

41ST PARLIAMENT



Report 133

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

Fair Trading Amendment Bill 2021

Presented by
Hon Donna Faragher MLC (Chair)
August 2021

Standing Committee on Uniform Legislation and Statutes Review

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ISBN 978-1-925580-41-9



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EXECUTIVE SUMMARY

- 1 The Fair Trading Amendment Bill 2021 (Bill) proposes to:
 - amend the *Fair Trading Act 2010* (Act) by incorporating amendments to the Australian Consumer Law (ACL) that have come into force prior to 1 June 2021
 - automatically incorporate amendments to the ACL into the Australian Consumer Law (WA) (ACL WA) subject to the amendments being disallowed by Parliament
 - introduce a disallowance mechanism to allow Parliament the opportunity to disallow amendments to the ACL before they are automatically incorporated into the ACL WA.
- 2 The Bill has addressed some of the Committee’s recommendations in Report 123 on the lapsed Fair Trading Amendment Bill 2019.
- 3 The Committee has identified that the disallowance mechanism proposed in the Bill impacts upon the Parliamentary sovereignty and law making powers of the Western Australia Parliament for the following reasons:
 - Once a disallowance motion is moved, there is nothing in the Bill to trigger a debate on the disallowance motion.
 - The Commonwealth amending law does not come within the terms of reference of any Legislative Council standing committee and will not be automatically scrutinised by a committee.
- 4 The Committee has proposed recommendations to address these sovereignty issues.
- 5 The Committee draws these clauses to the Legislative Council’s attention for consideration during debate on the Bill.

Findings and recommendations

Findings and recommendations are grouped as they appear in the text at the page number indicated:

FINDING 1

Page 8

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

FINDING 2

Page 8

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’.

RECOMMENDATION 1

Page 8

The Legislative Council delete Standing Order 67(1) of the Standing Orders of the Legislative Council and replace it as follows:

For the purpose of this Standing Order, a “regulation” includes any instrument made subject to disallowance by a written law.

RECOMMENDATION 2

Page 9

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 in the terms set out in recommendation 1.

FINDING 3

Page 11

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

RECOMMENDATION 3

Page 11

The Fair Trading Amendment Bill 2021 be amended as follows:

Clause 6

Page 4, line 7 – To delete “Assent.” and insert:

Assent and upon being laid before each House is taken to be published under this Act.

1 Introduction

- 1.1 On 23 June 2021, the Fair Trading Amendment Bill 2021 (Bill) was introduced into the Legislative Council.¹
- 1.2 The Bill was referred to the Standing Committee on Uniform Legislation and Statutes Review (Committee) under Standing Order 126(1). The Committee was required to report by 10 August 2021, being the first Legislative Council sitting day following the expiry of the 45 day reporting period.
- 1.3 The Bill proposes to amend the *Fair Trading Act 2010* (FTA) to 'ensure ongoing consistency between the Australian Consumer Law in Western Australia (ACL WA) and the Australian Consumer Law (ACL) as it applies in all other Australian jurisdictions.'²
- 1.4 The Bill introduces a mechanism to incorporate future ACL amendments into the ACL WA subject to the amendments being disallowed by Parliament (disallowance mechanism). Currently, the FTA is updated by way of an amendment bill each time the ACL is amended.

Background

- 1.5 There have been two prior bills relating to the Bill. The Committee has reported on the prior bills.³
- 1.6 In 2018, the Fair Trading Amendment Bill 2018 (2018 Bill) was introduced into Parliament. The 2018 Bill contained a disallowance mechanism. The Committee found that the proposed disallowance mechanism in the 2018 Bill made an attempt at, but fell short of, preserving Western Australia's Parliamentary sovereignty.⁴
- 1.7 The Legislative Council agreed to pass the 2018 Bill with amendments that omitted the proposed disallowance mechanism. This was done on the understanding that a further Bill would be introduced with a revised disallowance mechanism that would allow incorporation of ACL amendments into the ACL WA.
- 1.8 In 2019, the Fair Trading Amendment Bill 2019 (2019 Bill) was introduced into Parliament. The 2019 Bill contained a disallowance mechanism in clause 6. The Committee made 8 recommendations in relation to the 2019 Bill. The 2019 Bill lapsed upon the prorogation of Parliament on 7 December 2020.
- 1.9 This report includes discussion and analysis of the Bill and its impact on Parliamentary sovereignty and law-making powers.

2 Inquiry procedure

- 2.1 The Committee posted the inquiry on its webpage at [Uniform Legislation Committee homepage](#). The general public was notified of the referral via social media.⁵

¹ Hon Alannah MacTiernan MLC, Minister for Regional Development, introduced the Bill.

² Fair Trading Amendment Bill 2021, *Explanatory Memorandum*, Legislative Council, p 1.

³ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, report 119, *Fair Trading Amendment Bill 2018*, November 2018; Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, report 123, *Fair Trading Amendment Bill 2019*, August 2019.

⁴ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, report 119, *Fair Trading Amendment Bill 2018*, November 2018, Finding 3.

⁵ Legislative Council, 23 June 2021, retrieved from <https://twitter.com/WALegCouncil/status/1407601529851371520>

2.2 Under its terms of reference, the Committee is confined to investigating whether a Bill has an impact on the parliamentary sovereignty and law-making powers of the Parliament of Western Australia. The Committee is not able to consider any other matter, including the policy of the Bill.

2.3 Given the Committee's terms of reference, the Committee did not seek further submissions.

3 Supporting documents

3.1 The Committee received copies of the Bill, its second reading speech and Explanatory Memorandum (EM) when the Bill was introduced into the Legislative Council.

3.2 Standing Order 126(5) states:

The Member in charge of a Bill referred to the Committee shall ensure that all documentation required by the Committee is provided to the Committee within 3 working days after referral...

3.3 The Minister for Commerce forwarded the information required under Ministerial Office Memorandum MM 2007/01 on 28 May 2021, the 3rd working day after referral. The Committee extends its appreciation to the Minister for the timely provision of the supporting documentation and information.

4 Fair Trading Amendment Bill 2021

4.1 The Bill:

- applies the ACL as in force on 1 June 2021 as the ACL WA (clause 5)
- provides a disallowance mechanism similar to the disallowance mechanism in the 2019 Bill (clause 6).

Clause 4 – Section 17 amended

4.2 Clause 4 reads:

In section 17(1) insert in alphabetical order:

amend includes replace;

amending law means a Commonwealth Act that

amends either or both of the following —

- (a) Schedule 2 to the *Competition and Consumer Act 2010* (Commonwealth);
- (b) the regulations made under section 139G of that Act;

4.3 The 2019 Bill inserted two definitions for 'amend' and 'amending law'. In report 123, the Committee recommended the definition of 'amending law' be amended to mean a Commonwealth Act that amends 'either or both of the following':

- Schedule 2 to the Competition and Consumer Act (Commonwealth)
- the regulations made under section 139G of that Act.⁶

⁶ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, report 123, *Fair Trading Amendment Bill 2019*, August 2019, recommendation 8.

Committee comment

- 4.4 Proposed clause 4 has followed recommendation 8 in report 123 and preserves the Western Australian Parliament's sovereignty and law-making powers.

Clause 5 – Section 19 amended

- 4.5 Clause 5(1) has the effect of amending section 19 of the FTA to provide that the ACL as in force on 1 June 2021 is incorporated into the ACL WA. All Commonwealth laws passed before 1 June 2021 will be incorporated into the ACL WA.
- 4.6 The laws that have been passed between 26 October 2018 and 1 June 2021 are listed on pages two and three of the EM. These laws will not be subject to disallowance under the mechanism proposed in this Bill. Three Commonwealth amending laws will be incorporated into the FTA upon the passing of the Bill:
- *Treasury Laws Amendment (2020 Measures No. 6) Act 2020*
 - *Competition and Consumer Amendment (Australian Consumer Law – Country of Origin Representations) Act 2020*
 - *Financial Sector Reform (Hayne Royal Commission Response) Act 2020.*
- 4.7 The Committee notes that Parliament will have the opportunity to consider the three laws given they are identified in the text of the EM.
- 4.8 Clause 5(1) also amends section 19 of the FTA to incorporate future amendments into the ACL WA pursuant to the process set out in proposed sections 19B and 19C. In report 123, the Committee made the following comments about clause 5:

The wording currently proposed is significant because, unlike in the 2018 Bill, the new disallowance mechanism in the Bill is to operate before the Commonwealth amending laws commence operation in Western Australia. This means that from 1 March 2019, a Commonwealth amending law sought to be applied in Western Australia will be subject to Parliament's consideration and possible disallowance before it becomes law in this jurisdiction.

In that regard, clause 5 preserves the Western Australian Parliament's sovereignty and law-making powers.⁷

Committee comment

- 4.9 The amendments to the ACL listed above in paragraph 4.6 have been passed by the Commonwealth prior to 1 June 2021.
- 4.10 The Committee considers that Parliament should be aware of these amendments and that they will be incorporated into the FTA upon the passing of the Bill.

Partial disallowance

- 4.11 In report 123, the Committee commented that there may be instances where the Parliament considers that part of a Commonwealth amending law ought not to be applied as the ACL WA.⁸

The inability to partially disallow Commonwealth amending laws constrains Western Australia's Parliamentary sovereignty by obliging it to either entirely

⁷ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, report 123, *Fair Trading Amendment Bill 2019*, August 2019, p 4.

⁸ *ibid.*, p 9.

accept or entirely reject changes to the ACL so far as they will apply in Western Australia. This is notwithstanding that the objectionable element in a Commonwealth amending law may be discreet and easily severable from many worthy reforms in that legislation. Whether consultation and a regulatory impact assessment may be necessary may be determined, as it is now, on a case-by-case basis.⁹

4.12 Upon introducing the Bill Hon Alannah MacTiernan advised:

In its 123rd report, the Standing Committee on Uniform Legislation and Statutes Review recommended that the disallowance mechanism in the bill should permit the partial disallowance of commonwealth amendments. This recommendation has not been accepted by the government.

The Department of Mines, Industry Regulation and Safety has advised that partial disallowance of amendments could give rise to issues with regard to participation by WA in the national scheme. The intergovernmental agreement that supports the national operation of the Australian Consumer Law requires participating jurisdictions to maintain consistent legislation.

It is important that if the WA Parliament decides that parts of the commonwealth ACL should not be incorporated into the WA ACL, that amendments are incorporated by way of an amendment bill. This will permit consideration of the potential impact of any inconsistency so that this risk can be managed through the process of drafting and implementing an adopting bill.¹⁰

4.13 In report 123 the Committee:

- considered that it is an erosion of Parliamentary sovereignty if Parliament lacks the power to partially disallow a Commonwealth law¹¹
- made recommendations to amend clauses 5 and 6 in relation to allowing partial disallowance of an amending law.¹²

Committee comment

- 4.14 The inability to partially disallow an amending law constrains Western Australia's Parliamentary sovereignty by obliging it to either entirely accept or entirely reject changes to the ACL so far as they will apply in Western Australia.
- 4.15 The Committee notes the Government's position at paragraph 4.12. The need to provide consistency with the ACL must be balanced against the impact on Parliamentary sovereignty.
- 4.16 It would have been preferable to provide the Western Australian Parliament with the power to partially disallow an amending law. However, the Committee considers that, on balance, an inability to partially disallow a Commonwealth amending law can be justified in this case due to the risk of a lack of consistency between the ACL WA and the ACL.

⁹ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, report 123, *Fair Trading Amendment Bill 2019*, August 2019, p 10.

¹⁰ Hon Alannah MacTiernan, Minister for Regional Development, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 23 June 2021, p 20b-22a.

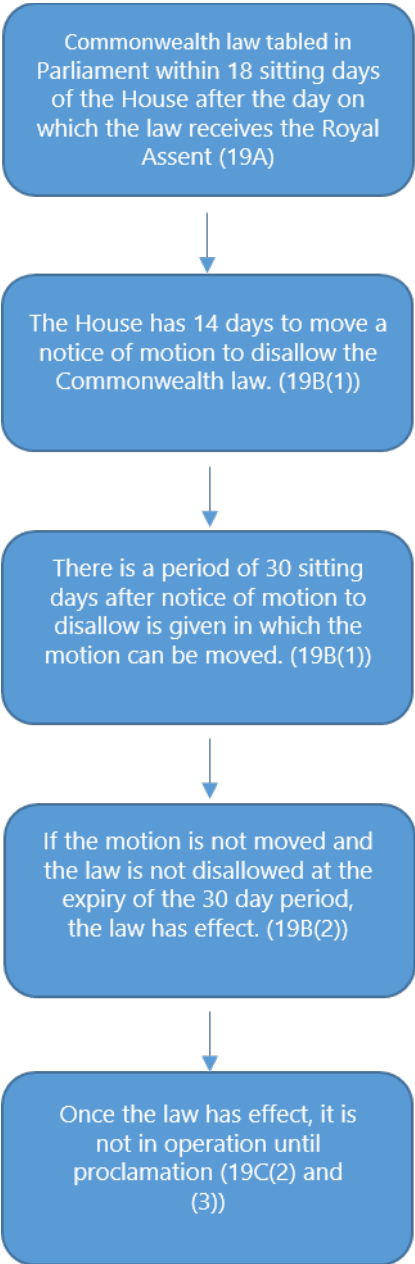
¹¹ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, report 123, *Fair Trading Amendment Bill 2019*, August 2019, p 10.

¹² *ibid.*, Executive Summary.

Clause 6 – Sections 19A to 19D inserted

- 4.17 Clause 6 contains proposed sections 19A to 19D. These set out the process for how a Commonwealth amending law becomes part of the ACL WA and the disallowance mechanism. Proposed section 19D provides that the process for the incorporation and disallowance mechanism will apply to any Commonwealth amending laws that receive Royal Assent after 1 June 2021.
- 4.18 The disallowance mechanism allows Parliament to scrutinise an amending law before it becomes a law of Western Australia.
- 4.19 The process for how a Commonwealth amending law becomes part of the ACL WA and the disallowance mechanism is set out in Figure 1.

Figure 1. *Disallowance mechanism in proposed sections 19A to 19C of the Fair Trading Amendment Bill 2021.*



Clarifying the meaning of 'has effect' and 'operation'

4.20 The Committee proposed amendments to the 2019 Bill to clarify what was meant by, and when, a Commonwealth amending law 'has effect' under section 19B(2) and it 'comes into operation' under section 19C(3) and (4).¹³ These recommendations have been followed with amendments to proposed sections 19B and 19C.

Parliamentary sovereignty issues

4.21 There are two possible issues regarding Parliament's sovereignty in relation to clause 6:

- Once a disallowance motion is moved, there is nothing in the Bill to trigger a debate on the disallowance motion.
- The Commonwealth amending law does not come within the terms of reference of any Legislative Council standing committee and thus will not be scrutinised.

No mechanism to trigger debate in the House

4.22 Usually, if a member or committee wishes to move a motion to disallow a regulation or item of subsidiary legislation, the disallowance motion will usually fall within the ambit of Standing Order 67.

4.23 SO 67 provides:

(1) For the purposes of this Standing Order, a "regulation" includes any statutory instrument made subject to disallowance by a written law.

(2) A notice of motion to disallow a regulation shall have precedence over other notices of motion.

(3) If a notice of motion to disallow a regulation has not been moved at the expiration of 2 sitting days after the day on which notice was given, that motion shall be deemed to have been moved *pro forma* upon that expiration.

(4) An order of the day to disallow a regulation has precedence over other orders of the day.

(5) Where –

(a) on the 17th sitting day after the motion was moved (exclusive of the day on which the motion was moved); or

(b) on the proposed last sitting day prior to a general election,

a motion to disallow remains unresolved, then the question shall be put before the Council rises on that day.

¹³ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, report 123, *Fair Trading Amendment Bill 2019*, August 2019, p 8.

- 4.24 A Commonwealth amending law would not fall within the ambit of SO 67(1) because it is not a statutory instrument. There is no definition of statutory instrument in the Standing Orders or in the *Interpretation Act 1984*. A statutory instrument is generally accepted to be:
- a rule, order, or administrative regulation having the force of law promulgated by the crown in council, a minister, a local authority, a corporation or other body under power delegated by Parliament.¹⁴
- 4.25 If the term 'statutory instrument' in SO 67 is interpreted in accordance with its ordinary and usual meaning, then primary legislation would not be included in this definition. Commonwealth amending laws are primary legislation and do not fall within the definition of 'regulation' within the meaning of SO 67(1).
- 4.26 SO 67 provides that a disallowance motion is moved automatically after two sitting days and has precedence over other orders of the day.¹⁵ This provides precedence to disallowance motions in the House and ensures that they are not overlooked or ignored.
- 4.27 A default mechanism that prevents the repeated and indefinite postponement of a disallowance motion is contained in SO 67.¹⁶ It requires the disallowance motion to be dealt with on a certain day in the event that the question is not put earlier:
- 17th sitting day after the disallowance motion was moved; or
 - proposed last sitting day prior to a general election.
- 4.28 This procedure ensures a vote on the disallowance motion. It prevents a disallowance motion remaining on the Notice Paper unresolved.
- 4.29 If a Commonwealth amending law does not come within the ambit of SO 67 a disallowance motion may be overlooked by the House and not be debated before the 30 day disallowance period has expired in the Bill.
- 4.30 This scenario frustrates Parliament's law making powers because Parliament would not have an opportunity to decide whether the Commonwealth amending law should be disallowed.
- 4.31 If the Commonwealth amending law came within the ambit of SO 67, then any disallowance motion moved in respect to it would be given priority on the Notice Paper and be brought on for debate pursuant to the timeframes in SO 67(5).

Minister's position

- 4.32 The Committee asked the Minister why the Bill does not ensure that a disallowance motion will be debated in the Legislative Council. The Minister's position is:

...it is considered more appropriate for Parliament to address the procedural issue of bringing on notices of motion for disallowance of any Commonwealth amendments for debate by way of relevant Standing Orders, the same way that it provides for other notices of motion. Parliament can then make whatever amendments it considers appropriate to Standing Orders to deal with procedural matters and provide for appropriate scrutiny of Commonwealth amendments.

It is noted that the same disallowance mechanism is proposed in the Legal Profession Uniform Law Application Bill 2021 which is currently before the Legislative Assembly. It is also intended that the same mechanism will be used for

¹⁴ Merriam-Webster online dictionary, See: <https://www.merriam-webster.com/dictionary/statutory%20instrument>, Viewed 21 July 2021.

¹⁵ Standing Order 67(3) and Standing Order 67(4)

¹⁶ Standing Order 67(5)

adoption of amendments in other national legislation schemes in the future. By addressing this issue in the Standing Orders, Parliament can establish a suitable procedure for this form of disallowance mechanism to apply to all such disallowance mechanisms.¹⁷

Committee Comment

- 4.33 Parliament's sovereignty and law making powers are diminished if there is nothing in the Bill to ensure that a disallowance motion will be debated. Parliament may be denied the opportunity to consider the Commonwealth amending law, thus eroding Parliamentary sovereignty.

FINDING 1

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

- 4.34 Bringing Commonwealth amending laws within the ambit of SO 67(1), ensures that disallowance motions are automatically moved under SO 67(3) and brought on for debate.
- 4.35 Commonwealth amending laws would be included in the definition of 'regulation' in SO 67 if the word 'statutory' is deleted because they are instruments made subject to disallowance by a written law.

FINDING 2

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'.

- 4.36 The Minister advised there will be further Bills introduced into the Parliament that will contain this disallowance mechanism in relation to Commonwealth amending laws.
- 4.37 Amendment of SO 67(1) would ensure that all Commonwealth amending laws are included in the definition of 'regulation'. This means Parliament is given an opportunity to debate a disallowance motion regarding a Commonwealth amending law the same as most other disallowable 'regulations'.

RECOMMENDATION 1

The Legislative Council delete Standing Order 67(1) of the Standing Orders of the Legislative Council and replace it as follows:

For the purpose of this Standing Order, a "regulation" includes any instrument made subject to disallowance by a written law.

- 4.38 The amendments to SO 67(1) pursuant to recommendation 1 should be coordinated with the passage of the Bill. This ensures that all future disallowance motions made under the FTA fall within the ambit of SO 67.

¹⁷ Hon Amber-Jade Sanderson MLA, Minister for Commerce, letter, 8 July 2021, p 2.

RECOMMENDATION 2

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 in the terms set out in recommendation 1.

Scrutiny of a Commonwealth amending law by a Parliamentary committee

4.39 The Bill does not provide for a Parliamentary committee to scrutinise a Commonwealth amending law. The Legislative Council may refer a particular Commonwealth amending law to a Parliamentary committee but currently Commonwealth amending laws do not fall within the terms of reference of any Legislative Council standing committee.

Joint Standing Committee on Delegated Legislation

4.40 Most regulations and subsidiary legislation fall within the terms of reference of the Joint Standing Committee on Delegated Legislation (JSCDL). This provides Parliament with JSCDL oversight for the majority of subsidiary legislation tabled in Parliament.

4.41 The JSCDL scrutinises instruments referred to it in accordance with Joint Rule 10.6¹⁸, which requires the committee to consider whether an instrument:

- is within power
- has no unintended effect on any person's existing rights or interests
- provides an effective mechanism for the review of administrative decisions
- contains only matter that is appropriate for subsidiary legislation.

4.42 The JSCDL scrutinises instruments referred to it under Joint Rule 10.5:

Upon its publication, whether under s41(1)(a) of the Interpretation Act 1984 or another written law, an instrument stands referred to the Committee for consideration.¹⁹

4.43 The *Interpretation Act 1984* defines 'written law' in section 5:

written law means all Acts for the time being in force and all subsidiary legislation for the time being in force.

4.44 Commonwealth amending laws are not published under a written law of Western Australia and they do not come within section 41(1)(a) of the *Interpretation Act 1984*. That is why they do not fall under the terms of reference of the JSCDL.

4.45 For the amending law to come within the terms of reference of the JSCDL, the Bill needs to be amended to include that the laying of the amending law on the table in the House is taken to constitute 'publication' under the FTA.

¹⁸ Legislative Council Standing Orders Schedule 1: Committees Joint Rule 10.6

¹⁹ *ibid.*, Joint Rule 10.5

Minister's position

4.46 The Committee sought the Minister's view regarding an amendment to bring the Commonwealth amending laws within the terms of reference of the JSCDL. The Minister responded:

The recommendation that the Bill be amended to state that a Commonwealth amending law is taken to be published under the *Fair Trading Act 2010* (WA) (Act) was made by the former Committee in the context that the Commonwealth amending law was to be subject to Standing Order 67 and subject to disallowance in a manner akin to that for regulations. It was noted by the former Committee in this context that the JSCDL has the responsibility for inquiring into and recommending the disallowance of regulations and other subsidiary legislation. It was also noted that the requirement for publication of Commonwealth amending laws is necessary only if Commonwealth amending laws are to be referred to the JSCDL.

As I advised in my letter of 8 July 2021, as a matter of policy, references to Standing Orders were removed from the Bill. In line with that position, it is considered more appropriate for Parliament to address the matter of a referral of a Commonwealth amending Act to a Parliamentary Committee and which Committee that is by way of Standing Orders rather than in the Bill. Parliament can then make whatever amendments it considers appropriate to Standing Orders to deal with procedural matters and provide for appropriate scrutiny of Commonwealth amendments.²⁰

Committee comment

4.47 The Bill implements a system where Commonwealth laws are incorporated into Western Australian law without the need for a bill to be considered by the House each time the ACL WA is updated. The majority of the Legislative Council may be unaware of changes to the ACL WA unless a Member of the Council brings those changes to their attention.

4.48 The Minister's response to the Committee in paragraph 4.46 suggests that the Government did not amend the Bill to provide for publication of Commonwealth amending laws because the recommendation by the former Committee 'was made in the context that the Commonwealth amending law was to be subject to Standing Order 67 and subject to disallowance in a manner akin to that for regulations'.²¹

4.49 Amendment to the Bill that a Commonwealth amending law is taken to be published upon tabling can be made without amendment to SO 67. If this amendment is made without amendment to SO 67, the disallowance procedure in proposed clause 6 will apply. The JSCDL would be able to scrutinise the Commonwealth amending law and be able to:

- move a motion to disallow a Commonwealth amending law pursuant to proposed section 19B(1)
- provide a disallowance report to both Houses before the expiry of the disallowance period in proposed section 19B(1).

4.50 Parliamentary sovereignty will be enhanced if a Parliamentary committee has oversight over the Commonwealth amending laws. Parliament can only benefit from additional scrutiny and the ability for the JSCDL to be able to move a disallowance motion.

²⁰ Hon Amber-Jade Sanderson MLA, Minister for Commerce, letter, 20 July 2021, pp 1-2.

²¹ *ibid.*, p 1.

FINDING 3

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

- 4.51 The Committee considers that proposed section 19A should be amended to include the phrase at the end of the sentence, 'and upon being laid before each House is taken to be published under this Act.' Proposed section 19A would then read as follows:

19A. Tabling amending laws

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 and upon being laid before each House is taken to be published under this Act.

RECOMMENDATION 3

The Fair Trading Amendment Bill 2021 be amended as follows:

Clause 6

Page 4, line 7 – To delete "Assent." and insert:

Assent and upon being laid before each House is taken to be published under this Act.



Hon Donna Faragher MLC
Chair

APPENDIX 1

FAIR TRADING AMENDMENT BILL 2021

Western Australia

Fair Trading Amendment Bill 2021

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Western Australia

LEGISLATIVE COUNCIL

Fair Trading Amendment Bill 2021

A Bill for

An Act to amend the *Fair Trading Act 2010*.

The Parliament of Western Australia enacts as follows:

Fair Trading Amendment Bill 2021

s. 1

1 **1. Short title**

2 This is the *Fair Trading Amendment Act 2021*.

3 **2. Commencement**

4 This Act comes into operation as follows —

- 5 (a) sections 1 and 2 — on the day on which this Act
6 receives the Royal Assent;
7 (b) the rest of the Act — on the day after that day.

8 **3. Act amended**

9 This Act amends the *Fair Trading Act 2010*.

10 **4. Section 17 amended**

11 In section 17(1) insert in alphabetical order:

12

13 *amend* includes replace;

14 *amending law* means a Commonwealth Act that
15 amends either or both of the following —

- 16 (a) Schedule 2 to the *Competition and Consumer*
17 *Act 2010* (Commonwealth);
18 (b) the regulations made under section 139G of that
19 Act;

20

21 **5. Section 19 amended**

22 (1) In section 19(1):

23 (a) delete paragraph (a) and insert:

24

- 25 (a) Schedule 2 to the *Competition and Consumer*
26 *Act 2010* (Commonwealth) as in force on

1 1 June 2021 and as amended by each provision
2 that —

3 (i) is in an amending law that has effect for
4 the purposes of this section under
5 section 19B; and

6 (ii) has come into operation for the purposes
7 of this section under section 19C;

8 and

9

10 (b) in paragraph (b) delete “time.” and insert:

11

12 time, subject to subsection (1A).

13

14 (2) After section 19(1) insert:

15

16 (1A) For the purposes of subsection (1)(b), a provision of an
17 amending law does not amend regulations made under
18 the *Competition and Consumer Act 2010*
19 (Commonwealth) section 139G unless —

20 (a) the amending law has effect for the purposes of
21 this section under section 19B; and

22 (b) the provision has come into operation for the
23 purposes of this section under section 19C.

24

25 Note: The heading to amended section 19 is to read:

26 **Application of Australian Consumer Law text**

1 **6. Sections 19A to 19D inserted**

2 After section 19 insert:

3

4 **19A. Tabling amending laws**

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

8 **19B. Disallowance of amending laws**

9 (1) In this section —

10 *disallowance period*, in relation to a disallowance
11 resolution notice of which is given in a House of
12 Parliament, means the period of 30 sitting days of the
13 House after the day on which the notice is given;

14 *disallowance resolution* means a resolution that an
15 amending law be disallowed;

16 *notice period*, in relation to an amending law laid
17 before a House of Parliament under section 19A,
18 means the period of 14 sitting days of the House after
19 the day on which the amending law is laid before it.

20 (2) An amending law has effect for the purposes of
21 section 19 if the amending law is laid before each
22 House of Parliament under section 19A and either —

23 (a) no notice of a disallowance resolution is given
24 in either House within the notice period; or

25 (b) at least 1 notice of a disallowance resolution is
26 given in a House within the notice period and,
27 for each such notice, 1 of the following
28 applies —

29 (i) the notice is withdrawn or discharged
30 within the disallowance period;

- 1 (ii) the disallowance resolution is lost in the
2 House or not agreed to within the
3 disallowance period.
- 4 (3) For the purposes of this section and section 19A —
- 5 (a) the period specified in section 19A, a notice
6 period or a disallowance period continues to
7 run even though a House of Parliament is
8 prorogued or dissolved or expires; and
- 9 (b) notice of a disallowance resolution given in a
10 House of Parliament, or a motion that an
11 amending law be disallowed in the House, does
12 not lapse even though the House is prorogued
13 or dissolved or expires.

14 **19C. Commencement of amending laws**

- 15 (1) In this section —
- 16 *amending provision* means a provision of an amending
17 law that amends either or both of the following —
- 18 (a) Schedule 2 to the *Competition and Consumer*
19 *Act 2010* (Commonwealth);
- 20 (b) the regulations made under section 139G of that
21 Act.
- 22 (2) If, under section 19B(2), an amending law has effect
23 for the purposes of section 19, the Governor must
24 declare that fact by proclamation as soon as
25 practicable.
- 26 (3) If an amending provision has come into operation in
27 the Commonwealth before the proclamation is
28 published in the *Gazette*, the amending provision
29 comes into operation for the purposes of section 19 on
30 a day fixed by the proclamation.

s. 7

1 (4) If an amending provision has not come into operation
2 in the Commonwealth before the proclamation is
3 published in the *Gazette*, the amending provision
4 comes into operation for the purposes of section 19
5 when the amending provision comes into operation in
6 the Commonwealth in accordance with the amending
7 law.

8 **19D. Amending laws enacted after 1 June 2021 but**
9 **before commencement day**

10 If an amending law receives the Royal Assent after
11 1 June 2021 but before the day (*commencement day*)
12 on which the *Fair Trading Amendment Act 2021*
13 section 6 comes into operation, sections 19A to 19C
14 apply to the amending law as if the amending law
15 received the Royal Assent on commencement day.
16

17 **7. Section 36 deleted; particular regulations repealed**

- 18 (1) Delete section 36.
- 19 (2) The *Fair Trading (Permitted Calling Hours) Regulations 2014*
20 are repealed.



APPENDIX 2

LETTER FROM THE MINISTER DATED 8 JULY 2021



Hon Amber-Jade Sanderson MLA
Minister for Environment; Climate Action; Commerce

Our Ref: 76-02559
Your Ref: A896895

Hon Donna Faragher MLC
Chair
Standing Committee on Uniform Legislation and Statutes Review
By email: unileg@parliament.wa.gov.au

Dear Ms Faragher

Donna
FAIR TRADING AMENDMENT BILL 2021

Thank you for your correspondence of 1 July 2021, regarding the referral of the Fair Trading Amendment Bill 2021 (the Bill) to the Standing Committee on Uniform Legislation and Statutes Review (Committee).

The following are the responses to the questions raised by the Committee in respect of the Bill:

1.1. Why was proposed section 19E of the 2019 Bill deleted from the Bill?

Clause 19E was added to the Bill as a result of the review of the Fair Trading Amendment Bill 2018 by the Committee in November 2018 (Report 119). The former Committee was concerned that a notice of motion to disallow a Commonwealth amendment might not be accorded a priority for debate that would allow it to be dealt with in a timely way, and might, as a result, lapse without consideration.

Clause 19E addressed that concern by providing that, where a Standing Order of a House sets out a procedure for dealing with a disallowance motion in respect of regulations, the standing order would apply to disallowance motions in respect of Commonwealth amendments to the Australian Consumer Law.

When the mechanism was considered for a second time by the former Committee in August 2019 (Report 123) it was concerned that should Standing Order 67 (the current Standing Order in that regard) be amended or repealed, the disallowance mechanism might not work effectively. The former Committee was also concerned that the modification of Standing Order 67 in Clause 19E might conflict with the principle of comity between the Houses of Parliament, as it would involve the Legislative Assembly considering and deciding on a statutory modification of the procedural rules of the Legislative Council.

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As a matter of policy, it is preferable for all references to Standing Orders to be removed from the Bill. Parliament can then make whatever amendments it considers appropriate to Standing Orders to deal with procedural matters and provide for appropriate scrutiny of Commonwealth amendments. This approach is consistent with advice provided to the Department of Mines, Industry Regulation and Safety – Consumer Protection Division by Parliamentary Counsel.

1.2: Why was a clause not included in the Bill that would ensure that a notice of motion to disallow an amending law would be put as a question to the House after a defined number of sitting days? (Similar to the effect of SO67(5))

As for question 1.1, it is considered more appropriate for Parliament to address the procedural issue of bringing on notices of motion for disallowance of any Commonwealth amendments for debate by way of the relevant Standing Orders, the same way that it provides for other notices of motion. Parliament can then make whatever amendments it considers appropriate to Standing Orders to deal with procedural matters and provide for appropriate scrutiny of Commonwealth amendments.

It is noted that the same disallowance mechanism is proposed in the Legal Profession Uniform Law Application Bill 2021 which is currently before the Legislative Assembly. It is also intended that the same mechanism will be used for the adoption of amendments in other national legislation schemes in the future. By addressing this issue in Standing Orders, Parliament can establish a suitable procedure for this form of disallowance mechanism to apply to all such disallowance mechanisms.

If the Committee requires further information, I will be pleased to provide it.

Kind regards



HON AMBER-JADE SANDERSON MLA
MINISTER FOR COMMERCE

8 JUL 2021

APPENDIX 3

LETTER FROM THE MINISTER DATED 20 JULY 2021



Hon Amber-Jade Sanderson MLA
Minister for Environment; Climate Action; Commerce

Our Ref: 76-02970

Your Ref: A899973

Hon Donna Faragher MLC
Chair
Standing Committee on Uniform Legislation and Statutes Review
By email: unileg@parliament.wa.gov.au

Dear Ms Faragher

FAIR TRADING AMENDMENT BILL 2021

Thank you for your correspondence of 15 July 2021, regarding my letter of 8 July 2021 responding to the Committee's questions about the Fair Trading Amendment Bill 2021 (the Bill).

The following are the responses to the questions raised by the Committee about my views on:

- an amendment to the Bill that the amending law is taken to be published upon tabling; and
- each amending law being referred to the Joint Standing Committee on Delegated Legislation (JSCDL) for review upon tabling.

The recommendation that the Bill be amended to state that a Commonwealth amending law is taken to be published under the *Fair Trading Act 2010 (WA) (Act)* was made by the former Committee in the context that the Commonwealth amending law was to be subject to Standing Order 67 and subject to disallowance in a manner akin to that for regulations.¹ It was noted by the former Committee in this context that the JSCDL has the responsibility for inquiring into and recommending the disallowance of regulations and other subsidiary legislation. It was also noted that the requirement for "publication" of Commonwealth amending laws is necessary only if Commonwealth amending laws are to be referred to the JSCDL.

¹ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, report 123, *Fair Trading Amendment Bill 2019*, August 2019, p. 15.

As I advised in my letter of 8 July 2021, as a matter of policy, references to Standing Orders were removed from the Bill. In line with that position, it is considered more appropriate for Parliament to address the matter of a referral of a Commonwealth amending Act to a Parliamentary Committee and which Committee that is by way of Standing Orders rather than in the Bill. Parliament can then make whatever amendments it considers appropriate to Standing Orders to deal with procedural matters and provide for appropriate scrutiny of Commonwealth amendments.

This approach is consistent with advice provided to the Department of Mines, Industry Regulation and Safety - Consumer Protection Division by Parliamentary Counsel.

If the Committee requires further information, I will be pleased to provide it.

Kind regards



HON AMBER-JADE SANDERSON MLA
MINISTER FOR COMMERCE

20 JUL 2021

GLOSSARY

Term	Definition
ACL	Australian Consumer Law
ACL WA	<i>Australian Consumer Law (WA)</i>
Bill	Fair Trading Amendment Bill 2021
Committee	Standing Committee on Uniform Legislation and Statutes Review
Commonwealth amending law	A Commonwealth Act that applies amendments to the ACL to the ACL WA
FTA	<i>Fair Trading Act 2010</i>
House	The Legislative Council of Western Australia
JSCDL	Joint Standing Committee on Delegated Legislation
Legislative Council	The Legislative Council of Western Australia
Minister	Hon Amber-Jade Sanderson MLA, Minister for Commerce
SO 67	Legislative Council Standing Order 67
2018 Bill	Fair Trading Amendment Bill 2018
2019 Bill	Fair Trading Amendment Bill 2019

Standing Committee on Uniform Legislation and Statutes Review

Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

'6. Uniform Legislation and Statutes Review Committee

- 6.1 *A Uniform Legislation and Statutes Review Committee is established.*
- 6.2 The Committee consists of 4 Members.
- 6.3 The functions of the Committee are –
 - (a) to consider and report on Bills referred under Standing Order 126;
 - (b) on reference from the Council, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to Standing Order 126;
 - (c) to review the form and content of the statute book; and
 - (d) to consider and report on any matter referred by the Council.
- 6.4 In relation to function 6.3(a) and (b), the Committee is to confine any inquiry and report to an investigation as to whether a Bill or proposal may impact upon the sovereignty and law-making powers of the Parliament of Western Australia.'



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