

FAIR TRADING AMENDMENT BILL 2021

Second Reading

Resumed from 23 June 2021.

HON DR STEVE THOMAS (South West — Leader of the Opposition) [9.14 pm]: We are ploughing through tonight, honourable members. We are flying along! This is the Fair Trading Amendment Bill 2021, which, members who were here might recall, started life in the previous Parliament as the Fair Trading Amendment Bill 2018. It was a much broader bill that did a number of things that were supported by both sides of politics. But there was one clause that the Standing Committee on Uniform Legislation and Statutes Review had concerns with and raised them with the government. The government did the right thing at that point and pulled out those clauses of the bill that related to the automatic incorporation of Australian Consumer Law into the Fair Trading Act of Western Australia. The principal reason that those clauses were pulled out was that the committee raised legitimate concerns about the handing over of sovereignty, effectively, of statutes in Western Australia. There are circumstances in which Western Australian law automatically picks up those parts of the law that are enacted in the commonwealth. In fact, I get into very long constitutional debates in some centres about the priorities and which law supersedes the other. I make the point that although some people will say that federal law predominates automatically, it predominates in terms of legislation that is in direct conflict —

Hon Matthew Swinbourn: To the degree of any inconsistency.

Hon Dr STEVE THOMAS: — to the degree of any inconsistency. Therefore, the absence of a Western Australian law in a certain area does not automatically make it an area that cannot be addressed. It is not the case, for example, that federal law automatically overrides state law in this case, nor should it. In Western Australia, in particular, we are probably as parochial as any, and I think it would be very much against the state's will if that were to be handed over without some sort of review process.

Those clauses of the Fair Trading Amendment Bill, back in 2018, that everybody agreed with passed through the Parliament, and that was a reasonable outcome. The clause in which there was potentially some dispute—that is, the sovereignty of Western Australia—was set aside and put into a separate bill. That separate bill, although introduced and examined, and again sent back to the uniform legislation committee, did not get to the point at which it was debated and ultimately passed. Therefore, a couple of questions still remain.

Effectively, tonight we debate a bill that sets out simply whether the jurisdiction of the legislation in Western Australia can be separate and maintain its own sovereignty. We look like we have come to a compromise that that would appear to be the case, but I will ask the minister—I think the Minister for Regional Development is dealing with this—that we just confirm. I suspect that the current chair of the uniform legislation committee might throw a couple of comments into this debate, which I do not expect to be particularly long, to confirm that the intent of the committee and the concerns that were raised are being adequately addressed. The committee had one set of recommendations, but the government has come back with a slightly different proposal about the sovereignty question. In particular, the government is seeking to change the standing orders of Western Australia to incorporate the capacity to ensure that a disallowance motion, which would be enabled under the bill before the house, would come to a debate and a vote, which was probably the greatest question, as I read it, that was raised by the committee.

It appears to me that the government was always prepared to address the sovereignty issue by placing a disallowable instrument into the legislation. In fact, the current legislation that would come in if we insert, under clause 6, new section 19B would allow for the disallowance. It defines the disallowance period and the notice period in which it would sit under Parliament. I will go through that briefly. There is a notice period, which is a period of 14 sitting days, and a disallowance period. In relation to a disallowance resolution notice, the disallowance period is 30 sitting days of the house after the day on which notice is given. I think that is an adequate period of time. The minister with carriage of the bill is Hon Roger Cook, and he offered a separate briefing to the upper house because there had been some delay with it passing both houses. I appreciate that. In the discussions we had during the briefing, we just wanted to make sure that it was sitting days and not consecutive days, which would appear to give a reasonable level of capacity to examine a piece of legislation under Australian Consumer Law and to move to disallow it if it were not law that was supported by the state of Western Australia, or did not meet the needs of this state.

We want to be fairly supportive of changes to the Australian Consumer Law; there is obviously a process to go through. We do not believe that the commonwealth gets it right all the time, and there may be circumstances in which the state of Western Australia will want to chart its own course. As I understand it, if it charts its own course, a disallowance would have to be passed by one of the houses of Parliament. In that case, in order to meet our obligations under the intergovernmental agreement on consumer law, the state would probably need to look at introducing its own separate piece of legislation that may or may not differ to that imposed by the Australian Consumer Law that was passed by the federal Parliament. I imagine that that would start a bit of a constitutional bunfight, so we would like to at least hear the minister supporting that process, and we suggest that, in fact, we think we are on good

constitutional grounds and that in going through this process we are not ceding the state's right to disagree and to formulate its own law. It would be a slightly unwieldy process, but that is the process that currently exists. At the moment, if an Australian Consumer Law is changed by the federal Parliament in order to meet our intergovernmental agreement requirements, we actually have to go through the process of passing a piece of legislation for each significant amendment.

I note that under the Fair Trading Amendment Bill 2021 we will, as part of that process, accept some three pieces of federal ACL legislation that have been introduced in the interim. So that members are fully aware of them, they are, firstly, the Treasury Laws Amendment (2020 Measures No. 6) Act 2020, which basically amends the Australian Consumer Law to ensure that multiple minor failures can be added together to ultimately constitute a major failure to comply with the provisions of the act. That is effectively saying that multiple small breaches of the act can ultimately be treated as a major failure. That will have a significant impact on the penalties that are available.

The second one is the Competition and Consumer Amendment (Australian Consumer Law—Country of Origin Representations) Act 2020. That is an act that, I guess, tightens up the definition of “country of origin”, particularly in relation to the definition of “substantially transformed”. We are well aware of products that are manufactured in Australia from products that come from overseas. The definition, then, of what is “substantially transformed” becomes important, because if it comes in, is put in a separate bottle and the fruit juices of two different countries are mixed, it is “substantially transformed” versus those that go through a chemical process. That is a reasonable piece of legislation.

The third one is the Financial Sector Reform (Hayne Royal Commission Response) Act 2020. This act made some fairly minor amendments to Australian Consumer Law. I have to say, the legal response to the Haynes royal commission into the financial sector is an immensely problematic area. The entire review of the financial sector and how it impacts on finance brokers is something I think multiple governments will struggle with for a long time. In effect, there were people who lost money, in many cases through getting involved in finance proposals that were obviously too good to be true, offering magnificent rewards. The new finance broking laws that resulted from that, I have to say, make finance broking an incredibly difficult process. In fact, it has probably put a lot of finance brokers out of business. It might be argued that the bad ones went out of business, but I suspect plenty of good ones did too, because the new laws are immensely difficult.

Finance brokers effectively have to guarantee an outcome, and that is a very difficult piece of law to be involved with. A finance broker who is out there proposing slightly more high-risk investments runs the risk of falling foul of this law if those investments do not provide a return within a particular range. That is immensely dangerous. It basically takes the responsibility away from the investor and puts it very much onto the finance broker. I think that is a problematic area to operate in. It is not as though, when you go a surgeon, you say, “I have cancer. My expectation is that the result of the surgery has to be between here and here. If it is not, you are liable.” Almost no other industry operates under those parameters. It is complicated. It is very difficult. It has probably removed some cowboy operators from the system, but it has made it very difficult for everybody who remains in the system.

Those are the three components that will be added in as part of the legislation before the house today. Given the Financial Sector Reform (Hayne Royal Commission Response) Act 2020, these are only very minor amendments to deal with the majority of issues around finance broking, so it is quite reasonable for these amendments to be accepted.

Going forward, any amendments to the Australian Consumer Law that are passed by the federal Parliament will be deemed to be accepted by the state Parliament, unless there is a disallowance motion, as per this bill and the new sections that will be put in place, particularly the new subsections in section 19.

The Standing Committee on Uniform Legislation and Statutes Review did a very good report on this. This is the 2021 version; I think there was a 2009 version as well. The report offered advice about how to improve the bill and made a very small number of recommendations. It found no enormous faults with the bill. Finding 1 found —

Clause 6 of the Fair Trading Amendment Bill 2021 erodes the Western Australian Parliament's sovereignty and law-making powers.

Finding 2 suggested how to fix it —

Standing Order 67 will apply to Commonwealth amending laws that are made subject to disallowance in a Western Australian Act of Parliament if Standing Order 67(1) is amended to remove the word ‘statutory’.

That recommendation effectively removed “statutory” from standing order 67(1). I note, if members want to look up the standing orders, that in fact standing order 67(1) no longer contains “statutory”. I understand that this is partly helping with this bill, but it also helped with the legal bill that we dealt with not that long ago. It would appear that is basically in place.

Recommendation 2 suggested —

The Minister responsible for the Bill does not move the third reading of the Fair Trading Amendment Bill 2021 until Legislative Council Standing Order 67(1) is amended ...

The standing order seems to have been amended.

Finding 3 stated —

Referral to the Joint Standing Committee on Delegated Legislation provides an extra layer of scrutiny of Commonwealth amending laws.

I think that is a fair point as well.

At clause 6 of the bill, proposed section 19A states —

An amending law must be laid before each House of Parliament within 18 sitting days of the House after the day on which the law receives the Royal Assent.

I will be interested to hear in the minister's response how the government's proposed section 19A compares with the recommendation of the Standing Committee on Uniform Legislation and Statutes Review and what the differences are. The opposition is supportive of the government's intention. We appreciate the fact that the government has taken that on board and it intends to ensure the sovereignty of the state of Western Australia's legislation. I think I would like to get some confirmation from the minister that the current proposal meets the requirements that we have in place and the recommendations of the uniform legislation committee. We want to be assured that that will be the case in some way, shape or form. We also want an assurance that there certainly will be a vote on any piece of legislation that comes from the commonwealth, that it will be tabled, that there will be an opportunity to move a disallowance motion and to debate that motion, and, ultimately, that there will be a vote on that motion. Presumably, after a vote on that motion, should the house vote to disallow the motion, there would be a process to progress Western Australian-specific legislation and for the government to perhaps comment on the constitutionality of that, according to the government. I think that if we can roll those things together and get a satisfactory answer, the opposition will be more than happy to support the bill before the house today. I am sure that the chair of the standing committee might like to make a contribution on making sure that we get that right.

HON DONNA FARAGHER (East Metropolitan) [9.31 pm]: I also rise to make a brief contribution to this debate on the Fair Trading Amendment Bill 2021. I think the Leader of the Opposition has essentially canvassed the issues that I was going to raise. I will just say that, from my perspective, I have had the opportunity to look at the proposed amendments. Obviously, we will deal with them in due course.

If I could be given a little latitude, I will raise some general comments. The Leader of the Opposition referenced the changes that were made to standing order 67 some time ago to deal with the issues present in not only this bill, but also the Legal Profession Uniform Law Application Bill 2021 at the time, which has now passed this Parliament. A similar circumstance arose in that legislation. It did not relate, as it does in this instance, to a commonwealth amending act, but, rather, to a Victorian amending act. I will say in a general sense—this is not as the Chair of the Standing Committee on Uniform Legislation and Statutes Review—that although it might be convenient for Parliamentary Counsel and others to insert amending acts that can automatically be updated to allow our legislation to be updated and not necessarily require new legislation to come through on every occasion, I have some concerns about that. I appreciate the reasons behind it, but I do not necessarily agree with it. Given that it appears, certainly from the advice that was provided to the committee—I cannot remember whether it was referenced in this inquiry's report or the one relating to the legal profession uniform law—that this seems to be the new world order, if I can put it that way, and we are going to see more and more of these types of bills coming through this place, it is important that we have a mechanism in place to examine those amending acts.

With that said, there was, of course, a proposal to amend the standing orders, and I thank the government for taking on board the position that was taken by the committee to help address this issue. Although the committee recommended a form of words to deal with that, certainly with respect to the legal profession bill, and to then be able to deal with the tabling of an amending law and publication and those sorts of things, I do not think that the words that were put by the committee exactly replicated the amendment that appeared at the time. This relates to the legal profession. However, on balance, it still achieved the same aim.

From what I can see, the proposed amendments that are on the supplementary notice paper that we will be dealing with in due course directly reflect the same amendments that were put in the legal professions bill. On that basis, from my reading of it, I am happy, because it is consistent with previous amendments made to another bill that dealt with effectively the same issue. I agree, though, it would be helpful for the minister to reconfirm that. But certainly on my reading of it, I am happy that it reflects not only the general position of the committee, but also decisions that have been made previously in this house, albeit with respect to another bill but dealing with ultimately the same type of issue.

Debate adjourned, on motion by **Hon Pierre Yang**.

