7.86
Item 1, Part XI, Division 4, subdivision D, section 133H	19.48
Item 1, Part XI, Division 4, Subdivision D, subsections 133H(3) and 133H(4)	19.50
Item 1, Part XI, Division 4, Subdivision D, subsection 133H(1)	19.51
Item 1, Part XI, Division 4, Subdivision D, subsection 133H(2)	19.52
Item 1, Part XI, Division 4, Subdivision D, section 133J	19.53
Item 1, Part XI, Division 6, Subdivision A, subsection 135(3)	19.54
Item 1, Part XI, Division 6, Subdivision B, section 135H	19.56
Item 1, Part XI, Division 6, Subdivision A, subsections 135(1) and 135(2)	19.58
Item 1, Part XI, Division 6, Subdivision A, paragraphs 135A(1)(a) and 135A(2)(b)	19.59
Item 1, Part XI, Division 6, Subdivision A, paragraph 135A(1)(b), 135A(1)(e) and 135A(2)(b)	19.59
Item 1, Part XI, Division 6, Subdivision A, paragraph 135A(1)(c)	19.59
Item 1, Part XI, Division 6, Subdivision A, paragraphs 135A(1)(d) and 135A(2)(a)	19.59
Item 1, Part XI, Division 6, Subdivision A, paragraphs 135A(1)(f) and 135A(2)(c)	19.59
Item 1, Part XI, Division 6, Subdivision A, sections 135B and 135C	19.59
Item 1, Part XI, Division 6, Subdivision E, section 135S	19.59
Item 1, Part XI, Division 6, Subdivision E, sections 135V and 135W	19.59, 19.76
Item 1, Part XI, Division 6, Subdivision A, section 135B	19.60
Item 1, Part XI, Division 6, Subdivision A, subsection 135C(1)	19.61
Item 1, Part XI, Division 6, Subdivision A, subsection 135C(2)	19.62
Item 1, Part XI, Division 6, Subdivision A, subsection 135C(3)	19.63
Item 1, Part XI, Division 6, Subdivision C, subsections 135M(1) and 135M(2)	19.65
Item 1, Part XI, Division 6, Subdivision C, subsection 135M(3)	19.65
Item 1, Part XI, Division 6, Subdivision C, subsections 135N(1), 135N(4) and 135N(5)	19.66
Item 1, Part XI, Division 6, Subdivision C, subsections 135N(2) and 135N(3)	19.67

Item 1, Part XI, Division 6, Subdivision C, subsections 135P(1) and 135P(2)	19.68
Item 1, Part XI, Division 6, Subdivision C, subsection 135P(3)	19.68
Item 1, Part XI, Division 6, Subdivision C, section 135Q	19.69
Item 1, Part XI, Division 6, Subdivision D, subsection 135R(1)	19.70
Item 1, Part XI, Division 6, Subdivision D, subsections 135R(2), 135R(3) and 135R(4)	19.71
Item 1, Part XI, Division 6, Subdivision E, subsection 135S(1)	19.73
Item 1, Part XI, Division 6, Subdivision E, subsection 135S(3)	19.74
Item 1, Part XI, Division 6, Subdivision E, subsection 135S(2)	19.75
Item 1, Part XI, Division 6, Subdivision E, subsection 135S(4)	19.77
Item 1, Part XI, Division 6, Subdivision E, subsection 135S(5)	19.77
Item 1, Part XI, Division 6, Subdivision E, subsection 135T(1)	19.78
Item 1, Part XI, Division 6, Subdivision E, subsections 135T(2) and 135T(5)	19.79
Item 1, Part XI, Division 6, Subdivision E, subsections 135T(3) and 135T(4)	19.79
Item 1, Part XI, Division 6, Subdivision E, section 135U	19.80
Item 1, Part XI, Division 6, Subdivision E, subsections 135Y(1) and 135Y(2)	19.81
Item 1, Part XI, Division 6, Subdivision E, subsection 135Y(3)	19.81
Item 1, Part XI, Division 6, Subdivision E, subsection 135Y(4)	19.82
Item 1, Part XI, Division 6, Subdivision E, subsection 135X(1)	19.83
Item 1, Part XI, Division 6, Subdivision E, subsection 135X(2)	19.84
Item 1, Part XI, Division 6, Subdivision E, subsection 135X(3)	19.85
Item 1, Part XI, Division 6, Subdivision E, subsection 135X(4)	19.85
Item 1, Part XI, Division 6, Subdivision A, subsection 135F(1)	19.86
Item 1, Part XI, Division 6, Subdivision A, subsection 135F(2)	19.86
Item 1, Part XI, Division 6, Subdivision A, subsection 135F(3)	19.86
Item 1, Part XI, Division 6, Subdivision A, section 135G	19.87
Item 1, Part XI, Division 6, Subdivision B, section 135J	19.87, 19.98
Item 1, Part XI, Division 6, Subdivision A, section 135D	19.88
Item 1, Part XI, Division 6, Subdivision A, section 135E	19.89
Item 1, Part XI, Division 6, Subdivision F, subsection 135Z(1)	19.90
Item 1, Part XI, Division 6, Subdivision F, subsection 135Z(2)	19.91
Item 1, Part XI, Division 6, Subdivision F, subsection 136(1)	19.92
Item 1, Part XI, Division 6, Subdivision F, subsection 136(2)	19.92

Item 1, Part XI, Division 6, Subdivision F, subsections 136(3) and 136(4)	19.93
Item 1, Part XI, Division 6, Subdivision F, subsection 136(5)	19.94
Item 1, Part XI, Division 6, Subdivision F, subsection 136(6)	19.94
Item 1, Part XI, Division 6, Subdivision F, subsection 136(7)	19.94
Item 1, Part XI, Division 6, Subdivision F, subsection 136(8)	19.94
Item 1, Part XI, Division 6, Subdivision F, subsection 136(9)	19.94
Item 1, Part XI, Division 6, Subdivision F, subsection 136(10)	19.95
Item 1, Part XI, Division 6, Subdivision F, subsection 136(11)	19.95
Item 1, Part XI, Division 6, Subdivision F, subsection 135Z(3)	19.96
Item 1, Part XI, Division 6, Subdivision G, subsection 136B(1)	19.97
Item 1, Part XI, Division 6, Subdivision G, subsection 136B(2)	19.97
Item 1, Part XI, Division 6, Subdivision G, subsection 136B(3)	19.97
Item 1, Part XI, Division 6, Subdivision C, subsection 135K(1)	19.99
Item 1, Part XI, Division 6, Subdivision C, subsection 135K(2)	19.99
Item 1, Part XI, Division 6, Subdivision C, subsection 135K(3)	19.99
Item 1, Part XI, Division 6, Subdivision C, subsection 135L(1)	19.100
Item 1, Part XI, Division 6, Subdivision C, subsection 135L(2)	19.100
Item 1, Part XI, Division 6, Subdivision F, section 136A)	19.101
Item 1, Part XI, Division 3	19.102
Item 1, Part XI, Division 3, subsection 132(1)	19.104
Item 1, Part XI, Division 3, subsection 132(3)	19.105
Item 1, Part XI, Division 3, paragraph 132(3)(e)	19.106
Item 1, Part XI, Division 3, subsection 132(4)	19.106
Item 1, Part XI, Division 3, section 132B	19.107
Item 1, Part XI, Division 3, subsection 132B(2)	19.107, 19.113
Item 1, Part XI, Division 3, subsection 132(2)	19.108
Item 1, Part XI, Division 3, subsection 132(5)	19.109, 19.115
Item 1, Part XI, Division 3, subsection 132A(1)	19.110
Item 1, Part XI, Division 3, subsection 132A(3)	19.111
Item 1, Part XI, Division 3, paragraph 132A(3)(e)	19.112
Item 1, Part XI, Division 3, subsection 132A(4)	19.112
Item 1, Part XI, Division 3, subsection 132B(1)	19.113
Item 1, Part XI, Division 3, subsection 132A(2)	19.114
Item 1, Part XI, Division 3, subsection 132C(1)	19.116, 19.117
Item 1, Part XI, Division 3, subsection 132C(3)	19.117
Item 1, Part XI, Division 3, subsection 132C(2)	19.118

Item 1, Part XI, Division 3, section 132D	19.119
Item 1, Part XI, Division 3, paragraphs 132D(1)(a) & 132D (2)(a)	19.120
Item 1, Part XI, Division 3, paragraphs 132D(1)(b) & 132D(2)(b)	19.121
Item 1, Part XI, Division 3, subsection 132D(3)	19.122
Item 1, Part XI, Division 3, subsections 132J(1) and 132J(2)	19.124
Item 1, Part XI, Division 3, subsection 132J(4)	19.124, 19.126, 19.139
Item 1, Part XI, Division 3, subsection 132J(3)	19.125, 19.138
Item 1, Part XI, Division 3, subsection 132E(1)	19.127
Item 1, Part XI, Division 3, subsection 132E(2)	19.128, 19.130
Item 1, Part XI, Division 3, subsections 132E(1) and 132E(4)	19.129
Item 1, Part XI, Division 3, subsection 132E(3)	19.130
Item 1, Part XI, Division 3, subsection 132F(1)	19.131
Item 1, Part XI, Division 3, subsection 132F(4)	19.131
Item 1, Part XI, Division 3, subsection 132F(2)	19.132
Item 1, Part XI, Division 3, subsection 132G(1)	19.133, 19.134
Item 1, Part XI, Division 3, subsection 132G(2)	19.135
Item 1, Part XI, Division 3, subsection 132J(1)	19.137
Item 1, Part XI, Division 3, subsection 132H(3)	19.140, 19.142
Item 1, Part XI, Division 3, subsection 132H(1)	19.140
Item 1, Part XI, Division 3, paragraph 132H(1)(e)	19.141
Item 1, Part XI, Division 3, subsection 132H(2)	19.141
Item 1, Part XI, Division 3, subsection 132K(1)	19.143
Item 1, Part XI, Division 3, subsection 132K(2)	19.144
Item 1, Part XI, Division 3, subsection 132K (3)	19.144
Item 1: Part 5-1, Division 3, paragraph 223(1)(c)	14.42
Item 1: Part XI, Division 7, section 137H	15.84
Item 1: Part 5-1, Division 3, subsection 223(2)	14.43
Item 1: Part XI, paragraph 131E(2)(f)	14.45
Item 1: Part XI, Division 7, section 137A	15.87
Item 1: Part XI, Division 7, subsection 137A(1)	15.88
Item 1: Part XI, Division 7, subsection 137A(2)	15.89, 15.90
Item 1: Part XI, Division 7, subsection 137A(2)	15.91

Item 1: Part XI, Division 5	4.26, 4.42, 4.60, 6.136, 6.159, 6.171, 6.189, 6.203, 6.216, 6.228, 6.245, 6.257, 6.277, 6.341, 6.356, 6.382, 6.392, 6.403, 6.412, 6.421, 9.29, 14.40, 14.41
Item 1, section 130	17.14
Item 1, section 131	17.15
Item 1, section 131A	17.16
Item 1, section 131B	17.17
Item 1, section 131C(1)	17.18
Item 1, section 131C(2)	17.19
Item 1, section 131C(3)	17.20
Item 1, section 131D	17.21
Item 1: Part XI, Division 5, section 134F	21.22, 21.43
Item 1: Part XI, Division 1, section 130	21.23
Item 1: Part XI, Division 5, subsection 134A(2)	21.24
Item 1: Part XI, Division 5, section 134A	21.27
Item 1: Part XI, Division 5, section 134D	21.28, 21.29, 21.34, 21.36, 21.40
Item 1: Part XI, Division 5, subsection 134A(1)	21.30
Item 1: Part XI, Division 5, subsections 134A (3) and (4)	21.31
Item 1: Part XI, Division 5, section 134B	21.32
Item 1: Part XI, Division 5, subsections 134D	21.37
Item 1: Part XI, Division 5, subsections 134F(4)-(5)	21.44
Item 1: Part XI, Division 5, subsection 134G(1)	21.45
Item 1: Part XI, Division 5, subsection 134G(2)	21.46
Item 1: Part XI, Division 5, subsection 134G(3)	21.47
Item 1: Part XI, Division 5, subsection 134G(4)	21.48
Item 1: Part XI, Division 5, subsection 134G(5)	21.49
Item 1: Part XI, Division 5, subsection 134G(6)	21.51
Item 1: Part XI, Division 5, subsection 134G(7)	21.52
Item 2, Part XI, Division 4, section 133D	19.40
Item 2, Part XI, Division 4, subsection 133D(3)	19.41
Item 2, Part XI, Division 4, subsection 133F(1) and section 133G	19.43
Part 2, item 9, subsection 86E(3)	15.135
Part 4, item 17, subsection 87(1A)	15.133

Part 4, item 20, paragraph 156(1)(d)	15.134
Part XI, subsection 133(3)	19.30
Part XI, Division 4, subsection 133D	19.42
Part XI, subsection 133(4)	19.30
Part XI, Division 4, subsection 133F(2)	19.44, 19.45
Part XI, subsection 133A(6)	19.31
Part XI, subsection 133A(1)	19.31
Part XI, subsection 133A(4) and 133A(5)	19.32
Part XI, Division 4, subsection 133B(1)	19.34
Part XI, subsection 133(1)	19.28
Part XI, Division 4, subsections 133B(2) and 133C(2)	19.38
Part XI, subsection 133(2)	19.28

### **Schedule 3: Amendment of the Corporations Legislation**

<i>Bill reference</i>	<i>Paragraph number</i>
Item 1: section 131	3.9
Item 1: Part XI, Division 5	8.90
Item 6: section 12BB	2.29
Items 8, 9, 10, 11, 12 and 13	4.56
Item 8: section 12BEA	2.53
Item 14	6.137
Items 18-23	6.190
Items 24-28	6.291
Item 28, subsection 12DMB(6)	6.318
Item 28, subsection 12DMB(2)	6.308
Item 28, subsections 12DMB(1) and (2)	6.313
Item 28, section 12DMA	6.297, 6.299
Item 28, subsection 12DMB(3)	6.314, 6.315
Item 28, subsection 12DMB(1)	6.306
Item 28, subsection 12DMB(5)	6.317
Item 28, subsection 12DMB(4)	6.311
Item 29: section 12DN	3.23
Item 29, section 12DN	6.262
Items 32-35	15.121
Part 3, item 14, section 12GLD	15.136



Part 3, item 14, section 12GLD	15.137
Part 3, item 15, section 206EB	15.138
Part 3, item 15, paragraph 1273AA(1)(a)	15.139
Part 3, item 17, paragraph 1273AA(2)(ab)	15.139
Part 5, item 24, subsection 12GM(2)	15.133
Part 5, item 27, paragraph 12HB(1)(b)	15.134

#### **Schedule 4: Enforcement of Industry Codes**

<i>Bill reference</i>	<i>Paragraph number</i>
Item 1, subsection 4(1)	22.19
Item 4, subsection 51AEAA(1)	22.15
Item 4, subsection 51AEAA(2)	22.17
Item 4, subsections 51AEAB(1) and 51AEAB(3)	22.18
Item 4, Section 51AEAH	22.13
Item 4, subsection 51AEAB(2)	22.20
Item 4, subsection 51AEAB(1)	22.21, 22.27
Item 4, subsection 51AEAB(4)	22.22
Item 4, subsection 51AEAB(5)	22.23
Item 4, subsection 51AEAB(6)	22.24
Item 4, subsection 51AEAB(8)	22.25
Item 4, subsection 51AEAB(9)	22.26
Item 4, section 51AEAC	22.27, 22.28
Item 4, subsections 51AEAD(1) and (2)	22.29
Item 4, Subsection 51AEAD(3)	22.30
Item 4, subsection 51AEAD(3)	22.32
Item 4, subsection 51AEAD(5)	22.33
Item 4: section 51AEAF	22.34
Item 4, subsection 51AEAE(1)	22.35
Item 4, subsection AEAE(2)	22.35
Item 4, subsection 51AEAG(1)	22.36
Item 4, subsection 51AEAG(2)	22.37

**Schedule 5: Other Amendment of the *Trade Practices Act 1974***

<i>Bill reference</i>	<i>Paragraph number</i>
Item 1	1.3, 1.6
Item 2	1.4, 1.6
Items 3-129	1.6

**Schedule 6: Amendment of Other Acts to change references to the *Trade Practices Act 1974***

<i>Bill reference</i>	<i>Paragraph number</i>
Items 1-191	1.6

**Schedule 7: Transitional Matters**

<i>Bill reference</i>	<i>Paragraph number</i>
Items 2 and 3	10.212
Item 4	10.211
Item 5	11.42
Item 6	3.26, 4.63, 6.424, 7.142, 8.93, 9.32, 10.210, 11.40, 12.63, 13.40, 14.48, 15.129, 16.56, 17.55, 18.41, 19.147, 20.32, 21.55, 22.41
Item 7	3.27, 4.64, 6.425, 7.143, 8.94, 9.33, 10.213, 11.43, 12.64, 13.41, 14.49, 15.130, 16.57, 17.56, 18.42, 19.148, 20.33, 21.56, 22.42
Item 8	5.90, 5.91, 5.93
Item 11	11.44

Item 12	3.28, 4.65, 6.426, 7.144, 8.95, 9.34, 10.214, 11.45, 12.65, 13.42, 14.50, 15.131, 16.58, 17.57, 18.43, 19.149, 20.34, 21.57, 22.43
---------	--