

**STANDING COMMITTEE ON
UNIFORM LEGISLATION AND STATUTES REVIEW**

FAIR TRADING AMENDMENT BILL 2013

**TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
MONDAY, 17 JUNE 2013**

Members

**Hon Kate Doust (Chair)
Hon Brian Ellis (Deputy Chair)
Hon Mark Lewis
Hon Amber-Jade Sanderson**

Hearing commenced at 1.16 pm**MILFORD, MR GERALD****Manager, Strategic Policy, Department of Commerce, examined:****O'BRIEN, MS ANNE****Senior Policy Officer, Department of Commerce, examined:**

The CHAIR: Welcome to our meeting today. I thank both of you for coming in. On behalf of the committee I am very pleased you have both been able to join us today. We will not ask you to take an oath or an affirmation today. Please state the capacity in which you appear before the committee?

Ms O'Brien: I am the senior policy and instructing officer on the bill.

The CHAIR: You both will have signed a document entitled "Information for Witnesses"; Have you read and understood that document?

The Witnesses: Yes.

The CHAIR: These proceedings have been recorded by Hansard. A transcript of your evidence will be provided to you. To assist both the committee and Hansard, if you need to quote anything we ask that you please quote the full title of any document you refer to during the course of this hearing for the record, and please be aware of the microphones and try to talk into them and ensure you do not cover them with papers or make noise near them. Even though this is a private hearing, you should note that the committee retains the power to publish any private evidence. The Legislative Council may also authorise publication and this means that your private evidence may become public. Please note you should not publish or disclose any private evidence to any other person at any time unless the committee or the Legislative Council has already publicly released the evidence. I advise you that premature publication of private evidence may constitute a contempt of Parliament and may mean the material published or disclosed is not subject to parliamentary privilege.

The bill is the Fair Trading Amendment Bill 2013. It is our first bill that this new committee has to deal with. We were hoping you would be able to provide us with an overview of the bill and provide responses to those couple of matters that we have referred to you via a letter last week. A few other questions may arise from the discussion today.

Mr Milford: No problem. I have my notes here and I will be happy to leave a copy of my notes later on because that might help Hansard.

The CHAIR: That would be very good, thank you.

Mr Milford: Firstly, in July 2009 all Australian governments, including WA, signed an intergovernmental agreement for the Australian Consumer Law. That agreement required all the states and territories to apply the commonwealth Australian Consumer Law as a law of their jurisdiction, including any future changes. The agreement also provided for those future changes to be agreed to under a voting arrangement whereby the commonwealth and at least four other jurisdictions, of which at least three must be states, had to agree to the change. About two and a half years ago the WA Parliament passed the Fair Trading Act 2010. That act was the one that gave effect to this intergovernmental agreement. It provided for the adoption or the application of the commonwealth Australian Consumer Law as a law of WA as it existed on the day the act came into force. That act came into force on proclamation on 1 January 2011.

The Australian Consumer Law is a generic law that regulates the conduct of business in the marketplace and the relationship between consumers and traders. It deals with matters such as unconscionable conduct, misleading advertising, consumer guarantees on goods and services, door-to-door trading and product safety. As a national law, its major advantage was that it provided certainty and lower compliance costs for businesses that operated across national boundaries. It also ensured that consumers had the same rights and protections no matter where they were in Australia.

Most of these protections previously sat in the WA Fair Trading Act 1987, the Door to Door Trading Act 1987 and the Consumer Affairs Act 1971. The 2010 Fair Trading Act replaced those three acts. Since that act came into force on 1 January 2011, there have been a few amendments made to the commonwealth ACL. I will refer to the ACL as the Australian Consumer Law. In all other Australian jurisdictions those changes that have occurred were adopted automatically under each jurisdiction's respective legislation. But in WA the Parliament did not agree to the automatic adoption of those changes, and they can only be applied through amendment legislation, which is why we have this bill. It is one of the main reasons we have this bill. The main purpose is to realign the WA Australian Consumer Law with the rest of Australia. There are other amendments in the bill as well, and I will talk about those later.

[1.20 pm]

Since the ACL has come into force on 1 January 2011, the commonwealth government has passed two acts, and these amendments in those acts have been supported under the voting process provided for in the intergovernmental agreement, including Western Australia. The most significant of the changes was the inclusion of interpretive principles into the unconscionable conduct provisions of the Australian Consumer Law. Under the Australian Consumer Law, it is an offence for a business to engage in unconscionable conduct in connection with the supply or acquisition of goods and services. In determining whether conduct is unconscionable, courts can have regard to matters such as the relative bargaining strengths of the parties, whether a person is required to comply with conditions that were reasonably necessary to protect the supplier's interests or whether the supplier engaged in unfair tactics.

As an example, say a commercial lease was about to expire and the landlord said that you have got one week to renew and the rent is double, and perhaps those people did not have a good command of the English language and could not understand the contract—they did not have the time to get legal advice and so on—that would be one that is not done in good conscience and would be found to be unconscionable.

In late 2011, the commonwealth amended Australian Consumer Law to include interpretive principles to assist the courts in applying the prohibition against unconscionable conduct and help stakeholders to understand the meaning and scope of their provisions. The amendments originally stemmed from the recommendations of a federal senate committee in November 2009 and the recommendations of an expert panel, which was later established by the commonwealth to see whether these interpretive principles should be included. Just to be clear, the unconscionable conduct provisions themselves have not changed; but a set of principles have been added to include in the act to assist the courts to understand them and to apply them. The unconscionable conduct provisions themselves remain the same.

As well the unconscionable conduct principles, the other amendments are very, very minor. Firstly, the definition of document has been amended to align it with the definition in the commonwealth's Acts Interpretation Act. All that means is that the meaning of document has been broadened so it now includes maps, plans, drawings and photographs.

The CHAIR: Can I just ask: does it have to be hardcopy? I just wonder whether they have picked up on how people use technology—if the information is email or in some other version?

Mr Milford: I would imagine that would include anything electronic as well, as it would if we were to prosecute someone for misleading and deceptive conduct. If it was done electronically, we would apply that; so I imagine it would be the same.

The second amendment was a reference to Standards Australia International Limited, which has been updated to read Standards Australia because that, as an institution, does not exist anymore. That was, again, to align it with the definition in the commonwealth's Acts Interpretation Act.

The bill seeks to apply all the amendments that have been made to Australian Consumer Law since 1 January 2011 to 1 January 2013. This will effectively pick up those unconscionable conduct amendments and those minor definition changes. Those are the only changes that have come into force in that period between 1 January 2011 and 2013; there has been nothing else.

I might be jumping the gun now, but I think this is a good opportunity to explain—or to, perhaps, answer the first question that the committee put to me in the letter. I think there was a concern that there was a possibility of these amendments having a retrospective application. The bill has no retrospective implications whatsoever. The bill will adopt the version of commonwealth Australian Consumer Law as it existed on 1 January 2013, and that will apply as a law of Western Australia when this bill is passed and proclaimed. So it is just picking up the version as it existed six months ago.

The CHAIR: It only goes back to 2013, not back to 2011?

Mr Milford: No, it picks up all the changes between 1 January 2011 and 2013, and says that now the law of Western Australia will be the Australian Consumer Law as it applied on 1 January 2013; but the effective date of that will be when it is proclaimed. If it is passed in September this year, say, and it is proclaimed in October, from that day we will ask: What was the law? What was the ACL as it existed on 1 January 2013? And that is the law that would apply from that date from October; so it has no retrospective implications at all.

Hon BRIAN ELLIS: Therefore, there is no retrospective implication, say, from September back to 1 January 2013?

Mr Milford: No. If there have been any changes, even to the Australian Consumer Law in that period, they will not apply. We are just picking up the version as it existed as at 1 January this year, and so that will —

Hon BRIAN ELLIS: — and applying it in September?

Mr Milford: It will apply as from September, or whenever the proclamation date is. It is just to provide some certainty. We had to pick some point in time to say what was the law then. Say, if there are amendments between 1 January 2013 and before this bill went through and was proclaimed, then there would be uncertainty if we left it till the proclamation date and you would not know what was going to be included, and, rightfully, you would say, "Well, we don't know what's happened since more recently."

The CHAIR: At the moment, under this legislation, my understanding is that even if laws had been passed during that period, they have to come back and go through both houses here anyway at some point in time?

Mr Milford: Yes, absolutely.

The CHAIR: Therefore, it would not be picked up anyway; you still have to go through that process.

Mr Milford: That is right. You are agreeing only to what laws have occurred up until 1 January 2013.

The CHAIR: Okay.

Mr Milford: Can I move to the other amendments in the bill now?

The CHAIR: Sure.

Mr Milford: The bill also seeks to amend the Fair Trading Act to address a number of drafting errors and oversights; but there is one substantive amendment that will create an additional power. At present, the Commissioner for Consumer Protection has the power to commence or defend proceedings on behalf of the consumer or a business in any matter where the amount involved is up to \$100 000. What has become apparent is that the commissioner cannot intervene in proceedings if they are already underway. That means if a business was canny enough to institute proceedings against the consumer and we knew that it was a very strong case, once that had been commenced, the commissioner cannot help that consumer or business—or whoever has instituted the proceedings.

So the bill will amend the Fair Trading Act to enable the commissioner to assume the conduct of legal proceedings that are already underway. It is really just a power that has been sought to ensure that consumers are not disadvantaged should the commissioner decide that a case has merit but then finds they are hamstrung because they just cannot intervene.

The CHAIR: And that is under that section 18?

[1.30 pm]

Ms O'Brien: Section 48, and also 49, 58 and 59.

Mr Milford: It is like consequential changes that have percolated through the rest of the act as well.

Next, the bill will address a drafting oversight to extend the scope of criminal responsibility to anyone who is involved in a contravention or a provision of the act. At present, the way the act is drafted, only a person who is directly involved in the offence can be charged. This was a drafting oversight. It came about as a result of making reference to only a division of the act rather than referencing a part of the act. Simply because of the placement of the section, it has left us in a position where only persons directly involved can be charged. That was not the intention. Under the previous Fair Trading Act, people who were involved in the contravention could be charged as well.

The CHAIR: Could you provide for the committee an example of that type of contravention where you use those provisions? Would that be an example of scamming? Would that apply when you might have a number of people involved in electronic scamming?

Mr Milford: Yes, that would apply in any sort of contravention. For example, perhaps two partners in a business were involved in misleading sector conduct and one was directly involved in that they conceived the idea and so on but the other partner knew of it. I cannot think of a more direct example. Suffice to say, it really was just a drafting oversight. This has been the case since 1987 with people who are involved in a contravention of the act.

Next, the bill will correct an error in the act that currently operates to give precedence to a list of state acts in schedule 1 of the act if any provision of those acts is inconsistent with Australian Consumer Law. It was originally intended that the acts in schedule 1 would prevail only where they were inconsistent with the product safety provisions of Australian Consumer Law because that was the case under the old Fair Trading Act 1987 and Consumer Affairs Act 1971 to provide some certainty where there was inconsistency between the Fair Trading Act 1987 and other state legislation such as the Radiation Safety Act 1975 or the Firearms Act 1973. Before 2010, because the commissioner could make product safety orders or you could have regulations for regulating the supply of goods in relation to product safety, there was always a danger that we would have regulations made under the Fair Trading Act unbeknown that there were similar regulations regulating the supply of a product; for example, laser pointers under the Radiation Safety Act or particular types of firearms or tinted film for motor vehicles, which might be regulated under the Road Traffic Act 1974. As a safeguard and to provide some sort of certainty in case people found that they were faced with two laws regulating the same goods, this was to provide some sort of certainty. We intended to follow that through with the 2010 act but instead of limiting it to just the

product safety provisions, it says that these acts shall prevail. As one example of a perverse outcome, the Motor Vehicle Dealers Act 1973 is on that list. If that act was to prevail over Australian Consumer Law, a person who buys a motor vehicle does not have the protection of the statutory guarantees under Australian Consumer Law, only the Motor Vehicle Dealers Act warranty. That was a perverse outcome but it was always intended that it related to only the product safety provisions of those laws.

The CHAIR: Will this kick in where a state law is of a lower standard?

Mr Milford: Where there is an inconsistency. If we make the change and it relates to product safety, these acts prevailing, it would only do so in relation to product safety. That means that if Australian Consumer Law was to develop an information standard which relates to product safety, the state law would prevail as far as the Parliament would allow it to anyway, because there is still the corporations aspect of the Constitution so you would still have corporations where Australian Consumer Law would prevail over the state legislation. As far as the Parliament's power allows, it would ensure that the state legislation prevailed.

Hon MARK LEWIS: Could you give an example of what that might be? Under 50(20), what sort of act might override under the corporations sovereign?

Mr Milford: I am not sure what you mean by 50(20).

Hon MARK LEWIS: That is the Constitution's corporations power. What sort of act might override the state?

Mr Milford: This would only be under Australian Consumer Law. We have a commonwealth Australian Consumer Law, we have the Australian Consumer Law (WA), which is the applied law, and we have the state legislation. This would ensure that the state legislation prevailed over the WA Australian Consumer Law. It would not prevail over the commonwealth Australian Consumer Law.

Hon MARK LEWIS: I understand that, and "act" is not the right word. What sort of misdemeanour or thing might be involved?

Mr Milford: Perhaps as an example, if somebody sold a laser pointer in Western Australia and a company owned the business, there was an Australian Consumer Law standard in relation to that laser pointer and you had state legislation that regulated laser pointers, the Australian Consumer Law would prevail over the state law in regulating the two, if we had laws on laser pointers for both of them.

Hon MARK LEWIS: Using the federal corporations act?

Mr Milford: Yes, but the state law would have prevailed over Western Australia's version of the Australian Consumer Law, even though it will not prevail over the commonwealth Australian Consumer Law. That is simply because the state Parliament's power does not extend to that.

Giving precedence to those acts over the ACL was a drafting error, to say the whole act rather than just the product safety provisions. The bill corrects that error and restores us to the position that we were in before the 2010 act was made.

Next, the bill will amend the act so that the commissioner can draw on specific investigation and enforcement powers in the act relating to debt collectors, employment agents and travel agents. The commissioner is the licensing authority for lots of occupations and businesses at the moment, including those ones and real estate agents, settlement agents, land valuers, motor vehicle dealers and so on. These investigation and enforcement powers are being used in relation to those particular occupations. For some reason these acts that regulate these three occupations—debt collectors, employment agents and travel agents—just did not make it to the list. The commissioner has other powers to draw on but those specific powers relating to licensed occupations were created specifically to deal with licensed occupations. That was just a drafting oversight again.

Next, the bill will make non-compliance with an order of the Supreme Court or District Court an indictable offence. These are very serious offences and, again, it was just a drafting oversight not to include that.

Lastly, the bill will remove a redundant provision that refers to the process required to amend legislation. How that came about is that in the original bill that went up, a process of changing the Australian Consumer Law by order of the Governor, which was approved by both houses of Parliament, was proposed. That was the model proposed in the Fair Trading Bill two and a half years ago, and that was rejected by the upper house. That particular provision was amended in the upper house and, to be frank, it just states the obvious. It says that the law must be changed by bill. It is just a redundant provision; it is just a clean-up for that one.

[1.40 pm]

The CHAIR: The bill also includes business structures other than corporations. I was wondering if you could explain what other types of business structures that refers to.

Ms O'Brien: Where does it say that?

The CHAIR: I just had that in my notes in reference, I think, to schedule 2.

Mr Milford: There is no specific provision that I can see that actually makes any sort of distinction there.

The CHAIR: We will find the exact reference and perhaps put that in writing to you and get a response at a later stage, if that helps.

Mr Milford: Absolutely; no problem. We will get an answer to you as quickly as we can.

The CHAIR: Can we go back to the issue of unconscionable conduct that you referred to? Could you explain to us how the principles were decided in terms of being able to better understand when, I suppose, unconscionable conduct occurs?

Mr Milford: I am not sure about the depth at which I could explain it, but it came from the recommendations of a senate committee in November 2009 and the recommendations of an expert panel that was later established by the commonwealth to consider whether a list of examples of unconscionable conduct should be included in the bill. That is where it has its genesis. Beyond that, I am not sure.

Hon MARK LEWIS: Was WA involved in that?

The CHAIR: Not unless there was a Western Australian senator sitting on the committee at the time.

Mr Milford: No.

Hon MARK LEWIS: I am sorry, within the IGA process, I guess?

Mr Milford: Yes. Under the IGA, Western Australia supported those changes. That is done through the minister, through the Legislative and Governance Forum on Consumer Affairs.

The CHAIR: I think we set this out in the letter to you last week as well: we referred to section 21 of the Fair Trading Act headed "Certain instruments to be published, and may be disallowed by Parliament". Can you just touch on that?

Mr Milford: I was actually wondering what the problem was there. I think that there was a feeling that on the one hand section 18 said that regulations made under section 139G form part of the Australian Consumer Law and that section 21 takes them out, but actually section 21 does not take them out. It says that they "may be disallowed by Parliament". What happens as a matter of course is when regulations are made under the Australian Consumer Law they automatically become a law of Western Australia. That is what this provision says. What we do, within 28 days, is republish

them in the *Government Gazette* to give our own state Parliament the opportunity to disallow them. Those go through the joint standing committee as if they are regulations made in Western Australia.

The CHAIR: That would be the Joint Standing Committee on Delegated Legislation?

Mr Milford: Yes; the Joint Standing Committee on Delegated Legislation.

The CHAIR: When this matter was being looked at did the department seek any advice from the Clerk of the Parliament about this particular issue and the potential to disallow?

Mr Milford: No. I am not sure what we would be seeking advice from the Clerk about that, to tell you the truth. I thought that maybe why this question was asked is that it appeared to be an inconsistency between 18 and 21, but there is no inconsistency. It gives the Parliament the right to disallow rather than to disallow them automatically.

The CHAIR: Thank you. Is there anything else you want to add to what we have already been through?

Mr Milford: No, not at all. I would be happy to ask any questions as quickly as I can. If you give it to us today, I will try and get an answer to you this afternoon.

The CHAIR: We have one question that will come to you. That is about it. There were only a couple of issues that stood out. I think you have covered most of those for us.

Mr Milford: If you have any other concerns, I could perhaps elaborate on anything right now.

The CHAIR: No; I think we are fairly happy with that. Thank you very much to both of you for coming in and for providing that information. With that document that you have, you might want to provide the name and table it.

Mr Milford: It was the Fair Trading Amendment Bill and there are some notes I was using to talk.

Hearing concluded at 1.45 pm
