

**40TH PARLIAMENT**



## **Report 119**

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

*Fair Trading Amendment Bill 2018*

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Presented by  
Hon Michael Mischin (Chairman)

November 2018

## **Standing Committee on Uniform Legislation and Statutes Review**

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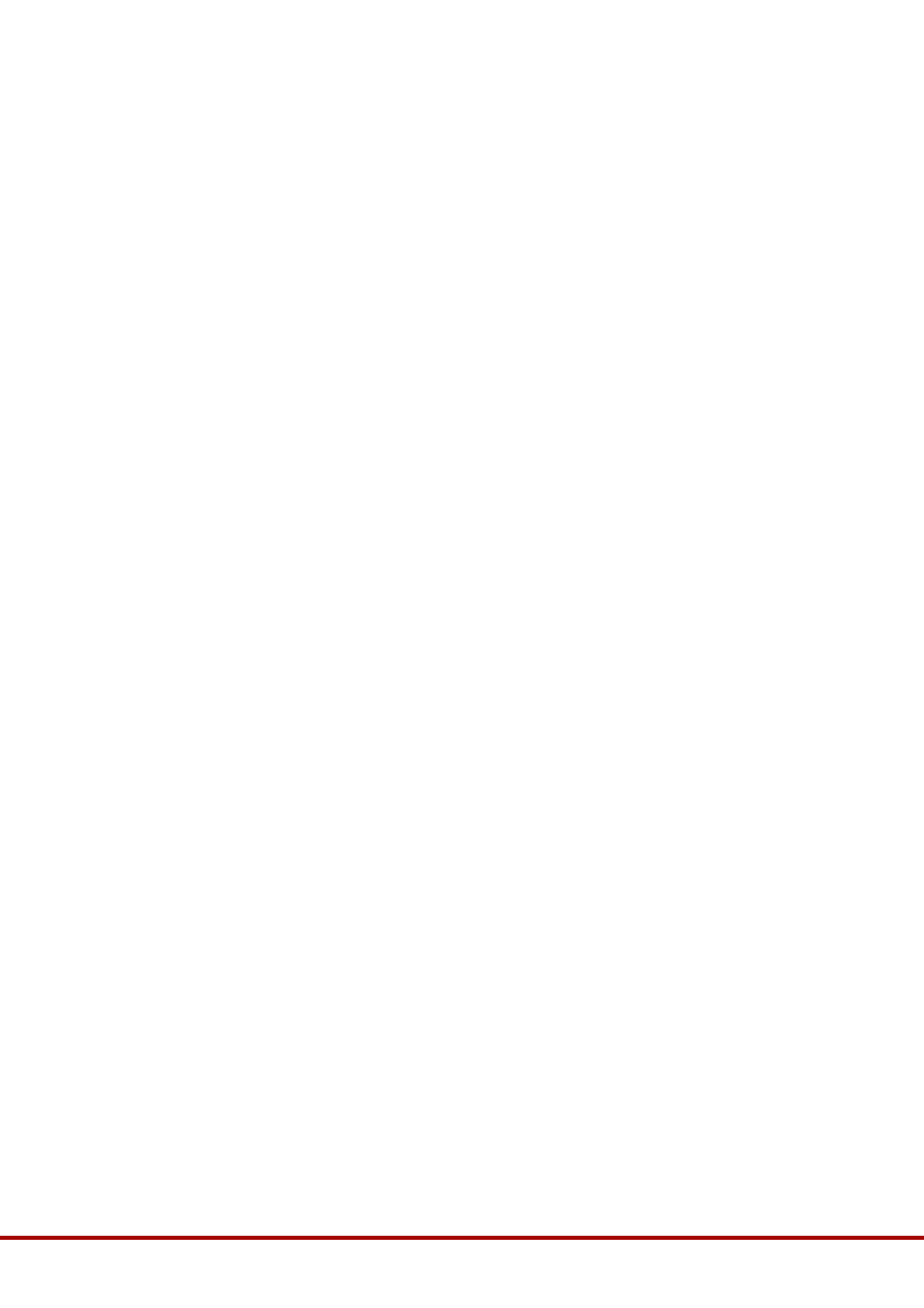
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## EXECUTIVE SUMMARY

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- 1 The Council of Australian Governments (COAG) agreed to implement the legislative elements of the national consumer policy framework by way of an Australian Consumer Law (ACL), to be enacted by the Commonwealth and applied by State and Territory legislation.
- 2 By virtue of section 51(xx) of the Australian Constitution, the ACL applies in Western Australia to any corporation. However, section 51(xx) does not capture all corporate and business entities. Due to these limitations on Commonwealth legislative power, power to legislate in respect of other corporate and business entities falls within the jurisdiction of State and Territory Parliaments.
- 3 The COAG agreed that each State and Territory government would introduce into its Parliament a bill or bills to enact application Acts which would apply the ACL in its jurisdiction. In Western Australia, this legislation is the *Fair Trading Act 2010* (Act). The Act adopted a point-in-time version of the ACL, being the *Australian Consumer Law WA* (ACL WA).
- 4 The manner in which the Act applied the ACL WA has resulted in a time lag between amendments to the ACL and the application of those amendments in Western Australia. This means that different laws apply to State and Commonwealth entities.
- 5 At the time the Fair Trading Amendment Bill 2018 (Bill) was referred to the Committee, six Commonwealth Acts had amended the ACL since 1 January 2013 that were yet to be incorporated into the ACL WA. Since the Committee received the referral, an additional two Commonwealth Acts have amended the ACL.
- 6 The Bill proposes to address the time lag problem by amending the Act to align the ACL WA with the ACL in other jurisdictions by:
  - applying the amendments to the ACL made by the eight Commonwealth Acts to the ACL WA
  - providing a mechanism for the automatic incorporation of future amendments to the ACL into the ACL WA unless the amendments are disallowed by Parliament.
- 7 To effect the changes, the Bill proposes to apply the ACL as in force from time to time as the ACL WA.
- 8 The Bill includes a mechanism for all future Commonwealth amendments to the ACL to be tabled in both Houses and be subject to disallowance by either House.
- 9 The Committee has identified that the:
  - proposal to apply the ACL as in force from time to time
  - disallowance process as proposedimpact upon the sovereignty and law-making powers of the Parliament of Western Australia.
- 10 The Committee has also identified an option that may address that concern.

## Findings and recommendations

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

### FINDING 1

Page 5

There is no intergovernmental agreement for the Fair Trading Amendment Bill 2018.

### FINDING 2

Page 15

Clause 5 of the Fair Trading Amendment Bill 2018, by proposing to apply any amending law of the Commonwealth as a law of Western Australia 'from time to time', derogates from Western Australia's Parliamentary sovereignty.

### RECOMMENDATION 1

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Clause 5 of the Fair Trading Amendment Bill 2018 not be passed unless the Fair Trading Amendment Bill 2018 contains, or is amended to provide, a satisfactory mechanism by which future amending laws can be scrutinised and open to disallowance by the Western Australian Parliament.

### FINDING 3

Page 21

The disallowance mechanism proposed in clause 6 of the Fair Trading Amendment Bill 2018 makes an attempt at, but falls short of, preserving Western Australia's Parliamentary sovereignty.

### RECOMMENDATION 2

Page 23

Clause 6 of the Fair Trading Amendment Bill 2018 be deleted and replaced with an alternative disallowance mechanism, possibly one similar to that in section 43 of the *Land Administration Act 1997*, so that an amending law does not take effect in Western Australia until certain conditions precedent are met, such as:

- the amending law is published in the *Government Gazette* within a specified time
- the amending law is to be tabled in both Houses of Parliament within a certain number of sitting days of the House after the day on which the amending law receives the Royal Assent
- a certain number of sitting days of the House are provided to give notice of motion to disallow the amending law
- a vote on the disallowance motion is taken within a specified time
- a requirement that the amending law not take effect unless no notice of motion is given within the specified time or a House resolves to negative the disallowance motion.

The replacement for clause 6 to the Bill would also need to:

- specify that it does not matter whether or not the period within which notice of motion to disallow is given occurs during the same session of Parliament or the same Parliament
- specify when the amending law will take effect if conditions precedent are met, for example:
  - no notice of motion: on the day next following the last day on which notice of motion could be given
  - disallowance negated: on the day next after the amending law is not subject to disallowance
- require the Clerk of the Parliaments to publish the disallowance of the amending law in the *Government Gazette*.

**FINDING 4**

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Legislative Council committees, as an extension of the Legislative Council, have a crucial role in reviewing proposed laws. This role cannot be performed unless adequate provision is made by both legislation and Standing Orders to enable effective scrutiny of those proposed laws.

**FINDING 5**

Page 24

If the tabling and disallowance mechanism proposed in clause 6 of the Fair Trading Amendment Bill 2018 becomes a template for future national legislative schemes, Parliament's sovereignty and law-making powers will be adversely affected, along with its ability to scrutinise laws becoming part of the law of Western Australia.

**RECOMMENDATION 3**

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Should clause 6 of the Fair Trading Amendment Bill 2018 or some alternative model be enacted, the Legislative Council consider amending its Standing Orders to enable the timely and effective scrutiny of, and reporting on, amending laws by a Parliamentary committee prior to them commencing operation in Western Australia.





# 1 Introduction

- 1.1 On 27 June 2018, the Minister for Regional Development (Minister) introduced the Fair Trading Amendment Bill 2018 (Bill) into the Legislative Council. During her second reading speech, the Minister advised that the Bill 'would not, pursuant to standing order 126, be considered to be a uniform legislation bill as it does not in itself give effect to a national agreement or introduce a uniform laws scheme.'<sup>1</sup>
- 1.2 The Minister moved a motion without notice to refer the Bill to the Standing Committee on Uniform Legislation and Statutes Review (Committee) under Legislative Council Standing Order 128 (SO 128) for consideration and report.<sup>2</sup> The motion was agreed to by the Legislative Council.<sup>3</sup>
- 1.3 The Committee was required to report to the House by 14 August 2018, being the first Legislative Council sitting day following the expiry of the 45 day reporting timeframe.
- 1.4 On 28 June 2018, the Committee sought an extension of the time in which it was to report to the Legislative Council from 14 August 2018 to 18 September 2018.<sup>4</sup> That extension of time was granted on 28 June 2018.<sup>5</sup>
- 1.5 On 27 August 2018, the Committee resolved to seek a further extension of the time in which it was to report to the Legislative Council from 18 September 2018 to 20 November 2018.<sup>6</sup> That extension of time was granted on 12 September 2018.<sup>7</sup>
- 1.6 The Bill proposes to amend the *Fair Trading Act 2010* (Act) to bring the *Australian Consumer Law (WA)* (ACL WA) into alignment with the Australian Consumer Law (ACL) in other Australian jurisdictions.<sup>8</sup> It also introduces a mechanism for the automatic incorporation of future amendments to the ACL into the ACL WA subject to the amendments being disallowed by Parliament.
- 1.7 There is no intergovernmental agreement supporting the Bill. The amendments have arisen to address the continuing problem of there being a time lag between amendments to the ACL and the application of those amendments to the ACL WA.
- 1.8 This report includes discussion and analysis of the:
  - manner in which the Bill was referred to the Committee
  - lack of any intergovernmental agreement supporting the Bill
  - Bill.

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<sup>1</sup> Hon Alannah MacTiernan MLC, Minister for Regional Development, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 27 June 2018, p 3903.

<sup>2</sup> *ibid.*, p 3904.

<sup>3</sup> Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 27 June 2018, p 3904.

<sup>4</sup> Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 114, *Fair Trading Amendment Bill 2018 – Extension of time*, June 2018.

<sup>5</sup> Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 28 June 2018, p 4108.

<sup>6</sup> Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 116, *Fair Trading Amendment Bill 2018 – Extension of time*, September 2018.

<sup>7</sup> Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 12 September 2018, p 5660.

<sup>8</sup> What constitutes the ACL and the ACL WA is discussed in paragraphs 5.18, 5.39 and paragraph 5.45 of this report. The application of the ACL and the ACL WA is discussed in paragraphs 5.45 to 5.48 of this report.

- 1.9 To provide context to the Bill, the report also discusses the:
- national Australian Consumer Law scheme
  - Fair Trading Bill 2010 (2010 Bill), the Acts Amendment Fair Trading Bill 2010 (2010 Amendment Bill) and the Committee's report on those bills
  - Fair Trading Amendment Bill 2013 (2013 Bill) and the Committee's report on that bill.

## 2 Inquiry procedure

- 2.1 The Committee posted the inquiry on its website at [Uniform Legislation Committee homepage](#). The general public was immediately notified of the referral via social media.<sup>9</sup>
- 2.2 Given the Committee's terms of reference, the Committee considered that any broader advertising or invitation for submissions from the public was neither necessary nor warranted.
- 2.3 The Committee conducted a private hearing with representatives from the Department of Mines, Industry Regulation and Safety – Consumer Protection Division (Department) on 22 August 2018: Mr David Hillyard, the Commissioner for Consumer Protection (Commissioner), Ms Catherine Scott, General Manager, Legislation and Policy and Ms Patricia Blake, Senior Policy Officer. The Committee thanks them for their assistance with the inquiry.
- 2.4 The opening comments made by the Commissioner for Consumer Protection are attached as Appendix 1.
- 2.5 The Committee also received an unsolicited submission by way of letter from the Consumer Credit Legal Service (WA) Inc. dated 24 August 2018 setting out its support for the Bill.

## 3 Supporting documents

- 3.1 The Committee received copies of the Bill, the second reading speech and the Explanatory Memorandum when the Bill was introduced into the Legislative Council.
- 3.2 Before the Bill was introduced into the Legislative Council, Hon Bill Johnston MLA, Minister for Commerce and Industrial Relations forwarded to the Committee the information required pursuant to Ministerial Office Memorandum MM 2007/01.<sup>10</sup>
- 3.3 Legislative Council 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 ...
- 3.4 The Committee extends its appreciation to the Minister for Commerce and Industrial Relations for the timely provision of the supporting documentation and information.

## 4 Referral process

- 4.1 As noted above, the Minister's second reading speech advised that the Bill was not a Uniform Legislation Bill for the purposes of Legislative Council Standing Order 126 (SO 126).

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<sup>9</sup> Legislative Council, 27 June 2018, retrieved from <https://twitter.com/WALegCouncil/status/1011879093669777410>.

<sup>10</sup> Hon Bill Johnston MLA, Minister for Commerce and Industrial Relations, Letter, 26 June 2018.

4.2 The Minister said:

Nevertheless, the bill may be referred to the Standing Committee on Uniform Legislation and Statutes Review and it is my intention to move a motion without notice to refer the bill to the committee pursuant to standing order 128(1) on the basis that it proposes amendments to a uniform legislation scheme that may have implications for parliamentary sovereignty and it is appropriate for the committee to consider that issue.<sup>11</sup> [Emphasis added]

4.3 On 27 June 2018 the Legislative Council referred the Bill to the Committee under SO 128.<sup>12</sup>

#### **Committee comment**

4.4 The Committee notes that the Minister stated, as provided for in SO 126(1), that the Bill was not a Uniform Legislation Bill and gave reasons for that opinion. The Council did not order that the Bill was a Uniform Legislation Bill as was open to it to do so under SO 126(3), as the Minister moved its referral under SO 128 and that referral was agreed.

4.5 The Committee questions the Minister's advice to the Council that the Bill is not a Uniform Legislation Bill within the meaning of SO 126(2). SO 126(2) provides that:

For the purposes of these Standing Orders, a Uniform Legislation Bill is a Bill that –

(a) ratifies or gives effect to a bilateral or multilateral intergovernmental agreement to which the Government of the State is a party; or

(b) by reason of its subject matter, introduces a uniform scheme or uniform laws throughout the Commonwealth.

4.6 As has been foreshadowed and will become clear from the report, the Bill introduces a mechanism for the automatic incorporation of Commonwealth law into the law of Western Australia to govern those who would not ordinarily be subject to that Commonwealth law and without prior Western Australian Parliamentary scrutiny.

4.7 Accordingly, the Committee is of the view that it does, through that mechanism, propose to introduce 'a uniform scheme or uniform laws throughout the Commonwealth' within the meaning of SO 126(2)(b).

4.8 The Committee's function as stated in its term of reference 6.4 is to direct and 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'. Having regard to the Minister's concession that the Bill 'proposes amendments to a uniform legislation scheme that may have implications for parliamentary sovereignty'<sup>13</sup> it would seem precisely the sort of bill the Council intended the Committee to consider, analyse and advise it upon as a matter of course under SO 126(1).

4.9 Notwithstanding that the Bill was referred under SO 128, having regard to its terms of reference and function, the Committee has conducted its inquiry as if the Bill had been referred under SO 126.

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<sup>11</sup> Hon Alannah MacTiernan MLC, Minister for Regional Development, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 27 June 2018, p 3903.

<sup>12</sup> Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 27 June 2018, p 3904.

<sup>13</sup> Hon Alannah MacTiernan MLC, Minister for Regional Development, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 27 June 2018, p 3903.

4.10 The Committee considers that more detailed reasons for saying that a Bill is not a Uniform Legislation Bill for the purposes of SO 126 should be provided in a second reading speech than were given in this case.

## 5 Background

5.1 The Committee has considered the following background information in its review of the Bill, namely, the:

- intergovernmental agreement
- process for amending the ACL
- Australian Consumer Law scheme
- Fair Trading Bill 2010
- Fair Trading Amendment Bill 2013
- application of the ACL and the ACL WA
- review of the ACL (June 2015 to March 2017).

### Intergovernmental Agreement

5.2 There is no intergovernmental agreement underpinning the Bill.

5.3 The Council of Australian Governments (COAG) met in October 2008 and agreed to a new national consumer policy framework to enhance consumer protection, reduce regulatory complexity for business and encourage the development of a seamless national economy.<sup>14</sup>

5.4 The Intergovernmental Agreement for the Australian Consumer Law dated 2 July 2009 (ACL IGA)<sup>15</sup> was created to give effect to the National Partnership Agreement to Deliver a Seamless National Economy.

5.5 The COAG agreed to implement the legislative elements of the national consumer policy framework by way of an Australian Consumer Law, to be enacted by the Commonwealth and applied by State and Territory legislation.<sup>16</sup>

5.6 It was agreed that the Commonwealth would introduce into the Australian Parliament a bill or bills to:

- enact the text of the ACL as a schedule to the *Trade Practices Act 1974* (Cth) (TPA)
- amend relevant provisions of the TPA to ensure they are consistent with the ACL
- enact changes to other legislation to ensure they are consistent with the ACL.<sup>17</sup>

5.7 The COAG also agreed that each State and Territory government would introduce into its Parliament a bill or bills to enact application Acts which would apply the ACL (as embodied in the relevant schedule to the TPA and as amended from time to time) in its jurisdiction.<sup>18</sup>

5.8 Western Australia adopted a point-in-time version of the ACL (being 1 January 2011) rather than applying the ACL from time to time. This is discussed in paragraph 5.19 of this report.

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<sup>14</sup> *Intergovernmental Agreement for the Australian Consumer Law* between the Commonwealth of Australia and all Australian States and Territories, 2 July 2009, p 3.

<sup>15</sup> *ibid.* It remains current.

<sup>16</sup> *ibid.*, p 3 and pp 5–6.

<sup>17</sup> *ibid.*, pp 5–6.

<sup>18</sup> *ibid.*, p 6.

- 5.9 The ACL IGA set out the:
- process for alteration of the ACL<sup>19</sup>
  - arrangements for enforcement and administration of the ACL<sup>20</sup>
  - process for withdrawal from the ACL IGA<sup>21</sup>
  - requirements for review of the ACL IGA.<sup>22</sup>

5.10 Western Australia's *Fair Trading Act 2010* was made pursuant to the ACL IGA.

#### **FINDING 1**

There is no intergovernmental agreement for the Fair Trading Amendment Bill 2018.

### **Process for amending the Australian Consumer Law**

- 5.11 As noted above, the ACL IGA sets out, among other things, the process for amending the ACL. That process can be summarised as follows:
- Any party to the ACL IGA may submit to the Commonwealth a valid proposal to amend the ACL.<sup>23</sup>
  - The Commonwealth will commence consultation with all parties within four weeks from the date of receiving a valid proposal. To commence consultation, the Commonwealth Minister will write to the relevant State and Territory Ministers notifying them of the proposed amendment. All parties will have three months within which they are required to consider and respond in writing to the proposal.
  - The Commonwealth does not need to consult with the parties before making minor or inconsequential amendments to the ACL, but must give the parties sufficient notice of its intention to make such amendments. Where four parties advise the Commonwealth Minister in writing within 21 days that they believe the proposed amendments are not minor or inconsequential, then the Commonwealth Minister must submit the proposed amendments to a vote.
  - At the end of the consultation period, or following the notification by four parties that the proposed amendments are not minor or inconsequential, the Commonwealth Minister will call a vote on the proposed amendment by sending a written notice to relevant State and Territory Ministers.
  - Parties will have 35 days from the date the Commonwealth Minister sends notice to vote.
  - If a party does not vote, or does not abstain, by the end of the 35 day voting period, that party will be taken to have voted in favour of the proposed amendment. The only

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<sup>19</sup> *ibid.*, pp 6–8. The ACL IGA permits amendment of the ACL only with the agreement of the Commonwealth and four other parties, including at least three States.

<sup>20</sup> *ibid.*, p 8. Enforcement and administration of the ACL is shared between Commonwealth, State and Territory agencies.

<sup>21</sup> *ibid.*, p 10. A party wishing to withdraw from the ACL IGA must give six months' written notice. The ACL IGA continues in force with respect to the remaining parties.

<sup>22</sup> *ibid.*, p 11. The ACL IGA is to be reviewed after seven years.

<sup>23</sup> A valid proposal shall include a description of the problem to be addressed by the proposal, a description of the key features of the legislative provisions by which it is proposed to address that problem, a discussion of the alternative methods of addressing the problem and provide supporting material: *Intergovernmental Agreement for the Australian Consumer Law* between the Commonwealth of Australia and all Australian States and Territories, 2 July 2009, pp 6–7.

circumstance in which a party may abstain from the vote is if it is in 'caretaker mode' at any time during the 35 day voting period.

- The Commonwealth will not introduce a bill into the Commonwealth Parliament to amend the ACL unless the proposed amendment is supported by the Commonwealth and four other parties, including at least three States.<sup>24</sup>

## Australian Consumer Law Scheme

- 5.12 The ACL introduced a single national law for fair trading and consumer protection, which applies equally in all Australian jurisdictions, to all sectors of the economy and to all Australian consumers and businesses.<sup>25</sup>
- 5.13 It was part of the regulatory reform agenda to develop a seamless national economy. The ACL is said to represent 'the largest reform to Australia's consumer laws in a generation'.<sup>26</sup>
- 5.14 The ACL was based on the existing consumer provisions of the TPA, enhanced by:
- a new national unfair contract terms law
  - a new national product safety legislative and regulatory framework
  - a new national consumer guarantees law, which replaced provisions in 15 national, State and Territory laws dealing with implied warranties and conditions in consumer contracts for goods and services
  - reforms to make the ACL reflective of national consumer policy, which enhance its effectiveness and minimise business compliance costs.<sup>27</sup>
- 5.15 The following key principles underpinned the ACL:
- maintaining consumer protection for all Australian consumers
  - minimising the compliance burden on business
  - creating a law which can apply to all sectors of the economy and to all Australian businesses
  - ensuring that the ACL is clear and easily understood
  - having laws which can be applied effectively by all Australian courts and tribunals.<sup>28</sup>

## Fair Trading Bill 2010

- 5.16 The 2010 Bill and Acts Amendment Fair Trading Bill 2010 (2010 Amendment Bill) were introduced into the Legislative Council on 20 October 2010.
- 5.17 Pursuant to the ACL IGA, the 2010 Bill replaced the *Fair Trading Act 1987*, *Consumer Affairs Act 1971* and *Door to Door Trading Act 1987*.<sup>29</sup>

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<sup>24</sup> *Intergovernmental Agreement for the Australian Consumer Law* between the Commonwealth of Australia and all Australian States and Territories, 2 July 2009, pp 7–8.

<sup>25</sup> Ministerial Council on Consumer Affairs, Joint Communiqué, 4 December 2009, p 2.

<sup>26</sup> *ibid.*

<sup>27</sup> *ibid.*, pp 2–3.

<sup>28</sup> *ibid.*, p 3.

<sup>29</sup> *Intergovernmental Agreement for the Australian Consumer Law*, between the Commonwealth of Australia and all Australian States and Territories, 2 July 2009. It remains current.

- 5.18 It also applied the ACL text which consisted of:
- Schedule 2 to the *Competition and Consumer Act 2010* (Cth)<sup>30</sup> (CCA 2010) as in force on the commencement of section 19 of the Act<sup>31</sup> (but as modified by section 36 of the Act<sup>32</sup>)
  - the regulations made under section 139G of the CCA 2010 as in force from time to time as a law of Western Australia, to be referred to as the *Australian Consumer Law (WA)* (ACL WA).<sup>33</sup> [Emphasis added]
- 5.19 By this application mechanism, Western Australia adopted a point-in-time version of the ACL (being 1 January 2011) but applied the regulations made under section 139G of the CCA 2010 as in force from time to time.<sup>34</sup>
- 5.20 Clause 21 of the 2010 Bill empowered the Western Australian Parliament to disallow specified subsidiary legislation, including regulations made pursuant to section 139G of the CCA 2010, by making the relevant instruments subject to section 42 of the *Interpretation Act 1984*.
- 5.21 Accordingly, on passage of the 2010 Bill, regulations made under section 139G of the CCA 2010 and certain other statutory instruments made under the ACL WA became subject to section 42 of the *Interpretation Act 1984* and therefore are subject to scrutiny by the Joint Standing Committee on Delegated Legislation and subject to disallowance by the Western Australian Parliament.
- 5.22 The 2010 Bill was referred to the Committee pursuant to former Legislative Council Standing Order 230A.<sup>35</sup>

### **Uniform Legislation and Statutes Review Committee Report on the Fair Trading Bill 2010– Report 56**

- 5.23 The Committee provided a comprehensive and detailed analysis of the:
- 2010 Bill and 2010 Amendment Bill
  - Australian Consumer Law Scheme
  - ACL IGA
  - impact of the two bills on State sovereignty and law-making powers
- in its Report 56.<sup>36</sup>

<sup>30</sup> The *Competition and Consumer Act 2010* (Cth) replaced the *Trade Practices Act 1974* (Cth).

<sup>31</sup> Section 19 of the *Fair Trading Act 2010* is the 'Application of Australian Consumer Law' provision. The Fair Trading Bill 2010, including clause 19, commenced operation on 1 January 2011.

<sup>32</sup> Section 36 of the *Fair Trading Act 2010* modifies sections 73 and 170 of the Australian Consumer Law which deal with 'Permitted hours for negotiating an unsolicited agreement'. The Western Australian modifications restrict the times a dealer may call on a person for the purposes of negotiating an unsolicited consumer agreement or for an incidental or related purpose.

<sup>33</sup> *Fair Trading Act 2010* s 19. The application of the ACL WA is discussed in paragraphs 5.45 to 5.48 of this report.

<sup>34</sup> The 'from time to time' approach ensures immediate uniformity across jurisdictions, but unequivocally erodes Parliamentary sovereignty as there is no Parliamentary oversight of amending laws that will apply in Western Australia. See also paragraph 6.24.

<sup>35</sup> Standing Order 126 superseded Standing Order 230A on 6 March 2012. The relevant parts of previous Standing Order 230A and current Standing Order 126 (that is, the definition of a Uniform Legislation Bill) are identical.

<sup>36</sup> Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 56, *Fair Trading Bill 2010 and Acts Amendment Fair Trading Bill 2010*, November 2010.

- 5.24 Information in that report may help to inform Members' consideration of the Bill. The report is available at [this link](#).
- 5.25 The Committee identified a number of concerns with the 2010 Bill. Those relevant to the Committee's current inquiry and its terms of reference are summarised below.

#### *Subsidiary legislation as primary legislation*

- 5.26 The Committee found:
- Clause 19(2) of the 2010 Bill proposed that regulations (which are subsidiary legislation) made pursuant to section 139G of the CCA 2010 apply in Western Australia as primary legislation.<sup>37</sup>
  - There was no requirement in the ACL IGA or the CCA 2010 for regulations made under section 139G of the CCA 2010 to be applied in Western Australia as primary legislation.<sup>38</sup>
  - It is undesirable for the subsidiary legislation of another jurisdiction to be applied as primary legislation in Western Australia and for subsidiary legislation to be treated as primary legislation for some purposes (clause 19 of the 2010 Bill) and subsidiary legislation for others (clauses 21 and 23 of the 2010 Bill) when that inconsistent treatment can, and should, be avoided.<sup>39</sup>
- 5.27 The Committee recommended amending clause 19 to apply regulations made under section 139G of the CCA 2010 as subsidiary legislation forming part of the ACL text for the purposes of that clause.<sup>40</sup>
- 5.28 The Parliament accepted the Committee's recommendation and amended the 2010 Bill accordingly.<sup>41</sup>

#### *Various interpretation legislation*

- 5.29 The Committee found that different parts of the proposed Act would be subject to different interpretation acts and, while the provisions of the State and Commonwealth Acts were largely consistent, this was undesirable. It found, however, that it was a consequence of the uniform legislative scheme.<sup>42</sup>

#### *Schedule 2 of the CCA 2010 not included in 2010 Bill*

- 5.30 The provisions of the ACL WA were not included as text in the 2010 Bill. Instead, the ACL WA was included as a note at the end of the 2010 Bill:

to inform the Parliament of the text of the law that it is asked to enact. It is also intended to assist Parliament to identify whether amendments may be necessary.<sup>43</sup>

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<sup>37</sup> *ibid.*, November 2010, Finding 7.

<sup>38</sup> *ibid.*, Finding 8.

<sup>39</sup> *ibid.*, Finding 9.

<sup>40</sup> *ibid.*, Recommendation 3.

<sup>41</sup> Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 24 November 2010, p 9435 and Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 25 November 2010, pp 9729–9730. Section 19(2)(d) of the *Fair Trading Act 2010* states: 'The Australian Consumer Law text – in so far as it constitutes regulations made under section 139G of the *Competition and Consumer Act 2010* (Commonwealth), is subsidiary legislation for the purposes of this Act'.

<sup>42</sup> Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 56, *Fair Trading Bill 2010 and Acts Amendment Fair Trading Bill 2010*, November 2010, Finding 14.

<sup>43</sup> *ibid.*, p 131.



5.31 The Committee queried why Schedule 2 of the CCA 2010 was not included in the 2010 Bill or another bill.<sup>44</sup> It could not identify any barrier to applying Schedule 2 of the CCA 2010, as modified, by reference to a schedule or even a Part of the 2010 Bill, rather than by merely a note.<sup>45</sup>

5.32 The Committee recommended that Schedule 2 to the CCA 2010, as in force at the time of commencement of section 19 of the Act, be Schedule 2 to the 2010 Bill.<sup>46</sup>

5.33 The Government advised in response:

Schedule 2 of the [CCA 2010] was not included as a schedule to the [2010 Bill] because the Australian Consumer Law had to be applied in Western Australia by reference. The core issue is that the commonwealth's Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010 effectively excludes the operation of any state Australian Consumer Law act that is not an application law. The term "application law" is defined in the commonwealth act to mean any act that applies to [sic] the commonwealth Australian Consumer Law by reference, with or without modifications. If Western Australia were to mirror the commonwealth Australian Consumer Law by including the Australian Consumer Law schedule – that is, restating the commonwealth Australian Consumer Law – it would not be an act that applies the commonwealth Australian Consumer Law by reference. It would be an application law within the meaning of the commonwealth act. This would seriously call into question the capacity of the Fair Trading Bill to operate concurrently with the commonwealth Australian Consumer Law, with the consequence that the state would be giving up all consumer law jurisdiction over corporations in Western Australia to the commonwealth.<sup>47</sup>

5.34 Accordingly, the 2010 Bill was not amended to include the text of the ACL WA and it remains as a note at the end of the Act.<sup>48</sup>

#### *Disregard of the institution of Parliament*

5.35 The Committee expressed concern about what it described as 'the serious disregard for the institution of State Parliament.'<sup>49</sup> It said:

While all uniform legislative schemes represent, to some extent, a derogation of and disregard for State Parliamentary privileges, the circumstances in which this significant legislation - introducing a wide-ranging, generic consumer law with new enforcement and remedy provisions as well as regulating a wider range of matters - has been presented to the Parliament (not all of which are under the control of the government) constitutes a derogation of the superiority of the Parliament beyond the norm.<sup>50</sup>

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<sup>44</sup> *ibid.*, pp 131–137.

<sup>45</sup> *ibid.*, p 135.

<sup>46</sup> *ibid.*, Recommendation 17.

<sup>47</sup> Hon Norman Moore MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 24 November 2010, p 9433.

<sup>48</sup> At the time of tabling this report, the note to the Act shows the version of the text of Schedule 2 to the CCA 2010, as in force on 1 January 2013, as modified by section 36 of the Act and the regulations made under section 116(3) of the *Fair Trading (Permitted Calling Hours) Regulations 2014*. The text of the regulations made under section 139G of the CCA 2010 is not reproduced in the note. They can be accessed at [www.comlaw.gov.au](http://www.comlaw.gov.au).

<sup>49</sup> Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 56, *Fair Trading Bill 2010 and Acts Amendment Fair Trading Bill 2010*, November 2010, p 150.

<sup>50</sup> *ibid.*

5.36 The Committee made no finding or recommendation regarding the matter and the Parliament did not address the issue in its consideration of the 2010 Bill.

### **2010 Bill and 2010 Amendment Bill passed**

5.37 On 24 November 2010, the Legislative Council adopted the Committee's Report 56, made a number of amendments to the 2010 Bill, and passed both the 2010 Bill and the 2010 Amendment Bill.<sup>51</sup> The Legislative Assembly agreed to the Legislative Council amendments the following day.<sup>52</sup> Both bills commenced operation on 1 January 2011. The 2010 Bill became the *Fair Trading Act 2010* (Act).

### **Fair Trading Amendment Bill 2013**

5.38 The 2013 Bill was introduced into the Legislative Council on 15 May 2013.

5.39 The purpose of the 2013 Bill was to amend sections of the Act to reflect changes to the ACL since 1 January 2011. It incorporated Commonwealth amendments to the ACL from 2011 to 2013 to align the ACL WA with the ACL then in force in all other Australian jurisdictions. It did that by amending the reference to 'Australian Consumer Law text' as it applies in Western Australia from Schedule 2 to the CCA 2010 'as in force on 1 January 2011', to Schedule 2 'as in force on 1 January 2013'. [Emphasis added]

5.40 The 2013 Bill was referred to the Committee pursuant to SO 126.

### **Uniform Legislation and Statutes Review Committee Report on the Fair Trading Amendment Bill 2013–Report 80**

5.41 The Committee reported on the 2013 Bill in its Report 80.<sup>53</sup>

5.42 Information in that report may help to inform Members' consideration of the Bill. The report is available at [this link](#).

5.43 The Committee found no Parliamentary sovereignty issues and recommended that the 2013 Bill be passed without amendment.

### **2013 Bill passed**

5.44 The Legislative Council adopted the Committee's Report 80 and passed the 2013 Bill on 12 September 2013. It commenced operation on 30 November 2013.

### **Application of the Australian Consumer Law and the Australian Consumer Law (WA)**

5.45 As a result of the amendments made by the 2013 Bill, the ACL text now consists of:

- Schedule 2 to the CCA 2010 as in force on 1 January 2013 (but as modified by section 36 of the Act)

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<sup>51</sup> Amendments were made to the following clauses of the 2010 Bill: clause 15 (see Recommendation 2 of Report 56), clause 19 (see Recommendation 3 of Report 56), clause 20 (see Recommendation 6 of Report 56), clause 31 (see Recommendation 10 of Report 56), clause 32 (see Recommendation 12 of Report 56) and the Note to Schedule 1 (see Recommendation 19 of Report 56): Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 24 November 2010, pp 9434–9437.

<sup>52</sup> Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 25 November 2010, pp 9729–9730.

<sup>53</sup> Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 80, *Fair Trading Amendment Bill 2013*, August 2013.

- regulations made under section 139G of the CCA 2010 as in force from time to time.<sup>54</sup> [Emphasis added]
- 5.46 The ACL applies in Western Australia to any corporation.<sup>55</sup> Section 131 of the CCA 2010 provides that Schedule 2 applies to the conduct of corporations. In doing this, the Commonwealth relies on section 51(xx) of the Australian Constitution which provides:
- The Parliament shall, subject to this Constitution have power to make laws for the peace, order, and good government of the Commonwealth with respect to ... foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.
- 5.47 Section 51(xx) does not capture all corporate and business entities. Due to these limitations on Commonwealth legislative power, power to legislate in respect of other corporate and business entities falls within the jurisdiction of State and Territory Parliaments. The ACL WA extends the application of the ACL to businesses that operate under a business structure that does not fall within the law-making power of the Commonwealth.
- 5.48 Accordingly, the ACL WA applies to and in relation to:
- persons carrying on business within this jurisdiction
  - bodies corporate incorporated or registered under the law of this jurisdiction
  - persons ordinarily resident in this jurisdiction
  - persons otherwise connected with this jurisdiction.<sup>56</sup>

### **Review of the Australian Consumer Law (June 2015 to March 2017)**

- 5.49 Consumer Affairs Australia and New Zealand completed a review of the ACL in 2017: the Australian Consumer Law Review Final Report (ACL Review).<sup>57</sup> The recommendations of the ACL Review are currently being considered and implemented.<sup>58</sup> The Minister for Commerce and Industrial Relations advised that:

A series of amendments are expected to be made to the Commonwealth legislation [ACL] over the next 2-3 years and early implementation [of the Bill] will provide for the timely and effective incorporation of those amendments into the ACL in Western Australia as well as the incorporation of other amendments made since January 2013.<sup>59</sup>

- 5.50 The Department advised that approvals have been given for:
- a further 15 proposals for amending the ACL that are currently being drafted. Even if our department was able to commit to additional resources to regularly amending the [Act] to align the ACL WA with these proposed upcoming commonwealth amendments, it would be impossible to maintain pace with the

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<sup>54</sup> *Fair Trading Act 2010* s 19(1).

<sup>55</sup> 'Corporation' means 'a body corporate that (a) is a foreign corporation; (b) is a trading corporation formed within the limits of Australia or is a financial corporation so formed; (c) is incorporated in a Territory; or (d) is the holding company of a body corporate of a kind referred to in paragraph (a), (b) or (c): s 4 *Competition and Consumer Act 2010* (Cth).

<sup>56</sup> *Fair Trading Act 2010* s 24(1).

<sup>57</sup> Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review Final Report*, March 2017.

<sup>58</sup> Hon Bill Johnston MLA, Minister for Commerce and Industrial Relations, Letter, 26 June 2018, Attachment A, p 1.

<sup>59</sup> *ibid.*

commonwealth changes because of unavoidable delays in the drafting and passage of amendments to the [Act], and the electoral cycle.<sup>60</sup>

## 6 Fair Trading Amendment Bill 2018

- 6.1 As noted in paragraph 5.45, the Act currently applies the ACL as in force on 1 January 2013 as the ACL WA. All other Australian jurisdictions apply the ACL from time to time.
- 6.2 At the time the Bill was referred to the Committee, six Commonwealth Acts had amended the ACL since 1 January 2013 that were yet to be incorporated into the ACL WA. Since the Committee received the referral, an additional two Commonwealth Acts have amended the ACL. Whereas many of the amendments make no material change to consumer protection in Western Australia, the amendments also include significant reforms such as:
- the extension of unfair contract terms protections to small businesses
  - a new regime for country-of-origin labelling requirements for food.<sup>61</sup>
- 6.3 It is expected that additional amendments will be made to the ACL over the next few years resulting from the ACL Review.<sup>62</sup>
- 6.4 According to the second reading speech:
- The intention of the interaction of commonwealth and state laws is that the commonwealth amendments apply directly to constitutional corporations trading in Western Australia, which is around 80 per cent of traders, but not to other forms of enterprise such as sole traders or business partnerships. Lack of consistency between the ACL and ACL WA is confusing for traders and for consumers, with small businesses particularly disadvantaged.<sup>63</sup>
- 6.5 The Committee asked the Department about the practical consequences of the lack of alignment between the ACL and ACL WA.
- 6.6 The Department advised that, in the case of the unfair contract provisions:
- A small business, whether incorporated or not, is a beneficiary of the unfair contract term protections under section 23 of the ACL (Cth), provided that the unfair contract was provided to them by a corporation. The difficulty emerges in how small businesses in Western Australia (WA) enforce their rights.<sup>64</sup>
- 6.7 In short, apart from the undesirability and potential confusion that may arise from the concurrent operation of two systems of consumer law, it was the Department's view that:
- The main practical impact for sole traders and partnerships of the unfair contract law provisions not applying to them is the limited remedies that are available to them to seek redress.<sup>65</sup>
- 6.8 Presumably, similar issues would arise in the case of other substantive changes to the ACL if they are not applied as a law of the State in a timely way.

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<sup>60</sup> David Hillyard, Commissioner for Consumer Protection, Department of Mines, Industry Regulation and Safety – Consumer Protection Division, *Transcript of evidence*, 22 August 2018, p 3.

<sup>61</sup> Commentary and analysis of these eight Commonwealth Acts is provided at paragraphs 6.96 to 6.171.

<sup>62</sup> Hon Bill Johnston MLA, Minister for Commerce and Industrial Relations, Letter, 26 June 2018, Attachment A, p 1.

<sup>63</sup> Hon Alannah MacTiernan MLC, Minister for Regional Development, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 27 June 2018, p 3903.

<sup>64</sup> Submission from Department of Mines, Industry Regulation and Safety, 12 September 2018, p 1.

<sup>65</sup> *ibid.*

6.9 Although updating the Act to incorporate a more recent version of the ACL addresses the current inconsistencies:

it does not address the ongoing issue of there being a time lag between the application of the ACL amendments to constitutional corporations and the application of ACL WA to other kinds of businesses.<sup>66</sup>

6.10 The Minister for Commerce and Industrial Relations advised 'The requirement for changes to the ACL to be incorporated into the ACL WA by legislative amendment has proved unsatisfactory for consumers, businesses and the regulator as a result of the rapid pace of development of the ACL'.<sup>67</sup>

6.11 Similarly, the Department advised the Committee:

It is because of the ineffectiveness of the current model applying in Western Australia that this amendment bill has been introduced.

...

Limiting Western Australia's capacity to achieve uniformity by formally amending the ACL WA each time a change is made has resulted in the ACL WA lagging behind other jurisdictions in relation to maintaining harmonisation. This in turn has impacted on WA's capacity to administer and enforce the ACL as a regulatory scheme operating in WA.<sup>68</sup>

6.12 The Department conceded that, until recently, many of the amendments to the ACL were 'so small—like really, technical insignificant amendments'<sup>69</sup> which have had no significant material impact on the consumer protection regime in Western Australia. Nevertheless, failure to keep the law up to date in a timely manner results in an increasing backlog of unapplied amendments.

6.13 The Bill contains 10 clauses. It proposes to amend the Act to align the ACL WA with the ACL in other jurisdictions by:

- applying the amendments to the ACL made by the eight Commonwealth Acts to the ACL WA
- providing a mechanism for the automatic incorporation of future amendments to the ACL into the ACL WA unless the amendments are disallowed by Parliament.

6.14 To effect the changes, the Bill proposes to replace the current ACL application provision referred to in paragraph 6.1 of this report with a new application provision, which applies the ACL as in force from time to time as the ACL WA.

6.15 It includes a mechanism that purports to preserve the sovereignty of the Western Australian Parliament, by providing that all future Commonwealth amendments to the ACL must be tabled in both Houses of the Western Australian Parliament and which will be subject to disallowance by either House.<sup>70</sup>

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<sup>66</sup> Hon Alannah MacTiernan MLC, Minister for Regional Development, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 27 June 2018, p 3903.

<sup>67</sup> Hon Bill Johnston MLA, Minister for Commerce and Industrial Relations, Letter, 26 June 2018, Attachment A, p 2.

<sup>68</sup> David Hillyard, Commissioner for Consumer Protection, Department of Mines, Industry Regulation and Safety – Consumer Protection Division, *Transcript of evidence*, 22 August 2018, p 3.

<sup>69</sup> Catherine Scott, General Manager, Legislation and Policy, Department of Mines, Industry Regulation and Safety – Consumer Protection Division, *Transcript of evidence*, 22 August 2018, p 15.

<sup>70</sup> Fair Trading Amendment Bill 2018 cl 6 inserting proposed s 19A.

## Clauses that may impinge upon Parliamentary sovereignty and law-making powers

6.16 Clauses 4, 5 and 6 have an impact upon Parliamentary sovereignty and law-making powers.

### Clause 4—inserts new definitions

6.17 Clause 4 raises no Parliamentary sovereignty issue itself as it simply inserts two new definitions into the Act. However, the new definitions are relevant to questions of Parliamentary sovereignty by way of clauses 5 and 6 of the Bill.

6.18 Clause 4 inserts definitions of 'amend' and 'amending law' into section 17 of the Act, which contains an explanation of terms used in Part 3 of the Act. Part 3 deals with the application of the ACL in Western Australia.

6.19 'Amending law' is defined as a Commonwealth Act that amends:

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

6.20 'Amend' includes 'replace'.

### Clause 5—amends ACL application provision

6.21 Section 19(1) of the Act provides that the ACL text consists of:

- (a) Schedule 2 to the *Competition and Consumer Act 2010* (Commonwealth), as in force on 1 January 2013 (but as modified by section 36<sup>71</sup>); and
- (b) regulations made under section 139G of that Act, as those regulations are in force from time to time. [Emphasis added]

6.22 Clause 5 amends section 19(1)(a) by deleting 'on 1 January 2013' and inserting 'from time to time'. This would mean that the ACL text as in force from time to time applies as the ACL WA.

6.23 The effect of this clause is to incorporate all amendments to the ACL from 1 January 2013 up to the date of commencement of the Bill into the text of the ACL WA, and to provide for the automatic incorporation of future amendments.<sup>72</sup> Those future amendments would apply as the law in Western Australia from the time they receive Commonwealth Royal Assent, unless subsequently disallowed by the Western Australian Parliament.

6.24 The 'from time to time' approach ensures immediate uniformity across jurisdictions, but unquestionably erodes Western Australian Parliamentary sovereignty, as there is no Parliamentary oversight of law that will apply in Western Australia before that law comes into operation.<sup>73</sup>

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<sup>71</sup> Section 36 of the Act modifies sections 73 and 170 of the ACL, which deal with 'Permitted hours for negotiating an unsolicited agreement'. The Western Australian modifications restrict the times a dealer may call on a person for the purposes of negotiating an unsolicited consumer agreement or for an incidental or related purpose.

<sup>72</sup> Eight Commonwealth Acts have amended the ACL since 1 January 2013 that are yet to be incorporated into the ACL WA. The Bill, if passed, would apply those amendments to the ACL WA. Commentary and analysis of these eight Commonwealth Acts is provided at paragraphs 6.96 to 6.171.

<sup>73</sup> In this case, clause 6 of the Bill proposes a mechanism for Parliamentary oversight of future amendments which is considered later in this report.

- 6.25 The Committee is of the view that a law of another jurisdiction automatically applying in Western Australia is an unequivocal erosion of Parliamentary sovereignty. The Committee's long-standing position on this method of adopting uniform legislation is that it 'should, in all but exceptional circumstances, be resisted.'<sup>74</sup>

## FINDING 2

Clause 5 of the Fair Trading Amendment Bill 2018, by proposing to apply any amending law of the Commonwealth as a law of Western Australia 'from time to time', derogates from Western Australia's Parliamentary sovereignty.

## RECOMMENDATION 1

Clause 5 of the Fair Trading Amendment Bill 2018 not be passed unless the Fair Trading Amendment Bill 2018 contains, or is amended to provide, a satisfactory mechanism by which future amending laws can be scrutinised and open to disallowance by the Western Australian Parliament.

### **Clause 6—inserts proposed new sections 19A, 19B and 19C: Tabling, disallowance, publication in Western Australia Government Gazette, effect of failure to table or disallowance**

- 6.26 Clause 6 inserts proposed new sections 19A, 19B and 19C into the Act.
- 6.27 Section 19A introduces a requirement for all future Commonwealth legislation amending the ACL<sup>75</sup> to be tabled in both Houses of the Western Australian Parliament within 18 sitting days of the House after the day on which the Commonwealth law receives the Royal Assent.
- 6.28 Section 19A(2) provides for either House of Parliament to pass a resolution disallowing the amending law.
- 6.29 Section 19A(3) provides that for that resolution to be effective, 'notice of the resolution must be given in the House within 14 sitting days of the House after the day on which the copy of the amending law is laid before the House.' [Emphasis added]
- 6.30 Section 19B provides that, if a House of Parliament passes a resolution disallowing an amending law, the Clerk of the Parliaments must publish 'notice of the resolution in the *Gazette* as soon as practicable after the day on which the resolution is passed.' [Emphasis added]

#### *Committee comment*

- 6.31 The terminology is confusing, in that it appears to use 'notice of the resolution' in two senses: notice of a *proposed* resolution (section 19A(3)) and notice of *the resolution passed* (section 19B): compare with 'notice of *such* resolution' in section 42(5) of the *Interpretation Act 1984*.
- 6.32 Section 19C deals with the consequences of a failure to table an amending law and with the disallowance of an amending law.

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<sup>74</sup> Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 103, *National Electricity (Western Australia) Bill 2016, National Gas Access (WA) Amendment Bill 2016, Energy Legislation Amendment and Repeal Bill 2016*, September 2016, p 28.

<sup>75</sup> This is an 'amending law' as per the new definition of that term in clause 4. See paragraph 6.19 for the definition of 'amending law'.



- 6.33 If an amending law has not been tabled in accordance with section 19A then, from the day following the last day for tabling, the amendment ceases to have effect in Western Australia: see sections 19C(1)(a), (2) and (3).
- 6.34 If an amending law is disallowed by the Parliament then, from the day following the resolution to disallow, the amendment ceases to have effect in Western Australia: see sections 19C(1)(b), (2) and (3).
- 6.35 Anything done in reliance on the amended law prior to disallowance ceases to have effect on disallowance, but without affecting the validity or invalidity of that action: see sections 19C(4) and (7).

#### *Disallowance by Parliament and Standing Order 67*

- 6.36 Standing Order 67 (SO 67) provides a mechanism for the disallowance of certain subsidiary legislation.
- 6.37 SO 67 applies to a 'regulation' which includes 'any statutory instrument made subject to disallowance by a written law'. SO 67 is intended to apply to those forms of subsidiary legislation that are 'regulations' for the purpose of section 42 of the *Interpretation Act 1984*. This includes 'rules, local laws and by-laws'.<sup>76</sup>
- 6.38 This definition permits Acts to specify other types of instruments of subsidiary legislation to be regulations for the purpose of section 42 of the *Interpretation Act 1984*.<sup>77</sup>
- 6.39 The mechanism forces a vote on a notice for disallowance by specifying that the notice becomes an order of the day after two sitting days and that it is given precedence over other orders of the day.

#### *Committee's concerns with clause 6 and limitations of SO 67*

- 6.40 An amending law is not a regulation for the purposes of section 42 of the *Interpretation Act 1984*; that is, it is not a rule, local law or by-law. It is a primary law of another jurisdiction that becomes a law of Western Australia when it receives the Commonwealth Royal Assent.
- 6.41 Further, an amending law is unlikely to be a 'statutory instrument' for the purposes of SO 67. A 'statutory instrument' is generally regarded as a government or executive order of subsidiary legislation. Consequently, SO 67 would not apply to a notice of motion to disallow an amending law. It would not have precedence as an order of the day. It would therefore remain on the Notice Paper under 'Motions on Notice' until:
- it finds its way to the top of the motions queue
  - the Government brings the motion on for debate
  - the House agrees to give the notice of motion priority under Standing Order 17(5) by advancing it to motion Number 1
- or
- the House is prorogued (whereupon the item of business is terminated).
- 6.42 Under clause 6, an amending law will form part of the law of Western Australia at the time it receives the Commonwealth Royal Assent. While it may subsequently be disallowed by the

<sup>76</sup> *Interpretation Act 1984* s 42(8).

<sup>77</sup> See for example *Mining Act 1978* s 120AA(7) which specifies an order to be a regulation, *Biosecurity and Agriculture Management Act 2007* s 47 which specifies a management plan to be subsidiary legislation and that section 42 of the *Interpretation Act 1984* applies as if the management plan was a regulation made under the *Biosecurity and Agriculture Management Act 2007* and *Dangerous Goods Safety Act 2004* s 20 which specifies that a code of practice is a regulation for the purposes of section 42 of the *Interpretation Act 1984*.



Western Australian Parliament, it becomes a law in this jurisdiction upon receiving that Royal Assent. As the amending law would not come within the operation of SO 67, the disallowance process would not be expedited for consideration.

- 6.43 Consequently, there may be significant delay between when notice is given of a motion to disallow and when that motion is debated and determined.
- 6.44 Currently, no other standing orders would perform a similar function to SO 67 should an amending law be tabled in the Legislative Council.

#### *Western Australia's participation in the process to amend the ACL*

- 6.45 The process for amending the ACL is set out in the ACL IGA and summarised in paragraph 5.11 of this report.
- 6.46 As noted, the ACL IGA provides that the Commonwealth will not introduce a bill into the Commonwealth Parliament to amend the ACL unless the proposed amendment is supported by the Commonwealth and four other parties, including at least three States.<sup>78</sup>
- 6.47 The Department gave evidence to the Committee that:

There should be a level of comfort for the Parliament of Western Australia in the process that is adopted by the commonwealth and the states and territories that the amendments being made to the ACL are both warranted and appropriate. At the highest level, CAF [COAG Legislative Governance Forum on Consumer Affairs comprised of consumer affairs ministers in each jurisdiction] and CAANZ [Consumer Affairs Australia and New Zealand, comprised of Commonwealth, State and Territory senior policy officials] provide a cooperative decision-making approach to proposals for change to the ACL.<sup>79</sup>

- 6.48 Further, each proposal to amend the ACL is subject to a regulatory impact assessment to which all interested parties Australia-wide may contribute. Each of the States and Territories has input into this process and has access to the assessment prior to voting on a proposed amendment.
- 6.49 The Department gave evidence about the Western Australian Government's participation in the process to amend the ACL. One witness noted that a proposed amendment need only be supported by the Commonwealth and four other parties, but stated:

In order for this legislation to work nationally and in each jurisdiction, there needs to be consistency and a high degree of uniformity, so that is why I think the approach has been that if they cannot get unanimous agreement, when it is going to come to a vote, they send it back to CAANZ and to the other subcommittees to do more work in relation to the area of disagreement.<sup>80</sup>

- 6.50 The Commissioner said:

I think the reality is that if they do not get unanimous approval from all the jurisdictions, it just does not happen, so they are cognisant of not wanting to have a piece of legislation that gets out of kilter across the various jurisdictions. At the forefront of the Australian consumer law is that all of the jurisdictions have worked really hard to make sure that we have got this one law and it is not being

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<sup>78</sup> *Intergovernmental Agreement for the Australian Consumer Law* between the Commonwealth of Australia and all Australian States and Territories, 2 July 2009, pp 7–8.

<sup>79</sup> David Hillyard, Commissioner for Consumer Protection, Department of Mines, Industry Regulation and Safety – Consumer Protection Division, *Transcript of evidence*, 22 August 2018, p 3.

<sup>80</sup> Catherine Scott, General Manager, Legislation and Policy, Department of Mines, Industry Regulation and Safety – Consumer Protection Division, *Transcript of evidence*, 22 August 2018, p 14.

amended and changed as we go across state borders. So, whilst they are the outline of the requirements in the IGA and the voting requirements, in practical terms it has always been unanimous and we are currently faced with that.<sup>81</sup>

6.51 The Committee sought an explanation of how the process would work if a party disagreed with a proposed amendment. The Commissioner advised:

if the unanimous support for a provision or a proposal has not been brought forward, at that point it is referred back to CAANZ as a working group to find a solution and in each of the jurisdictions that are not comfortable with it and come up with a solution.<sup>82</sup>

6.52 The Department advised that when consensus to amend the ACL is reached by all parties to the ACL IGA:

we would take the matters to the WA government cabinet for endorsement and notification that these things are headed this way and the reasons why. At that point, prior to this legislation being developed and then the formal vote process, it would then come back for the minister to vote on whether that is to be accepted and proposed.<sup>83</sup>

6.53 Evidence to the Committee was that in addition to the processes under the ACL IGA, the Minister for Commerce and Industrial Relations has 'introduced an additional step whereby the CAF decisions to amend the ACL are taken to cabinet for information and endorsement prior to him voting at CAF on the proposed amendment'.<sup>84</sup>

6.54 According to the Department:

We place a lot of importance on ensuring that the minister actually votes one way or another [on a proposed amendment to the ACL] so it is clear that we are going to be taken to have agreed to the amendment.<sup>85</sup>

#### *Notification of the commencement of a Commonwealth Act to amend the ACL*

6.55 The Department also explained how Western Australia receives notification of the commencement of a Commonwealth Act that amends the ACL:

If an amending bill is passed by both houses of the commonwealth Parliament and it receives royal assent, each jurisdiction is notified by the CAF secretariat. In addition to that, we can get notification through the federal register. Federally, they have a register of all legislation and we can be notified of any amendments via email that are made to the Australian Consumer Law or the Australian Consumer Law Regulations. That is another notification mechanism so that we are aware of when an amendment has been made.<sup>86</sup>

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<sup>81</sup> David Hillyard, Commissioner for Consumer Protection, Department of Mines, Industry Regulation and Safety – Consumer Protection Division, *Transcript of evidence*, 22 August 2018, p 12.

<sup>82</sup> *ibid.*, p 13.

<sup>83</sup> *ibid.*, p 12.

<sup>84</sup> *ibid.*, p 4.

<sup>85</sup> Catherine Scott, General Manager, Legislation and Policy, Department of Mines, Industry Regulation and Safety – Consumer Protection Division, *Transcript of evidence*, 22 August 2018, p 11.

<sup>86</sup> *ibid.*, pp 11–12.

6.56 The Department intends to rely on the content of that email for the purposes of tabling Commonwealth amending Acts in the Western Australian Parliament for the purposes of clause 6 of the Bill (new section 19A(1)):

The email that gets sent out from the CAF secretariat will give us the name of the amending act, the date on which it commenced, a link to the act within the email, and where the act is registered on the Federal Register of Legislation. That link can be used to download the act and we would do that for the purpose of tabling the act in both houses of the WA Parliament.<sup>87</sup>

*Effect of disallowance by the Western Australian Parliament of a Commonwealth amending law*

6.57 As noted in paragraph 6.28, clause 6 of the Bill (inserting new section 19A(2)) provides that either House of the Western Australian Parliament may pass a resolution disallowing a Commonwealth amending law. Reasons this may occur include:

- the Western Australian Parliament is of the view that the proposed amendment, or a part of it, is not in the State's best interests
- or
- there is insufficient time in which to properly examine the proposed amendments before a notice of the resolution to disallow is required to be tabled under new section 19A(3).

6.58 Disallowance would result in the proposed amendments no longer being incorporated into the ACL WA.

6.59 The Parliamentary process proposed in the Bill does not provide for either the partial disallowance or the amendment of a Commonwealth amending law. The Commissioner said:

This mechanism will not enable you to partially adopt it; it is either in or out.

...

It would then be incumbent on the government to present an amending bill, which is still meeting whatever those requirements were that we thought should be applied to this group of sole traders, effectively, in a slightly different manner within Western Australia. At this point we would have been still working on the issue; it would have been an issue that is applying across the Australian economy. It will be affecting our local people, but, as you say, there is a particular issue that we do not think works well for WA. So we would have to come up with an amending portion of a new bill to come forward for the ACL WA.<sup>88</sup>

6.60 Currently, a State bill to amend the ACL WA must be introduced every time it is intended to amend the ACL WA to align it with changes to the ACL. The Bill therefore reverses the current position, so that a State bill to amend the ACL WA to align it with the ACL would only need to be introduced into the Western Australian Parliament if there was a failure to comply with the tabling requirements under section 19A(1) of the Bill or if Parliament disallowed a Commonwealth amending law under section 19A(2).

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<sup>87</sup> *ibid.*, p 12.

<sup>88</sup> David Hillyard, Commissioner for Consumer Protection, Department of Mines, Industry Regulation and Safety – Consumer Protection Division, *Transcript of evidence*, 22 August 2018, pp 14–15.

6.61 The Department noted that some of the amendments made to the ACL since the ACL WA was last updated in 2013 were small, technical and insignificant.<sup>89</sup> One witness said:

So the advantage of the bill is that those amendments will apply because they are just not contentious. So the Parliament's time and government's time and department's time is not taken up preparing a bill ...<sup>90</sup>

#### *Template for future national scheme legislation*

6.62 There appears to be an intention to use the mechanism proposed in the Bill for other national scheme legislation:

My understanding is that from parliamentary counsel's perspective, they see this as the template moving forward for dealing with any sort of national scheme of legislation.<sup>91</sup>

#### **Committee comment**

6.63 The Bill provides that a Commonwealth amending law becomes law of Western Australia upon receiving Commonwealth Royal Assent. The tabling requirement brings its making to the attention of each House of the Western Australian Parliament and triggers a process whereby either House may pass a resolution to disallow that law.

6.64 This in part reflects the mechanism by which the Western Australian Parliament can disallow 'regulations'. However, what is proposed involves not subordinate legislation but a law of another jurisdiction being applied as a law of Western Australia.

6.65 Unlike the process for regulations, the Standing Orders of the Legislative Council do not provide for the scrutiny or disallowance of such laws.

6.66 Accordingly, the mechanism proposed in the Bill has serious implications for the sovereignty of the Western Australian Parliament. This mechanism has the potential to limit the role of the Parliament by reducing or negating its scrutiny powers in relation to national legislative schemes. As mentioned, the evidence from the Department suggests that this mechanism may be used for other national uniform legislative schemes.

6.67 The tabling and disallowance mechanism set out in clauses 19A, 19B and 19C purports to preserve Parliamentary sovereignty by providing that the Western Australian Parliament will be notified of future amendments to the ACL and given an opportunity to disallow those amendments. However, this is subject to Western Australia receiving notification of those Commonwealth amending laws. Failure to comply with the tabling requirements in section 19A would result in:

- the amending law ceasing to have effect in Western Australia
- a requirement to introduce the Commonwealth amending law into the Western Australian Parliament for incorporation into the ACL WA.

6.68 The Parliamentary scrutiny provisions proposed in the Bill rely on the:

- diligent and timely monitoring by the Department of all Commonwealth amendments to the ACL; and

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<sup>89</sup> Catherine Scott, General Manager, Legislation and Policy, Department of Mines, Industry Regulation and Safety – Consumer Protection Division, *Transcript of evidence*, 22 August 2018, p 15.

<sup>90</sup> *ibid.*

<sup>91</sup> *ibid.*, p 17.

- tabling of those amendments in the Western Australian Parliament within the time provided in section 19A.
- 6.69 Further, the Bill, if passed, will incorporate into the ACL WA all amendments to the ACL made from 1 January 2013 to the date of commencement of the Bill. Those amendments will not be subject to the tabling and disallowance provisions in new section 19A. The Bill provides no mechanism for Parliamentary scrutiny of those amendments. This is a Parliamentary sovereignty issue for consideration by the Legislative Council during debate on the Bill.
- 6.70 The Committee considers, as a matter of general principle, that laws of another jurisdiction that the Government seeks to have applied in Western Australia should be subject to Parliament's consideration and possible disallowance before they become laws of the State.
- 6.71 The principle of Parliamentary sovereignty ought not to be abrogated, whether in favour of amending laws that make small and technical changes to the ACL WA and which do not have a significant material impact on the law in Western Australia or those which make more substantial amendments.

### **FINDING 3**

The disallowance mechanism proposed in clause 6 of the Fair Trading Amendment Bill 2018 makes an attempt at, but falls short of, preserving Western Australia's Parliamentary sovereignty.

#### **Options identified by the Committee for addressing its concerns about clause 6**

- 6.72 The Committee has identified three options which may go some way to addressing its concerns in relation to clause 6. They are discussed below.

##### *Option one*

- 6.73 One option is to suitably amend clause 6 to the effect of deeming an amending law to be subsidiary legislation for the purposes of the *Interpretation Act 1984*: that is, to provide that section 42 of the *Interpretation Act 1984* applies to and in relation to the amending law as if the amending law was a regulation made under the Act and to bring amending laws within the operation of SO 67.
- 6.74 This would trigger the referral of amending laws to the Joint Standing Committee on Delegated Legislation for scrutiny, report and possible recommendation for disallowance by the Legislative Council.
- 6.75 However, the Act excludes the operation of the *Interpretation Act 1984* to the ACL WA and any instrument under that law.<sup>92</sup> This exclusion is made subject to section 21 of the Act, which provides that certain statutory instruments are subject to disallowance under the *Interpretation Act 1984*.
- 6.76 Further, the terms of reference for the Joint Standing Committee on Delegated Legislation would need amendment if that Committee were to consider issues of Parliamentary sovereignty and policy.
- 6.77 Nevertheless, the Committee draws this possibility to the attention of the House for its consideration during debate on the Bill.

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<sup>92</sup> *Fair Trading Act 2010* s 23.

### *Option two*

- 6.78 A second option is to amend clause 6 to deem an amending law to be an instrument to which section 21 of the Act applies. Section 21 requires a copy of the instrument to be published in the *Government Gazette* not later than 28 days after the instrument is made.
- 6.79 If the instrument is not published in the *Government Gazette* in accordance with that requirement, it ceases to have effect in Western Australia on the expiry of the 28<sup>th</sup> day after the instrument is made.
- 6.80 If the instrument is published in the *Government Gazette* in accordance with that requirement, section 42 of the *Interpretation Act 1984* applies to that instrument as if it were a regulation published in the *Government Gazette*. This means Members would have 14 days to give notice of a motion to disallow the instrument.
- 6.81 As with option one, the process provided for in SO 67 would apply.
- 6.82 Again, as with option one, the terms of reference for the Joint Standing Committee on Delegated Legislation would need amendment if that Committee were to consider issues of Parliamentary sovereignty and policy.
- 6.83 Further, it is not clear whether such an amendment to clause 6 of the Bill would be consistent with the ACL IGA.
- 6.84 Nevertheless, the Committee draws this possibility to the attention of the House for its consideration during debate on the Bill.

### *Option three*

- 6.85 In both options one and two, an amending law takes effect as a law of Western Australia unless and until disallowed. A disallowance would not invalidate anything that occurs prior to the disallowance unless the Bill specifies otherwise.
- 6.86 A preferable option is to have an amending law take effect only when certain conditions precedent have been satisfied. Those conditions precedent could include:
- a requirement to publish the amending law in the *Government Gazette* within a specific period of time
  - a requirement to table the amending law in both Houses of Parliament within a specified period of time after publication
  - a period of time from tabling in which notice of motion to disallow the amending law can be given by any member of that House
  - a requirement that the amending law not take effect unless:
    - no notice of motion is given within the specified time
    - or
    - notice to disallow is given, but a House resolves to defeat the disallowance motion.
- 6.87 The replacement for clause 6 to the Bill would also need to:
- specify that it does not matter whether the period within which notice may be given of a motion to disallow falls within the same session of Parliament or the same Parliament
  - specify when the amending law will take effect if the conditions precedent are met, for example, if:
    - no notice of motion: on the day next following the last day on which notice of motion could be given

- disallowance negated: on the day next after the amending law is not subject to disallowance
  - require the Clerk of the Parliaments to publish any disallowance of the amending law in the *Government Gazette*.
- 6.88 The Committee suggests that the process set out in section 43 of the *Land Administration Act 1997* might be used as a guide. That section is reproduced in Appendix 2.
- 6.89 Further, there is no need to set out in the Bill the effect of any disallowance, because the existing law would continue to apply. The amending law would have no effect until the:
- time specified to give a notice of motion has expired and no notice is given
  - or
  - Legislative Council votes against a motion to disallow the amending law.
- 6.90 However, under current Standing Orders such a motion for disallowance would be listed under Motions on Notice unless it were to be made an order of the day by a Minister or Parliamentary Secretary.
- 6.91 As it is the Government's desire that an amending law become a law of the State, it would be preferable for a motion for disallowance to be dealt with as part of Government Business, leaving Motions on Notice as Private Members' Business.
- 6.92 The Committee observes that given the Government is likely to want to resolve the issue, there is a reasonable prospect that it will agree to make a notice of motion for disallowance an order of the day, to be dealt with in Government time as currently occurs with disallowance motions under SO 67.

## RECOMMENDATION 2

Clause 6 of the Fair Trading Amendment Bill 2018 be deleted and replaced with an alternative disallowance mechanism, possibly one similar to that in section 43 of the *Land Administration Act 1997*, so that an amending law does not take effect in Western Australia until certain conditions precedent are met, such as:

- the amending law is published in the *Government Gazette* within a specified time
- the amending law is to be tabled in both Houses of Parliament within a certain number of sitting days of the House after the day on which the amending law receives the Royal Assent
- a certain number of sitting days of the House are provided to give notice of motion to disallow the amending law
- a vote on the disallowance motion is taken within a specified time
- a requirement that the amending law not take effect unless no notice of motion is given within the specified time or a House resolves to negative the disallowance motion.

The replacement for clause 6 to the Bill would also need to:

- specify that it does not matter whether or not the period within which notice of motion to disallow is given occurs during the same session of Parliament or the same Parliament
- specify when the amending law will take effect if conditions precedent are met, for example:

- no notice of motion: on the day next following the last day on which notice of motion could be given
- disallowance negated: on the day next after the amending law is not subject to disallowance
- require the Clerk of the Parliaments to publish the disallowance of the amending law in the *Government Gazette*.

### Committee comment

- 6.93 Whether clause 6 or some alternative model is enacted, it should be incumbent on Government to provide Parliament with sufficient explanatory material, such as the Commonwealth explanatory memorandum and the Commonwealth second reading speech for the amending law, to be able to readily understand the effect of any amending law.
- 6.94 Further, whether clause 6 or some alternative model is enacted, consideration needs to be given to changes to Standing Orders to enable timely and effective scrutiny of, and reporting on, amending laws.
- 6.95 For example, unless the current Standing Orders are amended, amending laws would not be referred to the:
- Committee and, in any case, it would not have a remit to consider and report on the policy of those amending laws
  - Joint Standing Committee on Delegated Legislation and, in any case, it would not have a remit to consider and report on issues of Parliamentary sovereignty and law-making power or the policy of those amending laws
  - Standing Committee on Legislation.

### FINDING 4

Legislative Council committees, as an extension of the Legislative Council, have a crucial role in reviewing proposed laws. This role cannot be performed unless adequate provision is made by both legislation and Standing Orders to enable effective scrutiny of those proposed laws.

### FINDING 5

If the tabling and disallowance mechanism proposed in clause 6 of the Fair Trading Amendment Bill 2018 becomes a template for future national legislative schemes, Parliament's sovereignty and law-making powers will be adversely affected, along with its ability to scrutinise laws becoming part of the law of Western Australia.

### RECOMMENDATION 3

Should clause 6 of the Fair Trading Amendment Bill 2018 or some alternative model be enacted, the Legislative Council consider amending its Standing Orders to enable the timely and effective scrutiny of, and reporting on, amending laws by a Parliamentary committee prior to them commencing operation in Western Australia.



## Commonwealth Acts that have amended the ACL since 1 January 2013

6.96 Eight Commonwealth Acts have amended the ACL since 1 January 2013. They are the:

- *Competition and Consumer Amendment Act 2013*
- *Consumer Credit Legislation Amendment (Enhancements) Act 2012*
- *Omnibus Repeal Day (Autumn 2014) Act 2014*
- *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015*
- *Competition and Consumer (Country of Origin) Act 2017*
- *Competition and Consumer Amendment (Competition Policy Review) Act 2018*
- *Treasury Laws Amendment (2018 Measures No. 3) Act 2018*
- *Treasury Laws Amendment (Australian Consumer Law Review) Act 2018*.

6.97 The effect of the proposed new application provision in clause 5 of the Bill would be to automatically incorporate into the ACL WA, upon commencement of the Bill:

- the amendments to the ACL made by the eight Commonwealth Acts listed in paragraph 6.96
- any subsequent Commonwealth Acts amending the ACL up to the date the Bill comes into effect

without any of those Commonwealth Acts being subject to the disallowance mechanism proposed in the Bill.

6.98 Despite the lack of any provision for it in the Bill, the Committee has considered the eight Commonwealth Acts against its terms of reference and has commented on them below.

6.99 As required by its terms of reference, the Committee has confined its examination of the eight Commonwealth Acts to the amendments they made to the ACL and whether those amendments have an impact upon the sovereignty and law-making powers of the Parliament of Western Australia.

6.100 However, any subsequent Commonwealth Acts that amend the ACL up to the date the Bill becomes law will not be subject to Parliamentary scrutiny.

### ***Competition and Consumer Amendment Act 2013 (Cth)***

6.101 The *Competition and Consumer Amendment Act 2013* (Cth) amended the ACL to insert a regulation-making power, enabling regulations to be made to exempt certain representations from the component pricing requirements in the ACL.

6.102 The component pricing requirements in the ACL prohibit a person in trade or commerce from representing a component of a price when making a representation about the price of a good or service, without also prominently specifying the total price a person must pay to obtain the good or service, to the extent that a total price is quantifiable at the time of making a representation.<sup>93</sup>

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<sup>93</sup> The component pricing requirement is contained in section 48 of Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

- 6.103 The Commonwealth made a regulation in 2013 that prescribed that restaurant and café menu surcharges for specific days are exempt from the component pricing requirement provided conditions relating to disclosure, prominence and transparency are satisfied.<sup>94</sup>
- 6.104 For restaurants to obtain the benefit of the exemption, a menu must include a representation which comprises the words ‘a surcharge of [percentage] applies on [the specified day or days]’.<sup>95</sup> This means that on a typical menu, the text is placed prominently and transparently once on the menu.
- 6.105 The *Competition and Consumer Amendment Act 2013* (Cth) commenced on 30 June 2013.
- 6.106 The amendment raises no issues of Parliamentary sovereignty or law-making powers.

***Consumer Credit Legislation Amendment (Enhancements) Act 2012 (Cth)***

- 6.107 The *Consumer Credit Legislation Amendment (Enhancements) Act 2012* (Cth) amended the ACL to correct a minor error in terminology by replacing references to ‘consumer goods’ with ‘goods’ or ‘goods supplied to a consumer’ (as appropriate) in the lay-by and repair notice provisions.<sup>96</sup>
- 6.108 Schedule 7 of the *Consumer Credit Legislation Amendment (Enhancements) Act 2012* (Cth), which amended the ACL, commenced on 17 September 2013.
- 6.109 The amendments raise no issues of Parliamentary sovereignty or law-making powers.

***Omnibus Repeal Day (Autumn 2014) Act 2014 (Cth)***

- 6.110 The *Omnibus Repeal Day (Autumn 2014) Act 2014* (Cth) (ORDA Act) amended a number of Commonwealth Acts, including the ACL.
- 6.111 The amendment to the ACL repealed a cross-reference to a section of a Commonwealth Act that was itself repealed by the ORDA Act.<sup>97</sup>
- 6.112 This was a technical consequential amendment and its application in Western Australia will have no substantive effect on the operation of the ACL WA.
- 6.113 Schedule 2 of the ORDA Act, which amended the ACL, commenced on 17 October 2014.
- 6.114 The amendment raises no issues of Parliamentary sovereignty or law-making powers.

***Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015 (Cth)***

- 6.115 The unfair contract term protections available to consumers under the ACL are set out in section 23 of Schedule 2 of the CCA 2010.
- 6.116 They provide that a term of a contract is void if the term is ‘unfair’ and the contract is a ‘standard form contract’.<sup>98</sup>

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<sup>94</sup> *Competition and Consumer Amendment Regulation 2013 (No. 3)* (Cth) and see *Competition and Consumer Regulations 2010* (Cth) r 80A. ‘Transparent’ is defined in section 2 of Schedule 2 of the *Competition and Consumer Act 2010* (Cth) to mean, in relation to a document, expressed in reasonably plain language, legible and presented clearly.

<sup>95</sup> *Competition and Consumer Amendment Regulation 2013 (No. 3)* (Cth) and see *Competition and Consumer Regulations 2010* (Cth) r 80A(4).

<sup>96</sup> *Consumer Credit Legislation Amendment (Enhancements) Act 2012* (Cth) Schedule 7.

<sup>97</sup> This was the *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992* (Cth) s 5(1), which was repealed by section 185 of the ORDA Act.

<sup>98</sup> Section 27(2) of Schedule 2 of the *Competition and Consumer Regulations 2010* (Cth) lists matters a court must take into account in determining whether a contract is a standard form contract. These include whether one of the

- 6.117 A term of a contract is 'unfair' if:
- it would cause significant imbalance in the parties' rights and obligations arising under the contract
  - it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term
  - it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.<sup>99</sup>

6.118 Prior to the passage of the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* (Cth) (TLA Act), these protections only applied to a 'consumer contract'. These are contracts 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.<sup>100</sup> The unfair contract term protection applied to consumers only.

6.119 The TLA Act extended the unfair contract terms provisions to cover businesses with less than 20 employees agreeing to standard form contracts valued at less than a prescribed threshold.<sup>101</sup> The contract must be for the supply of goods or services or the sale or grant of an interest in land. These are 'small business contracts'.

6.120 According to the Explanatory Memorandum for the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015:

Small businesses, like consumers, are vulnerable to unfair terms in standard form contracts, as they are often offered contracts on a 'take it or leave it' basis and lack the resources to understand and negotiate contract terms. There is potential for small business detriment where these unfair contract terms are enforced.<sup>102</sup>

...

The extension of the unfair contract terms protection to cover small business contracts will address this vulnerability by allowing unfair contract terms to be declared void, providing a remedy for small businesses.<sup>103</sup>

6.121 In relation to the threshold value, the Explanatory Memorandum said:

Limiting the extension of the unfair contract term protection to low-value, standard form small business contracts will support time-poor small businesses entering into contracts for day-to-day transactions, while maintaining the onus on small businesses to undertake due diligence when entering into high-value contracts.<sup>104</sup>

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parties has all or most of the bargaining power relating to the transaction and whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties: s 27(2)(a) and (b).

<sup>99</sup> *Competition and Consumer Act 2010* (Cth) Schedule 2 s 24.

<sup>100</sup> *ibid.*, s 23(3).

<sup>101</sup> *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* (Cth) s 31 and section 23(4) of Schedule 2 of the *Competition and Consumer Act 2010* (Cth). The upfront price payable must not exceed \$300 000 or the contract must have a duration of more than 12 months and the upfront price payable under the contract must not exceed \$1 000 000: *Competition and Consumer Act 2010* (Cth) Schedule 2 s 23(4)(c).

<sup>102</sup> Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015, *Explanatory Memorandum*, House of Representatives, p 15.

<sup>103</sup> *ibid.*, pp 15–16.

<sup>104</sup> *ibid.*

6.122 Schedule 1 of the TLA Act, which amended the ACL, commenced on 12 November 2016.

6.123 The amendments raise no issues of Parliamentary sovereignty or law-making powers.

### **Competition and Consumer Amendment (Country of Origin) Act 2017 (Cth)**

6.124 Australia has a 'country of origin' labelling framework, which aims to ensure businesses provide customers with information in order to make purchasing decisions in line with their preferences. The framework aims to balance consumer demand for this information with the cost to business of providing it.<sup>105</sup>

6.125 In Australia, country of origin labelling is mandated via a set of laws and regulations. The ACL is part of that framework, and provides that labels must not be false or misleading.

6.126 Claims on labels are not false or misleading if they meet certain criteria, known as 'safe harbour defences'. Prior to amendments to the ACL in 2017, businesses that relied on the general safe harbour defences had to meet the following criteria:

- Substantial transformation test. Goods are considered 'substantially transformed' in a country if they undergo a 'fundamental change in that country in form, appearance or nature such that the goods existing after the change are new and different goods from those existing before the change'.<sup>106</sup>
- Cost of production/manufacture test. Fifty per cent or more of the total production costs must have been incurred in the claimed country of origin. Costs incurred are calculated by adding up the expenditure on materials, labour and overheads.<sup>107</sup>

6.127 Businesses in Western Australia that rely on the general safe harbour defences under the current ACL WA still need to meet the criteria above as the ACL WA was last amended in 2013. It does not include the 2017 amendments discussed at paragraph 6.134.

6.128 Evidence to the Committee was that the main impact for the safe harbour defences not applying in Western Australia is:

confusion for unincorporated small businesses working in the agricultural sector providing food products, in terms of whether or not the standard applies and also whether or not they are entitled to use ... the kangaroo trademark. It entitles them to use that trademark in conjunction with other measures that indicate quickly to consumers how much of this product has actually come from Australia or has been processed in Australia.<sup>108</sup>

6.129 Research into the country of origin labelling framework found the labels confusing for consumers and hard for them to find.<sup>109</sup>

6.130 The research also found the substantial transformation test to be inadequate and misleading. The '50 per cent production cost' test an unnecessary burden on business, meaningless to

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<sup>105</sup> Competition and Consumer Amendment (Country of Origin) Bill 2016, *Explanatory Memorandum*, House of Representatives, p 7.

<sup>106</sup> *Competition and Consumer Act 2010* (Cth), Schedule 2 s 255(3). This subsection was repealed by the *Competition and Consumer Amendment (Country of Origin) Act 2017* (Cth) however it still applies in Western Australia as the ACL WA.

<sup>107</sup> *ibid.*, Schedule 2 ss 255(1) and (2) and s 256. These subsections were repealed by the *Competition and Consumer Amendment (Country of Origin) Act 2017* (Cth) however they still apply in Western Australia as the ACL WA.

<sup>108</sup> Catherine Scott, General Manager, Legislation and Policy, Department of Mines, Industry Regulation and Safety – Consumer Protection Division, *Transcript of evidence*, 22 August 2018, p 8.

<sup>109</sup> Competition and Consumer Amendment (Country of Origin) Bill 2016, *Explanatory Memorandum*, House of Representatives, p 11.

consumers and difficult to administer given the complexities of sourcing components through the global supply chain and variability due to currency fluctuations.<sup>110</sup>

- 6.131 A Consultation Regulation Impact Statement (RIS) for country of origin labelling was released by the Australian Government in December 2015. It recommended a revised approach to country of origin labelling. Part of that approach required changes to the ACL to simplify and clarify the country of origin safe harbour defences.
- 6.132 The objective of reforming country of origin labelling was to provide increased information to consumers without overly increasing the cost.
- 6.133 The *Competition and Consumer Amendment (Country of Origin) Act 2017* (Cth) (Country of Origin Act) amended the ACL to simplify the tests used to justify a country of origin 'made in' claim by clarifying what 'substantial transformation' means and removing the '50 per cent production cost' test.
- 6.134 The 2017 amendments in the Country of Origin Act set out safe harbour defences for the following:
- 6.134.1 Representations that goods were grown in a particular country. If a representation is made to this effect, it would comply with this safe harbour defence provided 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 of the goods happened in that country.<sup>111</sup>
- 6.134.2 Representations that goods are the produce of a particular country. If a representation is made to this effect, it would comply with this safe harbour defence provided that 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 happened in that country.<sup>112</sup> This safe harbour defence applies to goods such as bottled water, furniture, machinery and clothing.
- 6.134.3 All country of origin representations except representations that goods were grown in or were the produce of a particular country. If a representation is made about the country of origin of goods (other than a representation that the goods were grown in or the produce of a particular country), it would be considered to comply with this safe harbour defence if that country was the country in which the goods were last substantially transformed.<sup>113</sup> This safe harbour defence covers pictorial or symbolic representations such as iconic flora and fauna associated with a particular country or national flags, as well as representations that goods were made or manufactured in a particular country.
- 6.134.4 Representations in the form of a mark specified in an information standard relating to country of origin labelling of goods.<sup>114</sup> If food bears a mark specified in an information standard that complies with the requirements of that standard, it would be considered to comply with this safe harbour defence.

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<sup>110</sup> *ibid.*, p 1.

<sup>111</sup> *Competition and Consumer Amendment (Country of Origin) Act 2017* (Cth) Schedule 1 Item 2 and *Competition and Consumer Act 2010* (Cth) Schedule 2 s 255(1) Table Item 1.

<sup>112</sup> *Competition and Consumer Amendment (Country of Origin) Act 2017* (Cth) Schedule 1 Item 2 and *Competition and Consumer Act 2010* (Cth) Schedule 2 s 255(1) Table Item 2.

<sup>113</sup> *Competition and Consumer Amendment (Country of Origin) Act 2017* (Cth) Schedule 1 Item 2 and *Competition and Consumer Act 2010* (Cth) Schedule 2 s 255(1) Table Item 3.

<sup>114</sup> *Competition and Consumer Amendment (Country of Origin) Act 2017* (Cth) Schedule 1 Item 2 and *Competition and Consumer Act 2010* (Cth) Schedule 2 s 255(1) Table Item 4.

- 6.135 The Country of Origin Act also amended the definition of ‘substantially transformed’ to provide that goods will be considered substantially transformed if they are fundamentally different in identity, nature or essential character from all of the goods’ ingredients or components that were imported into that country.<sup>115</sup> As an example, if apples and spices were imported into Australia to make apple pies, using other Australian ingredients such as pastry and sugar, then the finished product, apple pie, would be fundamentally different from its imported ingredients—apple and spices—at least in terms of its identity and nature. The good would therefore be considered to have been substantially transformed in Australia.<sup>116</sup>
- 6.136 Another amendment made by the Country of Origin Act dealt with packaging materials. The amendment related to representations that goods are grown in a particular country (see paragraph 6.134.1) and provided that packaging materials are not considered to be an ingredient or component of the goods.<sup>117</sup> The purpose of this amendment was to ensure that the requirements for the safe harbour defence relate directly to the goods and the defence is not circumvented by including packaging when determining if the ‘significant component’ is met.
- 6.137 The other significant amendment made by the Country of Origin Act also related to representations that goods are grown in a particular country. It stipulated that, when considering a component or ingredient that has been dried or concentrated, any water added to return the water content to no more than its natural level is considered to have the same origin as the component or ingredient.<sup>118</sup> This ensured that country of origin of an ingredient or component is not altered through dehydrating and rehydrating processes.
- 6.138 The Country of Origin Act commenced on 23 February 2017.
- 6.139 The amendments raise no issues of Parliamentary sovereignty or law-making powers.

***Competition and Consumer Amendment (Competition Policy Review) Act 2017 (Cth)***

- 6.140 In 2014, the Commonwealth Government commissioned a review of Australia’s competition laws and policy. The competition policy review was led by a review panel chaired by Professor Ian Harper (Harper Review). The Harper Review’s Final Report, released on 31 March 2015, contained 56 recommendations on competition policy, law and institutions.
- 6.141 The amendments to the ACL made by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017 (Cth)* (Competition Policy Review Act) arose from the Harper Review.
- 6.142 The first amendment to the ACL made by the Competition Policy Review Act related to the disclosure of certain information.
- 6.143 Under the ACL, suppliers of consumer goods of a particular kind have an obligation to report to the relevant Commonwealth Minister by written notice, within two working days of becoming aware, that the goods have been associated with the death or serious injury of illness of any person.<sup>119</sup> The ACL provides that these notices are confidential unless the

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<sup>115</sup> *Competition and Consumer Amendment (Country of Origin) Act 2017 (Cth)* Schedule 1 Item 2 and *Competition and Consumer Act 2010 (Cth)* Schedule 2 s 255(2).

<sup>116</sup> *Competition and Consumer Amendment (Country of Origin) Bill 2016 (Cth)*, *Explanatory Memorandum*, House of Representatives, p 87.

<sup>117</sup> *Competition and Consumer Amendment (Country of Origin) Act 2017 (Cth)* Schedule 1 Item 4 and *Competition and Consumer Act 2010 (Cth)* Schedule 2 s 255(8).

<sup>118</sup> *Competition and Consumer Amendment (Country of Origin) Act 2017 (Cth)* Schedule 1 Item 4 and *Competition and Consumer Act 2010 (Cth)* Schedule 2 s 255(9).

<sup>119</sup> *Competition and Consumer Act 2010 (Cth)* Schedule 2 s 131.

person who gave the notice has consented to the Australian Competition and Consumer Commission (ACCC) sharing the information, or in other specific circumstances.<sup>120</sup>

- 6.144 The Competition Policy Review Act amended the ACL to permit the ACCC to disclose the notices it receives to specific agencies where it is 'reasonably necessary to protect public safety'.<sup>121</sup> This is not the law in Western Australia under the ACL WA as the ACL WA was last amended in 2013 and does not include this 2017 amendment.
- 6.145 The second amendment to the ACL made by the Competition Policy Review Act clarified the operation of the cooling-off period for unsolicited consumer agreements.
- 6.146 Prior to the 2017 amendment, the ACL provided that a supplier under an unsolicited consumer agreement must not supply unsolicited goods or services, or accept or require payment under an unsolicited consumer agreement, for 10 business days commencing on the first business day after such an agreement was made in person, or if it was made by telephone, commencing at the start of the business day after the consumer was given a copy of the agreement.<sup>122</sup> This is still the law in Western Australia under the ACL WA, as the ACL WA was last amended in 2013 and does not include this 2017 amendment.<sup>123</sup>
- 6.147 The drafting of this provision may inadvertently permit traders to supply unsolicited goods or services and accept or require payment after an unsolicited consumer agreement has been entered into, but before the 10 business days commence; that is, on the day the contract is agreed.
- 6.148 The amendments clarified the responsibilities for traders and the rights of consumers regarding the supply and acceptance of payment for unsolicited goods or services and the commencement of the cooling-off period. In particular, it is now clear that the cooling-off period commences when the agreement is entered into. During this period, traders are not permitted to supply unsolicited goods or services and accept or require payment under an unsolicited consumer agreement.
- 6.149 The amendments clarified the operation of the cooling-off period for unsolicited consumer agreements; they did not change the substantive law.
- 6.150 Schedule 14 of the Competition Policy Review Act, which amended the ACL, commenced on 28 October 2017.
- 6.151 The amendments raise no issues of Parliamentary sovereignty or law-making powers.

### ***Treasury Laws Amendment (2018 Measures No. 3) Act 2018 (Cth)***

- 6.152 The *Treasury Laws Amendment (2018 Measures No. 3) Act 2018* (Cth) made amendments to two parts of the ACL.

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<sup>120</sup> *Competition and Consumer Act 2010* (Cth) Schedule 2 s 132A. The specific circumstances include a disclosure by the Commonwealth Minister to another Consumer Affairs Minister, the regulator or an associate of the regulator, a disclosure required or authorised by or under law and a disclosure reasonably necessary for the enforcement of the criminal law or a law imposing pecuniary penalties: *Competition and Consumer Act 2010* (Cth) Schedule 2 s 132A(2).

<sup>121</sup> *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth) Schedule 14 Part 4 s 11 and *Competition and Consumer Act 2010* (Cth) Schedule 2 s 132A(3). Specified agencies are any agency within the meaning of the *Freedom of Information Act 1982* (Cth), the Commonwealth Director of Public Prosecutions, a State or Territory government body or a foreign government body.

<sup>122</sup> *Competition and Consumer Act 2010* (Cth) Schedule 2 ss 82(3)(a)–(d), 85(3)(a), 85(6)(a), 86(1)(d) and (e), 179(1)(b)(i) and (ii).

<sup>123</sup> *Fair Trading Act 2010* ss 82(3)(a)–(d), 85(3)(a), 85(6)(a), 86(1)(d) and (e), 179(1)(b)(i) and (ii).



- 6.153 The first amendment introduced new penalties for breaches of the consumer protection provisions in the ACL.
- 6.154 The effectiveness of the ACL penalty and enforcement provisions and the flexibility of the provisions to respond to new and emerging issues were reviewed as part of the ACL Review process.<sup>124</sup>
- 6.155 Prior to the ACL Review, the ACL contained a single set of enforcement powers, penalties, remedies and redress provisions applicable to breaches of the consumer protection provisions. The maximum civil pecuniary penalty and fine for criminal offences was \$1.1 million for a body corporate and \$220 000 for a person other than a body corporate.
- 6.156 The ACL Review found that the maximum penalties available in the ACL were ‘insufficient to deter highly profitable non-compliant conduct and can be seen by some entities as a “cost of doing business”’.<sup>125</sup> They were also found to be inconsistent with penalties available under the competition provisions of the CCA 2010.
- 6.157 The ACL Review proposed increasing the maximum financial penalties available under the ACL by aligning them with the penalty regime under the competition provisions of the CCA 2010.<sup>126</sup>
- 6.158 The *Treasury Laws Amendment (2018 Measures No. 3) Act 2018* (Cth) gave effect to this proposal.
- 6.159 The maximum penalty for a body corporate under the ACL is now the greater of:
- \$10 million
  - if the court can determine the value of the benefit obtained from the offence, or act or omission, by the body corporate and any related bodies corporate – three times the value of the benefit
  - if the court cannot determine the value of the benefit – 10 per cent of the annual turnover of the body corporate.
- 6.160 The second amendment to the ACL introduced a safe harbour defence for complying with an information standard about free-range eggs.
- 6.161 Section 134(1)(a) of the ACL provides that the Commonwealth Minister may, by written notice published on the internet, make an information standard for goods of a particular kind. The information standard may, among other things:
- make provision in relation to the content of information about goods of that kind
  - require the provision of specified information about goods of that kind
  - provide for the manner or form in which such information is to be provided.
- 6.162 On 31 March 2016, Commonwealth, State, Territory and New Zealand Consumer Affairs Ministers agreed to the introduction of an information standard for the labelling of free-range eggs, as well as a safe harbour defence in the ACL.<sup>127</sup>

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<sup>124</sup> Treasury Laws Amendment (2018 Measures No.3) Bill 2018, *Explanatory Memorandum*, House of Representatives, p 7.

<sup>125</sup> Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review Final Report*, March 2017, p 87.

<sup>126</sup> *ibid.*

<sup>127</sup> Treasury Laws Amendment (2018 Measures No. 3) Bill 2018, *Explanatory Memorandum*, House of Representatives, p 21.



- 6.163 The *Australian Consumer Law (Free Range Egg Labelling) Information Standard 2017* for the display and labelling requirements for free-range eggs commenced on 26 April 2018.
- 6.164 Compliance with the requirements of an information standard made under the ACL is not a defence to an allegation of false, misleading or deceptive conduct under the ACL.<sup>128</sup>
- 6.165 The *Treasury Laws Amendment (2018 Measures No. 3) Act 2018* (Cth) amended the ACL to provide an exception to this. It provided a safe harbour defence to an allegation of false, misleading or deceptive conduct where a person has complied with the labelling or display requirements that are specified in the *Australian Consumer Law (Free Range Egg Labelling) Information Standard 2017*.
- 6.166 In proceedings that allege false, misleading or deceptive conduct or representations, a person seeking to rely on the safe harbour defence bears the evidential burden.<sup>129</sup> Whether placing the evidential burden on the respondent/defendant is appropriate is outside the Committee's terms of reference. Accordingly, the Committee makes no comment about this.
- 6.167 The *Treasury Laws Amendment (2018 Measures No. 3) Act 2018* (Cth) commenced on 31 August 2018.
- 6.168 The amendments raise no issues of Parliamentary sovereignty or law-making powers.

***Treasury Laws Amendment (Australian Consumer Law Review) Act 2018 (Cth)***

- 6.169 As previously noted, a review of the ACL was completed in 2017. The amendments to the ACL made by the *Treasury Laws Amendment (Australian Consumer Law Review) Act 2018* (Cth) (ACL Review Act) arose from that ACL Review.
- 6.170 The amendments:
- 6.170.1 ensure that the unsolicited services provisions in the ACL operate as intended by including services that were not actually supplied. The definition of unsolicited services in the ACL prior to the amendment was limited to services actually supplied to a person without the person requesting the services. The ACL Review Act amended the definition of 'unsolicited services' so it also includes unrequested services which are purported to have been supplied but have not actually been supplied
- 6.170.2 clarify that an unsolicited consumer agreement may be entered into in a public place. The ACL provides that an agreement which is the result of negotiations between a consumer and dealer at a place other than the supplier's place of business is an unsolicited consumer agreement. Certain other conditions need to be met including that the consumer did not invite the dealer to come to that place. The ACL Review Act clarified that such a place could be a public place, even though a consumer's invitation is not required for the dealer to enter a public place
- 6.170.3 enhance price transparency by requiring that additional fees or charges associated with pre-selected options are included in the headline price. Prior to the amendments, the ACL provided that a charge of any description payable to a person making a representation (the 'seller') by another person (the 'customer') was included in the single price or 'headline price'. However, there was an exception for optional charges. That is, an optional charge did not need to be included in the headline price. This meant that the headline price for a good or service was not always represented in the total price of the good or service where the person offering the good or service has pre-selected options. This was a particular issue for

<sup>128</sup> *Competition and Consumer Act 2010* (Cth) ss 18, 29(1)(a) and 151(1)(a).

<sup>129</sup> *Treasury Laws Amendment (2018 Measures No. 3) Act 2018* (Cth) Schedule 2 Item 2 s 137A(2).

online sales. If a consumer did not specifically de-select the pre-selected options they were charged a higher price than the single price. The ACL Review Act amended the provisions relating to a single price so that the headline price must include charges automatically applied by the seller, even though, during the transaction, the customer may deselect these options

6.170.4 give courts the power to require a person in contravention of the ACL to engage a third party to give effect to a community service order. The ACL allows regulators to apply to the court for a community service order as a remedy where a person has contravened, or has been involved in a contravention of, the ACL. The amendments made by the ACL Review Act clarified that a court may issue a community service order requiring the person to engage a third party, at the person's expense, to perform the service required in the order

6.170.5 clarify the scope of consumer guarantees where goods are transported or stored. The consumer guarantee regime in the ACL sets out a number of statutory guarantees that apply to all consumer transactions, whether that be the supply of goods or the supply of services. In relation to the supply of services, the consumer guarantees include a requirement that services must be provided with due care and skill, fit for a particular purpose and supplied within a reasonable amount of time. Section 63 of the ACL outlines services to which the guarantees regime does not apply (exemptions). Prior to the amendments, section 63(a) provided that the consumer guarantees did not apply to services that were supplied under 'a contract for or in relation to the transportation and storage of goods for the purpose of a business, trade, profession or occupation carried on or engaged in by the person for whom the goods are transported'. The amendments clarified that this exemption only applies to the extent that the goods being transported relate to a consignee's business. It does not apply where the goods being transported are for the consignee's personal use.

6.171 The *Treasury Laws Amendment (Australian Consumer Law Review) Act 2018* (Cth) commenced on 25 October 2018.

6.172 The amendments raise no issues of Parliamentary sovereignty or law-making powers.

## Conclusions

6.173 There is a national scheme for a uniform Australian consumer law to be applied in all Australian jurisdictions. Each Australian jurisdiction applies the ACL as in force from time to time.

6.174 However, Western Australia, to preserve State and Parliamentary sovereignty and law-making powers, chose to adopt a point-in-time version of the ACL as the ACL WA. This means that in order to keep the ACL WA current with the ACL in other jurisdictions, Western Australia must from time to time pass acts incorporating progressive amendments to the ACL. This means that the ACL WA will always, to some extent, lag behind the ACL in other jurisdictions.

6.175 The Bill proposes through its clause 6 a mechanism to eliminate this time lag, however it will necessarily result in changes to the law in Western Australia being effected without the opportunity for scrutiny by Parliament or its committees beforehand. Although clause 6 provides a mechanism for those changes to be disallowed, the Committee is not satisfied that it sufficiently preserves Parliament's sovereignty.

6.176 The Department has indicated that the adoption and disallowance mechanism proposed in clause 6 is being considered as a template to be applied to other national schemes of

legislation. The Committee is concerned that if that were to occur, it will result in an erosion of Parliamentary sovereignty and law-making powers.

- 6.177 The Committee understands the desirability of eliminating or reducing the prospect of Western Australia being out of step with other jurisdictions when it is a party to a national scheme of uniform laws. However, it is also conscious of its responsibility, as an extension of the Parliament, to inform Parliament of risks to its sovereignty and law-making powers.
- 6.178 Accordingly, the Committee recommends against the adoption of the model proposed in clause 6 for the reasons detailed in this report, but has suggested an alternative approach that with further consideration and refinement might provide a satisfactory balance between those competing public interest considerations.

A handwritten signature in blue ink, appearing to read 'Michael Mischin'.

Hon Michael Mischin MLC  
**Chairman**

# APPENDIX 1

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## OPENING COMMENTS MADE BY THE COMMISSIONER FOR CONSUMER PROTECTION

### Opening comments

I wish to thank the Committee for the opportunity to speak today on the Fair Trading Amendment Bill 2018.

The Department of Mines, Industry Regulation and Safety recognises the inherent conflict that arises when the State of Western Australia enters into a uniform regulatory scheme such as the one operating for the Australian Consumer Law. Such arrangements present challenges in how to balance the desire for consistency across jurisdictions to facilitate such things as ease of trade with the need to preserve State Sovereignty.

Clause 6 of the Fair Trading Amendment Bill seeks to achieve this balance by introducing a disallowance mechanism as the tool by which state sovereignty is exercised.

When the Fair Trading Act 2010 was amended to enact the Australian Consumer Law in WA (the ACL WA) the approach taken was to apply the ACL at a particular point in time; that is 1 January 2011. Currently, the only way of changing the ACL WA under section 19 of the Fair Trading Act is by the passage of an Amendment Bill through Parliament. This has proven to be an inefficient and expensive way of maintaining consistency between the ACL WA and ACL operating elsewhere in Australia and has resulted in inconsistencies in the ACL WA for extended periods of time.

For example, since 1 January 2011, the ACL WA has been updated just once to apply the ACL as in force on 1 January 2013. Since 1 January 2013 the ACLWA has not been amended. Nationally the ACL has been amended by six separate amending Bills. Of these amendments, reforms to extend the unfair contract terms protections to small business contracts and the 'safe harbour' defences for country of origin claims are the most significant.

In relation to the extension of unfair contract terms protections to small business, unincorporated small businesses in WA have not had protection from the provisions for two years now. This means that those businesses are likely to have continued to incur harm or loss as a result of unfair contract terms continuing to be included in their contracts. A survey of small businesses that experienced unfair contract terms (conducted by the Commonwealth when the proposed reforms were consulted upon) indicated that losses incurred as a result of unfair contract terms were in the range of \$1200 to \$20 000<sup>1</sup>.

In relation to the 'safe harbour' defences for country of origin claims, unincorporated small businesses in Western Australia that choose to use country of origin claims about their goods have not had the benefit of the safe harbour claims. The safe harbour claims were implemented in 2017 to provide certainty to businesses by setting out 'safe harbour defences' for claims that goods:

were 'grown in' a particular country

are the 'product of' a particular country

were 'made (or manufactured) in', or otherwise originated in, a particular country.

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<sup>1</sup> RIS – "Extending unfair contract term protections to Small Business" page 14

If a business satisfies the criteria for a safe harbor, they will have an automatic defence against an allegation that they have breached the relevant section of the ACL, if it relates to a country of origin claim. It is this protection that unincorporated small businesses are currently without in Western Australia.

In addition, as a result of the major review of the ACL that was finalised early last year, CAF has approved a further 15 proposals for amending the ACL which are currently being drafted. Even if DMIRS was able to commit additional resources to regularly amending the FTA to align the ACL WA with these proposed upcoming Commonwealth amendments, it would be impossible to maintain pace with the Commonwealth changes because of unavoidable delays in the drafting and passage of amendments to the FTA and the electoral cycle.

It is because of the ineffectiveness of the current model applying in Western Australia that this Amendment Bill has been introduced.

Only WA chose to date to apply the ACL as model legislation at a particular point in time. Every other State and Territory has achieved uniformity via a combination of measures. That is by applying the Commonwealth ACL as in force from time to time subject to the power to disallow Commonwealth Amendments variously by Proclamation, Order of the Governor or Regulation. Limiting Western Australia's capacity to achieve uniformity by formally amending the ACL WA each time a change is made has resulted in the ACL WA lagging behind other jurisdictions in relation to maintaining harmonisation. This in turn has impacted on WA's capacity to administer and enforce the ACL as a regulatory scheme operating in WA.

The approach used by the Commonwealth Government and each State and Territory Government to ensure that the ACL continues to apply as a consistent set of consumer protection laws in each jurisdiction is comprehensive. It is underpinned by the Intergovernmental Agreement for the Australian Consumer Law (IGA) which provides a collaborative leadership model for the ACL. Western Australia participates in this model via meetings of:

- the COAG Legislative and Governance Forum on Consumer Affairs (CAF) comprised of Consumer Affairs Ministers in each jurisdiction; and
- Consumer Affairs Australia and New Zealand (CAANZ) comprised of Commonwealth, state and territory senior policy officials.

There should be a level of comfort for the Parliament of Western Australia in the process that is adopted by the Commonwealth and the States and Territories that the amendments being made to the ACL are both warranted and appropriate.

At the highest level, CAF and CAANZ provide a cooperative decision making approach to proposals for change to the ACL. These in turn are underpinned by governance papers for CAF and CAANZ and the various subcommittees that support the work of Ministers and senior policy officials.

Importantly, the IGA provides a process of amendment which requires the Commonwealth to consult with all states and territories. The Commonwealth cannot introduce a Bill to amend the ACL unless the proposed amendment is supported by four other parties (including at least three States). In practice, CAF Ministers in each jurisdiction vote on proposed amendments and to date only

amendments that have unanimous agreement have been enacted in the ACL. In addition to the processes under the IGA, Minister Johnston has introduced an additional step whereby CAF decisions to amend the ACL are taken to Cabinet for information and endorsement prior to him voting at CAF on the proposed amendments.

Each proposal to amend the Commonwealth ACL is subject to a regulatory impact assessment which applies a systematic approach to identifying, evaluating and resolving consumer problems using the Organisation for Economic Co-operation and Development's (OECD's) *Consumer Policy Toolkit*. This toolkit applies an evidence based approach to consumer policy. This regulatory impact assessment process is open to consultation with all interested parties Australia wide. Each of the states and territories has input into this process and has access to the assessment prior to voting on the proposed amendment.

If the Commonwealth seeks to make minor administrative amendments to the ACL, it must still notify each state and territory of its intention to do so. If four or more jurisdictions advise the Commonwealth in writing that the proposed amendments are not of a minor administrative nature, the Commonwealth must revert to the full consultation process.

Thank you for allowing this opening statement. We are happy to answer any questions the Committee may have.

## APPENDIX 2

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### SECTION 43 OF THE *LAND ADMINISTRATION ACT 1997*

**43. Certain changes to class A reserves, national parks etc., parliamentary procedure as to**

- (1) If, after a proposal is laid before each House of Parliament under section 42(4), 44(1) or 45(4) notice of a resolution disallowing the proposal —
  - (a) is not given in either House of Parliament within 14 sitting days of that House after the proposal was laid before it, the proposed reduction, excision, cancellation, change, grant or permission may be implemented by order after the last day of the later of those periods of 14 sitting days; or
  - (b) is given in either or both of the Houses of Parliament within 14 sitting days of that House, or each of those Houses, after the proposal was laid before it, but that resolution is not lost in that House or each of those Houses within 30 sitting days after the proposal was laid before it, the proposed reduction, excision, cancellation, change, grant or permission lapses; or
  - (c) is given in either or both of the Houses of Parliament within 14 sitting days of that House, or each of those Houses, after the proposal was laid before it, but that resolution is lost in that House or each of those Houses within 30 sitting days after the proposal was laid before it, the proposed reduction, excision, cancellation, change, grant or permission may be implemented by order after that loss or after the later of those losses, as the case requires.
- (2) It does not matter whether or not the period of 14 sitting days referred to in subsection (1) or some of them occur during —
  - (a) the same session of Parliament; or
  - (b) the same Parliament,

as that in which the relevant proposal is laid before the House of Parliament concerned.

- (3) If the notice of a resolution referred to in subsection (1) is given to a House and that resolution is not lost but, before the period of 30 sitting days mentioned in subsection (1)(b) and (c) expires, Parliament is prorogued or that House is dissolved or expires —
  - (a) the relevant proposal does not lapse but, subject to paragraph (b)(iii), it cannot be implemented; and
  - (b) on the commencement of the next session of Parliament —
    - (i) the Minister may cause the proposal to be laid before that House again; and
    - (ii) notice of a resolution disallowing the proposal may be given again in that House; and
    - (iii) subsection (1) applies again but as if the references in subsection (1)(b) and (c) to the period of 30 sitting days after the proposal was laid were references to the remaining sitting days after notice of a resolution disallowing the proposal is given under

- (4) In subsection (3)(b)(iii) —

***remaining sitting days*** means the number of sitting days equal to the portion of the period of 30 sitting days mentioned in subsection (1)(b) and (c) that remained unexpired when Parliament was prorogued, or the relevant House was dissolved or expired, as referred to in subsection (3).

*[Section 43 amended by No. 59 of 2000 s. 11.]*

## GLOSSARY

Term	Definition
<b>ACCC</b>	Australian Competition and Consumer Commission
<b>ACL</b>	Australian Consumer Law
<b>ACL IGA</b>	Intergovernmental Agreement for the Australian Consumer Law dated 2 July 2009
<b>ACL Review</b>	Consumer Affairs Australia and New Zealand, <i>Australian Consumer Law Review Final Report</i> , March 2017
<b>ACL Review Act</b>	<i>Treasury Laws Amendment (Australian Consumer Law Review) Act 2018</i> (Cth)
<b>ACL WA</b>	<i>Australian Consumer Law (WA)</i>
<b>Act</b>	<i>Fair Trading Act 2010</i>
<b>Bill</b>	Fair Trading Amendment Bill 2018
<b>CCA 2010</b>	<i>Competition and Consumer Act 2010</i> (Cth)
<b>COAG</b>	Council of Australian Governments
<b>Commissioner</b>	Mr David Hillyard, the Commissioner for Consumer Protection
<b>Committee</b>	Standing Committee on Uniform Legislation and Statutes Review
<b>Competition Policy Review Act</b>	<i>Competition and Consumer Amendment (Competition Policy Review) Act 2017</i> (Cth)
<b>Country of Origin Act</b>	<i>Competition and Consumer Amendment (Country of Origin) Act 2017</i> (Cth)
<b>Department</b>	Department of Mines, Industry Regulation and Safety – Consumer Protection Division
<b>Harper Review</b>	Professor Ian Harper, Competition Policy Review, Final Report, March 2015
<b>Minister</b>	Minister for Regional Development
<b>ORDA Act</b>	<i>Omnibus Repeal Day (Autumn 2014) Act 2014</i> (Cth)
<b>SO 67</b>	Legislative Council Standing Order 67
<b>SO 126</b>	Legislative Council Standing Order 126
<b>SO 128</b>	Legislative Council Standing Order 128
<b>TLA Act</b>	<i>Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015</i> (Cth)
<b>TPA</b>	<i>Trade Practices Act 1974</i> (Cth)



<b>Term</b>	<b>Definition</b>
<b>2010 Amendment Bill</b>	Acts Amendment Fair Trading Bill 2010
<b>2010 Bill</b>	Fair Trading Bill 2010
<b>2013 Bill</b>	Fair Trading Amendment Bill 2013



## 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 examine the provisions of any treaty that the Commonwealth has entered into or presented to the Commonwealth Parliament, and determine whether the treaty may impact upon the sovereignty and law-making powers of the Parliament of Western Australia;
  - (d) to review the form and content of the statute book; and
  - (e) 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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