THIRTY-EIGHTH PARLIAMENT

REPORT 56

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

FAIR TRADING BILL 2010 AND ACTS AMENDMENT FAIR TRADING BILL 2010

Presented by Hon Adele Farina MLC (Chairman)

November 2010

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:

"**8. Uniform Legislation and Statutes Review Committee**

8.1 A *Uniform Legislation and Statutes Review Committee* is established.

8.2 The Committee consists of 4 Members.

8.3 The functions of the Committee are -

(a) to consider and report on Bills referred under SO 230A;

(b) of its own motion or on a reference from a Minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;

(c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;

(d) to review the form and content of the statute book;

(e) to inquire into and report on any proposal to reform existing law that may be referred by the House or a Minister; and

(f) to consider and report on any matter referred by the House or under SO 125A.

8.4 For a purpose relating to the performance of its functions, the Committee may consult with a like committee of a House of the Parliament of the Commonwealth, a state or a territory, and New Zealand and similarly, may participate in any conference or other meeting."

Members as at the time of this inquiry:

Hon Adele Farina MLC (Chairman)

Hon Nigel Hallett MLC (Deputy Chairman)

Hon Liz Behjat MLC

Hon Linda Savage MLC

Staff as at the time of this inquiry:

Susan O'Brien, Advisory Officer (Legal)

Mark Warner, Committee Clerk

Address:

Parliament House, Perth WA 6000, Telephone (08) 9222 7222
lcco@parliament.wa.gov.au
Website: http://www.parliament.wa.gov.au
ISBN978-1-921634-55-0

CONTENTS

EXECUTIVE SUMMARY, FINDINGS AND RECOMMENDATIONS

FINDINGS AND RECOMMENDATION

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

Page 30

Finding 1: The Committee finds that State and Territory (and Commonwealth) legislation inconsistent with the CCA 2010 will survive the coming into effect of the Commonwealth Australian consumer law legislation.

Page 39

Finding 2: The Committee finds that the ACL IGA is not the current intergovernmental agreement in respect of introduction of a uniform consumer law.

The MCCA Communiqué of the meeting of 4 December 2009 is a more accurate written record of the current agreement but the terms of the legislation proposed by the various jurisdictions also contain further evidence as to the content of the current agreement.

Page 40

Finding 3: The Committee finds that the Australian consumer law does not represent the total legislation implementing the Australian consumer law scheme.

Page 40

Finding 4: The Committee finds that there are administration, enforcement and remedy provisions in the application laws that are located outside the Australian consumer law itself and the scheme requires application of these provisions to other legislation. The Australian consumer law scheme also requires amendment to other legislation to remove inconsistent provisions.

Page 40

Finding 5: The Committee finds that, as implemented, the Australian consumer law scheme requires significant uniformity in the version of the Commonwealth Schedule 2 and section 139G Regulations to be applied at 1 January 2011 but allows for less uniformity in the application of amendments to those laws.

Page 41

Recommendation 1: The Committee recommends that the responsible Minister advise the Legislative Council:

- **of the current stage of consideration of the application laws of the other States and Territories; and,**
- **in the event that legislation has not been passed, the reasons for believing the Australian Consumer Law legislative scheme will be implemented in all jurisdictions at 1 January 2011**.

Page 53

Finding 6: The Committee finds that it is unsatisfactory to have in the same law such a large number of different definitions of terms representing the fundamental concepts of consumer law.

Page 57

Recommendation 2: The Committee recommends that the FT Bill be amended to remove the power to prescribe the Acts that will prevail over the FT Bill. This can be effected in the following manner:

Page 13, lines 5 and 6 - To delete the lines

Page 13, line 7 - To delete (c) and insert -

(b)

Page 59

Finding 7: The Committee finds that clause 19(2) of the Fair Trading Bill 2010 proposes that subsidiary legislation, regulations made pursuant to section 139G of the Competition and Consumer Act 2010 (Cwlth), apply in Western Australia as primary legislation.

Page 66

Finding 8: The Committee finds that, on the information provided to it, neither the intergovernmental agreements nor the Commonwealth legislation require regulations made under section 139G of the CCA 2010 to be applied in the State as primary legislation.

Page 67

Finding 9: The Committee finds that it is undesirable for:

- **the subsidiary legislation of another jurisdiction to be applied as primary legislation in the State; and**

- **subsidiary legislation to be treated as primary legislation for some purposes (clause 19) and subsidiary legislation for others (clauses 21 and 23) when that inconsistent treatment can, and should, be avoided.**

Page 68

Recommendation 3: The Committee recommends that clause 19 of the FT Bill be amended to apply regulations made under section 139G of the CCA 2010 as subsidiary legislation forming part of the Australian Consumer Law text for the purposes of that clause. This can be effected in the following manner:

Page 17, line 5 - To delete the line and insert -

(c) in so far as it constitutes Schedule 2 to the *Competition and Consumer Act 2010* (Commonwealth), is part of this Act; and

(d) 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.

Page 69

Recommendation 4: The Committee recommends that the responsible Minister advise the Legislative Council:

- **whether the note to the FT Bill constitutes the current text of Schedule 2 to the *Competition and Consumer Act 2010* (Commonwealth);**

- **if not, of any changes to that text; and**

- **if so, whether there will be any amendment of that Schedule prior to clause 19 of the FT Bill commencing.**

Page 72

Finding 10: The Committee finds that clause 20 of the FT Bill is consistent with the way in which the Australian consumer law scheme has been implemented in other jurisdictions.

Page 75

Finding 11: The Committee finds that provision in the FT Bill for amendments to the Australian Consumer Law (WA) to be subject to Parliamentary approval recognises the privileges of the Parliament. This provides an opportunity for the Parliament to balance the competing factors at play in making, or not making, an amendment to the uniform legislation.

Page 82

Finding 12: The Committee finds that clauses 20(4) and (5) of the FT Bill derogate from the Parliament's right to vote and are inconsistent with that right as set out in section 14 of the *Constitution Acts Amendment Act 1899.*

Page 83

Recommendation 5: The Committee recommends that the President direct the Clerk of the Legislative Council to obtain a legal opinion from a Queens Counsel or Senior Counsel on the application of section 73 of the *Constitution Act 1899* to section 14 of the *Constitution Acts Amendment Act 1899.*

Page 85

Recommendation 6: The Committee recommends that amendment of the FT Bill be by bill. This can be effected in the following manner:

Page 17 - lines 10 and 11 - To delete -

by order published in the *Gazette*

and insert -

by bill.

Page 17 - lines 12 to 31 - To delete the lines

Page 18 - lines 1 to 8 - To delete the lines

Page 86

Recommendation 7: The Committee recommends that, in the event that Recommendation 6 is not accepted, clause 20 of the FT Bill be amended to provide power for the Parliament to make amendments to a draft order presented for its approval. This can be effected in following manner:

Page 17 after line 14 - To insert -

(3) A resolution under subsection (2) may approve a draft order in whole or in part and may approve a draft order as amended by the House.

Page 86

Recommendation 8: The Committee recommends that, in the event that Recommendation 6, clause 20 of the FT Bill be amended so as to be consistent with section 14 of the *Constitution Acts Amendment Act 1899*. This can be effected in the following manner:

Page 17 - lines 17 to 31 - To delete the lines

Page 18 - lines 1- 8 - To delete the lines

Page 86

Recommendation 9: The Committee recommends that, in the event that Recommendation 6, draft orders under clause 20 of the FT Act be subject to SO230A. This can be effected in the following manner:

Page 17 - after line 16 - To insert -

(4) The Clerk of each House of Parliament is to give a copy of the draft order to the committee or committees of the Parliament whose terms of reference cover uniform legislation (that is, legislation that gives effect to an intergovernmental agreement or that is part of a uniform system of laws throughout the Commonwealth).

Page 93

Finding 13: The Committee finds that omission of power to disallow interim product safety bans from clause 21 of the FT Bill does not offend Fundamental Legislative Scrutiny Principal 13 (*Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council*).

Page 93

Finding 14: The Committee finds that, in addition to the varying specific interpretation provisions reported in Chapter 3, different parts of the Fair Trading Act 2010 will be subject to different Interpretation Acts. Whilst the provisions of the State and Commonwealth Acts are largely consistent, this is undesirable. This is, however, a consequence of the uniform legislative scheme.

Page 100

Recommendation 10: The Committee recommends that clause 31 of the FT Bill be deleted. This can be effected in the following manner:

Page 22, lines 8 to 17 - To delete the lines.

Page 106

Recommendation 11: The Committee recommends that the responsible Minister explain to the Legislative Council the circumstances, other than that of fresh evidence, in which it would be appropriate to prosecute a person for an offence of which they had previously been acquitted or "*not convicted*" in another jurisdiction.

Page 108

Recommendation 12: The Committee recommends that clause 32 of the FT Bill be amended to be consistent with section 17 of the *Criminal Code.* This can be effected in the following manner:

Page 22 lines 27 to 30 - To delete the lines and insert -

(b) the offender has been acquitted or convicted of the offence with which the offender is charged, or has already been convicted or acquitted of an offence of which the offender might be convicted upon the indictment or prosecution notice on which the offender has been charged, under the application law of the other participating jurisdiction,

the offender is not liable to be prosecuted or punished for the offence against the Australian Consumer Law (WA).

Page 108

Recommendation 13: The Committee recommends that the responsible Minister advise the Legislative Council:

- **whether clause 32 operates to protect a person who has paid an infringement notice in respect of an offence in another jurisdiction from prosecution for the offence in Western Australia; and**
- **if not, the reason why that is not considered appropriate.**

Page 113

Finding 15: The Committee finds that, on the information available to it, clause 32(4) of the FT Bill is not confined in its application to what the Department of Commerce refers to as "*civil pecuniary penalties*".

Page 113

Recommendation 14: The Committee recommends that the responsible Minister advise the Legislative Council whether:

- **clause 32(4) of the FT Bill is intended to apply only to "*civil pecuniary penalties*";**
- **if so, how that is achieved, bearing in mind the Committee's comments in this report; and**
- **if that result was intended but has not been achieved, whether clause 32(4) requires amendment.**

Page 115

Recommendation 15: The Committee recommends that the responsible Minister clarify for the Legislative Council whether or not use of the term "*crime*", rather than "*indictable offence*" in clause 33 of the FT Bill raises any issues under the State's criminal procedure and sentencing legislation.

Page 125

Finding 16: The Committee finds that sections 69(3) and (4) and 94 of the Australian Consumer Law (WA) allow amendment of the agreements which constitute "*unsolicited consumer agreements*" for the purposes of the FT Bill. This is an inappropriate delegation of legislation-making power.

Page 129

Finding 17: The Committee finds that the State Parliament is asked to pass the FT Bill applying the Australian Consumer Law (WA) (as defined in clause 19) as a law of Western Australia prior to the full text of that law being known.

Page 135

Recommendation 16: The Committee recommends that the responsible Minister explain to the Legislative Council why the application method employed in Part XI of the CCA 2010 was not replicated in the FT Bill.

Page 136

Finding 18: The Committee finds that legislation as important and far-reaching as the Australian Consumer Law (WA), with the significant consequences that may flow from breach - both in terms of consumer protection (including safety) and supplier liability - require public access to an authorised, up-to-date, consolidated version of the law.

Page 137

Recommendation 17: The Committee recommends that Schedule 2 to the Competition and Consumer Act 2010, as in force at the time of commencement of section 19 of the Fair Trading Act 2010, be Schedule 2 to the FT Bill.

Page 137

Recommendation 18: The Committee recommends that the responsible Minister advise the Legislative Council of the measures to be put in place to ensure that there is a publicly available authorised, up-to-date, consolidated version of the Australian Consumer Law (WA), which includes:

- **the modified Commonwealth Schedule 2 amended by order published in the Gazette; and**
- **the regulations made pursuant to section 139G of the CCA 2010 that are not disallowed by the Parliament.**

Page 137

Recommendation 19: The Committee recommends that, in the event Recommendation 17 is not accepted, the note to Schedule 1 of the FT Bill deleted. This can be effected in the following manner:

Page vii - after "*Schedule 1 - Acts that override this Act*" - To delete -

Pages viii to xxii - delete the pages

Pages 98 to 351 - delete the pages

Page 143

Recommendation 21: The Committee recommends that the responsible Minister advise the Legislative Council whether there is any current proposal before the:

- **Commonwealth;**
- **COAG; or**
- **MCCA,**

to implement the Senate Committee's recommendation that insurance contracts be subject to the Australian consumer law.

Page 143

Recommendation 21: The Committee recommends that the responsible Minister advise the Legislative Council whether there is any current proposal before the:

- **Commonwealth;**
- **COAG; or**
- **MCCA,**

to implement the Senate Committee's recommendation that insurance contracts be subject to the Australian consumer law.

Page 150

Finding 19: The Committee finds that the deadline for implementation of the Australian Consumer Law legislative scheme, imposed by the ACL IGA and Seamless National Economy IGA, results in an unreasonably limited time for Parliamentary scrutiny of this "*foundation consumer law*" that amounts to a serious disregard for the institution of State Parliament.

Page 155

Recommendation 22: The Committee recommends that, subject to acceptance of its recommendations, the FT Bill be passed.

CHAPTER 1

INTRODUCTION AND INQUIRY PROCESS

REFERENCE AND PROCEDURE

1.1 The Fair Trading Bill 2010 (**FT Bill**) and Acts Amendment Fair Trading Bill 2010 (**Amendment Bill**) were introduced to the Legislative Council on 20 October 2010 by Hon Norman Moore, Minister for Mines and Petroleum; Fisheries and Electoral Affairs.[1] Following the respective Second Reading Speeches, the bills stood referred to the Standing Committee on Uniform Legislation and Statutes Review (**Committee**) pursuant to Standing Order 230A.

1.2 Standing Order 230A(4) requires the Committee to report on bills not later than 30 days of the date of reference.

INQUIRY PROCESS

Advertisement and submissions

1.3 The Committee advertised its inquiry into the FT and Amendment Bills in the *West Australian* of 23 October 2010. Details of the Committee's inquiry were also published on the Committee's website.

1.4 The Committee received one submission, from the Western Australian Council of Social Service (**WACOSS**), which expressed general support for the FT Bill.[2]

Supporting documents

Provided by the Minister for Commerce

1.5 In anticipation of referral of the Bills, the Committee wrote to the Minister for Commerce on 23 September 2010, requiring provision of the supporting documents in respect of the Bills.[3]

1.6 The Minister for Commerce provided the following supporting documents in respect of the FT Bill on 15 October 2010:

---

1 Hon Norman Moore MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 20 October 2010, pp8000 and 8002.

2 Letter from Ms Sue Ash, Chief Executive Officer, Western Australian Council of Social Service, 1 November 2010, p2.

3 Ministerial Office Memorandum 2007/01 requires the responsible Minister to provide the Committee with supporting documents in respect of bills to which SO230A will apply on introduction of such bills to either house of Parliament.

- Intergovernmental Agreement for the Australian Consumer Law, 2 July 2009 (**ACL IGA**);

- National Partnership Agreement to Deliver a Seamless National Economy, December 2008 (**Seamless National Economy IGA**); and

- Fair Trading Amendment (Australian Consumer Law) Bill 2010 (Vic).[4]

1.7 The Minister for Commerce asserted that the Amendment Bill did not fall within the ambit of SO230A.[5] It was not until some 13 days after referral of that bill, that the Committee received from the Minister some of the information required by Ministerial Office Memorandum 2007/01 but the Minister advised that there were no supporting documents.[6]

Identified by the Committee

1.8 The Committee identified the following, additional supporting documents:

- Ministerial Council for Consumer Affairs (**MCCA**) Joint Communiqué of meeting 17 May 2006;

- Council of Australian Governments (**COAG**) Communiqué of meeting 14 July 2006;

- MCCA Joint Communiqué of meeting 15 September 2006;

- COAG Communiqué of meeting 13 April 2007;

- MCCA Joint Communiqué of meeting 23 May 2008;

- MCCA Joint Communiqué of meeting 15 August 2008;

- COAG Communiqué of meeting 2 October 2008;

- MCCA Joint Communiqué of meeting 8 May 2009;

- MCCA Joint Communiqué of meeting 4 December 2009;

- Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010 (Cwlth) (**First ACL Act or Bill, as the context requires**);

4 Letter from Hon Bill Marmion MLA, Minister for Commerce, 6 October 2010.

5 Letter from Hon Bill Marmion MLA, Minister for Commerce, 11 October 201o, p1.

6 Letter from Hon Bill Marmion MLA, Minister for Commerce, 26 October 2010, p2.

- Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010 (Cwlth) (**Second ACL Act or Bill, as the context requires**); and

- Consultation Draft of Competition and Consumer (Australian Consumer Law) Amendment Regulations 2010, September 2010.

1.9 The Committee also identified the following reports and documents relevant to the Australian Consumer Law:

- Australian Competition and Consumer Commission (**ACCC**), Australian Consumer Law - A guide to the unfair contract terms law;

- Productivity Commission of Australia, Inquiry Report 33, *Review of National Competition Policy Reforms*, 28 February 2005;

- Productivity Commission of Australia, Research Report, *Review of the Australian Consumer Product Safety System*, 16 January 2006;

- Productivity Commission of Australia, Inquiry Report 45, *Review of Australia's Consumer Policy Framework*, 30 April 2008;

- Explanatory Memorandum to the First ACL Bill;

- Commonwealth of Australia, Senate, Standing Committee on Economics Legislation, *Inquiry into Trade Practices Amendment (Australian Consumer Law) Bill 2009*, 7 September 2009; and

- Explanatory Memorandum to the Second ACL Bill; and

- Commonwealth of Australia, Senate, Standing Committee on Economics Legislation, *Inquiry into Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010*, 21 May 2010.

1.10 Failure by the Government to provide all of the supporting documents in respect of bills referred requires the Committee to devote its time to sourcing and obtaining the documents necessary for its inquiry. This frustrates the Committee's ability to proceed with its scrutiny of the proposed legislation.

Hearings

1 November 2010

1.11 The Committee held a hearing on 1 November 2010, which was attended by:

- Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection;

- Mr Gerald Milford, Manager, Strategic Policy;
- Mrs Carolyn Allanson, Principal Legal Policy Officer; and
- Ms Anne O'Brien, Senior Policy Officer,
- all of the Department of Commerce.

1.12 In some recent reports, the Committee has drawn attention to lack of preparedness of witnesses at hearings.

1.13 The Committee is in this case able to commend the witnesses, in particular Mr Newcombe, for their helpful evidence. The Committee was particularly pleased to observe that the witnesses, having received short notice of the areas likely to be canvassed by the Committee, made efforts to direct their responses to the Committee's concerns rather than provide generic, broad answers.

1.14 It was, nonetheless, necessary for some questions to be taken on notice and for additional questions to be put by correspondence. The Department provided a written response to the questions taken on notice and the additional questions on 5 November 2010 (**Department's Response to Questions**).

22 November 2010

1.15 At the request of Hon Norman Moore MLC, Leader of the House, the Committee held a further meeting with the Department of Commerce on 22 November 2010 for the Department to :

- explain the basis of the government's opposition to the Committee's motion for an extension of time to report; and
- provide the government's response to the Committee's concern that clauses 20(4) and (5) of the FT Bill were in conflict with section 14 of the *Constitutions Act Amendment Act 1899* (in that they denied members of Parliament of their right to vote).

1.16 The hearing on 22 November 2010 was attended by:

- Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection; and
- Mr Gerald Milford, Manager, Strategic Policy,
- both of the Department of Commerce.

1.17 The Committee thanks the witnesses and WACOSS for their assistance in its inquiry.

SCOPE OF INQUIRY

Limited time to report

1.18 The Committee has previously reported on the difficulties posed by the 30 day reporting period in meeting the Legislative Council's expectations as to its scrutiny of proposed uniform legislation.

1.19 In the case of the FT and Amendment Bills, the Committee was faced with 477 pages of 'legislation' and 330 pages of Explanatory Memoranda. Of the 477 pages of 'legislation', 253 consisted of the version of the Australian consumer law to be applied in Western Australia as a note to Schedule 1 of the FT Bill.

1.20 The 'note' to the FT Bill will not form part of the legislation when enacted. However, the Australian consumer law will form part of the Fair Trading Act 2010. This occurs by way of reference to Commonwealth legislation (see clause 19), the text of which is not set out in the effective part of the FT Bill. (The issues arising from provision of the text of the Australian consumer law as a note to the FT Bill are discussed in Chapter 7.)

1.21 It is not possible for the Committee to comprehensively scrutinise 477 pages of legislation introducing a myriad of different and complex changes to current law, and prepare its report, in 30 days.

1.22 In light of the issues raised by the Bills, having noted that at 17 November 2010 three jurisdictions had not introduced their Australian consumer law legislation, the Committee explored the possibility of an extension of time to report.

1.23 The government, however, was adamant that to avoid significant financial detriment to the State under the Seamless National Economy IGA, the FT Bill must be passed in sufficient time to come into effect on 1 January 2011 and that the other jurisdictions, some of which had not yet introduced legislation at 22 November 2010, would meet the implementation deadline.[7]

---

[7] "*Under either scenario it is likely that we will suffer a significant financial penalty because the Australian Consumer Law is one of the keys of the COAG reforms and the commitment is to have it commence uniformly everywhere … My view is that we would be in line for a multimillion-dollar penalty for what must be paid, but I cannot tell you the exact amount.*" (Mr Gary Newcombe, Director, Strategic Policy and Development, Department of Commerce, Consumer Protection Division, Mrs Carolyn Allanson, Principal Legal Policy Officer, Department of Commerce, Mr Gerald Milford, Manager, Strategic Policy, Department of Commerce, Consumer Protection division, Ms Anne O'Brien, Senior Policy Officer, Department of Commerce, *Transcript of Evidence*, 1 November 2010, pp19 and 20.) (**Department of Commerce Transcript 1 November 2010**) See also Mr Gary Newcombe, Director, Strategic Policy and Development, Department of Commerce, Consumer Protection Division, and Mr Gerald Milford, Manager, Strategic Policy, Department of Commerce, Consumer Protection division, *Transcript of Evidence*, 22 November 2010. (**Department of Commerce Transcript 22 November 2010**).

1.24 A memorandum entitled "*Reasons not to delay the Fair Trading Bill 2010 and Acts amendment (Fair Trading) Bill 2010*" opposing the Committee's motion of an extension of time to report was provided to the Minister for Commerce. On 18 November 2010, the Minister advised the Committee that it would be provided with a copy of that memorandum. However, that did not occur until after demand at the hearing on 22 November 2010.[8] The memorandum is **Appendix 1**.

1.25 At the hearing of 22 November 2010, the Department asserted that there would be significant problems arising from inconsistent Commonwealth and State consumer laws in the event the FT Bill were not passed before 31 December 2010. The Committee, however, notes that the 'unfair contract' provisions of the Australian consumer law came into effect in the Commonwealth legislation in July 2010, without the State enacting those provisions. Many of the Department's concerns appeared to the Committee to arise from administrative 'ease and convenience' (such as the Commonwealth agency not having the staff to investigate any complaints in the interim between the Commonwealth and State laws taking effect).[9]

1.26 The government was also of the view that failure to pass the FT Bill by 31 December 2010 would risk the State's powers to regulate corporations in respect of consumer protection by reason of the Competition and Consumer Act 2010 (being taken to 'cover the field'. This concern arises from section 109 of the *Commonwealth of Australia Constitution Act* (***Constitution***) and section 140H of the Competition and Consumer Act 2010, which provides that the Competition and Consumer Act 2010 is not intended to exclude the operation of an "*application law*". The concern is that the current State Acts do not meet the definition of "*application law*" in the Competition and Consumer Act 2010, being a law that applies the Australian Consumer Law.[10] Whether this is a justified concern is considered in Chapter 2.

Context for report

General support for enactment of uniform consumer law

1.27 The Second Reading Speech to the FT Bill explains that bill as follows:

> *The introduction of the Australian Consumer Law represents the most significant reform of consumer laws in Australia since the introduction of state and territory fair trading acts in the late 1980s. Nationally this reform will replace a complex array of 17 commonwealth, state and territory generic consumer laws. the*

8 At the hearing, the Department advised the Committee that it was not aware that the Minister for Commerce had undertaken to provide a copy of the memorandum to the Committee. (Department of Commerce Transcript 22 November 2010).

9 See also Department of Commerce Transcript 22 November 2010.

10 Letter from Hon Bill Marmion MLA, Minister for Commerce, 6 October 2010, p3.

> *singles greatest benefit of the Australian Consumer Law is that it will result in the uniformity of the foundation consumer law in Australia at commonwealth, state and territory levels. This will mean certainty and lower compliance costs for businesses that operate in more than one jurisdiction in Australia, and it will ensure that all Australian consumers will have the same rights and protections wherever they live in Australia*.[11]

1.28 Enactment of an Australian consumer law has wide support from both business and consumer groups.[12]

Consultation and Senate Committee review of Commonwealth ACL Bills

1.29 The proposed Australian Consumer Law and Commonwealth legislation were subject to a number of consultation processes:

- February 2009 - a discussion paper explaining the ambit of the proposed consumer law and seeking suggestions on its provisions attracted 102 submissions;
- May 2009 - a consultation paper on the draft provisions for unfair contract terms, enforcement powers and remedies, new penalties and consumer redress attracted 96 submissions;
- July/August 2009 - a review of ways to improve the current *Trade Practices Act 1974* (Cwlth) implied terms, protect consumers who purchase goods which continually fail and identify other means for improving the operation of existing statutory conditions and warranties attracted 33 submissions; and
- November 2009 - a regulatory impact statement based on 'best practice' of the laws of the States and Territories attracted 28 submissions.[13]

---

11 Hon Norman Moore MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 20 October 2010, p8000.

12 Commonwealth of Australia, Senate, Standing Committee on Economics Legislation, *Inquiry into Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010*, 21 May 2010 states: "*The Committee notes the overwhelming support for uniformity of consumer protection legislation"* (p1). The Productivity Commission observed: "*In the Commission's view, the intrinsic case for introducing a single national generic consumer law applying across Australia is therefore compelling — a view supported by many consumer and business organisations and several State and Territory Governments*". (Productivity Commission of Australia, Inquiry Report 45, *Review of Australia's Consumer Policy Framework*, 30 April 2008, Vol 1, p19)

13 Commonwealth of Australia, Senate, Standing Committee on Economics Legislation, *Inquiry into Trade Practices Amendment (Australian Consumer Law) Bill 2009*, 7 September 2009, p8 and Commonwealth of Australia, Senate, Standing Committee on Economics Legislation, *Inquiry into Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010*, 21 May 2010, p9.

1.30 The First and Second ACL Bills were each referred to the Senate Standing Committee on Economic Legislation (**Senate Committee**), which:

- had 10 weeks to consider each bill;
- received 105 submissions in total;
- held hearings with 84 witnesses; and
- produced 220 pages of report.

1.31 The Senate Committee inquiries and reports focussed on the legislation relating to the new areas of regulation, rather than the application mechanisms or amendments to existing provisions of the TPA, making a number of recommendations for improvement of the legislation.

This report

1.32 Having regard to the above, in particular the limited time for its inquiry, consistent with previous practice, the Committee has prepared a 'specific issues and clauses' report.

1.33 This report focuses on:

- an explanation of the intergovernmental agreement and uniform scheme introduced by the bills;
- the impact of the bills on State sovereignty and Parliamentary privileges;
- the mechanism by which the FT Bill applies the Australian consumer law as a law of Western Australia; and
- Senate Committee recommendations in respect of the 'unfair contracts' provisions of the Australian consumer law.

Structure of the report

1.34 To assist in consideration of the Bills in the Committee as a whole stage of debate, this report follows the sequential order of the clauses of the Bills, rather than a subject-matter consideration.

SOME TERMS

Trade Practices Act 1974 - to be renamed Competition and Consumer Act 2010

1.35 The Second ACL Act will, when it has come into effect, change the title of the *Trade Practices Act 1974* (Cwlth). From 1 January 2011, that Act will be titled the Competition and Consumer Act 2010.

1.36 The FT and Amendment Bills, and some other documents, refer to the Competition and Consumer Act 2010. Other documents, such as the First ACL Act and ACL IGA, refer to the *Trade Practices Act 1974* (Cwlth).

1.37 This report repeats the title used in a particular document when referring to that document. Otherwise, it uses *Trade Practices Act 1974* (**TPA**) for past and current circumstances and Competition and Consumer Act 2010 (**CCA 2010**) for circumstances that will apply after 1 January 2011.

Australian consumer law

Variations on a theme

1.38 The ACL IGA requires the Commonwealth to enact the "*Australian Consumer Law*" and for the States and Territories to apply that law.[14] "*Australian Consumer Law*" is defined in the ACL IGA to mean:

> *the text contained in the relevant Schedule of the Trade Practices Act and any legislative instruments made pursuant to the Australian Consumer Law*.[15]

1.39 However:

- the jurisdictions later agreed that the States and Territories could modify the relevant TPA Schedule in applying it in their jurisdictions; and
- in enacting its legislation, the Commonwealth located the regulation-making power in respect of the Australian Consumer Law outside the Schedule to the TPA. The reason for this is not known.

1.40 This has, in the Committee's opinion, resulted in some tortuous drafting. (Drafting note: highlighted for further consideration per Committee instruction)

1.41 To describe the totality of the Australian consumer law as enacted, section 140 of CCA 2010 uses the term "*applied Australian Consumer Law*", which is the Australian

---

[14] Intergovernmental Agreement for the Australian Consumer Law, 2 July 2009 (**ACL IGA**), *Recital F*, p4.

[15] ACL IGA, *Definitions and Interpretations*, p4.

Consumer Law as it may be modified by the States or Territories, together with regulations made under section 139G of the CCA 2010.[16]

1.42 To capture regulations made under section 139G of the CCA 2010 as well as Schedule 2 to that Act, and reflect the fact that the text of the Australian Consumer Law as enacted by the Commonwealth is applied in Western Australian with modifications not necessarily made in other jurisdictions, clause 17 of the FT Bill uses several very similar terms:

- "Australian Consumer Law":

  means (according to the context) -

  (a) the Australian Consumer Law text; or

  (b) the Australian Consumer Law text, applying as a law of a participating jurisdiction, with or without modifications;

- "Australian Consumer Law text":

  means the text described in section 18,

  being:

  The Australian Consumer Law text consists of -

  (a) Schedule 2 to the Competition and Consumer Act 2010 (Commonwealth); and

  (b) the regulations made under section 139G of that Act; and

- "Australian Consumer Law (WA)":

  means the provisions applying in this jurisdiction because of section 19,

  being:

  (1) For the purposes of this section, the Australian Consumer Law text consists of -

[16] Section 140 of the Competition and Consumer Act 2010 (**CCA 2010**) provides that "***applied Australian Consumer Law*** *means (according to the context): (a) the text described in section 140B; or (b) that text, applying as a law of a participating jurisdiction, either with or without modifications"*. Section 140B of the CCA 2010 provides: "*The applied Australian Consumer Law consists of: (a) Schedule 2; and (b) the regulations made under section 139G of this Act*."

> *(a) Schedule 2 to the Competition and Consumer Act 2010 (Commonwealth), as in force on the commencement of this section (but as modified by section 37); and*
>
> *(b) the regulations made under section 139G of that Ac, as those regulations are in force from time to time.*

1.43 Issues arising in the way in which the section 139G regulations have been applied are explored in Chapter 4.

Terms used in report

1.44 At this time, it is simply necessary to note that to be consistent with the generic discussion in most reports and documents, when referring to the general agreement to introduce a uniform consumer law, and that law as implemented by First and Second ACL Act, this report uses the term "*Australian consumer law*": it uses the capitalised "*Australian Consumer Law*" to refer to the ACL IGA defined term comprising the Commonwealth Schedule 2 alone.

FT Bill - 'front' and 'back' 'ends' and "clause" and "section"

1.45 The FT Bill comprises the Australian Consumer Law (WA) and other provisions, some of which also apply to the Australian Consumer Law (WA). The Department of Commerce refers to these different areas of regulation as the 'back end' (Australian Consumer Law (WA)) and 'front end' of the FT Bill.[17] This report adopts that terminology.

1.46 There is an overlap in the numbering of the provisions between the 'front' and 'back ends' of the FT Bill. To clarify which provision numbered, for example, "*2*" is being referred to:

- "*clause*" is used to refer to a provision of the FT Bill located in the 'front end' of the Bill; and
- "*section*" is used where a provision is located in the Australian Consumer Law (WA).

OVERVIEW OF THE BILLS

Fair Trading Bill 2010

1.47 The FT Bill will replace the *Fair Trading Act 1987*, *Consumer Affairs Act 1971* and *Door to Door Trading Act 1987*, pursuant to an intergovernmental agreement to implement a nationally uniform generic consumer law, amalgamating regulation of

[17] **Department of Commerce Transcript, 1 November 2010**, p8.

matters relating to 'consumer protection'. The **ACL IGA,** and subsequent variations to the uniform scheme described in that document, is discussed in Chapter 2.

Policy

1.48 The Minister for Commerce advises that the FT Bill supports the policy objective articulated in the ACL IGA, which the Minister identifies as being:

> *to improve consumer wellbeing through consumer empowerment and protection, to foster effective competition and to enable the confident participation of consumers in markets in which both consumers and suppliers trade fairly.*[18]

Content

1.49 The matters addressed by the FT Bill are set out in paragraph 2.40 below.[19]

Structure of FT Bill

1.50 The FT Bill is best understood as comprising two parts, the 'back end' - Parts 3, 9 and 10, which respectively:

- apply the text described in section 140B of the CCA 2010 with modifications as the Australian Consumer Law (WA); and
- comprise transitional and consequential provisions,
- and the 'front end' which provides:
- the Commissioner's administrative powers;
- … the bill standardises the scope of investigation and enforcement powers
- further investigation and enforcement powers to those provided in the Australian Consumer Law (WA), and

---

18 Letter from Hon Bill Marmion MLA, Minister for Commerce, 6 October 2010, p2.

19 The Australian Consumer Law component of the FT Bill is described as being: "*firmly based on existing consumer protection provisions in Part V of the Trade Practices Act. … enhanced by implementing new unfair contract terms provisions and adopting best practice provisions from the states' and territories' fair trading acts. … The unfair contract terms provisions are possibly the biggest reform … These provisions regulate terms in standard "take it or leave it" consumer contracts that are so commonplace, particularly in new electronic commerce contracts. … terms in such standard from consumer contracts will be void if they are found to unfair by assessment against the criteria set out in the bill. … … also provides for a side range of specific consumer protections covering unsolicited selling, pyramid schemes, consumer guarantees, lay-by agreements, product safety, and information standards*". (Hon Norman Moore MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 20 October 2010, p8001.)

- for criminal and civil proceedings.

1.51 However, the 'front end' of the FT Bill applies to the Australian Consumer Law (WA) as well as the matters falling outside that law.

1.52 The 'front end' of the FT Bill has potential to impact on the uniformity of administration and enforcement of the uniform consumer law. However, these provisions replicate to some extent the application provisions of the CCA 2010 and, therefore, may also be part of the uniform legislative scheme if not the Australian consumer law.

1.53 The 'front end' of the FT Bill will operate in conjunction with other State legislation but, in general, will prevail over inconsistent provisions (clause 14). Schedule 1 of the FT Bill comprises a list of Acts that will prevail over the FT Bill (clause 15). These Acts currently comprise the exceptions to the *Consumer Affairs Act 1971* and represent specific regulation of particular items, such as firearms, spear guns and poisons, where the generic regulation proposed by the Australian consumer law is seen as inappropriate.[20]

1.54 Section 109 of the *Constitution* will have the effect that the CCA 2010 will prevail over the FT Bill in its regulation of corporations to the extent of any inconsistency.

1.55 The extent to which consistency with the Commonwealth Australian consumer law legislation is required by section 109, and the extent to which it is a practical imperative arising from the ACL IGA and Seamless National Economy IGA, is discussed in Chapter 2.

Acts Amendment (Fair Trading) Bill 2010

1.56 Part 8 of the Amendment Bill proposes amendments to various Acts to reflect enactment of the Fair Trading Bill 2010 and, in clause 192, puts forward amendments to the proposed Fair Trading Act 2010 itself.

1.57 The Amendment Bill proposes abolition of a number of industry licensing boards in the consumer protection portfolio and applies the administration, investigation and enforcement powers of the FT Bill to regulation of the relevant industries. It also proposes applyin the investigation powers of the FT Bill to other legislation, such as the *Retirement Villages Act 1992*.

1.58 The reason for abolition of the industry licensing boards is twofold:

[20] Department of Commerce Transcript 1 November 2010, p25.

- addressing State concerns such as allocation of consolidated revenue and other resources to tied areas, rather than on need, and ability to strategic approach to issues emerging across industries; and

- national imperatives in structuring regulation of relevant occupational areas so as to facilitate implementation of the COAG national occupational licensing stream of its Seamless National Economy IGA.[21]

1.59

[21] Ibid, pp2-3.

CHAPTER 2
AUSTRALIAN CONSUMER LAW SCHEME

INTRODUCTION

Background to uniform scheme

2.1 **Appendix 2** sets out the background to the Australian Consumer Law scheme, reporting the various MCCA, COAG and Productivity Commission and other initiatives and reviews that culminated in the current scheme. The most influential of these have been the two Productivity Commission reviews:

- Research Report, Review of the Australian Consumer Product Safety System, January 16 2006; and
- Inquiry Report 45, Review of Australia's Consumer Policy Framework, 30 April 2008.[22]

2.2 The MCCA articulated the following key principles underpinning the scheme:

- *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 Australian Consumer Law is clear and easily understood; and*
- *having laws which can be applied effectively by all Australian courts and tribunals.*[23]

2.3 It is apparent from Appendix 2 that there has been uneven development of the Australian consumer law. While national regulation of product safety has been on the MCCA and COAG agenda for some years, incorporation of that area into a generic consumer law is more recent. The ready availability of a Victorian model has enabled the 'unfair contract' provisions of the generic law to be settled early and introduced

[22] See MCCA Joint Communiqué of meeting 4 December 2009 and history of COAG and MCCA meetings set out in Appendix 2.

[23] Ibid, p3.

prior to the rest of the law in 2009. However, at its December 2009 meeting, the MCCA only agreed the "*final aspects*" of the product safety provisions and broad topics for proposed consumer guarantees and other areas of the proposed law.

2.4 It was not until the December 2009 meeting that MCCA agreed that the Australian consumer law would include door to door sales.[24] The provisions in respect of "*unsolicited consumer agreements*" in the Australian consumer law allow for significant modification through regulations, suggesting lack of clarity and consensus in what will constitute such agreements.

2.5 It is also apparent that the States and Territories reconsidered the extent to which the scheme impacted on State sovereignty subsequent to the signing of the ACL IGA and that that document does not accurately describe the scheme as it has been implemented.

2.6 While the Committee supports initiatives to preserve State sovereignty, this has resulted in lack of certainty as to what amendments by the State to the lead Commonwealth legislation will or will not be in breach of the current intergovernmental agreement. (As explored below, the ACL IGA requires the MCCA to develop guidelines on the meaning of 'inconsistent with or alters the effect of' the Australian Consumer Law'). [25]

2.7 Given the significance of section 109 of the Constitution to understanding the uniform scheme, the Committee has explained the constitutional context for the scheme.

STRUCTURE OF THE AUSTRALIAN CONSUMER LAW SCHEME

Introduction

Uniform legislative structures

2.8 National legislative schemes can take a number of different forms. **Appendix 3,** identifying nine legislative structures**,** is based on the 1996 Position Paper endorsed by the legislation review Committees of all Australian jurisdictions.[26] The Position Paper was tabled in the Western Australian Parliament.[27]

2.9 As the introduction to Appendix 3 states, it comprises a brief summary of the identified structures, not a description of those structures or of the forms that a uniform legislative scheme can take.

---

24 Ibid, p4.

25 ACL IGA, Clause 3.2, p6.

26 Working Party of Representatives of Scrutiny of Legislation Committees Throughout Australia, Position Paper, *Scrutiny of National Schemes Legislation*, October 1996.

Scheme part of broader COAG reform agenda

2.10 A nationally consistent, generic Australian consumer law is part of the Seamless National Economy IGA. By clause 34(a)(iv) and (v) of that IGA, meeting the milestones for implementation of national consumer policy framework and product safety regulation reform is necessary to ensure the State's entitlement to reward payments under clause 32 of that IGA. While it is not possible to allocate a specific sum to meeting the 31 December 2010 deadline for implementation, the Department of Commerce is of the view that failure could result in a "*multimillion dollar*" penalty for the State.[28]

2.11 However, other than the fact of clauses 3.2 and 3.4 of the Seamless National Economy IGA, no evidence was provided to support the assertion that a decision would be made to withhold the 'reward payment' or (other than the total sum payable on achievement of all the Seamless National Economy IGA objectives) the quantum of the sum in issue. In the event that other jurisdictions do not meet the nominated deadline which, on the information presented at 22 November 2010 seems likely to be the case, the Committee considers that there would have to be some recognition by the decision-making body that the 31 December 2010 deadline was unreasonable.

Several layers to scheme

2.12 There appear to be three layers to the Australian consumer law scheme:

- legislation comprising the Australian consumer law;
- model application provisions not forming part of the Australian consumer law but part of the legislative scheme; and
- CCA 2010 investigation, enforcement and remedy provisions, which are not model provisions but may have been replicated in the laws of other jurisdictions.

Australian consumer law scheme

ACL IGA calls for template legislation

2.13 In July 2009, the ACL IGA contemplated that the FT Bill reflect Appendix 3 - Structure 3: *Template, Co-operative, Applied or Adopted Complementary legislation*, being:

---

27 Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 19, *Uniform Legislation and Supporting Documents*, 27 August 2004, p18.

28 "… *we would be in line for a multimillion-dollar penalty for what must be paid, but I cannot tell you the exact amount"*. (Department of Commerce Transcript 1 November 2010, p20.)

> *a jurisdiction enacts the main piece of legislation, with the other jurisdictions passing Acts which do not replicate, but merely adopt that Act and subsequent amendments as their own.*

2.14 Clause 3.2 of the ACL IGA provides:

> *each State and territory government will introduce to its Parliament a Bill or Bills to enact application Acts no later than 31 December 2010 … which will apply the Australian Consumer Law (as embodied in the relevant Schedule to the Trade Practices Act and as amended from time to time) in its jurisdiction …*[29]

2.15 The ACL IGA permits amendment of the Australian Consumer Law only with the agreement of the Commonwealth and at least three other jurisdictions.[30] It also requires the parties to amend or repeal legislation that is inconsistent with, or alters the effect of, the Australian Consumer Law.[31]

CCA 2010 does not require template legislation

2.16 The CCA 2010, however, contemplates modifications to the Australian Consumer Law in its application by other jurisdictions (sections 140 and 140B).

2.17 While there has been no written variation or amendment of the ACL IGA, at an MCCA meeting in December 2009, all jurisdictions agreed that there could be some ability to modify the Australian Consumer Law. This arose in part from specifically agreed areas for divergence (such as door to door sales) and in part from the fact that there is no referral of State powers to the Commonwealth.[32] (The Committee notes that this agreement is not recorded in the MCCA Joint Communiqué in respect of that meeting, highlighting the problems the Parliament experiences in ascertaining what has been agreed at Ministerial Council meetings without an inquiry.)

2.18 There also appears to be some understanding that further areas of divergence might be agreed and that the ACL IGA will be reconsidered.[33]

2.19 The States and Territories also reconsidered the ACL IGA requirement for adoption of the Schedule to the TPA as amended from time to time, which precluded review of amendments by their respective Parliaments.

---

29 ACL IGA, p6.

30 Ibid, Clause 19, pp7-8.

31 Ibid, Clause 3.2, p6.

32 Department of Commerce Transcript 1 November 2010, pp4-5.

33 "*No other modifications have so far been agreed to. … I suspect the IGA will continue to be examined by the parties as we move along".* (Department of Commerce Transcript 1 November 2010, p5.)

2.20 While Western Australia appears to have taken the initiative on this, and is the only jurisdiction to require the approval of Parliament prior to an amendment to the Commonwealth legislation having effect, the other jurisdictions propose legislation providing that amendments to Commonwealth legislation may be 'excluded' by their respective Parliaments.[34]

2.21 It follows from this that the degree of uniformity now required by the Australian consumer law legislative scheme is uncertain.

Schedule 2 to the CCA 2010 is not the agreed uniform consumer law

2.22 The Minister for Commerce advises that there is no model bill for the Australian consumer law.[35] The MCCA agreed the "*final form*" at its meeting in December 2009 but this was an agreement as to topics to be covered in relation to each of the main aspects of the law, not for specific provisions.[36]

2.23 There are, however, model application clauses for the Australian consumer law. These clauses are reflected in the Victorian Bill (a copy of which was provided by the Minister).[37]

2.24 The ACL IGA provides that the Australian Consumer Law is "*embodied*" in the relevant Schedule of the TPA. In the absence of a model law, this confers considerable power on the Commonwealth to determine the way in which the Australian consumer law is implemented. This is reflected in the event.

2.25 The Department of Commerce advises that in the process of passing the First and Second ACL Bills, the Commonwealth Parliament made amendments to the Australian Consumer Law which had not been agreed.[38] A particular area of divergence seems to be location of the regulation-making power in the main body of the CCA 2010, rather than in the Commonwealth Schedule 2.

Model application provisions

2.26 The Committee has been advised that there are model application provisions in respect of the Australian consumer law. This may constitute a related intergovernmental

---

34 See, for example, clause 10 of the Fair Trading Amendment (Australian Consumer Law) Bill 2010 (Vic). While the Department of Commerce preferred to describe the legislation of other jurisdictions as adopting "*automatic application of the Australian Consumer Law*" it was acknowledged that there was "*a capacity, after the event, to not accept an amendment that is made nationally*". (Department of Commerce Transcript 1 November 2010, p6.)

35 Letter from Hon Bill Marmion MLA, Minister for Commerce, 6 October 2010, p5.

36 MCCA Joint Communiqué of meeting 4 December 2009, p2.

37 Letter from Hon Bill Marmion MLA, Minister for Commerce, 6 October 2010, p5.

38 Department of Commerce Transcript, 1 November 2010, p20.

agreement as to uniformity outside the content of the Australian consumer law. Whether this is the case, and the degree of unity required, is uncertain.

2.27 The Department of Commerce occasionally responded to a Committee inquiry by identifying a provision as a 'model' provision. For example, in response to a question on the section 139G regulations, the Department said:

> *And the model process for regulations is that they would apply automatically in every jurisdiction.*[39]

2.28 However, clause 21 of the FT Bill allows for disallowance.

Possible replicated provisions

2.29 Some provisions of the 'front end' of the FT Bill appeared to the Committee to be replications of CCA 2010 investigation, enforcement and remedy provisions.

2.30 However, the Committee was unable in the time available to it to determine the extent to which this was the case and, therefore, the extent to which the intergovernmental agreement and resultant legislative scheme:

- influenced apparently independent domestic legislation; or
- constrained the extent to which that legislation could be amended.

Fair Trading Bill 2010

2.31 The Committee understands that those jurisdictions that have presented bills have replicated the Commonwealth legislation as enacted.

2.32 Western Australia has made some amendments to the model application clauses, using those clauses "*where relevant*". In particular, the mechanism for amendment of the Australian consumer law as it applies in the State has been altered.[40] The Department of Commerce advised:

> *The purpose of that is to enable us to have initial application of the Australian Consumer Law on a particular date — that is why I argued it is within the scope of the intergovernmental agreement and everything else — but reserves to state Parliament the capacity to control what the law is that ultimately comes into effect in this place.*[41]

---

39 Ibid, p27.

40 Letter from Hon Bill Marmion MLA, Minister for Commerce, 6 October 2010, p5.

41 Department of Commerce Transcript, 1 November 2010, p29.

2.33 As the uniform legislative scheme has been implemented, the FT Bill introduces a uniform legislative scheme that has elements of each of Appendix 3 - Structures 1, 2, 3, 5 and 8 but is fully described by none.

Acts Amendment (Fair Trading) Bill 2010

2.34 The Minister for Commerce asserts that the Amendment Bill does not fall within the ambit of SO230A.[42]

2.35 The Department of Commerce advises that one of the purposes of the Amendment Bill is to establish the regulatory framework required to facilitate introduction of a national occupational licensing scheme. The Occupational Licensing National Law (WA) Bill 2010 was introduced to the Legislative Assembly on 17 November 2010.

2.36 The occupational licensing reforms are part of the Seamless National Economy IGA, the first wave of which (dealing with, at least, real estate agents) is scheduled to come into operation in July 2012.[43] Under the proposed uniform model, there will be a national, central licensing authority that will delegate various licensing functions back to State entities. The Department of Commerce explains:

> *Delegating those functions back to a multiplicity of boards was seen to be quite a complicating factor. In addition, a range of new appeal and review processes are inconsistent with a board decision-making process.*[44]

2.37 It is apparent that the Amendment Bill introduces legislation that, in part, establishes the legislative framework necessary for the national occupational licensing scheme to operate in Western Australia.[45] The Occupational Licensing National Law (WA) Bill 2010 will introduce that scheme. However, the extent to which this is the case cannot be established without inquiry.

2.38 In any event, Part 8 - at least - of the Amendment Bill introduces uniform legislation. The Committee notes that there is a long-standing practice of applying SO230A to Acts amendment bills relating to independent uniform legislation.[46] This enables the

---

42 Letter from Letter from Hon Bill Marmion MLA, Minister for Commerce, 11, p1.

43 Department of Commerce Transcript, 1 November 2010, p4. The Second Reading Speech to the Occupational Licensing National Law (WA) Bill 2010 identifies a wider group of occupations captured in the 'first wave', being: building and building-related occupations; air conditioning and refrigeration installers; electricians; land transport operators; maritime occupations; plumbing occupations; and property-related occupations. (Hon W R Marmion, Minister for Commerce, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 17 November 2010, p8926).

44 Department of Commerce Transcript, 1 November 2010, p4.

45 Ibid, p4.

46 See, for example, the current committee's Reports 3 and 18 and the Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 1.

Committee to consider the full effect of participation in the uniform legislative scheme.

2.39 A Bill that is in part uniform falls within the ambit of SO230A.[47]

CONTENT OF THE AUSTRALIAN CONSUMER LAW SCHEME

Australian consumer law

2.40 In summary, as presently enacted, the Australian consumer law provides for:

- current consumer protection provisions in the main body of the TPA, such as those relating to misleading and deceptive conduct, with amendments to those provisions to adopt 'best practice' provisions of State or Territory legislation;
- addition of 'unfair contract' provisions, largely modelled on existing Victorian provisions and applicable only to standard-form contracts;
- capture of services that are part of the purchase price;
- capture of subcontract credit providers linked to purchase;
- liability of manufacturers for goods with safety defects;
- country of origin provisions;
- a revised guarantee system in place of the current TPA 'condition and warranty' system;
- revised enforcement, investigation, remedies and penalties;
- new obligations in respect of transparency of documents relating to consumer transactions;
- new provisions in respect of door to door trading; and
- the Commonwealth to issue permanent product safety bans.

2.41 It is proposed that the Australian consumer law will also contain 'unconscionable conduct' provisions.[48]

2.42 As enacted, the Australian consumer law consists of:

---

47 Ruling of the Deputy President, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 September 2003, p11598.

48 Commonwealth of Australia, Senate, Standing Committee on Economics Legislation, *Inquiry into Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010*, 21 May 2010, p5.

- Schedule 2 to the TPA (**Commonwealth Schedule 2**);
- regulations made under a section of the CCA 2010 which is not in Commonwealth Schedule 2 (**section 139G Regulations**);
- legislative instruments made under Commonwealth Schedule 2; and
- the application laws of the other Australian jurisdictions.

2.43 However, as noted above, the scheme in respect of the Australian consumer law is broader than that law itself. It also includes provisions located outside that law.

Administration, investigation and enforcement provisions

2.44 The Department of Commerce explained the location of uniform scheme legislative provisions outside the Australian consumer law as follows:

> *There are a range of enforcement provisions in the Fair Trading Bill that are state specific, but that the commissioner can rely on in enforcing the Australian Consumer Law in Western Australia. They are specific to Western Australia and may vary from other states. There is a range of common remedies in the Australian Consumer Law that are common and that the commissioner can enforce. The reason for the difference is that it was recognised that most jurisdictions have different criminal law procedures and processes, and different regimes. So, for example, apart from questions about when we obtain warrants and so on, the ACT and Victoria have human rights legislation that impacts on everything they do. We do not have that statutory responsibility in this state. Also, there are things like infringement notices — how are infringement notices issued, and what is the process for recovery? They are all state specific and they all relate to state enforcement policy, which is usually run under the Attorney General's portfolio. The view, very early on, was that all those day-to-day enforcement issues would be left to the states to make sure that they were consistent with the way in which they proceed, and the common provisions would be the sort of enforcement-type, remedy-type provisions in the Australian Consumer Law.*[49]

2.45 The way in which these provisions would inter-relate, in the context of different definitions of important terms such as "*consumer*" was an issue the Committee was not able to fully explore in the time available to it.

---

[49] Department of Commerce Transcript, 1 November 2010, p18.

2.46 As there has at this time been no referral of State powers to the Commonwealth to regulate consumer protection or product safety, the enforcement and administration of the uniform consumer law remains a responsibility shared between the Commonwealth and the States.

2.47 In this respect, the Department of Commerce makes a distinction between a referral of power and vesting of jurisdiction. The Australian consumer law does 'vest' administrative jurisdiction in the Commonwealth where a formal referral of power is not required.[50]

2.48 The ACL IGA provides for mechanisms, such as Memoranda of Understanding between the enforcement agencies and national guidelines, to encourage uniformity in enforcement and administration. It also provides for any party to confer its powers in respect of enforcement, administration and product safety bans to the Commonwealth.[51] Clause 31 of the FT Bill is a generic provision directed at allowing referral of these powers without recourse to Parliament. (This clause is considered in Chapter 4.)

Uniform scheme does not include financial services

2.49 For constitutional reasons, and due to the uniform scheme in respect of regulation of financial services, consumer protection in respect of financial services has been dealt with outside the Australian consumer law.[52]

---

50 "*I say that, in a sense, because we could have had some provisions, perhaps, where jurisdiction was vested, but the provision would still allow changes to the way in which that occurred. There would never be any particular certainty, unless you had a provision that simply said, in relation to each and every vesting of a function, there was a separate provision only in relation to that matter, because then you could tie that vesting directly to a power. But if you created a power and said, "In some sections we have given power to a commonwealth authority to do it, but we have the capacity to do more in the future", your fundamental problem would still exist. So you would end up having to write the bill in a way, and amend the bill, every single time there was an adjustment to who might or might not administer it under a cooperative scheme*". (Department of Commerce Transcript, 1 November 2010, p 23. See also p2.)

51 ACL IGA, Clauses 26, 37 and 45, pp8, 9 and 10.

52 The Explanatory Memorandum to the *Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010* (Cwlth) explains the exclusion of financial services as follows: "*The ACL is a generic law that applies to all sectors of the economy. However, separate laws dealing with financial products and services are necessary, due to constitutional issues relating to the States' referral of those powers under the Corporations Agreement 2002. The IGA does not require the corporations legislation to be identical to the ACL legislation. The IGA reflects that financial products and services will be carved-out of the scope of the ACL as result of the separate legislative arrangements that exist for in respect of financial products and services under the Corporations Agreement 2002. The corporations legislation currently contains consumer protection provisions that mirror the consumer protection provisions of the TP Act*." (Pp 18 and 460).

CONSTITUTION

Introduction

Commonwealth's legislative powers limited

2.50 The State Parliament is a plenary Parliament and has broad powers to legislate for the good governance of the State. These powers include regulation of corporations and corporate activities provided these are sufficiently connected to the State.

2.51 The Commonwealth Parliament, however, is not a plenary Parliament and is limited to the powers that can be found in the *Constitution.* The Explanatory Memorandum to the Second ACL Bill states:

> *An application law scheme is necessary as the Australian Parliament does not have power to legislative* (sic) *generally with respect to fair trading and consumer protection matters.*[53]

Section 51 powers

2.52 Section 131 of the CCA 2010 states that the Commonwealth Schedule 2 applies to the conduct of corporations. In this, the Commonwealth relies on section 51(xx) of the *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.*

2.53 Section 51(xx) does not capture all corporate entities; nor does it confer a general power of incorporation. Power to legislate in respect of other corporate entities falls within the sole ambit of State and Territory Parliaments.

2.54 The Commonwealth has additional powers to regulate interstate trade and commerce (section 51(i)) and postal, telegraphic, telephonic and other like services (section 51(v)) but, although the Australian consumer law touches on these matters, these are not the main subject of the legislation.

---

53 Ibid, p372.

Referral of State corporation powers in 2001 for limited purposes only

2.55 Section 51 (xxxvii) of the *Constitution* empowers the Commonwealth Parliament to enact legislation in respect of:

> *Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law…*

2.56 The *Corporations (Commonwealth Powers) Act 2001*, referred Western Australia's power to legislate in respect of all corporate entities to the Commonwealth:

> *to provide the Commonwealth with a mechanism to regulate corporations beyond its capacity under the Commonwealth Constitution.*[54]

2.57 However, the referral of the State's power was subject to important limitations.

2.58 Section 4 of the *Corporations (Commonwealth Powers) Act 2001* restricts the referral of State powers to that necessary to make laws in substantially the same terms as the then Corporations Bill 2010 (Cwlth) and Australian Investment and Securities Bill 2001 (Cwlth) and:

> *the matters of the formation of corporations, corporate regulation and the regulation of financial products and services, but only to the extent of the making of laws with respect to those matters by making express amendments of the Corporations legislation (including laws inserting or amending provisions that authorise the making of Corporations instruments that affect the operation of the Corporations legislation, otherwise than by express amendment.)*

2.59 Clause 505 of the Corporations Agreement 2002 (the intergovernmental agreement supporting the *Corporations (Commonwealth Powers) Act 2001*) provides that, with the exception of:

> *a Bill … prohibiting the formation of partnerships or associations that consist of more than 20 members* …[or] *… for the purpose of the regulation of financial products, financial services, or markets regulated by the national law, or a purpose unanimously agreed by the Council,*

---

[54] Western Australia, Legislative Council, Standing Committee on Legislation, Report 1, *Corporations (Commonwealth Powers) Bill 2001, Corporations (Ancillary Provisions) Bill 2001, Corporations (Administrative Actions) Bill 2001, Corporations (Consequential Amendments) Bill 2001,* 19 June 2001, p7.

the Commonwealth will not introduce a bill that depends wholly, or in part, on State referral other than:

> *for the formation of corporations, corporate regulation and the regulation of financial products and services.*[55]

Financial services

2.60 The Commonwealth took the view that, due to clause 505 of the Corporations Agreement 2002, it was not possible for the Australian consumer law to incorporate consumer protection regulation of financial services, as was recommended by the Productivity Commission.

2.61 The Explanatory Memorandum to the Second ACL Bill explains the exclusion of financial services as follows:

> *The ACL is a generic law that applies to all sectors of the economy. However, separate laws dealing with financial products and services are necessary, due to constitutional issues relating to the States' referral of those powers under the Corporations Agreement 2002.*
>
> …
>
> *The IGA does not require the corporations legislation to be identical to the ACL legislation. The IGA reflects that financial products and services will be carved-out of the scope of the ACL as result of the separate legislative arrangements that exist for in respect* [sic] *of financial products and services under the Corporations Agreement 2002. The corporations legislation currently contains consumer protection provisions that mirror the consumer protection provisions of the TP Act.* [56]

2.62 The First and Second ACL Acts make amendments to the *Australian Securities and Investments Commission Act 2001* (Cwlth) and *Corporations Act 2001* (Cwlth) to impose obligations in respect of financial services related to those imposed under the Australian consumer law.

---

55 Ibid, Annexure A, Draft Corporations Agreement 2001, p13.

56 Explanatory Memorandum to the *Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010* (Cwlth), pp9 and 460.

Australian Consumer Law scheme does not involve express referral of State powers

2.63 The Department of Commerce advises that the FT Bill does not refer any State powers to the Commonwealth but that administration has "*changed*" in one area, being product safety.[57]

2.64 The prospect of referral of State powers is left open by the ACL IGA. Clauses 26 and 45 respectively provide:

> *Subject to the Commonwealth's agreement, any Party may confer its powers in relation to the enforcement and administration of the Australian Consumer Law on the Commonwealth.*
>
> *Any Party, with the agreement of the Commonwealth, may confer its powers in relation to the enforcement and administration of product safety on the Commonwealth.*

2.65 The Explanatory Memorandum to the Second ACL Bill states:

> *17.7 The use of an application law model will not preclude a State or Territory from referring all or part of its consumer law powers or functions to the Australian Government at a later time.*[58]

2.66 As seen in Chapter 5, clause 31 of the FT Bill has been drafted in anticipation of referral of power to the Commonwealth at a later time.

2.67 The government, however, in its description of the effect of section 140H of the CCA 2010, when read with the provisions defining "*application law*" and section 109 of the *Constitution*, suggests the same practical effect as a referral of State power to regulate corporations in respect of consumer protection.[59]

Section 109 of the *Constitution*

Text

2.68 Section 109 of the *Constitution* provides:

> *When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.*

---

57 Department of Commerce Transcript, 1 November 2010, pp5 and 7.

58 Explanatory Memorandum to the *Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010* (Cwlth), p372.

59 See Letter from Hon Bill Marmion MLA, Minister for Commerce, 6 October 2010 p3.

2.69 Section 109 only applies, of course, to Commonwealth legislation made in valid exercise of the Commonwealth's legislative powers.

2.70 There are essentially two types of Commonwealth legislation: that which "*covers the field*"; and that which provides minimum or partial regulation. The first type renders any State legislation covering the same subject matter invalid: the second permits co-existent State legislation canvassing related subject matter, or the same subject matter, in a manner that is not inconsistent with the Commonwealth legislation.

2.71 Section 131C of the CCA 2010 provides that, in effect, enactment of the Australian Consumer Law by the Commonwealth does not exclude or limit the concurrent operation of any law of the State.[60]

2.72 The Minister for Commerce, however has expressed a concern that section 140H of the CCA 2010 may result in any State legislation not constituting an "*application law*" being invalid in respect of the consumer protection regulation of corporations, as the CCA 2010 'covers the field' other than in respect of application laws.[61]

2.73 The Committee has not been able to reach a conclusion on the interaction of sections 131C and 140H of the CCA 2010 in the time available to it.

Application of Australian Consumer Law (WA)

2.74 The provisions of the Commonwealth Schedule 2 apply only to corporations subject to Commonwealth powers. It follows that the State's powers to regulate in respect of other corporate entities, non-corporate organisations and natural persons are not affected by Commonwealth enactment of the Australian Consumer Law.

2.75 The Australian Consumer Law (WA), therefore, presents the main consumer protection legislation in respect of these entities.

Guidelines on whether legislation consistent with the Australian Consumer Law

2.76 The question of whether any particular legislation, or a provision of it, is inconsistent with Commonwealth legislation is difficult to ascertain with any certainty and a fertile ground for litigation. Arguing the case for enactment of the FT Bill prior to 1 January 2011, the Department of Commerce said:

> *Although there are savings provisions in the various acts about allowing the operation of consistent state legislation, any inconsistencies would render the state law invalid in relation to corporations. It may or may not eventuate that it is inconsistent, but*

60 *"(1) This Part is not intended to exclude or limit the concurrent operation of any law, whether written or unwritten, of a State or a Territory."*

61 Letter from Hon Bill Marmion MLA, Minister for Commerce, 6 October 2010, p3.

> *it would be very fertile ground to challenge every action taken in this state in relation to a corporation if we are still using the Fair Trading Act and everyone else is using Australian Consumer Law*.[62]

2.77 Clause 3.2 of the ACL IGA states that the parties have agreed that Ministerial Council on Consumer Affairs will develop a process for the jurisdictions to review legislation and identify inconsistencies with the Australian Consumer Law. That process was to include provision of guidelines on the meaning of "*inconsistent with or alters the effect of the Australian Consumer Law*".

2.78 The Department of Commerce advised on 27 October 2010 that the process for review had not at that date been agreed.[63] The Committee observes that the ACL IGA was signed in July 2009 - some 17 months ago.

2.79 The Department advised:

> *The work is being carried out by the Policy and Research Advisory Committee, which is a Commonwealth, State and Territory Officers Committee that reports to SCOCA, which is the Standing Committee of Officials on Consumer Affairs (made up of all the senior Commonwealth, State and Territory officials). Any recommendation to MCCA must first be endorsed by SCOCA. Priority has obviously been given to the finalisation and implementation of the ACL itself and development of the regulations.*[64]

2.80 It is apparent that State and Territory (and Commonwealth) legislation inconsistent with the CCA 2010 will survive the coming into effect of the Commonwealth Australian consumer law legislation and that repealing that legislation has not been given any urgent priority.

Finding 1: The Committee finds that State and Territory (and Commonwealth) legislation inconsistent with the CCA 2010 will survive the coming into effect of the Commonwealth Australian consumer law legislation.

62 Department of Commerce Transcript, 1 November 2010, p20.

63 Email from Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection, Department of Commerce, 27 October 2010.

64 Ibid.

COMPARISON BETWEEN AUSTRALIAN CONSUMER LAW UNIFORM SCHEME AND CURRENT 'CONSISTENT' SCHEME

Introduction

2.81 Until the 1970's, consumer protection was mainly a matter for the common law and State Sale of Goods legislation.

2.82 The TPA was the first national legislation specifically designed to provide consumer protection but it was subject to Constitutional limitations in its application to particular entities and natural persons (see below).

Scheme of the *Trade Practices Act 1974* and various Fair Trading Acts

2.83 In 1983, the Commonwealth, States and Territories agreed to consistent consumer protection across all jurisdictions. The various State Fair Trading Acts, enacted between 1984 and 1987, gave effect to the agreement in respect of consistent consumer regulation by replicating TPA provisions in State legislation in order to apply the provisions to entities not subject to the TPA, such as partnerships and natural persons.[65]

2.84 Contemporaneous with this agreement in respect of consumer protection was a review recommending a national approach to product safety regulation. In 1986, the TPA was amended to add a part regulating product safety. These provisions were replicated in the various State Fair Trading Acts.

2.85 It appears to have been open for the Commonwealth to make unilateral amendments to the TPA which, by reason of sections 51 and 109 of the Constitution, would apply to the activities of certain corporations in Western Australia.

2.86 While there may have been an agreement that amendments to the TPA would be replicated by the States and Territories, this did not automatically occur. The Western Australian *Fair Trading Act 1987* maintained reasonable consistency with the TPA. However, the Fair Trading Acts of other jurisdictions - most notably Victoria and New South Wales - diverged considerably.[66]

2.87 The TPA and Fair Trading Act scheme is jointly enforced.[67]

---

65 Productivity Commission of Australia, Inquiry Report 45, *Review of Australia's Consumer Policy Framework*, 30 April 2008, Vol. 2, p18.

66 Department of Commerce Transcript, 1 November 2010, p7.

67 "*When I say "jointly enforced", the commonwealth has responsibility for enforcing the Trade Practices Act. The Australian Competition and Consumer Commission enforces that, and ASIC enforces similar provisions in relation to financial services under the ASIC act. We enforce the Fair Trading Act and the Consumer Affairs Act. When I say "we", it is the Commissioner for Consumer Protection*." (Department of Commerce Transcript, 1 November 2010, p7.)

2.88 In addition to the TPA and Fair Trading Acts, there is a plethora of legislation dealing with consumer protection. As well as different regulation at the Commonwealth level in respect of the TPA, food and therapeutic goods:

> *At the state and territory level, several hundred statutes cover an array of activities and providers, (including home building, retail energy supply, credit providers, vehicle sales, retirement villages, travel agents, pawnbrokers and second-hand dealers, and various professional occupations). Much of this legislation is administered by the Fair Trading Authorities, but there are also a significant number of industry-specific regulators, including licensing authorities and safety regulators.*[68]

2.89 Around 2002, the Western Australia commenced a review of the *Fair Trading Act 1987* and *Consumer Affairs Act 1971*, with a view to removing inconsistencies and amalgamating and updating those Acts. That review continued until 2006, when it was overtaken by the developing momentum for a national consumer law.[69]

2.90 One of the aims of the Australian consumer law scheme is to reduce industry-specific regulation and apply the same administration and enforcement provisions as applies in respect of the generic law to the industry-specific legislation that remains.[70] This is the subject-matter of the Amendment Bill.

Mechanisms for achieving consistency

2.91 The Committee enquired what mechanism there was in place to ensure greater consistency than that achieved in the current regime:

> ***The CHAIRMAN**: What is the mechanism that guarantees greater consistency in the application of the ACL than was achieved in respect of the TPA state regime outside the areas of commonwealth legislative power?*
>
> ***Mr Newcombe**: Okay; well there was no mechanism before, so that is very straightforward. The reality was that we had the Trade Practices Act, part V, reflected initially in the Fair Trading Acts when*

---

68 Productivity Commission of Australia, Inquiry Report 45, *Review of Australia's Consumer Policy Framework*, 30 April 2008, Vol. 2 , p21.

69 Department of Commerce Transcript, 1 November 2010, pp2-3.

70 The terms of reference of the Productivity Commission's *Review of Australia's Consumer Policy Framework* included: "*the scope for avoiding regulatory duplication and inconsistency through reducing reliance on industry-specific consumer regulation and making greater use of general consumer regulation*" (Productivity Commission of Australia, Inquiry Report 45, *Review of Australia's Consumer Policy Framework*, 30 April 2008, Vol. 1, pvii - and see that report generally). One of the key principles is: "*creating a law which can apply to all sectors of the economy and to all Australian businesses*" (MCCA Communiqué of meeting 4 December 2009, p3).

> *they were introduced in the late '80s—in this state in 1987. There was no supporting mechanism to say how they would stay uniform, other than that there was, in one iteration or another, a ministerial council of people to talk about these issues and talk about uniformity. But history shows that there has been wide divergence in jurisdictions, and there was no process, no mechanism, and no consequence for being different. So what is different? Well, the model that the IGA provides for is that there is one Australian consumer law, it is applied in other jurisdictions, and it is applied as amended from time to time, so all of the amendments to the Australian Consumer Law made at the commonwealth level would apply — this is putting Western Australia to one side for a moment — automatically in those jurisdictions, and there is a formal voting mechanism and process under the intergovernmental agreement to deal with how amendments are approved. In that regard, future amendments will need to be approved by a majority of voters — that is, it must be the commonwealth plus four other jurisdictions, three of which are states. If that majority is not achieved, then an amendment cannot proceed.*
>
> *Equally, the IGA includes a provision providing that jurisdictions will not introduce — or parties to the agreement will not introduce — legislation that is inconsistent with the ACL. We have those mechanisms: we have application of laws; we have a voting mechanism; and a prohibition on introducing inconsistent legislation. Much of that, of course, is agreement — it is not something that a court would enforce — but that is the mechanism that sits around it.* [71]

2.92 In requiring the State and Territory applications laws to adopt the Commonwealth Schedule 2 as amended from time to time, the ACL IGA envisaged a scheme that ensured uniformity and uniformity without a time lag.

2.93 In the event, the current uniform consumer law legislation allows for modifications to Australian consumer law to be applied in each of the different jurisdictions, not just Western Australia, and for amendments to the Commonwealth applied legislation to be adopted on approval (Western Australia) or excluded (the other jurisdictions).

2.94 As the Department of Commerce said, section 109 of the *Constitution* is the primary factor ensuring consistency:

> *Because there is no referral of power involved in this process, every jurisdiction has the capacity to amend its law. It has kept its law. …*

[71] Department of Commerce Transcript, 1 November 2010, p24.

> *The primary controlling point is that the commonwealth has constitutional authority in some areas, and if the states introduced inconsistent legislation under their application of laws legislation, they might be overridden by the commonwealth law, particularly in relation to the regulation of corporations. That is the ultimate control over the level of inconsistency.*[72]

2.95 This control was present in the TPA and Fair Trading Acts scheme.

Expansion of areas where section 109 inconsistency may arise

2.96 There are, however, some aspects of the Australian consumer law scheme that will, in the Committee's opinion, lead to increased consistency. (Drafting note: highlighted for further consideration)

2.97 The Australian consumer law introduces a number of provisions not present in the TPA, which expands the areas in which State legislation may be found to be inconsistent.

Legislative mechanism to require contemporaneous consideration of maintenance of consistency

2.98 A major legislative difference between the two schemes is provision in the application bills (or Acts, as appropriate) for an amendment to the Commonwealth Schedule 2 to:

- in Western Australia, be put forward as an order for the approval of Parliament; and
- in the other jurisdictions, to have effect unless excluded.

2.99 There is, therefore, a mechanism absent from the current legislative scheme to ensure reasonably contemporaneous Parliamentary consideration of amendments to the Commonwealth legislation.

Administrative mechanism for proposal of amendments

2.100 The ACL IGA provides a detailed process by which amendments must be submitted and agreed. The Commonwealth has agreed that it will not introduce a bill amending its Australian consumer law legislation unless the Commonwealth and four other parties, including three States, support the amendment.[73]

---

72 Ibid, p5.

73 ACL IGA, Clause 19, pp7-8.

2.101 The Department of Commerce points out that exercise of the State's sovereign power to amend could be a breach of the ACL IGA.[74]

2.102 Apart from the ACL IGA not being a legally binding document, the Committee notes that there is more scope for amendment in the Australian consumer law scheme, as currently implemented, than was anticipated in the now partially superseded ACL IGA.

No change in the fundamentals of enforcement regime but administrative guidelines

2.103 The Department of Commerce has advised that:

> [The current] *enforcement regime will continue; enforcement of the Australian Consumer Law in WA will continue to be a state-only responsibility. Enforcement of the commonwealth Australian Consumer Law will be a responsibility of the ACCC and ASIC. So, again, in enforcement, we are not actually seeing a change in the fundamentals that we are undertaking.*[75]

2.104 However, the ACL IGA does provide for a Memorandum of Understanding between the relevant Commonwealth, State and Territory agencies in respect of the co-existent enforcement and administration.[76]

Changes in administration of product safety bans

2.105 The Department of Commerce identifies the changes in administration of product safety bans as the most far-reaching alteration of the current framework. It explained this:

> *The administration generally has not changed. The one area of administration that has changed is in product safety. Just briefly, in product safety we have a situation that exists where individual jurisdictions can permanently ban products they regard as unsafe, as well as introduce interim bans and so on. What happened over time was different products were banned in different jurisdictions. Not always the same judgements were used as to why a product should be banned and why it should not be. Bless us all; even when we banned the same thing, we usually worded it differently. You can see from a national business perspective this is really crazy — no certainty; you might have to comply with different wording in different jurisdictions. The one agreement in relation to the administration for product safety*

74 Department of Commerce Transcript, 1 November 2010, p5.

75 Ibid, p7.

76 ACL IGA, Clause 21, p8.

> *was that we would keep the capacity of states to introduce interim bans to react immediately to a problem that might appear in WA. Something might be imported directly in WA; we can respond immediately. Permanent bans will only be able to be introduced by the commonwealth minister. So the idea is we will have national certainty over what the ban is, and any jurisdiction that introduces an interim ban will need to convince the commonwealth and other jurisdictions that it is worth having a permanent ban in place. That is the one area where the administration has largely changed.*
>
> …
>
> *We have now got a national clearing-house website, which is run by the ACCC, which has all of the information about product safety. The ACCC is taking a much stronger leading role in product safety. There is very good cooperation within the jurisdictions. Leading up to the ACL, we actually sat down and went through and tried to remove all of the inconsistencies and work out which bans should be carried forward as permanent bans, which ones could be dropped and so on. I think the 120 days* [maximum State temporary ban] *will be sufficient.*[77]

IMPLEMENTATION OF THE UNIFORM LEGISLATIVE SCHEME

Introduction - timetable

2.106 Despite the MCCA resolving in August 2008 that the Australian consumer law scheme come into effect in late 2011, the ACL IGA requires legislation to be in place by 31 December 2010. The impetus for earlier implementation of the scheme appears to have come from the Commonwealth and COAG, rather than the States and Territories. When asked if any consideration had been given to State and Territory Parliamentary scrutiny of the proposed legislation in setting the implementation timetable, the Department of Commerce said:

> *I cannot warrant that there has not been any discussion at COAG. But what I can say is that to date, at the ministerial council level, no, the date of 1 January has been quite firm. Indeed, the commonwealth minister, at the meeting here in December of last year, wanted to bring it forward.*
>
> *There certainly has been no view about backtracking. … COAG is all about saying speed up. I do not think there has been any discussion*

[77] Ibid, pp7-8.

at COAG level. But certainly there has been at the ministerial council level.[78]

Legislation

Commonwealth legislation

2.107 The Commonwealth has partially given effect to the Australian consumer law.

2.108 The First ACL Act, which contains:

- applications provisions;
- provisions in respect of 'unfair contract' terms in standard-form contracts;
- enforcement powers and remedies;
- new penalties; and
- consumer redress,

came into effect on 1 July 2010.

2.109 The Australian consumer law, therefore, has been operating with inconsistent effect in the different jurisdictions since that date.

2.110 The Department of Commerce advises that the Commonwealth's decision to bring forward implementation of the 'unfair contract' provisions of the Australian consumer law was "*unilateral*".[79]

2.111 The Second ACL Act, which introduces the balance of the matters noted in paragraph 2.40, will come into effect on 1 January 2011.

2.112 A third Commonwealth ACL Bill, proposing 'unconscionable conduct' provisions is expected.[80]

---

78 Ibid, p21. The Department also said: "*It is just one part of it and we want the whole law to come into operation at the same time. The commonwealth government made a unilateral decision to bring forward the implementation of the unfair contract legislation at a national level. The states were not involved in that decision; it was a decision of the then minister*." (Ibid, p19)

79 Department of Commerce Transcript, 1 November 2010, p19.

80 Commonwealth of Australia, Senate, Standing Committee on Economics Legislation, *Inquiry into Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010*, 21 May 2010, p5.

Victoria

2.113 Victoria introduced its application law, the *Fair Trading Amendment (Australian Consumer Law) Act 2010* on 17 July 2010. That bill received Royal Assent on 28 September 2010.

New South Wales

2.114 New South Wales introduced the *Fair Trading Amendment (Unfair Contract Terms) Act 2010 (NSW)*, applying the 'unfair contract' provisions of the ACL on 10 June 2010. That Act commenced on 1 July 2010.

2.115 New South Wales has not, at the time of reporting, introduced legislation implementing the balance of the Australian consumer law. Notice of motion to introduce that legislation was given on 23 November 2010.

Queensland

2.116 Queensland introduced the Fair Trading (Australian Consumer Law) Amendment Bill 2010 on 31 August 2010. That bill stands adjourned at Second Reading debate.

South Australia

2.117 South Australia introduced the Statutes Amendment and Repeal (Australian Consumer Law) on 29 September 2010. It stands at Second Reading stage in both the Legislative Council and Legislative Assembly.

Tasmania

2.118 Tasmania introduced the Australian Consumer Law (Tasmania) No. 37 of 2010 on 21 September 2010. That bill passed on 18 November 2010.

Australian Capital Territory

2.119 The Australian Capital Territory introduced the Fair Trading (Australian Consumer Law) Amendment Bill 2010 on 18 November 2010.

Northern Territory

2.120 the Northern Territory has introduced the Consumer Affairs and Fair Trading Amendment (National Uniform Legislation) Bill 2010 but the date is not known.

Comment

2.121 The fact that two (possibly three) jurisdictions had not introduced the application legislation at 17 November 2010, and the stage of consideration of those bills that

have been introduced, causes the Committee to question the government's insistence that the Australian consumer law scheme will be fully implemented at 1 January 2011.

CONCLUSIONS IN RESPECT OF THE CURRENT INTERGOVERNMENTAL AGREEMENT AND UNIFORM LEGISLATIVE SCHEME

2.122 The ALC IGA has, to some extent, been superseded by subsequent agreements and events.

2.123 In particular, having regard to:

- an already agreed area for State and Territory variation of the Commonwealth legislation and the Department's advice that further areas for variation may be agreed;
- provision in the Commonwealth legislation for modifications to the Australian Consumer Law as applied in other jurisdictions, without restriction of those modifications to particular sections or subject matters;
- acceptance (by conduct) of the Commonwealth Parliament's variations to the MCCA agreed Australian consumer law; and
- reservation in all jurisdictions' application laws of their respective Parliaments' privilege to accept or exclude amendments made by the Commonwealth Parliament, regardless of whether those amendments are made by the process set out in the ACL IGA,

2.124 the initial intergovernmental requirement for maintenance of absolute uniformity with the MCCA agreed legislation or Commonwealth legislation has not been maintained.

2.125 The Australian consumer law does not represent the total legislation implementing the Australian consumer law scheme. There are administration, enforcement and remedy provisions in the application laws that are located outside the Australian consumer law itself and the scheme requires application of these provisions to other legislation.

Finding 2: The Committee finds that the ACL IGA is not the current intergovernmental agreement in respect of introduction of a uniform consumer law.

The MCCA Communiqué of the meeting of 4 December 2009 is a more accurate written record of the current agreement but the terms of the legislation proposed by the various jurisdictions also contain further evidence as to the content of the current agreement.

Finding 3: The Committee finds that the Australian consumer law does not represent the total legislation implementing the Australian consumer law scheme.

Finding 4: The Committee finds that there are administration, enforcement and remedy provisions in the application laws that are located outside the Australian consumer law itself and the scheme requires application of these provisions to other legislation. The Australian consumer law scheme also requires amendment to other legislation to remove inconsistent provisions.

2.126 The Australian consumer law scheme also requires amendment to other legislation to remove inconsistent provisions.

2.127 The Amendment Act introduces some of these other aspects of the Australian consumer law scheme.

2.128 The exact degree of uniformity in the Australian consumer law currently required by the Australian consumer law scheme is not clear. However, the Committee is of the view that significant uniformity is expected in respect of the initial application law but that the scheme allows for less uniformity in the application of amendments to the Commonwealth Schedule 2 and section 139G Regulations. The Department of Commerce's advice that the FT Bill is intended to have legislation in place for the purpose of achieving application of the Australian consumer law by a particular date, but reserving the Parliament's powers in respect of amendments, supports this.

Finding 5: The Committee finds that, as implemented, the Australian consumer law scheme requires significant uniformity in the version of the Commonwealth Schedule 2 and section 139G Regulations to be applied at 1 January 2011 but allows for less uniformity in the application of amendments to those laws.

2.129 It is apparent that the deadline imposed by COAG has resulted in limited opportunity for the Parliaments of the States and Territories to scrutinise the Australian consumer law.

2.130 While the bills of those States that have introduced application laws contain mechanisms for Parliamentary scrutiny of future legislation (the adequacy of the Western Australian mechanism is discussed in Chapter 4), the deadline, set in December 2009, for introduction of this important and complex legislative scheme

disregards the sovereignty of the States and Territories and the privileges of their Parliaments.

2.131 The government has not brought on the Committee's motion for an extension of time and the Department of Commerce is opposed to that extension.[81]

2.132 However, at the time of reporting one jurisdiction has not introduced the necessary application laws and only two jurisdictions other than the Commonwealth have passed their laws.

Recommendation 1: The Committee recommends that the responsible Minister advise the Legislative Council:

- **of the current stage of consideration of the application laws of the other States and Territories; and,**
- **in the event that legislation has not been passed, the reasons for believing the Australian Consumer Law legislative scheme will be implemented in all jurisdictions at 1 January 2011**.

[81] See Department of Commerce Transcript 22 November 2010.

CHAPTER 3

CLAUSES 4 TO 15 OF THE FAIR TRADING BILL 2010 - INTERPRETATION

CLAUSES 5 TO 9 - DIFFERENT DEFINITIONS IN DIFFERENT PARTS OF THE FAIR TRADING BILL 2010

Introduction

3.1 There are three distinct sets of definitions applicable to different parts of the FT Bill, as well as individual definitions of previously defined terms for the purposes of specific clauses (see, for example, clause 19).

3.2 The FT Bill is regarded by the Department of Commerce as being essentially in two parts:

> *The front end is the bits that relate to WA as a state. They are the bits that relate to the Commissioner for Consumer Protection; the back end is the Australian Consumer Law — just the standard bit.*[82]

3.3 Clause 5 of the FT Bill is in accord with this view in providing for certain definition clauses, 6 to 9, to apply to the proposed Act, other than the Australian Consumer Law (WA) and Part 3 of the FT Bill (which applies the Australian Consumer Law (WA)), and for the interpretation of terms used in Part 3 to be provided in clause 17. The Australian Consumer Law (WA) has its own, separate definition and interpretation provisions, sections 2 to 17.

3.4 However, the two 'ends' of the FT Bill are not distinct: they overlap. For example, in respect of the enforcement and investigation provisions, the Department said:

> ***The CHAIRMAN****: In terms of the enforcement provisions, are Western Australia's enforcement provisions part of the uniform standard?*
>
> ***Mr Newcombe****: There are two sets of enforcement provisions, so what you will find is that there are standard enforcement provisions in Australian Consumer Law, and they are the ones I have talked about. But equally, in the front-end, again, the Fair Trading Bill has enforcement provisions that are that are* [sic] *relevant to the operation of the commissioner in Western Australia, which apply to*

82 Department of Commerce Transcript, 1 November 2010, p8.

> *the Australian Consumer Law … There are a range of enforcement provisions in the Fair Trading Bill that are state specific, but that the commissioner can rely on in enforcing the Australia Consumer Law in Western Australia.*[83]

3.5 This raised the question of how the two 'ends' of the FT Bill will be applied consistently and whether application of the State enforcement provisions has potential to result in the inconsistent enforcement of uniform provisions that was deprecated by the Productivity Commission.[84]

Clause 6 and section 2 - terms used

3.6 A number of defined terms differ in between the 'front end' of the FT Bill and that part that comprises the Australian Consumer Law (WA). Some examples are set out in the table below:

Table 1

Term	**Section 2 Australian Consumer Law (WA)**	**Clause 6 FT Bill**
Business	includes a business not carried on for profit.	includes: (a) a business not carried on for profit; and (b) a trade or profession.

[83] Ibid, p18.

[84] Productivity Commission of Australia, Inquiry Report 45, *Review of Australia's Consumer Policy Framework*, 30 April 2008, Vol 2, pp225ff.

Term	Section 2 Australian Consumer Law (WA)	Clause 6 FT Bill
Acquire	includes: (a) in relation to goods — acquire by way of purchase, exchange or taking on lease, on hire or on hire-purchase; and (b) in relation to services— accept. The definition of "*acquire*" is further expanded by section 11.	includes: (a) in relation to goods — acquire by way of purchase, exchange or taking on lease, on hire or on hire-purchase; and (b) in relation to services— accept; and (c) in relation to an interest in land - acquire by purchase or exchange or by taking on lease, or in any other manner in which an interest in land may be acquired for valuable consideration. The definition of "*acquire*" is further expanded by clause 9 of the FT Bill, which is not in the same terms as section 11 of the Australian Consumer Law (WA)

Term	**Section 2 Australian Consumer Law (WA)**	**Clause 6 FT Bill**
Supply	when used as a verb, includes: (a) in relation to goods — supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase; and (b) in relation to services — provide, grant or confer; and, when used as a noun, has a corresponding meaning, and ***supplied*** and ***supplier*** have corresponding meanings. Note: Section 5 deals with when a donation is a supply. Section 5 provides: (1) For the purposes of this Schedule, other than Parts 3-3, 3-4, 4-3 and 4-4: (a) a donation of goods or services is not treated as a supply of the goods or services unless the donation is for promotional purposes; and (b) receipt of a donation of goods or services is not treated as an acquisition of the goods or services unless the donation is for promotional purposes. (2) For the purposes of Parts 3-3, 3-4, 4-3 and 4-4: (a) any donation of goods or services is treated as a supply of the goods or services; and (b) receipt of any donation of goods or services is treated as an acquisition of the goods or services.	includes - (a) in relation to goods - (i) supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase; and (ii) exhibit, expose or have in possession for the purpose of sale, exchange, lease, hire or hire-purchase or for any purpose of advertisement, manufacture or trade; and (b) in relation to services — provide, grant or render for valuable consideration; and (c) in relation both to goods and to services - donate for promotional purposes.

Rationale of the government

3.7 The Committee put each of these different terms to the Department of Commerce and inquired: whether there were any real differences between the terms used in the

different parts of the FT Bill; if so, what differences the differences were and the rationale for them. The Department's response was the same in respect of all terms:

> *The definitions in the "front end" of the Fair Trading Bill 2010 affect the overall role, responsibilities and functions of the Commissioner for Consumer Protection, in particular the non-ACL (WA) responsibilities and functions of the Commissioner for Consumer Protection. The existing definitions from the Fair Trading Act 1987 (or, where relevant, the Consumer Affairs Act 1971) have been retained to avoid any unintended consequences arising from such changes, including any unintended changes to the interpretation of these provisions by the courts. Other than in express circumstances, there has been no intention to change the general scope of the Fair Trading Act 1987 or the Consumer Affairs Act 1971.*
>
> *This contrasts with the ACL (WA), which is intended to introduce new, nationally consistent law and which, therefore uses nationally consistent definitions.*[85]

3.8 While the provisions of the FT Bill outside Part 3 are viewed as being primarily applicable to the "*non ACL (WA)*" parts of the FT Bill, the fact is that they also apply to the ACL (WA).

3.9 In response to a later question, the Department provided the following additional information:

> *The definitions for "supply" and "re-supply" in the Bill (front end) are the same as those in the Fair Trading Act 1987. The differences between the definitions in the Bill and those in the ACL (WA) are essentially differences in drafting style other than references to interests in land which are otherwise addressed in section 12 of the ACL (WA).* ***Consideration was given to adopting the same definitions as those in the ACL (WA). However, even though the difference was likely to be of little practical effect, through an abundance of caution the definitions from the Fair Trading Act 1987 were retained to avoid any unintended consequences.***
>
> *The definition of "supplier" in the Bill (front end) is the same as that in the Fair Trading Act 1987. Noting differences in drafting styles, consideration was given to adopting the definition of "supply" from the ACL (WA) to give meaning to that term. However, even though the difference was likely to be of little practical effect, through an*

[85] Email from Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection, Department of Commerce, 5 November 2010, p5.

> *abundance of caution the definition from the Fair Trading Act 1987 was retained to avoid any unintended consequences.*[86] (Committee emphasis)

Comment

3.10 The FT Bill provides for the expiry of the *Fair Trading Act 1987* and *Consumer Affairs Act 1971* and makes transitional provision for that to occur. Presumably it is the purpose of the transitional provisions to "*avoid any unintended consequences*" of enactment of the Fair Trading Bill 2010.

3.11 Different definitions have potential to render the law confusing for consumers, suppliers and regulators. The Committee is particularly concerned that the term "*consumer*" is differently defined in different parts of legislation described as a 'consumer law'.

Clause 7 and section 3 - different definitions of "*consumer*"

Introduction

3.12 The fundamental term "*consumer*" is defined differently in clause 7 of the FT Bill than in section 3 of the Australian Consumer Law (WA). The clause 7 definition runs over two pages and the section 3 definition over four pages. The Committee has not, therefore, set them out in this report.

3.13 However, a significant difference is the Australian Consumer Law (WA) provision of a monetary limit for purchase of goods or services as a consumer:

> *3* [Meaning of consumer]
>
> *(1) A person is taken to have acquired particular goods as a* ***consumer*** *if, and only if:*
>
> *(a) the amount paid or payable for the goods, as worked out under subsections (4) to (9), did not exceed:*
>
> *(i) $40,000; or*
>
> *(ii) if a greater amount is prescribed for the purposes of this paragraph—that greater amount; or*
>
> *(b) the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption; or*

[86] Ibid, p7.

> *(c) the goods consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads.*
>
> *(2) However, subsection (1) does not apply if the person acquired the goods, or held himself or herself out as acquiring the goods:*
>
> *(a) for the purpose of re-supply; or*
>
> *(b) for the purpose of using them up or transforming them, in trade or commerce:*
>
> *(i) in the course of a process of production or manufacture; or*
>
> *(ii) in the course of repairing or treating other goods or fixtures on land.*
>
> (Original emphasis)

3.14 Clause 7 of the FT Bill proposes no monetary limit in its definition, differentiating between consumers and non-consumers on the basis of the purpose for which a good or service is acquired.

Rationale for different definitions of "consumer"

3.15 The Department of Commerce explained the use of different definitions as follows:

> *The definition of "consumer" in the "front end" of the Bill is identical to that in the Consumer Affairs Act 1971. The definition encompasses all domestic consumers (<u>without any cap on the price of goods or services</u>) and includes farmers.*
>
> *The definition in the "front end" of the Bill is significant in that it determines from whom the Commissioner may receive complaints and to whom he or she may provide a conciliation service.*
>
> *The definition is different from that in the ACL (WA), which essentially determines whom the ACL (WA) protects and, therefore, which persons are entitled to seek a remedy under the provisions of the ACL (WA).*
>
> *A "consumer" within the meaning of the ACL (WA) could include a small business, as long as the transaction was for less than $40,000. In the absence of a monetary cap in the definition of "consumer" in the ACL (WA), "consumer" exclude* (sic) *any business at all (ie if para 3(1)(a) was deleted) and this would remove rights currently*

> *available to businesses under the Trade Practices Act 1974, which was not agreed policy.*
>
> *By comparison, the inclusion of a monetary cap in the definition of "consumer" in the front end of the Bill is not warranted because it does not extend to businesses (other than primary producers which are equated to consumers) and it is intended to capture all consumer transactions, without regard to an artificial monetary cap.*[87]
>
> (Original emphasis)

Different remedies available between Australian Consumer Law (WA) "*consumers*" as well as between FT Bill "*consumers*"

3.16 The Department of Commerce's responses, in some instances, did not gel. On the one hand it advised the Committee:

> *in the front-end, again, the Fair Trading Bill has enforcement provisions that … apply to the Australian Consumer Law … There are a range of enforcement provisions in the Fair Trading Bill that are state specific, but that the commissioner can rely on in enforcing the Australia Consumer Law in Western Australia,*[88]

but on the other, that the different definitions are appropriate as the persons from whom the Commissioner may receive a complaint are different under the 'front end' of the FT Bill than under the Australian Consumer Law (WA). Yet there is no explanation as to why they should be different.

3.17 The explanation provided by the Department suggests that some "*consumers*" under the Australian Consumer Law (WA) will be able to access the Commissioner's powers under the 'front end' of the FT Bill and others will not. For example, clause 57(1)(c) of the FT Bill empowers the Commissioner to receive complaints from "*consumers*" (as defined in clause 6) concerning matters affecting their interests as consumers and for the Commissioner to take such action as "*seems proper*".

3.18 The Committee asked the Department to identify the sections of the Australian Consumer Law (WA) conferring investigation and enforcement powers and advise how the powers conferred by Part 6 of the FT Bill differ. The Department's response was:

> *The bulk of the Commissioner's investigations powers and enforcement tools are contained in Part 6 of the Fair Trading Bill*

87 Ibid, pp5-6.

88 Department of Commerce Transcript, 1 November 2010, p18.

> *2010 which are drawn largely from existing state consumer protection legislation; particularly the Consumer Affairs Act 1971.*
>
> *Sections 218 – 248 of the ACL (WA) provide additional enforcement tools, however many of the powers and enforcement tools are already available to the Commissioner, either under the Fair Trading Act or under the inherent power of the Supreme Court to issue a variety of orders.*
>
> *New powers available to the Commissioner under the ACL (WA) include: the ability to accept written undertakings in relation to matters; the power to issue substantiation notices; the right to seek civil pecuniary penalties; the right to seek compensation orders for non-party consumers; the right to seek declarations in relation to unfair contract terms; and the right to seek an order disqualifying a person from managing a corporation.*[89]

3.19 As described by the Department, it appears that enforcement options and remedies available under Parts 5 and 6 of the FT Bill in respect of the Australian Consumer Law (WA) may differ within the group of "*consumers*" as defined in section 3 of the Australian Consumer Law (WA).

3.20 If this is the case, which is not clear to the Committee, no rationale has been presented for the different treatment and that situation would seem to be contrary to the policy of the uniform legislative scheme.

3.21 The different definitions of "*consumer*" may have important legal consequences. In dealing with the differences between the 'front end' and Australian Consumer Law (WA) enforcement and investigation provisions, the Department advised:

> *The reason for the difference is that it was recognised that most jurisdictions have different criminal law procedures and processes, and different regimes. So, for example, apart from questions about when we obtain warrants and so on, the ACT and Victoria have human rights legislation that impacts on everything they do. We do not have that statutory responsibility in this state. Also, there are things like infringement notices — how are infringement notices issued, and what is the process for recovery? They are all state specific and they all relate to state enforcement policy, which is usually run under the Attorney General's portfolio.*[90]

---

89 Email from Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection, Department of Commerce, 5 November 2010, p8.

90 Department of Commerce Transcript, 1 November 2010, p18.

Conclusion

3.22 The examples cited above do not constitute all of the instances of different definitions of the same terms in the Australian Consumer Law (WA) and the balance of the FT Bill.

3.23 While it is not unusual for the same terms to be differently defined for different provisions of legislation, it is clearly unsatisfactory to have in the same law such a large number of different definitions of terms representing the fundamental concepts of consumer law.

3.24 It is particularly unsatisfactory for this to occur when provisions of legislation use common terms to which both definitions apply.

3.25 However, due to the limited time available to the Committee to consider this legislation and prepare its report, the Committee has not been able to reach any conclusion on the practical effect of the different definitions of "*consumer*", and other common terms, in the FT Bill.

Differing definitions of "consumer*" in the ACL criticised in Senate Committee report*

3.26 Varying definitions of "*consumer*" within the Commonwealth Schedule 2, and between that Schedule and the balance of the TPA, was an issue raised in the Senate Committee report on the Second ACL Act. At that time, "*consumer*" was defined in the Commonwealth Schedule 2 without the monetary threshold imposed by section 4B of the TPA.[91]

3.27 The different definitions of "*consumer*" were criticised as confusing:

> *A consumer might well think that consumer goods are goods supplied to a consumer, but they are not. A consumer might well think that a consumer contract is a contact* [sic] *to which the consumer guarantees apply, but it is not. There is a definition of 'consumer' which is not followed through in the act.*[92]

3.28 On balance, the Senate Committee supported removal of the monetary limit in the definition of "*consumer*" but said:

---

91 Commonwealth of Australia, Senate, Standing Committee on Economics Legislation, *Inquiry into Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010*, 21 May 2010, p20. The arguments for and against the particular definitions of "*consumer*" are set out at pages 19-30.

92 Professor John Carter, *Proof Committee Hansard*, 29 April 2010, p. 38. See also Ms Deborah Healey, *Proof Committee Hansard*, 28 April 2010, p. 34. (Both quoted in Commonwealth of Australia, Senate, Standing Committee on Economics Legislation, *Inquiry into Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010*, 21 May 2010, pp21-2.)

> *The Committee notes the overwhelming support for uniformity of consumer protection legislation. The greater clarity this brings could be enhanced if the occasional inconsistencies in the definition of 'consumer' in the bill could be removed. The Committee believes that the Government should aim to arrive at a single definition of 'consumer' throughout the provisions of the ACL in future consultations and amendments to the legislation.*[93]

3.29 The need for consistency in the CCA 2010 appears to have resulted in a Commonwealth Schedule 2 definition of "*consumer*" that is inconsistent with the current State law.

Finding 6: The Committee finds that it is unsatisfactory to have in the same law such a large number of different definitions of terms representing the fundamental concepts of consumer law.

CLAUSE 8 - EXCLUSION OF LEGAL SERVICES

Introduction

3.30 Clause 8 of the FT Bill provides the meaning for "*services*" for the 'front end' of that Bill. Clause 8(4) provides:

> *Legal services as defined in the Legal Profession Act 2008 section 3 are not services for the purposes of this section,*

effectively excluding legal services from the application of the 'front end' of the FT Bill.

Rationale

3.31 The Committee enquired as to the exclusion of legal services from the FT Bill. The Department advised:

> *The definition is wider than that in the ACL (WA) in that it includes the provision of gas, electricity or other forms of energy, as well as the provision of lodging or accommodation. However, it is narrower in that it excludes legal services as defined in the Legal Profession Act 2008.*

93 Ibid, p1.

> *The Consumer Affairs Act 1971 was amended in February 1993 by the Legal Practitioners Amendment (Disciplinary and Miscellaneous Provisions) Act 1992 which established a disciplinary mechanism to deal specifically with complaints against legal practitioners. A consequential amendment was included in that Act which amended the definition of "services" in the Consumer Affairs Act to effectively preclude the Commissioner for Consumer Protection from receiving complaints against legal practitioners. The definition of "services" in the Bill (front end) maintains the status quo in relation to the Commissioner's scope of authority.*[94]

Comment

3.32 The Committee received no submission raising the different treatment of legal services in the Australian Consumer Law (WA) and balance of the FT Bill as an issue.

CLAUSE 15 - LEGISLATION THAT PREVAILS OVER THE FAIR TRADING ACT 2010

Introduction

3.33 Clause 15 provides that the:

- Acts specified in Schedule 1;
- Acts prescribed for the purposes of clause 15; and
- subsidiary instruments made under the specified Acts,
- prevail over the FT Bill to the extent of any inconsistency.

3.34 Clause 15 of the FT Bill is, of course, subject to section 109 of the *Constitution*, which may result in the Australian Consumer Law (WA) prevailing over the specified legislation in any event.

3.35 Clause 15(1)(b), which provides for prescription of Acts that will prevail over the FT Bill, is a Henry VIII clause.

Acts listed in Schedule 1

Specific regulation of certain goods

3.36 The Department of Commerce explained the precedence conferred on the Acts listed in Schedule 1, saying:

---

94 Email from Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection, Department of Commerce, 5 November 2010, pp7-8.

> *The laws in schedule 1 are currently also in schedule 1 of the Consumer Affairs Act so this is a continuation of the existing arrangement. The laws that are in the schedule are laws that specifically regulate the supply of particular items such as firearms, spear guns, poisons. The argument is that where Parliament has introduced some very specific, focused regulation of the way things should be supplied, that specific regulation should continue to apply and the generic legislation should not over-ride it.*[95]

Schedule 1 amended by Amendment Bill

3.37 Clause 192(8) of the Amendment Bill proposes an amendment of clause 86 of the *Biosecurity and Agriculture Management (Repeal and Consequential Provisions) Act 2007* so that that Act provides for insertion of Schedule 1 to the FT Bill of the *Biosecurity and Agriculture Management Act 2007.*

3.38 Other subclauses of clause 192 use the same mechanism to delete from Schedule 1 the various Acts that will be replaced by the *Biosecurity and Agriculture Management Act 2007* when it comes into effect.

Henry VIII clause

Power convenient not necessary

3.39 The Department advised that power to prescribe additional Acts that will prevail over the FT Bill was "*convenient*" rather than necessary:

> *Again, it is convenient. It is there to ensure that the schedule can be appropriately updated. I know what the committee's concern is with that. If you said that provision should come out I would not worry about it*.[96]

3.40 On the circumstances in which this power might be used, the Department said:

> *Obviously with new legislation that is specific you can include appropriate consequential amendments. There may be other legislation that is regarded as appropriately included on that schedule that is already in place and is not subject to an amending bill. You cannot do anything about it until the appropriate amending bill comes along. It is a convenient process for ensuring that the regulatory framework sits appropriately with specific legislation in*

95 Department of Commerce Transcript, 1 November 2010, p25.

96 Ibid.

> *one place and general in the other, but it is not pivotal to the legislation.*
>
> …
>
> *From a policy point of view, Consumer Protection's preference would be to keep that list as narrow as possible. And from a public policy there are competing views: one is trying to avoid industry-specific or specific legislation and look at generic legislation. Maybe it is more effective and efficient. The difficulty is that there are areas in which Parliament takes a view that there is a very strong reason for regulating something in a very particular way. When that happens it is appropriately excluded from the general legislation. But we do not have any intention at all to expand that. The schedule will be added to based only on either cabinet approval through another amendment process or a very well made out case from another agency. We would not be generating that.*[97]

Consequences of prescribing an existing Act after the FT Bill comes into effect

3.41 As the Department has acknowledged, the Henry VIII power is not required to prescribe new legislation as that legislation can amend Schedule 1 in the event that situation is desired. The clause 15(1)(b) power would only be used to reflect a change in policy and prescribe an Act not prescribed at commencement of the FT Bill or on enactment.

3.42 In this circumstance, the Committee was concerned at the consequences of prescription:

> ***The CHAIRMAN****: You may not be able to answer this, Gary, so just let me know if you cannot. What would be the consequences on rights, liabilities and obligations of prescribing an act after the Fair Trading Bill 2010 comes into effect?*
>
> ***Mr Newcombe****: Do you mean prescribing an act to be added to the schedule?*
>
> ***The CHAIRMAN****: Yes.*
>
> ***Mr Newcombe****: It would depend what the act was.*[98]

97 Ibid, pp25-66.

98 Ibid, p26.

Conclusion

3.43 Clause 15 and Schedule 1 give effect to the government's policy that certain legislation specifically regulating certain goods should prevail over the FT Bill. The extent to which this will, in fact, occur in respect of the provisions of the Australian Consumer Law (WA) will depend on section 109 of the *Constitution*.

3.44 Prescription of an Act pursuant to clause 15(1)(b) has potential to significantly affect a person's rights, interests and obligations. While such Henry VIII powers are no longer as rare as they were even 10 years ago, each instance needs to be considered on its own merits.

3.45 Having regard to the Department's view that power to prescribe Acts for the purposes of clause 15 is not necessary, and the purpose of the FT Bill - being, in part, to confer greater certainty in respect of rights and obligations - the Committee recommends deletion of this Henry VIII power.

Recommendation 2: The Committee recommends that the FT Bill be amended to remove the power to prescribe the Acts that will prevail over the FT Bill. This can be effected in the following manner:

Page 13, lines 5 and 6 - To delete the lines

Page 13, line 7 - To delete (c) and insert -

(b)

CHAPTER 4

CLAUSES 16 TO 24 OF THE FAIR TRADING BILL 2010 - APPLICATION OF THE AUSTRALIAN CONSUMER LAW

CLAUSE 19 - REGULATIONS APPLIED AS PART OF PRIMARY LEGISLATION

Introduction

4.1 Clause 19(2) of the FT Bill applies the "*Australian Consumer Law text*" as a "*law*" of Western Australia as "*part of*" the proposed Fair Trading Act 2010.

4.2 For the purposes of clause 19 alone, the "*Australian Consumer Law text*" consists of:

> *(a) Schedule 2 to the Competition and Consumer Act 2010 (Commonwealth) as in force on the commencement of this section (but as modified by section 37); and*
>
> *(b) the regulations made under section 139G of that Act, as those regulations are in force from time to time.*

4.3 Clause 19(2), therefore, applies the regulations made under section 139G of the CCA 2010, delegated legislation, as part of the proposed primary legislation in Western Australia.[99]

Finding 7: The Committee finds that clause 19(2) of the Fair Trading Bill 2010 proposes that subsidiary legislation, regulations made pursuant to section 139G of the Competition and Consumer Act 2010 (Cwlth), apply in Western Australia as primary legislation.

4.4 The Committee considers that a very strong rationale is required to justify application of the subsidiary legislation of one jurisdiction as the primary legislation of Western Australia.

4.5 The FT Bill contains subsequent provisions that treat the section 139G Regulations as subsidiary legislation.

---

[99] This outcome is confirmed by the Department of Commerce. (Email from Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection, Department of Commerce, 5 November 2010, p2.)

4.6 However, as currently drafted, clause 19 creates uncertainty as to the purposes for which the section 139G Regulations are primary or subsidiary legislation.

4.7 As well as elevating the subsidiary legislation of the Commonwealth to equal status with the primary legislation of the State, clause 19 offends Fundamental Legislative Scrutiny Principle 11 - *Is the Bill unambiguous and drafted in a sufficiently clear and precise way?*

Regulations made in respect of Australian Consumer Law part of that law as subsidiary legislation

ACL IGA

4.8 The ACL IGA defines "*Australian Consumer Law*" as the text contained in the relevant Schedule of the TPA:

> *and any legislative instruments made pursuant to the Australian Consumer Law.*[100]

4.9 By clause 3.2, the States and Territories are to enact the Australian Consumer Law as "*embodied in the relevant Schedule*" to the TPA. This includes the delegated legislation-making powers conferred in that schedule.

4.10 Various sections of the Commonwealth Schedule 2 confer power to make "*legislative instrument*s" (as subsidiary legislation is called by the Commonwealth). Most of these provisions are set out in clause 21 of the FT Bill.

Commonwealth legislation "modifies" *the ACL IGA*

4.11 For reasons not apparent to the Committee, and not addressed in either Senate Committee report, the Commonwealth enacted legislation that included a regulation-making power in respect of the Australian consumer law conferred outside the Commonwealth Schedule 2 and defined the "*application laws*" of the States and Territories as laws that included those regulations. (Section 139G of the CCA 2010 confers a general regulation-making power.)[101]

4.12 By section 130 of the CCA 2010, "*Australian Consumer Law"*:

> *means Schedule 2 as applied under Subdivision A of Division 2 of this Part.*

---

100 ACL IGA, Definitions and Interpretations, p4.

101 In part, section 139G of the CCA 2010 provides: *"(1) The Governor-General may make regulations prescribing matters: (a) required or permitted by Schedule 2 to be prescribed; or (b) necessary or convenient to be prescribed for carrying out or giving effect to that Schedule*."

4.13 But the CCA 2010's definitions of "*application law*" and "*applied law*" require State legislation giving effect to the uniform legislative scheme to include regulations made under section 139G - but not section 139G itself - as part of the Australian consumer law applied in the respective jurisdictions. Section 140B of the CCA 2010, for example, provides:

> *The applied Australian Consumer Law consists of:*
>
> *(a) Schedule 2; and*
>
> *(b) the regulations made under section 139G of this Act.*

4.14 The CCA 2010 does not, however, make the section 139G Regulations primary legislation or require them to be applied in the other jurisdictions as primary legislation.

Rationale provided by the government

4.15 The Department of Commerce's responses to the Committee's questions on this issue explain why the regulations made under section 139G are required, under the uniform scheme, to form part of Western Australian **law** but not why it is necessary that they constitute **primary** legislation, rather than **subsidiary** legislation.

4.16 At the hearing, the following exchange occurred:

> ***The CHAIRMAN****: The committee is concerned that clause 19 may not preserve the distinction between primary and subsidiary legislation, which is recognised in the Competition and Consumer Act 2010. Why are regulations made under section 139G made part of the Australian Consumer Law text rather than section 139G itself?*
>
> ***Mr Newcombe****: Section 139G is a power of the commonwealth. It has the power to make regulations under the Competition and Consumer Act. Clearly, the commonwealth needs it in its own act. It is the power to make commonwealth regulations. The mechanism is part of the application process. The reason it is part of the Australian Consumer Law text is that the model was to apply to both the act and the commonwealth amendments. The commonwealth amending power is not in the Australian Consumer Law (WA). The commonwealth regulations will make up the Australian Consumer Law text, which, by virtue of clauses 18 and 19 read together, form part of the Australian Consumer Law (WA). If you put 139G in the Australian Consumer Law, where is the commonwealth's regulation-making power? Because it sits outside the Australian Consumer Law.*

It is the commonwealth's regulation-making power to make regulations for its legislation.

***The CHAIRMAN**: How does the section 139G power differ from the other commonwealth powers to make subsidiary legislation in the ACL, which forms part of the ACL WA?*

***Mr Newcombe**: Section 139 is made up of regulations. The others are not regulations. The only other legislative instruments are things like bans and so on, but there is no other regulation-making power in the ACL. That is how it differs. It is the regulation-making power. The intention of the scheme is that the commonwealth amendment ACL, the primary legislation, and amendments to it will be applied in other jurisdictions, and commonwealth regulations made under that primary legislation will equally be applied in the jurisdictions.*

…

In relation to the regulations, there were two options really. One was that we would make our own regulations and mirror the commonwealth regulations that are made. The other option was to apply the regulations. If we apply the regulations, the concern was the same with the legislation — you are creating subordinate legislation that this Parliament does not have any say over. If you make the regulations, specifically again in WA, it is a very cumbersome process. The commonwealth has already made the regulations. The commitment was that those regulations would be applied but we would be saying, "We have to re-state every regulation", and you could get drafting changes and all sorts of things to muck up the uniformity.

…

***The CHAIRMAN**: Are section 139G regulations part of Fair Trading Bill?*

***Mr Newcombe**: The regulations that are made are part of the Australian Consumer Law (WA).*

***The CHAIRMAN**: I ask you to look at clause 19(2)(c). Does that not make the regulations part of the Fair Trading Bill?*

***Mr Newcombe**: Yes, but it also makes them part of the Australian Consumer Law. Subclause (2)(b) states — as so applying, may be referred to as the Australian Consumer Law (WA); The Australian*

Consumer Law (WA) encapsulates the regulations and the text of the act itself. Yes, they are a major part of the act because the regulations themselves are part of the Australian Consumer Law.

***The CHAIRMAN**: Why is clause 19(2)(c), when read with clauses 19(1)(b) and 19(2)(a), worded so as to make the section 139G regulations part of the Fair Trading Act 2010, rather than to apply those regulations as regulations? Just to clarify that a bit further, the regulations are made under the consumer credit law; they are not applied as part of the act. There is a difference. I am just trying to understand why this distinction is being made.*

Gary, I am happy for you to take that on notice if you like.

***Mr Newcombe**: We are right. Part of this is obviously negotiation with parliamentary counsel and the drafting methodology, so I do not want to give you an immediate answer that is going to be misleading, if that is okay.*[102]

4.17 The Department's Response to Questions was as follows:

[**Committee**] *1.3 Why is clause 19(2)(c) of the Fair Trading Bill 2010, when read with clauses 19(1)(b) and (2)(a), worded so as to make regulations made under section 139G of the Competition and Consumer Act 2010 "part of" the proposed Fair Trading Act 2010, rather than apply those regulations as regulations?*

[**Department**] *If the regulations made under section 139G were made as separate regulations rather than applying them as a law of WA, it would run the risk of them not applying to corporations. The risk stems from section 140H of the Commonwealth's Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010 which makes it clear that the Commonwealth Act is not intended to exclude the operation of any "application law" to the extent that the application law is capable of operating concurrently with the Commonwealth's Act. In other words, this savings provision will allow any State or Territory "application law" to operate concurrently (thereby allowing such laws to regulate corporations) but will not operate so as to allow other consumer laws that are not "application laws" that purport to cover the same field, to do so.*

[102] Department of Commerce Transcript, 1 November 2010, pp28-30.

> *Clause 19(2) mirrors the drafting of the laws of other jurisdictions that apply the Australian Consumer Law (for example, section 9 of the Fair Trading Act 1999 (Victoria) (as inserted by section 9 of the Fair Trading Amendment (Australian Consumer Law) Act 2010)).*
>
> [**Committee**] *In making the section 139G regulations part of the Fair Trading Act 2010, does clause 19(2)(c) make those regulations primary legislation in WA?*
>
> [**Department**] *Regulations made under section 139G will be primary legislation for reasons described in the answer to Question 1.3 above.*
>
> [**Committee**] *If so, what is the rationale for this?*
>
> *If not, how is this outcome avoided?*
>
> [The Department provided no additional response] [103]

Comments

Applying section 139G Regulations as subsidiary legislation does not prevent review by Parliament

4.18 The closest that the Department comes to providing an explanation as to why section 139G Regulations have not been applied as regulations is the statement:

> *If we apply the regulations, the concern was the same with the legislation — you are creating subordinate legislation that this Parliament does not have any say over.* [104]

4.19 The Committee does not agree that application of section 139G Regulations as regulations would have the asserted consequence.

4.20 Clause 21(1)(a) of the FT Bill, when read with the balance of that clause, confers power on the Parliament to disallow regulations made pursuant to section 139G of the CCA 2010. This flows from those regulations being part of the Australian Consumer Law (WA), not from those regulations being primary legislation.

Inconsistency in treatment of section 139G Regulations

4.21 Clause 23 of the FT Bill applies the *Acts Interpretation Act 1901* (Cwlth) to the Australian Consumer Law (WA) as if:

---

103 Email from Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection, Department of Commerce, 5 November 2010, p2.

104 Department of Commerce Transcript, 1 November 2010, p29.

> *(b) the regulations in the Australian Consumer Law (WA) or instruments under that Law were regulations or instruments under a Commonwealth Act.*

4.22 This clause undermines the proposition that the section 139G Regulations must be part of primary legislation. It also sets up an apparently inconsistent treatment of the regulations within the FT Bill. This is undesirable.

4.23 Clause 23 is subject to clause 21.

Need for further variation in description of the Australian Consumer Law

4.24 Clause 21 of the FT Bill requires an amendment to the section 139G Regulations to be published in the *Gazette* and subject to the disallowance process of section 42 of the *Interpretation Act 1984*. Clause 20 of the FT Bill requires an amendment to the Australian Consumer Law (WA) to be approved in accordance with the process set out in that clause and effected by order.

4.25 To prevent an inconsistency in the application of these provisions to that part of the Australian Consumer Law (WA) that comprises the section 139G Regulations, clause 20(1) applies only to

> *the Australian Consumer Law (WA) (as described in section 19(1)(a)).*

4.26 This adds another instance to the plethora of variations of the Australian consumer law definitions that apply in different circumstances. (See Chapter 1)

No need to replicate poor drafting of other jurisdictions

4.27 In the Committee's opinion, whether or not the section 139G Regulations have been made primary legislation in the other jurisdictions is irrelevant in the circumstances that:

- the ACL IGA does not require that to occur;
- the CCA 2010 does not make the section 139G Regulations primary legislation or require the States and Territories to do so; and
- the uniform legislative scheme is that the Commonwealth legislation be given effect by the other jurisdictions, not that the application model of another State or Territory be adopted.

Conclusions

4.28 The Committee concludes:

- the ACL IGA does not contemplate that regulation-making powers in respect of the Australian Consumer Law will be located outside the Commonwealth Schedule 2. It is, however, consistent with the intent of that agreement that regulations made in respect of the Commonwealth Schedule 2 be applied in the other jurisdictions; and

- the CCA 2010 defines the application laws in respect of the Australian consumer law so as to require those laws to apply the regulations made under section 139G of the CCA 2010 as part of the Australian consumer law in the respective jurisdictions. While modifications are permitted by the application laws, failure to apply those regulations (at least in part or substance) may be in breach of the intergovernmental agreement in respect of the Australian consumer law and, for that reason, may result in an 'application law' not meeting the requirements of the CCA 2010 and defeat the State's policy objective of participating in the uniform Australian consumer law scheme.[105]

4.29 However, the CCA 2010 does not require application laws to apply the section 139G Regulations, which are subsidiary legislation under that Act, as primary legislation.

Finding 8: The Committee finds that, on the information provided to it, neither the intergovernmental agreements nor the Commonwealth legislation require regulations made under section 139G of the CCA 2010 to be applied in the State as primary legislation.

4.30 The Committee is of the view that, as a matter of principle, it is undesirable for:

- the subsidiary legislation of another jurisdiction to be applied as primary legislation in the State; and

- subsidiary legislation to be treated as primary legislation for some purposes (clause 19) and subsidiary legislation for others (clauses 21 and 23) when that inconsistent treatment can be avoided.

105 *The Queen v Hughes* (2000) 171 ALR 155, paragraph 1 quoted in Western Australia, Legislative Council, Standing Committee on Legislation, Report 1, *Corporations (Commonwealth Powers) Bill 2001, Corporations (Ancillary Provisions) Bill 2001, Corporations (Administrative Actions) Bill 2001, Corporations (Consequential Amendments) Bill 2001*, 19 June 2001, p13.

Finding 9: The Committee finds that it is undesirable for:

- **the subsidiary legislation of another jurisdiction to be applied as primary legislation in the State; and**
- **subsidiary legislation to be treated as primary legislation for some purposes (clause 19) and subsidiary legislation for others (clauses 21 and 23) when that inconsistent treatment can, and should, be avoided.**

Precedent

4.31 In amending the *Consumer Credit (Western Australia) Act 1996* in 2003 to constitute template legislation, regulations made under a Queensland Act that was to be applied in Western Australia were applied in the following manner:

> *The regulations in force under Part 4 of the Consumer Credit (Queensland) Act 1994 on the commencement of section 6 of the Consumer Credit (Western Australia) Amendment Act 2003 apply, as if amended as set out in regulations made for the purposes of this section, as regulations in force for the purposes of the Consumer Credit (Western Australia) Code.*[106]

4.32 The Committee considers this provision provides a model that gives effect to the policy intent without raising the issues set out in Finding 9.

4.33 The Committee recommends that clause 19 of the FT Bill be amended to reflect the model of the *Consumer Credit (Western Australia) Act 1996* as amended.

106 Section 6(1) of the Consumer Credit (Western Australia) Act 1996).

Recommendation 3: The Committee recommends that clause 19 of the FT Bill be amended to apply regulations made under section 139G of the CCA 2010 as subsidiary legislation forming part of the Australian Consumer Law text for the purposes of that clause. This can be effected in the following manner:

Page 17, line 5 - To delete the line and insert -

(c) in so far as it constitutes Schedule 2 to the *Competition and Consumer Act 2010* (Commonwealth), is part of this Act; and

(d) 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.

CLAUSE 19 - POINT-IN-TIME VERSION OF COMMONWEALTH SCHEDULE 2 APPLIED

4.34 By clause 19 of the FT Bill, Western Australia adopts a point-in-time version of part of the Australian consumer law. That clause applies the Commonwealth Schedule 2 as in force at the commencement of section 19 of the Fair Trading Act 2010 (as amended by clause 37 in respect of unsolicited consumer agreements). (By contrast, the section 139G Regulations are adopted as they are in force from time to time.)

4.35 The version of the Commonwealth Schedule 2 that is the note to the FT Bill is the version in force at the time that bill was presented to the Parliament. In the event the Commonwealth Schedule 2 is amended between that date and the day section 19 of the Fair Trading Act 2010 commences, the amended Commonwealth Schedule 2 becomes part of the Australian Consumer Law (WA), not the note to the FT Bill.

4.36 the Committee, has therefore, recommended that the responsible Minister advise the Legislative Council of the currency of the note to the FT Bill.

Recommendation 4: The Committee recommends that the responsible Minister advise the Legislative Council:

- **whether the note to the FT Bill constitutes the current text of Schedule 2 to the *Competition and Consumer Act 2010* (Commonwealth);**
- **if not, of any changes to that text; and**
- **if so, whether there will be any amendment of that Schedule prior to clause 19 of the FT Bill commencing**.

CLAUSE 20 - AMENDMENT OF THE AUSTRALIAN CONSUMER LAW

Introduction

4.37 The application of the particular version of the Commonwealth Schedule 2 as part of the Australian Consumer Law (WA) under clause 19 of the FT Bill is subject to clauses 20 to 23 and 117(3). (Clause 117(3) also deals with unsolicited consumer agreements.[107] The modifications proposed by clause 37 and 117(3) are discussed below.)

ACL IGA mechanism for amendment

4.38 As previously observed, the ACL IGA contemplates template legislation, requiring State legislation applying the ACL as it is amended from time to time (clause 3.2). The ACL IGA sets out the process for amendment of the ACL in clauses 8 to 19.

4.39 In summary:

- any party may submit a proposal for amendment to the Commonwealth, other parties are also to be provided with a copy of the proposal (clause 8);
- a proposal is to meet the requirements of clause 9, which includes a regulatory impact statement if required under Commonwealth regulatory requirements, to be 'valid';

[107] Clause 117(3) of the FT Bill permits regulations that: "*provide that the Australian Consumer Law (WA) Part 3-2, Division 2 (unsolicited consumer agreements) does not apply to specified agreements; alter the operation of section 73(1) and 170(1) (both hours for negotiating unsolicited consumer agreements); and altering the operation of Part 3-2, Division 2 generally*".

- the Commonwealth is to commence consultation with other parties within four weeks. The parties have three months after the date of written notification of a proposed amendment to respond to the Commonwealth;

- the Commonwealth must give notice of intention to make minor changes but need not consult. If our parties give notice within 21 days that they consider the amendment is not minor or consequential, the amendment must be put to a vote. The Commonwealth is also to consult with the parties on any 'non-minor' changes it proposes;

- while the requirements of clause 9 must be met, those of clauses 8 and 10 need not. ;

- at the end of the consultation period, the Commonwealth is to call for a postal vote;

- the parties have 35 days within which to respond to the call for a vote;

- in the event a party does not respond within the 35 days, the party is taken to have agreed the amendment;

- the Commonwealth will not introduce a bill unless the Commonwealth and four other parties, including three States, support the amendment.

4.40 The ACL IGA mechanism permits an amendment that the Western Australian government may not support.

Subsequent agreement for 'modifications'

4.41 As implemented, the uniform consumer law legislative scheme allows for 'modifications' of the Commonwealth Schedule 2 in the application laws of the States and Territories.

4.42 The Department of Commerce explains that clause 20 arose from the current government reconsidering the use of an application law to apply the Australian consumer law[108] and from an agreement in December 2009 that different laws could apply in respect of the hours for door-to-door sales.[109]

4.43 The Department went on to advise:

---

108 "*The government, however, reconsidered its position in relation to the use of application of laws legislation, and, as a result, our model is what I would call a hybrid. It does apply the commonwealth Australian Consumer Law at a particular point in time—that is, when the legislation commences—but it does not provide for the automatic application of future amendments."* (Department of Commerce Transcript, 1 November 2010, p2.)

109 Ibid, pp4-5.

> *No other modifications have so far been agreed to. … I suspect the IGA will continue to be examined by the parties as we move along.*[110]

Legislative mechanism for amendment of primary legislation

4.44 Clause 20 of the FT Bill provides for amendment of that part of the Australian Consumer Law (WA) that comprises the Commonwealth Schedule 2 to occur by way of order of the Governor published in the *Gazette*.

4.45 An order cannot be published unless a draft order has first been "*approved*" by resolution of both Houses of Parliament, which resolution can originate in either House.

4.46 By clauses 20(4) and (5), unless one of the following occurs, a draft order is taken to have been approved on the expiration of the 21st sitting day after the giving of notice of a resolution to approve a draft order:

- the notice is withdrawn before being called upon and moved;
- the notice is withdrawn after being called upon;
- the resolution has been called upon and lost;
- the resolution is passed prior to the expiry of 21 days; or
- the Legislative Assembly expires or is dissolved or the Parliament is prorogued.

4.47 Clauses 20(4) and (5) raise constitutional issues, which are discussed below.

4.48 The Committee, however, considers that amendments to the Australian Consumer Law (WA) should be made by way of bill. In the event its Recommendation 6 is accepted, the constitutional issue arising in respect of subclauses (4) and (5) of clause 20 falls away.

Whether legislative mechanism consistent with intergovernmental agreement

4.49 The Committee queried whether the FT Bill was consistent with the ACL IGA. The Department of Commerce advised:

> *We believe we have developed a model that is an appropriate hybrid. The commonwealth officer-level advice has been that that will be fine.*

110 Ibid, p5.

> *The major issue from all jurisdictions is that the Australian Consumer Law is in place to start on 1 January in all jurisdictions.*[111]

Conclusion

4.50 It is, in the Committee's opinion, open to question whether the amendment process set out in clauses 8 to 19 of the ACL IGA remain unaffected by the apparent agreement, reflecting in the legislation (and proposed legislation) of all jurisdictions that the Australian consumer law may be applied with modifications.

4.51 The Committee notes that section 131C of the CCA 2010 preserves the concurrent operation of the laws of the States and Territories. Section 131C makes some specific exceptions for direct inconsistency but imposes no limits on the "*modifications*" that may be made.

Finding 10: The Committee finds that clause 20 of the FT Bill is consistent with the way in which the Australian consumer law scheme has been implemented in other jurisdictions.

Rationale for clause 20

4.52 One rationale for clause 20 is that it retains scrutiny and control by the State Parliament of the legislation applying in the State:

> *The purpose of that is to enable us to have initial application of the Australian Consumer Law on a particular date — that is why I argued it is within the scope of the intergovernmental agreement and everything else — but reserves to state Parliament the capacity to control what the law is that ultimately comes into effect in this place. In the past, consumer credit orders have been referred to this committee. Full scrutiny is retained by state Parliament.*[112]

4.53 Although not expressed as such at the hearing, it is clear that an important rationale for clause 20 is that the process for amendment of the Australian consumer law in the ACL IGA may result in an amendment that the Government does not agree.[113] Clause 20 enables the government of the day to present for approval only the amendments to

111 Ibid.

112 Ibid, p30.

113 Letter from Hon Bill Marmion MLA, Minister for Commerce, 6 October 2010, p3

the Commonwealth Schedule 2 with which it agrees and also to independently propose amendments. In the Legislative Assembly, the Minister for Commerce said:

> *Indeed, if Western Australia wanted to make an amendment to our law, it would be up to me as the minister to take it to the ministerial council. It would then be voted on by the ministerial council; and, if adopted, the Australian Consumer Law would be changed. …*
>
> *… our first choice would be to ask the ministerial council whether it would adopt it … If we were to decide that a matter was important to Western Australia, then because of the way we have brought our legislation through, we would be able to amend our act.*[114]

4.54 It is in this respect that the FT Bill differs from the application laws of the other jurisdictions. Those laws enable the respective Parliaments only to exclude amendments made by the Commonwealth to its legislation.

Capacity to amend Australian Consumer Law (WA)

4.55 The extent to which the government of the day's independent power to amend is exercised may depend on the ambit of the ACL IGA obligation not to present inconsistent legislation to the Parliament and will depend on the constraints imposed by section 109 of the *Constitution*.[115]

4.56 It follows that the extent to which clause 20 confers a real power to amend the Australian consumer law as it will apply in Western Australia is not clear.

4.57 There are legal constraints in amending the application of the FT Bill to certain corporations. Section 109 of the *Constitution* has been discussed above. As the Department pointed out:

> *if we are inconsistent with the legislation, then the commonwealth's corporations power will enable them to override our legislation.*

4.58 When discussing power to disallow proposed regulations in respect of door-to-door sales, the Department said:

> *If the dividing line is not perhaps where you would prefer to see it, then that is a matter of judgement. I think if that were changed, we run into the risk that we would be directly inconsistent with the*

---

114 Hon Bill Marmion MLA, Minister for Commerce, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 19 October 2010, p7917.

115 As the MCCA has yet to determine the process for identifying inconsistent legislation, the constraints that will be imposed by the ACL IGA are unclear.

> *commonwealth legislation and our provisions may well be invalid if you wanted to amend that provision.*[116]

4.59 The following exchange at the hearing highlighted the "*conundrum*" noted by the Committee, and its previous incarnations, in numerous reports:

> ***Hon LINDA SAVAGE:*** *But are you saying if [a draft amendment order] was not passed by the Parliament, we would be in breach* [of the ACL IGA]*?*
>
> ***Mr Newcombe****: Well, dependent on the nature of the amendment, yes.*
>
> ***Hon LINDA SAVAGE****: That is a bit of a catch 22, is it not?*
>
> ***Mr Newcombe****: There is no way around it. This is the conundrum that we are in: either there is uniformity or there is state sovereignty and the state exercises its sovereignty. When it exercises its sovereignty, you will lose uniformity.*[117]

4.60 Any amendment of the FT Bill in breach of the ACL IGA may have financial consequences for the State:

> *We have the capacity to amend our law, and it will be up to Parliament to do so. Any one of those amendments that Parliament makes between now and the end of the payments, may well mean we are in serious breach of the agreement and there may well be a financial penalty. But at the moment the legislation effectively reflects the Australian Consumer Law and I do not believe there is any reason that the state would suffer any financial penalty under national partnerships at this point.*[118]

4.61 At the end of the day, as is always the case, whether an amendment is for the good governance of the State is a balancing exercise for the Parliament. This was recognised by the Department:

> *The consequence is that in any action the Parliament takes either in the order process or the regulation disallowance process, may well put us in breach of the intergovernmental agreement. But we have*

---

116 Department of Commerce Transcript 1 November 2010, pp28-9.

117 Ibid, p33.

118 Ibid, p5.

left that to the good judgement of the Parliament to decide on every circumstance.[119]

Finding 11: The Committee finds that provision in the FT Bill for amendments to the Australian Consumer Law (WA) to be subject to Parliamentary approval recognises the privileges of the Parliament. This provides an opportunity for the Parliament to balance the competing factors at play in making, or not making, an amendment to the uniform legislation.

4.62 The Committee, however, has concerns with the order mechanism proposed by clause 20.

AMENDMENT BY WAY OF ORDER

Rationale for amendment by order

4.63 The order process has been chosen, rather than an amendment process, due to the view that Parliament's approval takes too long. The Department of Commerce said:

> ***Mr Newcombe**: … It would be open to the government of the day to substantively amend the act if it chose to; it has always got that power, so there could be amendments to the act. But the mechanism that we have put in place is really to, as I say, maintain uniformity, deal with the problem of the time lag. If you say they have to be substantive amendments, we know absolutely, from history, that Western Australia will fall a long way behind if the order process is not included, because then, firstly, you would be in breach of the agreement, probably, but you have to make a separate amendment bill every time there is an amendment agreed.*
>
> ***Hon LINDA SAVAGE**: But with the order, it still has to be passed, does it not, by both houses?*
>
> ***Mr Newcombe**: It does, but it does not go through the same mechanism. It has not passed, but it does not have the various stages. It does not go to first reading, second reading, and it does not go to committee.*
>
> ***The CHAIRMAN**: It does go to committee, orders.*

[119] Ibid, p32.

> ***Mr Newcombe**: Well, consideration in detail; the orders do not go into the consideration in detail process.*[120]

4.64 The Department also relied on precedent:

> *That is based on what existed for consumer credit in this state for a number of years. That is the model that has operated in this state. … In the past, consumer credit orders have been referred to this committee. Full scrutiny is retained by state Parliament.*[121]

Comment

4.65 The Committee is of the view that, notwithstanding the precedent of the *Consumer Credit (Western Australia) Act 1996* the order process proposed by clause 20 of the FT Bill is unsatisfactory. In part, this arises from the different terms of clause 20 to sections 5 and 6B of the *Consumer Credit (Western Australia) Act 1996*. (See paragraph 4.75 for the terms of section 6B.)

Limitations of order process

4.66 The Committee observes that while clause 20 is said to be directed at preserving the ability of the Parliament to scrutinise the legislation it is asked to pass, the process by which this will occur has been chosen (on the advice provided by the Department - see paragraph 4.63 above) with a view to avoiding consideration in detail.

No consideration in detail

4.67 As identified by the Department, the Parliamentary process for consideration of an order is less informative than that in respect of a bill. There is no Second Reading Speech or consideration of the clauses of the proposed amendment in detail. (There is also no Explanatory Memorandum but, in the Committee's experience, these documents do little more than paraphrase the clauses of a bill.)

Ability to approve in part but not to amend

4.68 Clause 20 does not provide Parliament with the ability to amend a draft order. Under the principle that a reference to the whole includes the composite parts, power to approve a draft order implies power to approve in part. However, this does not equate with power to amend.

4.69 'Approve in part' and 'amend' differ in that 'approve in part' means accepting or rejecting parts of the order as drafted: power to amend would allow varying provisions of the order . For example, providing three days notice of a requirement to produce

120 Ibid, pp32-3.

121 Ibid, p29.

documents instead of one day would be amending the provision - absent power to amend, a requirement to produce documents on one day's notice can only be accepted or rejected.

4.70 The Department of Commerce understands that clause 20 does permit amendment of a draft order but it emerged at the hearing that that is to occur through the cumbersome, and time consuming, process of resubmission of an order not approved:

> ***The CHAIRMAN**: Okay. But, Gary, is it the case that clause 20 only permits the approval in part or disapproval, which means we could not actually amend the order in some way?*
>
> ***Mr Newcombe**: Our understanding is that you can amend it.*
>
> ***The CHAIRMAN**: Where is that?*
>
> ***Mr Newcombe**: It does not express the point, but the point is that it is for Parliament to decide the process it uses in terms of dealing with these things. The question is that the statute requires that the draft has got to be approved. That resolution could approve the draft with amendments. I do not think there is actually anything in the act that precludes that. It is a matter for Parliament to decide how it decides to go about approving the order. All the act provides is that the Governor cannot make one unless there is an approval. What will happen, in our view of this, is that if the Parliament did not approve the draft order in the way it is presented, then it cannot be made. So the Parliament says, "Okay, we approve this order" and it gets made. If the Parliament says, "We reject this order in totality", it cannot be made. If the Parliament says, "We would approve this order and it was amended in this way", Parliament has not approved the draft order; therefore, it cannot be made unless the amendment is agreed, and a new draft order would have to be submitted to the Parliament. You have got the capacity to decide exactly what that order would be, because the Governor cannot make it unless that exact draft has been approved by the Parliament.*[122]

4.71 It is the Committee's view that it is preferable for the Parliament to have power to amend an order under consideration.

4.72 Section 42(4) of the *Interpretation Act 1984* provides an express power to amend regulations that are subject to disallowance under that section. It provides:

---

122 Ibid, p35.

> *Notwithstanding any provision in any Act to the contrary, if both Houses of Parliament at any time pass a resolution originating in either House amending any such regulations or substituting other regulations for that which has been disallowed by either House under subsection (2), then on the passing of any such resolution —*
>
> > *(a) amending regulations, the regulations so amended shall, after the expiration of 7 days from the publication in the Gazette of the notice provided for in subsection (5), take effect as so amended;*

4.73 The Committee considers this provision can be adapted for use in respect of the draft orders required by clause 20. The Committee notes that publication of an amended order remains within the control of the government.

No application of SO230A to orders presented under clause 20

4.74 SO230A requires only the referral of bills falling within the ambit its subparagraph (1) the Committee.

4.75 The Department of Commerce points to the fact that draft amendment orders considered by the Parliament under section of 5 of the *Consumer Credit (Western Australia) Act 1996* were referred to the Committee.[123] However, that occurred pursuant to section 6B of that Act, which provided:

> *(1) Within 7 days of the Minister becoming aware of —*
>
> > *(a) the introduction into the Legislative Assembly of Queensland of a Bill to amend the Consumer Credit Code set out in the Appendix to the Consumer Credit (Queensland) Act 1994; or*
> >
> > *(b) the notification in the Queensland Government Gazette of regulations to amend the regulations in force under Part 4 of the Consumer Credit (Queensland) Act 1994,*
>
> *the Minister is to give a copy of the Bill or regulations to the Clerk of each House of Parliament.*
>
> …
>
> *(3) The Clerk of each House of Parliament is to give a copy of the Bill or regulations to the committee or committees of the Parliament whose terms of reference cover uniform legislation (that*

[123] Ibid, p29.

> *is, legislation that gives effect to an intergovernmental agreement or that is part of a uniform system of laws throughout the Commonwealth).*

4.76 The FT Bill proposes no equivalent to section 6B(3) of the *Consumer Credit (Western Australia) Act 1996.*

4.77 It is clear from the evidence of the Department that it is the policy intent that draft orders presented to the Parliament pursuant to section 20 of the Fair Trading Act 2010 will be referred to the Committee.

Possible conflict with section 14 of the Constitutions Acts Amendment Act 1899

4.78 The Committee has been advised that clauses 20(4) and (5) may be in conflict with section 14 of the *Constitutions Acts Amendment Act 1899* in that they have potential to remove the right of Members of Parliament to vote.

4.79 Due to the importance of this matter, it has been dealt with in a separate part below.

Henry VIII clause

4.80 Clause 20 is a Henry VIII clause, as an amendment to the Act that may occur by way of subsidiary instrument.

4.81 The Committee is concerned at aspects of the rationale for this clause, in particular with the intent to by-pass consideration in detail of an amendment, and has recommended below that amendment to the primary legislation be by way of bill.

4.82 If the Recommendation 6 is not accepted, the Committee is of the view that its alternate Recommendations 7, 8 and 9 (to amend clause 20 to allow the Parliament to make amendments to draft orders, remove the deeming provisions in respect of votes and preserve the custom and practice of referral of such orders under SO230A) ameliorate the issues raised by the Henry VIII aspects of this clause.

CLAUSES 20(4) AND (5) AND SECTION 14 OF THE *CONSTITUTIONS ACTS AMENDMENT ACT 1899*

Introduction

4.83 As noted above, clauses 20(4) and (5) provide that, unless an event set out in clause 20(5) occurs, a draft order is:

> *on and from the expiry of that 21st sitting day, to be* ***treated as if it had been approved*** *by a resolution passed by that House.*

(Committee's emphasis)

4.84 Section 14 of the Constitutions Acts Amendment Act 1899 provides:

> *The presence of at least one-third of the members of the Legislative Council, exclusive of the President, shall be necessary to constitute a quorum for the despatch of business; and* ***all questions which shall arise in the Legislative Council shall be decided by a majority of votes of the members present****, other than the President, and when the votes are equal the President shall have the casting vote:*
>
> *Provided always, that if the whole number of members constituting the Legislative Council shall not be exactly divisible by 3, the quorum of the Legislative Council shall consist of such whole number as is next greater than one-third of the members of the Legislative Council.*
>
> (Committee's emphasis)

Parliamentary right

4.85 The right of elected members to exercise their vote on matters arising in the Parliament is regarded as fundamental. Parliament preserves that right in respect of delegation of legislation-making power by providing the Houses with power to disallow. Failure to maintain the right of decision on the making of legislation would be:

> *a considerable violation of the Separation of Powers, the principle that laws should be made by the elected representatives of the people in Parliament and not by the executive government.*[124]

4.86 Deeming a resolution in respect of a law of the Parliament is anathema to the principle that the Parliament makes the laws of the State. This issue has previously arisen, in a related guise, in respect of SO153(c).

SO 153(c)

4.87 Standing order 153(c) previously provided for the deemed passing of a resolution of the House disallowing an instrument upon prorogation. This deeming provision was inserted to avoid the situation in which prorogation prevented a disallowance motion from being resolved in the current session or revived in the next session of Parliament. This would occur where a disallowance motion had not moved, or had been moved, but the question had not been resolved prior to the House being prorogued.

4.88 As the Standing Committee on Procedure and Privileges (**PPC**) reported in 2005:

> *In the period since the proclamation of the Interpretation Act 1984, the Office of Parliamentary Counsel[6], the (then) Crown Solicitor's Office[7] and the Solicitor General[8] have at various times questioned the validity of the deeming provision contained in SO 153(c).*
>
> *The most recent view is contained in an opinion of the Solicitor General, Robert Meadows QC dated June 27 2005 which concluded that SO 153(c) was invalid as being inconsistent with section 42(2) of the Interpretation Act 1984. The Solicitor General argued that the reference in section 42(2) of the Interpretation Act 1984 to a House of Parliament passing a resolution disallowing an instrument implied a requirement that an actual vote of the Members present and voting occurred.* [125]

4.89 The PPC, however, resolved the issue on the basis of section 14 of the *Constitutions Acts Amendment Act 1899*:

> *Due to the House having exclusive cognisance in respect of its own procedures, a House of Parliament, in the absence of a legal requirement to the contrary, could deem a resolution to be passed on the happening of an external event such as prorogation. The Committee was not satisfied that the Interpretation Act 1984, of itself, implied such a requirement.*
>
> *3.10 However, an express legal requirement is contained in section 14 of the Constitution Acts Amendment Act 1899.* ***Section 14 puts beyond doubt that an actual vote of Members present in the Chamber is a necessary requirement to resolve all questions before the House.*** *Section 14 provides in part:*[126] (Text set out)
>
> (Committee emphasis)

4.90 The PPC recommended an amendment to SO153(c) that required a motion for disallowance to be put to the vote in the event of prorogation.[127] That recommendation was accepted by the Legislative Council.[128]

---

124 Odgers', *Australian Senate Practice, 12th Ed.* Australian Senate, Canberra, 2008, p325.

125 Western Australia, Legislative Council, Standing Committee on Procedure and Privileges, Report 8, *Matters Referred to the Committee and Other Miscellaneous Matters*, 16 November 2005, p4.

126 Ibid, pp4-5.

127 Ibid, p5.

128 Various Members, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 20 September 2006, pp6301-08.

4.91 The Legislative Council has, therefore, expressed the will to preserve its right to vote.

4.92 The Committee applies the interpretation of section 14 of the *Constitution Acts Amendment Act 1899* applied by the PPC.

Conclusion

4.93 Clauses 20(4) and (5) of the FT Bill derogate from the Parliament's right to vote and are inconsistent with that right as set out in section 14 of the *Constitution Acts Amendment Act 1899.*

Finding 12: The Committee finds that clauses 20(4) and (5) of the FT Bill derogate from the Parliament's right to vote and are inconsistent with that right as set out in section 14 of the *Constitution Acts Amendment Act 1899.*

4.94 Advice provided to the Department of Commerce from the State Solicitor's Office states that if clause 20 is found to be inconsistent with the *Constitution Acts Amendment Act 1899*:

> *that matter should be treated as in the case of any later State Act being inconsistent with an earlier State Act and that latter Act would prevail.*[129]

4.95 The Committee is of the view that a cogent case (on merit, not simply legal possibility) needs to be made for the passage of legislation inconsistent with *Constitution Acts Amendment Act 1899.* That case has not been made in respect of clauses 20(4) and (5). The Committee has recommended an amendment to clause 20 on that basis.

Possible requirement for absolute majority vote

4.96 Section 73 of the *Constitution Act 1899* provides:

> *(1) Subject to the succeeding provisions of this section, the Legislature of the Colony shall have full power and authority, from time to time, by any Act, to repeal or alter any of the provisions of this Act. Provided always, that* ***it shall not be lawful to present to the Governor for Her Majesty's assent any Bill by which any change in the Constitution of the Legislative Council or of the Legislative***

[129] Letter from Mr B Prentice, Senior Assistant State Solicitor, State Solicitor's Office, 19 November 2010, p1.

> ***Assembly shall be effected, unless the second and third readings of such Bill shall have been passed with the concurrence of an absolute majority of the whole number of the members*** *for the time being of the Legislative Council and the Legislative Assembly respectively.*
>
> (Committee's emphasis)

4.97 While there has been some inconsistency in the application of section 73, the Committee's attention has been drawn to the fact that it has been argued that the High Court decision in the *Marquet* case[130] is to the effect that a clause in a bill that represents an amendment to section 14 of the *Constitution Acts Amendment Act 1899* (such as by prevailing over that section) may require an absolute majority.[131]

4.98 The attention of the Legislative Council is draw to this view, which raises the prospect that, without the amendment to clause 20 proposed by Recommendation 8 below, passage of the FT Bill may result in the Clerk of the Parliaments declining to present the FT Bill to the Governor.

4.99 Due to the time constraints imposed on its inquiry, the Committee has not been able to explore this issue. Noting that clause 5 of the Occupational Licensing National Law (WA) Bill 2010, currently before the Legislative Assembly, contains the same provisions, the Committee considers that this matter requires resolution.

Recommendation 5: The Committee recommends that the President direct the Clerk of the Legislative Council to obtain a legal opinion from a Queens Counsel or Senior Counsel on the application of section 73 of the *Constitution Act 1899* to section 14 of the *Constitution Acts Amendment Act 1899.*

CLAUSE 20 - CONCLUSIONS AND RECOMMENDATIONS

Summary

4.100 Clause 20 represents a compromise between the practical and Commonwealth constitutional imperatives for uniformity in the legislative scheme and desire to preserve the sovereignty of the State government and Parliament.

---

130 *Attorney General for Western Australia and Western Australia v Marquet* 217 CLR 545.

131 Dr Peter Johnston,' *Attorney General (WA) v Marquet: Ramifications for the Western Australian Pariliment*, ASPG Australiasian Conference, Perth 2004, 28 and 29 May 2004, p7.

4.101 The FT Bill imposes no limits on the nature of the amendments that may be made.

4.102 However: section 109 of the *Constitution*; the uniform consumer law scheme; and financial consequences of not conforming to that scheme, may limit the scope for amendment.

4.103 On this, the following exchange occurred at the hearing:

> ***The CHAIRMAN****: You can solve it by allowing more of a lead time, so that states can actually enact regulations or amendment legislation before that change comes into effect. I appreciate sometimes that might take a little bit longer than people would like, but it still keeps consistency as well as state sovereignty.*
>
> ***Mr Newcombe****: Sorry, but my answer to that is that it would not, for the same reason that this would not, because if Parliament chose not to introduce the uniform amendment or chose to introduce it in a different way, which is the parliamentary sovereignty, then you would not have uniformity.*
>
> ***The CHAIRMAN****: I suppose it also depends on the extent to which we have to have uniformity, if it is the spirit or if it is the exact word.*[132]

4.104 As found in Chapter 2, whether the current agreement in respect of the uniform consumer law scheme requires 'in spirit' or 'exact word' uniformity is not clear. The Committee has concluded that there is an intent to establish significant uniformity at 1 January 2011 but that there appears to be an acceptance that uniformity may not be maintained.

Recommendations

4.105 The Committee, however, is of the opinion (for the reasons set out above) that the amendment mechanism proposed by clause 20, that of a draft order, is not satisfactory. It considers that a proposed amendment to the Australian Consumer Law (WA) should occur in the ordinary way - by bill - and be subject to the usual Parliamentary scrutiny.

---

[132] Department of Commerce Transcript, 1 November 2010**,** p33.

Recommendation 6: The Committee recommends that amendment of the FT Bill be by bill. This can be effected in the following manner:

Page 17 - lines 10 and 11 - To delete -

by order published in the *Gazette*

and insert -

by bill.

Page 17 - lines 12 to 31 - To delete the lines

Page 18 - lines 1 to 8 - To delete the lines

Alternate recommendations

4.106 In the event the Legislative Council does not adopt the Committee's Recommendation 6, the Committee has made some recommendations to avoid the conflict between clause 20 and section 14 of the *Constitution Acts Amendment Act 1899* and to preserve the privileges of Parliament.

4.107 With respect to Recommendation 8, on being alerted to the possibility of this recommendation, the Department of Commerce advised that it would recommend to the government that the government support such a recommendation.[133]

133 Department of Commerce Transcript 22 November 2010.

Recommendation 7: The Committee recommends that, in the event that Recommendation 6 is not accepted, clause 20 of the FT Bill be amended to provide power for the Parliament to make amendments to a draft order presented for its approval. This can be effected in following manner:

Page 17 after line 14 - To insert -

(3) A resolution under subsection (2) may approve a draft order in whole or in part and may approve a draft order as amended by the House.

Recommendation 8: The Committee recommends that, in the event that Recommendation 6, clause 20 of the FT Bill be amended so as to be consistent with section 14 of the *Constitution Acts Amendment Act 1899*. This can be effected in the following manner:

Page 17 - lines 17 to 31 - To delete the lines

Page 18 - lines 1- 8 - To delete the lines

Recommendation 9: The Committee recommends that, in the event that Recommendation 6, draft orders under clause 20 of the FT Act be subject to SO230A. This can be effected in the following manner:

Page 17 - after line 16 - To insert -

(4) The Clerk of each House of Parliament is to give a copy of the draft order to the committee or committees of the Parliament whose terms of reference cover uniform legislation (that is, legislation that gives effect to an intergovernmental agreement or that is part of a uniform system of laws throughout the Commonwealth).

CLAUSE 21 - AMENDMENT OF THE AUSTRALIAN CONSUMER LAW: SUBSIDIARY LEGISLATION

Introduction

4.108 Clause 21 of the FT Bill provides power to the Parliament to disallow specified subsidiary legislation, including regulations made pursuant to section 139G of the CCA 2010, by applying section 42 of the *Interpretation Act 1984* to the relevant instruments.

4.109 Clauses 19(1)(b) and (2) make the regulations pursuant to section 139G part of the Australian Consumer Law (WA) and the law of Western Australia, as they are in force "*from time to time*". However, clause 19(3) renders those subclauses subject to clause 21. Reading the various clauses together, the section 139G Regulations will have effect in Western Australia until and unless they are disallowed in whole or in part.

4.110 Clauses 21(2) and (3) addresses an issue raised in the Committee's Report 52 - *Health Practitioner Regulation National Law (WA) Bill 2010* in notification to the public and the Parliament of passage of subsidiary legislation of another jurisdiction having effect in Western Australia.[134] Clause 21 requires the specified instruments to be published in the *Gazette* within 28 days of being made. The instrument ceases to have effect if not published within that time but may be revived by subsequent publication.

4.111 The process for disallowance commences on publication of the instrument in Western Australia (that is, in the *Gazette*), not on the instrument coming into effect in another jurisdiction.

Section 139G Regulations

4.112 As previously noted, section 139G provides a general 'necessary and convenient' regulation-making power in respect of the Commonwealth Schedule 2. It is the only regulation-making power in respect of that Schedule of the CCA 2010.[135]

4.113 The Commonwealth Schedule 2 expressly authorises regulations in respect of:

- the requirements for a statement that an invoice or other document does not amount to an assertion of a right to payment (section 10);
- a term of a kind, or that has the effect of a kind, such that it may be an unfair term (section 25(1)(n));

---

134 Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 52, *Health Practitioner Regulation National Law (WA) Bill 2010*, 22 June 2010, pp24-34.

135 Department of Commerce Transcript, 1 November 2010**,** p29.

- the matters to be taken into account in determining whether a contract is a standard form contract (section 27);

- the requirements for warning statements when sending an invoice in respect of unsolicited goods or services (section 40);

- the requirements for warning statements when sending an invoice for an advertisement without reasonable grounds to know the person placed the advertisement (section 43);

- exclusions from the ban on sending out invoices in respect of advertisements without warning statements (section 43);

- exclusion of kinds of gas, electricity and telecommunications contract from Division 1 Part 3-2, Consumer guarantees (section 65);

- the minimum amount at which an "*unsolicited consumer agreement*" arises for the purposes of the ACL (section 69);

- the kinds of agreements that are, or are not despite section 69(1) and (2), "*unsolicited consumer agreements*" (section 69) (Henry VIII clause);

- the identify information that must be disclosed by a person calling on another for the purpose of negotiating an unsolicited consumer agreement (section 74);

- the information that is to be provided before an *unsolicited consumer agreement* is made and the form and way in which that information is to be provided (section 76);

- the information to be included on the front page of any *unsolicited consumer agreements* and any other requirements in respect of that page (section 79);

- the requirements of a notice that may be used by a consumer to terminate an unsolicited consumer agreement (section 79);

- the circumstances, kinds of agreements or businesses that may be excluded from the *unsolicited consumer agreement Division* (section 94);

- the requirements for the form and content of warranties in relation to defects (section 102);

- the requirements for the form and content of notices to be given in relation to repair of consumer goods (section 103)

- prescription of organisations whose standards may be declared a safety standard (section 105 - a standard may be declared by notice published on the internet);

- the alternate laws, or industry codes of practice, requiring the reporting - by suppliers - of goods and product-related services, that have safety issues so that reporting under ACL not necessary (sections 131 and 132);

- prescription of organisations whose standards may be declared an information standard (section 135 - a standard may be declared by notice published on the internet);

- the words to be used in a statement that goods are for use outside Australia (section 137);

- excluding the application of the offence provisions (section 186);

- the prescription of logos representing country of origin for which a prescribed % of the cost of producing or manufacturing is attributable to that country (section 255);

- the changes that do not represent a fundamental change in for the purposes of country of origin provisions (section 255); and

- the materials, labour and overheads that may not be included in calculating expenditure in costing the manufacture of goods for the purposes of country of origin provisions and the manner of working out expenditure (section 256).

4.114 As can be seen, regulations may be made under section 139G restricting the operation of a number of provisions, in the main relating to unsolicited consumer agreements and country of origin provisions.

Rationale for applying the Commonwealth regulations as in force from time to time

4.115 The Committee notes that there may be a gap of 28 days between the regulations becoming law and those regulations being published in the *Gazette*. It is standard in Western Australia for regulations to take effect on gazettal.

4.116 The Department of Commerce explained the decision to apply the Commonwealth regulations as they are in force from time to time as follows:

> *In relation to the regulations, there were two options really. One was that we would make our own regulations and mirror the commonwealth regulations that are made. The other option was to apply the regulations. If we apply the regulations, the concern was*

> *the same with the legislation — you are creating subordinate legislation that this Parliament does not have any say over. If you make the regulations, specifically again in WA, it is a very cumbersome process. The commonwealth has already made the regulations. The commitment was that those regulations would be applied but we would be saying, "We have to re-state every regulation", and you could get drafting changes and all sorts of things to muck up the uniformity. The model that has been proposed is that the regulations will apply, but the protection for this state and this Parliament is to say that those regulations made at the commonwealth level must be published in the Government Gazette and they will be disallowable by the state Parliament as if they were made here.*[136]

4.117 The Department's illustration of the need for regulations to have immediate effect was, however, not on point:

> [Mr Newcombe] *one reason for things to come into operation is that there is a whole timeliness issue about things such as product safety bans and so on. If we said that we do them separately or replicate them, there might be an unsafe product that cannot be sold anywhere but can be sold in WA.*
>
> ***The CHAIRMAN**: Would a product ban be done by regulation?*
>
> ***Mr Newcombe**: If we went with that model, yes. Product bans are going to be by ministerial decision. Western Australia, unlike other jurisdictions, has provided that they also must be published in the Government Gazette and are disallowable, but they are made under the Australian Consumer Law by the commonwealth minister if it is a permit ban and by the state minister if it is an interim ban, but not by regulation. They are not made by regulation now.*[137]

Product safety bans

Introduction

4.118 As advised in the transcript passage above, clause 21 confers power on the Parliament to disallow permanent product safety bans imposed by the Commonwealth and revocations of those bans by the Commonwealth.

---

136 Ibid, pp29-30.

137 Ibid, p30.

4.119 It is not entirely clear how this clause sits with 'vesting' of sole power in the Commonwealth to issue permanent product safety bans and section 109 of the Constitution. As previously reported, the intent of the uniform legislative scheme is that:

> *So the idea is we will have national certainty over what the ban is, and any jurisdiction that introduces an interim ban will need to convince the commonwealth and other jurisdictions that it is worth having a permanent ban in place. That is the one area where the administration has largely changed.*[138]

Interim bans

4.120 The Committee enquired of the Department whether clause 21 provided for the disallowance by Parliament of all subsidiary instruments that might be made under the Australian Consumer Law (WA) and, in particular, whether there was any difference in the treatment of subsidiary instruments made by the Commonwealth Minister and those made by the State Minister.

4.121 At hearing the Department said:

> *there are some provisions, of course, that the state minister can make under the Australian Consumer Law, an interim ban and so on, but these are — no, I think it is intended to capture each of them. We will confirm that, but I believe that is the case,*[139]

4.122 but took the question on notice.

4.123 The Department's Response to Questions states:

> *The State Minister will be empowered to make legislative instruments under sections 109 and 122 of the ACL (WA).*
>
> *At present the Commissioner is empowered to make interim product safety orders and recall orders under section 23Q of the Consumer Affairs Act 1971 and section 54 of the Fair Trading Act 1987 respectively. Such orders are made where there is an imminent risk of death or serious injury or illness which demand an immediate response.*
>
> *As these orders are of a temporary nature and have a limited lifespan, disallowance is not relevant.*

138 Ibid, p7.

> *Notwithstanding the ACL (WA) requirement for regulators to merely post legislative instruments on the internet, the Department will continue its practice of publishing these instruments in the Gazette.*[140]

4.124 Neither of sections 109 or 122 of the Australian Consumer Law (WA) expressly condition exercise of the powers to impose interim bans or product recall on "*imminent risk of death or serious injury or illness*". Exercise of the powers is conditioned on reasonably foreseeable risk of injury to a person.

4.125 Section 131E(1) of the CCA 2010 (not part of the Commonwealth Schedule 2 but part of the CCA 2010 application Part) provides that interim bans issued under sections 111 and 113 are "*legislative instruments*" for the purposes of the *Legislative Instruments Act 2003* (Cwlth) and, therefore, are subject to the disallowance process of that Act. Section 109 and 111 are in the same terms in each pieces of legislation: Section 109 confers power to issue the ban; section 111 power to extend a ban.

Conclusions

4.126 The Committee notes:

- the relatively short time span of the interim orders (90 days at State Minister level, then a possible further 30 days extension by the Commonwealth Minister);
- the time that it might take for the House to consider a motion for disallowance under section 42 of the *Interpretation Act 1984* and current standing orders; and
- provision of power to disallow permanent product safety bans and recall notices,
- and concludes that omission of the interim ban and recall notices from clause 21 does not offend Fundamental Legislative Scrutiny Principal 13 (*Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?*).

---

139 Ibid, p31.

140 Email from Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection, Department of Commerce, 5 November 2010, p4.

Finding 13: The Committee finds that omission of power to disallow interim product safety bans from clause 21 of the FT Bill does not offend Fundamental Legislative Scrutiny Principal 13 (*Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council*).

CLAUSE 23 - FAIR TRADING ACT 2010 WILL BE SUBJECT TO TWO INTERPRETATION ACTS

4.127 Clause 23 of the FT Bill provides that the *Acts Interpretation Act 1901* (Cwlth) applies as a law of Western Australia to the Australian Consumer Law (WA) (which includes the section 139G Regulations) and any instruments made under that law. This is subject to the application of the *Interpretation Act 1984* to clause 21 (disallowance process in respect of subsidiary legislation).

4.128 Clause 23 has the effect that, in addition to the varying specific interpretation provisions reported in Chapter 3, different parts of the Fair Trading Act 2010 will be subject to different Interpretation Acts. Whilst the provisions of the State and Commonwealth Acts are largely consistent, this is undesirable.

4.129 This is particularly the case where different parts of the FT Bill provide overlapping enforcement and investigation powers which may each be applied to the Australian Consumer Law (WA).

4.130 It is, however, necessary for consistency in interpretation of the Australian consumer law in the different jurisdictions that the *Acts Interpretation Act 1901* (Cwlth) apply to that law regardless of the interpretation law of the particular jurisdiction. It would be an unnecessary derogation of State sovereignty, and potentially give rise to inconsistency in related State legislation, for the *Acts Interpretation Act 1901* (Cwlth) to apply to the balance of the FT Bill.

Finding 14: The Committee finds that, in addition to the varying specific interpretation provisions reported in Chapter 3, different parts of the Fair Trading Act 2010 will be subject to different Interpretation Acts. Whilst the provisions of the State and Commonwealth Acts are largely consistent, this is undesirable. This is, however, a consequence of the uniform legislative scheme.

CHAPTER 5

CLAUSES 31 TO 37 OF THE FAIR TRADING BILL 2010 - MISCELLANEOUS PROVISIONS

INTRODUCTION

5.1 Division 5 of Part 3 of the FT Bill, which comprises clauses 31 to 37, raises a number of important, though thematically disparate, issues.

5.2 These include provision for transfer of powers and functions from State agencies to Commonwealth agencies without Parliamentary review (clause 31) and multiple prosecutions for the same offence (clause 32). Clauses 33 and 34 highlight the use of 'civil penalty' provisions in the Australian Consumer Law (WA), with the lesser standards of proof applicable to behaviour offending those provisions.

5.3 Clause 37 modifies the Australian Consumer Law (WA) to maintain current hours of operation for door-to-door sales.

CLAUSE 31 - CONFERRAL OF FUNCTIONS AND POWERS ON COMMONWEALTH AGENCIES

Introduction

5.4 Clause 31(1) of the FT Bill proposes that the authorities and officers of the Commonwealth referred to in the Australian Consumer Law (WA) have the functions and powers conferred under that law. Clause 31(2) provides the Commonwealth authorities and officers with additional 'necessary and convenient' powers in connection with the functions and powers conferred. (The ACL IGA provides for any party to confer its powers in respect of enforcement, administration and product safety bans to the Commonwealth).[141]

5.5 Clause 31 relates to the distinction between referral of legislative power (which has not at this time occurred) and referral of functions and administrative powers touched on in Chapter 2.

5.6 The Committee's first inquiry was what functions and powers the Australian Consumer Law (WA) conferred on the Commonwealth officers and agencies.

---

141 ACL IGA, Clauses 26, 37 and 45, respectively pp 8, 9 and 10.

Department's explanation of clause 31

5.7 The Committee asked the Department of Commerce to identify the functions and powers to which clause 31 referred and the sections of the Australian Consumer Law (WA) making the relevant referral. The Department's response was:

> ***Mr Newcombe**: No functions have been conferred on authorities. So, for example, the Australian Competition and Consumer Commission — ACCC — is not enforcing this legislation. The only provisions that do give the power are the product safety ones that I have referred to in relation to the commonwealth minister making permanent bans. So it recognises the role of the commonwealth minister in doing so. But the enforcement of the legislation is vested in the term "the regulator", which is in the Australian Consumer Law, and "the regulator" is defined in the Fair Trading Bill to be the Commissioner for Consumer Protection; and that person is the current regulator as well.*[142]

5.8 As previously reported (other than in respect of product safety), administrative, enforcement and investigative functions under the CCA 2010 and FT Bill will be shared between the Commonwealth and State in the same way that they are shared under the TPA and *Fair Trading Act 1987.*

5.9 Given the response of the Department, the Committee questioned the need for clause 31. The Department advised:

> ***Mr Newcombe**: There is the possibility in future that there will be a vesting of jurisdiction in some of the commonwealth agencies that look at things. One area that has been contemplated is the ACCC in relation to product safety, because the commonwealth is taking a stronger role. So it might be appropriate for the ACCC to take on some role in that area. That has not happened, but it creates an opportunity. There are restrictions on the capacity to vest jurisdiction, which I think* [<u>were</u>] *identified in some of the preliminary questions. There are a couple of cases about regulating the way in which the commonwealth can exercise state jurisdiction. Those issues have been dealt with in the Competition and Consumer Act. There are a range of provisions in the 140 area that deal with The Queen v Hughes. It is a facilitating provision, I guess is the answer to 31. At the moment we have not used it, and there is no current intention to do so.*[143]

---

142 Department of Commerce Transcript, 1 November 2010, p22.

143 Ibid.

Committee comment

5.10 The issues arising from a "*facilitating*" provision of this nature in the context of an uncertain legislative and administrative framework for the uniform consumer law,[144] were canvassed at the hearing:

> ***The CHAIRMAN****: I suppose my question would be: why have a provision that tries to foresee a future eventuality? Why not simply amend the act at that time, if a decision is made to change the law in that way, to enable that transfer of powers to occur?*
>
> ***Mr Newcombe****: That is obviously an option. The fundamental reason is that amendments to legislation are quite difficult and time consuming, as you would appreciate. It is often extremely difficult to get a single amendment through compared with a bill.*
>
> *So the capacity to get an amendment through in a timely fashion in all jurisdictions for this one provision, stand alone, would be, in my experience, very, very limited.*
>
> ***The CHAIRMAN****: As a member of Parliament, my response to that would be, "Well, you're asking me to approve a provision that might have effect at some future time, but the exact shape and nature of that effect, we do not know." As a member of Parliament, I am required to make good laws for the governance of the state; I do not consider that to be a good provision because I cannot satisfy myself that the outcome of the enactment of a clause will actually be good for the people of Western Australia.*
>
> ***Mr Newcombe****: Okay; you are entitled to that view, obviously. If the Australian Consumer Law contained three provisions that vested jurisdiction in the ACCC—I pointed your attention to those—would your response be different?*
>
> ***The CHAIRMAN****: My response would be that if I had an opportunity to know exactly what was being transferred and the extent of the exercise of the powers in that transference, and I was satisfied that that was reasonable, then that would be fine; it is the*

[144] As discussed in Chapter 2, the framework for the uniform consumer law scheme is not settled. While the ACL IGA requires template legislation, implementation of the legislative scheme evidences that the States (Western Australia in particular) have moved to a model that better accommodates preservation of State sovereignty.

> *fact that you do not know the detail that goes with that. As we all know, in legislation, the devil is in the detail.*[145]

5.11 The Department pointed to difficulty in drafting legislation so as to specify reasonable "*adjustments*" in administration under a co-operative scheme and expressed a concern that removal of clause 31 might preclude an opportunity to transfer functions and powers.[146]

5.12 Clause 31 is not part of the Australian consumer law but may be part of the wider uniform legislative scheme.[147]

Committee conclusion

5.13 The Standing Committee on Legislation, after referring to concerns as to uniform legislation representing an erosion of State power, pointed out that in scrutinising uniform legislation it is:

> *important to take into account the role of the Western Australian Parliament in determining the appropriate balance between the advantages to the State in enacting uniform laws, and the degree to which Parliament, as legislature, loses its autonomy through the mechanisms used to achieve uniform laws.*[148]

5.14 A related issue on which the Committee (and its predecessors) report is the impact of a uniform legislative scheme on State sovereignty.

---

145 Department of Commerce Transcript, 1 November 2010, pp22-3.

146 "*I say that, in a sense, because we could have had some provisions, perhaps, where jurisdiction was vested, but the provision would still allow changes to the way in which that occurred. There would never be any particular certainty, unless you had a provision that simply said, in relation to each and every vesting of a function, there was a separate provision only in relation to that matter, because then you could tie that vesting directly to a power. But if you created a power and said, "In some sections we have given power to a commonwealth authority to do it, but we have the capacity to do more in the future", your fundamental problem would still exist. So you would end up having to write the bill in a way, and amend the bill, every single time there was an adjustment to who might or might not administer it under a cooperative scheme. I understand your point, but I am saying that would be the rationale for me. In a practical sense it would be extremely difficult to do it, and probably removing it would simply mean that there would not be an opportunity to go down that road in the future.*" (Ibid, p23.)

147 Ibid.

148 Western Australia, Legislative Council, Standing Committee on Legislation, *Special Report of the Standing Committee on Legislation in relation to Intergovernmental Agreements, Uniform Schemes and Uniform Laws: amendment to Standing Orders 230(c) and (d)*, 6 November 6 2001, p2. That Committee made the following comments on the advantages of uniform legislation: "*There are significant benefits in uniform laws, particularly in industry and commerce. It is appropriate that there be uniform laws to regulate a national market, rather than having eight separate markets with different conditions, as is possible if each state and territory were to legislate in the field. Uniform laws make it easier for consumers and businesses to operate, because there is greater certainty as to their rights and obligations. Practical benefits such as the removal of duplication of administration and compliance costs, increased efficiency and economies of scale also result from uniform laws*" (p2).

5.15 The Parliament is in the case of the FT and Amendment Bills asked to enact legislation that establishes the legislative framework for joint administration and enforcement of the Australian consumer law. Rightly anticipating concerns at erosion of Parliamentary and State sovereignty, the government has emphasised that the Bills effect no referral of legislative power; no referral of administrative functions; and referral of administrative power in only one instance.

5.16 During its inquiry into the National Gas Access (WA) Bill 2008, the Committee received the following information in respect of transfer of powers:

> *The state gives up certain powers to enable a national regime to work, to other jurisdictions and to the commonwealth. That can only happen because those other jurisdictions have corresponding legislation that accepts that transfer of power, and vice versa. The limits are clearly stated in the legislation. This is very common in national legislation to allow it to work on a national basis. Our understanding is that it is limited because it is specified in each corresponding set of legislation. So there are like a twinning of legislation, if you like — one provides the power to the other jurisdiction; the other jurisdiction accepts that power, but they are both limited in that respect. It clearly only refers to specific matters. That is the advice that we have had.*[149]

5.17 In its report on the National Gas Access (WA) Bill 2008, the Committee reported:

> *The Committee considered whether the basis for cross vesting powers and functions amongst various Minsters across borders may lie with the plenary, legislative power of the States and Territories to make laws for their "peace, order and good government" provided there is some nexus with the State or Territory concerned. However, this view has never been tested in the High Court.*[150]

5.18 The Committee was not able to fully explore whether the provisions of the FT Bill, in conjunction with the CCA 2010, effectively implemented the High Court *Wakim*[151] and *Hughes*[152] decisions in the limited time available to it.

---

149 Mr Peter Hawken, Acting Director Markets & Regulatory Policy, Office of Energy, *Transcript of Evidence*, 16 February 2009, p7, quoted in Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 35, *National Gas Access (WA) Bill 2008,* 10 March 2009, p32.

150 Ibid, pp32-3.

151 *Re Wakim: ex parte McNally* (1999) 198 CLR 511.

152 *The Queen v Hughes (2000) 171 ALR 155.* See Western Australia, Legislative Council, Standing Committee on Legislation, Report 1, *Corporations (Commonwealth Powers) Bill 2001, Corporations (Ancillary Provisions) Bill 2001, Corporations (Administrative Actions) Bill 2001, Corporations (Consequential Amendments) Bill 2001,* 19 June 2001 for discussion of the issues.

5.19 However, as discussed in Chapter 2, it is clear that the final legislative and administrative framework for the uniform consumer law scheme is not yet settled. The Parliament is, therefore, asked to enact legislation that permits an alteration of the scheme as it currently stands.

5.20 The Committee is of the view that, in order to maintain the Parliament's ability to determine the "*appropriate balance*" in weighing the pros and cons of the uniform consumer law scheme, important alterations in functions and powers between the Commonwealth and State should be open to Parliamentary scrutiny.

Recommendation 10: The Committee recommends that clause 31 of the FT Bill be deleted. This can be effected in the following manner:

Page 22, lines 8 to 17 - To delete the lines.

CLAUSE 32(2) - RISK OF MULTIPLE PROSECUTIONS

Introduction

5.21 Clause 32 of the FT Bill is headed "*No doubling-up of liabilities*". This heading identifies the clause as being directed at preserving the common law 'double jeopardy' principle.

5.22 However, as drafted, clause 32(2) will only protect a person from multiple "*punishment*" for the same offence in different jurisdictions in the event of conviction for the offence in one jurisdiction.

5.23 Clause 32(2) raises three issues:

- as it only prohibits "*punishment*" in the event of a previous conviction, it renders a person liable to multiple prosecutions and convictions for the same offence;
- as it is restricted in its application to a previous "*conviction*", it renders a person acquitted of the offence in one jurisdiction liable to both prosecution and punishment in another jurisdiction; and
- the use of the term "*the offence*" in clause 32(2)(b) restricts the protection provided by the clause to risk of punishment for the same offence in another jurisdiction, not against the risk of punishment for an offence which may arise from substantially the same facts,

all of which constitute a significant narrowing of the protection afforded by the common law rule against 'double jeopardy'.

5.24 Clause 32 also appears inconsistent with section 17 of the *Criminal Code*.

'Double jeopardy'

The rule against 'double jeopardy'

5.25 Double jeopardy is a procedural defence which provides that:

> *No man is to be brought into jeopardy of his life, more than once, for the same offence. If the prosecution attempts to do so, the accused may plead that he has already been convicted … or acquitted … of the same matter.*[153]

5.26 Double jeopardy occurs when a person is put at risk on more than one occasion of:

> *being convicted and punished either for the same offence or for offences respecting the same wrongful conduct.*[154]

5.27 The principle of double jeopardy extends to a person being tried for a second time on substantially the same facts.[155]

Rule applies at all stages of criminal justice process

5.28 As was pointed out in *Pearce v The Queen*:

> *The expression 'double jeopardy' is not always used with a single meaning. … 'double jeopardy' is an expression that is employed in relation to several different stages of the criminal justice process: prosecution, conviction and punishment.* [156]

Considerations giving rise to 'double jeopardy' rule

5.29 The rule against 'double jeopardy' reflects the importance at common law of finality of verdicts in the resolution of disputes and the serious consequences of conviction or acquittal. It also reflects a number of other important considerations, being that:

---

153 *R v Carroll* [2002] HCA 55

154 Colvin E and Mc Kehnie J, *Criminal Law in Queensland and Western Australia, Cases and Commentary*, 5th edition, Butterworths, 2008, p784.

155 *Connelly v Director of Public Prosecutions* [1964] AC 1254 approved in the seminal Australian case on double jeopardy - *R v Carroll* [2002] HCA 55.

156 (1998) 194 CLR 610 at [9]

- a person should not be harassed by multiple prosecutions about the same issue;
- the powers and resources of the State as prosecutor are much greater than those of any individual;
- prosecution has in the past and may in the future be used as an instrument of tyranny; and.
- trials are by nature stressful for all concerned; and
- a verdict of acquittal should be treated final and not subject to further investigation.

5.30 As the High Court explains, the rule against double jeopardy serves several purposes. To protect against:

> *the unwarranted harassment of the accused by multiple prosecutions.*

and reflect:

> *Policy considerations that go to the heart of the administration of justice and the retention of public confidence in the justice system.… Judicial determinations need to be final, binding and conclusive if the determinations of courts are to retain public confidence. Consequently, the decisions of the courts, unless set aside or quashed, must be accepted as incontrovertibly correct. In addition, the double jeopardy principle conserves judicial resources and court facilities.*[157]

Abuse of process

5.31 A related concept is that of abuse of process, which includes the principle that tying a person for a second time on essentially the same facts is an abuse of process.

Section 17 of the *Criminal Code*

5.32 Section 17 of the *Criminal Code* provides:

> ***Former conviction or acquittal a defence***
>
> *It is a defence to a charge of any offence to show that the accused person has already been tried, and convicted or acquitted upon an indictment or prosecution notice on which he might have been convicted of the offence with which he is charged, or has already been*

[157] *R v Carroll* [2002] HCA 55 at paragraph 128 per McHugh J.

> *convicted or acquitted of an offence of which he might be convicted upon the indictment or prosecution notice on which he is charged.*[158]

Rationale for clause 32(2)

5.33 The Department of Commerce confirmed the Committee's view that clause 32 enables a person to be charged with an offence under the Australian Consumer Law (WA) despite being acquitted of the same offence under the application law of another participating jurisdiction.

5.34 In response to the question:

> *Does clause 32 of the Fair Trading Bill 2010 permit a person to be charged with an offence under the ACL (WA) despite being acquitted of an equivalent offence under the application law of another jurisdiction?*

and, if so, to explain the rationale for this, the Department said:

> *Clause 32 does permit this and this is the situation that has always applied under the Fair Trading Act 1987 (see section 69(4)).*[159]

5.35 The Department also advised that:

> *The provision is only intended to prevent double jeopardy in Western Australia (or indeed double jeopardy in any particular jurisdiction). As a result, a person cannot be convicted of the same offence under the ACL (WA) and the ACL as it applies in any other jurisdiction.*[160]

5.36 The Department went on to say:

> *…is not intended to prevent a person being charged in WA merely because they have been acquitted elsewhere. If a person has been acquitted in another jurisdiction that would be of direct relevance to any decision to charge a person but it should not preclude such action as long as the basis for a charge exists.*
>
> *There are many reasons why a person may not be convicted (not just actively acquitted, but not convicted) in another jurisdiction that*

---

158 The Criminal Law and Evidence Amendment Bill 2006 introduced a very limited prosecution right to appeal against acquittal verdicts in trials heard by Judge and jury. This overturned the principle the High Court entrenched in 1915 in *R v Snow* (1915) 20 CLR 315 that the Crown does not have a right of appeal against a verdict of acquittal.

159 Email from Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection, Department of Commerce, 5 November 2010, p8.

160 Ibid.

> *would not, of themselves, warrant no action being taken against that person in WA.* [161]

5.37 In answer to a later question, the Department says:

> *Clause 32(2) deals with offences and makes clear that a person cannot be punished in different jurisdictions in respect of the same conduct.*[162]

Comment

Incorrect statements in Department's response

5.38 The Department's statement that by reason of clause 32;

> *a person cannot be convicted of the same offence under the ACL (WA) and the ACL as it applies in any other jurisdiction* (see paragraph 5.35),

is not correct. Clause 32 prevents a "*punishment*" from being imposed in the event of a previous conviction, not a further conviction.

5.39 Similarly, the statement that:

> *Clause 32(2) … makes clear that a person cannot be punished in different jurisdictions in respect of the same conduct* (see paragraph 5.37),

is not correct. Clause 32(2) speaks of "*the offence*", not the conduct. As discussed in Chapter 6, the same conduct may constitute a variety of offences under the 'front end' of the FT Bill, the Australian Consumer Law (WA) and within each of those two parts of the legislation.

Variety of enforcement options available in respect of the same conduct

5.40 One of the purposes of the FT Bill is to provide the Commissioner with a variety of options in terms of enforcement.

Answers recognise broad ambit of 'double jeopardy'

5.41 The Department's Response to Questions seems to recognise a broader ambit for 'double jeopardy' than that provided by clause 32(2) of the FT Bill.

---

161 Ibid, p9.

162 Ibid.

5.42 When asked if clause 32 was required by the Australian Consumer Law, the Department's response was:

> *The provision is required to avoid persons being exposed to double jeopardy under the Australian Consumer Law for the same conduct in more than one jurisdiction.*

5.43 In answering a question in respect of clause 32(4), the Department advised:

> *Clause 225 of the ACL (WA) prohibits a court from imposing a civil pecuniary penalty where a person has already been convicted of an offence constituted by conduct that is substantially the same as conduct constituting a contravention for which a pecuniary penalty could be imposed.*[163]

5.44 The Australian Consumer Law (WA), therefore, recognises a broader ambit for double jeopardy than that proposed by clause 32(2).

Clause 32 protection more limited than 'double jeopardy'

5.45 As appears from the outline of 'double jeopardy' above, clause 32 does not prevent 'double jeopardy' in Western Australia (or in any participating jurisdiction). It applies only to risk of multiple punishment in the event of conviction of the same offence; whereas 'double jeopardy' applies also to the risk of charge and prosecution and in circumstance of acquittal and in respect of offences arising out of the same act or omission.

Section 69(4) of the Fair Trading Act 1987

5.46 Firstly, the Committee observes that 'two wrongs do not make a right'.

5.47 Secondly, section 69(4) states:

> *If an act or omission is both an offence against this Act and an offence under a law of the Commonwealth or a law in force elsewhere in Australia, a person convicted of an offence under that law is not liable to be convicted of the offence against this Act.*
>
> (Committee's emphasis)

5.48 Clause 32(2) of the FT Bill is not, therefore, a mere replication of section 69(4) of the *Fair Trading Act 1987.*

---

163 Ibid, p9.

The "many reasons" why a person not convicted should be charged again not identified

5.49 Clause 32(1) provides that "*conviction*" for the purposes of clause 32(2) includes a finding or plea of guilty whether or not a conviction is recorded.

5.50 The Committee notes that the Department provided no illustration of a circumstance in which it would be appropriate to subject a person acquitted of an offence to further prosecution for the same or substantially similar offence. Nor of a circumstance in which a person not acquitted but not convicted should be charged again.

5.51 The Committee notes that one of the options for action in respect of conduct suspected of contravening the FT Bill will be the issue of an infringement notice. This is considered further below.

Fresh evidence

5.52 The rule against 'double jeopardy' does not prevent a further trial on the same offence in the event compelling fresh evidence becomes available.[164]

Recommendation 11: The Committee recommends that the responsible Minister explain to the Legislative Council the circumstances, other than that of fresh evidence, in which it would be appropriate to prosecute a person for an offence of which they had previously been acquitted or "*not convicted*" in another jurisdiction.

Conclusions

5.53 A uniform legislative scheme needs to have regard to 'double jeopardy' throughout the scheme, not just in one jurisdiction. Otherwise the uniform legislative scheme can be used to avoid fundamental common law rights.

5.54 Exposing a person to risk of multiple prosecutions undermines a rationale for the uniform consumer law scheme, being uniform enforcement and investigation, as well as reduced bureaucratic enforcement costs.

5.55 The Department's responses to questions suggest that the policy intent of clause 32 is to provide a wider protection than that achieved by the current provision. That is, to protect against the risk of being charged and prosecuted, as well as punished, for the

164 "*In order to be admitted for this purpose, the evidence must be such that it would have been relevant, and of such importance, cogency and plausibility that when considered either alone or in conjunction with other evidence, it was likely to have produced a different verdict".* (The Laws of Australia, www.lawbook.com.au.)

same conduct, not just the same offence, in one jurisdiction when convicted of an offence in respect of that conduct in another jurisdiction.

5.56 The Department's response makes it clear that the intention of clause 32(2) is to effect a charge, prosecution and conviction of a person in another participating jurisdiction where that person may have been "*not just actively acquitted, but not convicted*". This smacks of the Scottish verdict of "*not proven*", which is not part of Australian law.

5.57 The Department's response suggests a view that precedence should be given to administrative decisions as to guilt or innocence, rather than those of the justice system, and highlights the risks of unwarranted harassment by multiple prosecutions.

5.58 In *Green v United States*[165] there is a classic statement of the rationale behind the double jeopardy rule:

> *The underlying idea, one that is deeply ingrained in at least the Anglo - American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.*[166]

5.59 The FT Bill includes a number of provisions designed to facilitate conviction. In particular, there is provision for imposition of 'civil' pecuniary penalties for certain contraventions of the Australian Consumer Law (WA). These provisions require a lower standard of proof than is required for provisions where contravention remains a criminal matter.

5.60 Clause 32 of the FT Bill, however, appears to be in conflict with the general criminal law of the State as set out in section 17 of the *Criminal Code*.

5.61 The Committee recommends that clause 32 of the FT Bill be amended to be consistent with section 17 of the *Criminal Code.*

---

165 (1957) 355 US 184.

166 Ibid, p187.

Recommendation 12: The Committee recommends that clause 32 of the FT Bill be amended to be consistent with section 17 of the *Criminal Code.* This can be effected in the following manner:

Page 22 lines 27 to 30 - To delete the lines and insert -

(b) the offender has been acquitted or convicted of the offence with which the offender is charged, or has already been convicted or acquitted of an offence of which the offender might be convicted upon the indictment or prosecution notice on which the offender has been charged, under the application law of the other participating jurisdiction,

the offender is not liable to be prosecuted or punished for the offence against the Australian Consumer Law (WA).

Infringement notices

5.62 The Committee was advised by the Department of Commerce that it is intended to prescribe the Fair Trading Act 2010 (once passed) under the *Criminal Procedure Act 2004* to permit infringement notices to be issued in respect of offences against the Australian Consumer Law (WA).[167]

5.63 It is not clear to the Committee whether clause 32 provides any protection against further punishment in the event a person has paid of an infringement notice in respect of an offence.

Recommendation 13: The Committee recommends that the responsible Minister advise the Legislative Council:

- **whether clause 32 operates to protect a person who has paid an infringement notice in respect of an offence in another jurisdiction from prosecution for the offence in Western Australia; and**
- **if not, the reason why that is not considered appropriate.**

[167] Email from Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection, Department of Commerce, 5 November 2010, pp9-10.

CLAUSE 32 (3) - CLAUSE 58 STATEMENT

5.64 Clause 32(3) of the FT Bill provides that nothing in clause 32(2) prevents the Commissioner from making or issuing a statement under clause 58 of the FT Bill. The Committee asked the Department to explain the relationship between clause 58 and clause 32(3).

5.65 The Department advised:

> *Clause 32(3) is intended to make it clear that the Commissioner is not constrained from issuing a statement under section 58 to the effect that a person has been found guilty of an offence in another jurisdiction. In the absence of clause 32(3) the publication of such a statement could be interpreted as a punishment for the purposes of clause 32(2). This would unduly restrain the Commissioner from warning the public about a person's behaviour in another jurisdiction, even where that person is carrying on business in WA.*[168]

CLAUSE 32(4) - PECUNIARY PENALTY

Introduction

5.66 Clause 32(4) of the FT Bill provides that in the event a person has been ordered to pay a "*pecuniary penalty*" under the application law of another jurisdiction, the person is not liable to a pecuniary penalty under the Australian Consumer Law (WA) in respect of the same conduct.

5.67 This clause raises similar double jeopardy issues to that raised by clause 32(2). The Committee's comments on clause 32(4) are predicated on its recommendation for amendment of clause 32(2) being passed and clause 32(4) being confined in its operation to offences which the person could not have been convicted of in the course of the earlier prosecution.

"*Pecuniary penalty*" not defined

5.68 The term "*pecuniary penalty*" is not defined in the 'front end' of the FT Bill or in the Australian Consumer Law (WA). Nor is the term defined in the *Acts Interpretation Act 1901* (Cwlth), which - by clause 23 - governs the interpretation of clause 32.

5.69 Although the term is used in the TPA, it is not defined.

5.70 Butterworths Australian Legal Dictionary defines "*pecuniary penalty*" as follows:

---

168 Ibid, p12.

> *a sum of money ordered to be paid by a court which is equal to the value of benefits obtained by an offender as a result of the commission of a crime.*[169]

5.71 However, this definition does not seem to fit comfortably with section 224 of the Australian Consumer Law (WA), which provides:

> *(2) In determining the appropriate pecuniary penalty, the court must have regard to all relevant matters including:*
>
> > *(a) the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission; and*
> >
> > *(b) the circumstances in which the act or omission took place; and*
> >
> > *(c) whether the person has previously been found by a court in proceedings under Chapter 4 or this Part to have engaged in any similar conduct.*

5.72 Absent a definition, the term "*pecuniary penalty*" has its ordinary meaning. "*Pecuniary*" is defined in the Shorter Oxford Dictionary to mean:

> *1 Consisting of money; exacted in money. … b Of an offence: entailing a money penalty or fine.*[170]

Whether clause 32(4) could require a court to impose a custodial, or other inappropriate sentence

Issue

5.73 As "*pecuniary penalty*" is not a defined term, the question arose as to whether clause 32(4) could require a court to impose a custodial, or other inappropriate, penalty in the event a person has been ordered to pay a "*money penalty or fine*" in respect of the same conduct under an application law.

5.74 The Committee put this question to the Department of Commerce.

5.75 In this respect, it is relevant to note that clause 33 of the FT Bill provides that a person who commits an offence against the Australian Consumer Law (WA) is guilty of a crime and liable to:

---

169 Butterworths Australian Legal Dictionary, p860.

170 *The New Shorter Oxford English Dictionary*, Vol. 2, Clarendon Press, Oxford, 193, p2136.

- on indictment, the penalty set out in that law; or
- on summary conviction, the lesser of a fine of $36, 000 or the maximum penalty provided by the Australian Consumer Law (WA) for the offence.

Department's response

5.76 The Department of Commerce said:

> *Clause 32(4) deals with civil pecuniary penalties, not offences. This provision is, in relation to civil pecuniary penalties, intended to achieve the same outcome as clause 32(4)* [sic 32(2)], *which is that a person cannot be subject to a civil pecuniary penalty in different jurisdictions for the same conduct.*
>
> …
>
> *It should be noted that section 217 of the ACL (WA) makes it clear that criminal proceedings can only be taken in relation to those matters set out in Chapter 4* [offences relating to: unfair practices; consumer transactions; safety of consumer goods and product related services; information standards; and substantiation notices] *– ie those specifically made offences. Any other breaches of Chapters 2 and 3 will be subject to the range of non-criminal sanctions set out in Chapter 5* [undertakings and substantiation notices], *most particularly civil penalty payments.*
>
> *In the circumstances that conduct gives rise to both an offence and a civil pecuniary penalty, the regulator will need to choose which course of action to take. Clause 225 of the ACL (WA) prohibits a court from imposing a civil pecuniary penalty where a person has already been convicted of an offence constituted by conduct that is substantially the same as conduct constituting a contravention for which a pecuniary penalty could be imposed.*
>
> *The Fair Trading Bill does not provide for the imposition of custodial sentences. The sentencing options available to a court are determined by the Sentencing Act 1995.*[171]

[171] Email from Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection, Department of Commerce, 5 November 2010, pp9-10.

Comment

5.77 It is not to the point that sentencing options are available to a court under the *Sentencing Act 1995*, rather than the FT Bill. What is relevant is whether removal of the option of a monetary penalty exposes a person to risk of inappropriate penalty.

5.78 It is correct that, unlike the CCA 2010, the FT Bill does not propose a sentencing option of imprisonment on conviction of an offence under that bill.

5.79 Section 44 of the *Sentencing Act 1995* provides that in the event the statutory penalty for an offence is such that a fine but not imprisonment may be imposed, the following sentencing options (set out in section 39 of that Act) are available:

> *(a) with or without making a spent conviction order, under Part 6 impose no sentence and order the release of the offender;*
>
> *(b) with or without making a spent conviction order, under Part 7 impose a CRO and order the release of the offender;*
>
> *(c) with or without making a spent conviction order, under Part 8 impose a fine and order the release of the offender (unless an order under section 58 is made).*

5.80 In the event an offence is one prescribed for the purposes of section 44, a court may, with or without making a spent conviction order, under Part 9 of the *Sentencing Act 1995* impose a CBO and order the release of the offender.

5.81 The Committee notes, however, that imprisonment may be an option under the "*application law*" of another participating jurisdiction, not the Australian consumer law *per se*.

5.82 The CCA 2010 is an application law. Section 133G of the CCA 2010 provides that a person who provides false or misleading information in compliance, or purported compliance with a substantiation notice commits an offence and is liable to imprisonment for 12 months. Section 206 of the Australian Consumer Law (WA) constitutes the same offence. There are other duplications.

5.83 Replication of clause 32(4) in the application laws of other jurisdictions may expose a Western Australian citizen or resident to risk of inappropriate penalty. Whether this is the case it not clear, as each offence needs to be reviewed in light of clause 32(2) (as amended per the Committee's recommendation) and the terms of the relevant application law.

Conclusion

5.84 The Committee is satisfied that clause 32(4) will not expose an offender to risk of an inappropriate sentence of imprisonment in Western Australia.

5.85 The Committee was not, however, persuaded that clause 32(4) applies only to "*civil pecuniary penalties*". The term "*civil pecuniary penalty*" is not defined in the FT Bill.

5.86 The Committee was not, in the time available to it, able to review the FT Bill to determine whether use of the undefined term "*pecuniary penalty*" raised any issues in respect of the practical effect of the FT Bill or its implementation of the government's policy in respect of civil pecuniary penalties. The Committee, therefore, recommends that the responsible Minister provide further information on this clause.

Finding 15: The Committee finds that, on the information available to it, clause 32(4) of the FT Bill is not confined in its application to what the Department of Commerce refers to as "*civil pecuniary penalties*".

Recommendation 14: The Committee recommends that the responsible Minister advise the Legislative Council whether:

- **clause 32(4) of the FT Bill is intended to apply only to "*civil pecuniary penalties*";**
- **if so, how that is achieved, bearing in mind the Committee's comments in this report; and**
- **if that result was intended but has not been achieved, whether clause 32(4) requires amendment.**

CLAUSE 33 - OFFENCES AGAINST AUSTRALIAN CONSUMER LAW (WA) TO BE CRIMES

Issue

5.87 Clause 33 of the FT Bill proposes that all offences against the Australian Consumer Law (WA) be crimes. Normally, this would indicate an "*indictable offence*" - by reason of section 67(1a) of the *Interpretation Act 1984* (which provides: "*An offence designated as a crime or as a misdemeanour is an indictable offence*") - and, therefore, the process by which a prosecution is to be commenced and the range of the penalty available in the event no penalty was provided in the FT Bill.

5.88 However, section 67(1a) of the *Interpretation Act 1984* does not apply to Part 3 of the FT Bill. The *Acts Interpretation Act 1901* (Cwlth) does not use the word "crime".

5.89 The Committee, therefore, queried the designation of all offences as crimes and the consequences that flowed from that designation.

Department's response

5.90 The Department of Commerce said:

> *The Fair Trading Bill 2010 preserves the current position under the Fair Trading Act 1987, which provides in section 69 that all offences under that Act are crimes.*
>
> *The option of summary conviction is provided under the Fair Trading Act and a similar option is provided for under the Bill (clause 33).*
>
> *While it is normal for matters to be dealt with summarily, offences under the consumer legislation equate to other white collar criminal offences and it is appropriate that the Act reflect this. Any reduction in the seriousness of offences under the ACL (WA) would risk creating WA as a jurisdiction of choice for offenders.*[172]

5.91 In the event of summary conviction, by clause 33 of the FT Bill an offender is exposed to the lesser of a $36,000 fine or the maximum penalty imposed by the Australian Consumer Law (WA).[173]

Comment

5.92 The Committee is satisfied that the provision for summary conviction enables consideration to be given to the seriousness of an offence when choosing the initiating process for a prosecution.

5.93 The Committee notes that section 3 of the *Criminal Procedure Act 2004* provides:

> ***indictable offence*** *means a crime or any other offence described by a written law as an indictable offence, irrespective of whether in some circumstances it may be dealt with summarily.*

---

172 Email from Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection, Department of Commerce, 5 November 2010, p10.

173 Section 9(2) of the *Sentencing Act 1995* provides that unless a statutory penalty of a particular amount or particular term of imprisonment is mandatory or includes a minimum penalty, a lesser penalty of the same kind may be imposed.

5.94 It appears to the Committee that this provision may be sufficient to capture offences under the Australian Consumer Law (WA) and provide a clear prosecution process under the *Criminal Procedure Act 2004.* However, this requires clarification.

Recommendation 15: The Committee recommends that the responsible Minister clarify for the Legislative Council whether or not use of the term "*crime*", rather than "*indictable offence*" in clause 33 of the FT Bill raises any issues under the State's criminal procedure and sentencing legislation.

CLAUSE 34 - CIVIL EVIDENCE AND PROCEDURE RULES APPLY TO PROCEEDINGS FOR PECUNIARY PENALTY

Introduction

5.95 Clause 34 provides that the rules of evidence and procedure for civil matters apply when hearing proceedings for a pecuniary penalty under section 224 of the Australian Consumer Law (WA). As clause 34 refers specifically to section 224, there is no confusion that the "*pecuniary penalty*" may be a fine.

5.96 Pecuniary penalty provisions are part of the current TPA. They already exist for the restrictive trade practices provisions. However, the consumer protection provisions of the TPA were previously enforced solely through civil remedies such as injunctions and criminal sanctions. The Australian consumer law significantly expands the use of "*pecuniary penalty*" provisions.

5.97 The rationale for, and practical effect of, pecuniary penalty provisions has not been advised in the Second Reading Speech or Explanatory Memorandum to the FT Bill.

Civil pecuniary penalties

5.98 Section 224 of the Australian Consumer Law (WA) proposes pecuniary penalties for "*contraventions*" of the following provisions:

> *(i) a provision of Part 2-2 (which is about unconscionable conduct);*
>
> *(ii) a provision of Part 3-1 (which is about unfair practices);*
>
> *(iii) section 66(2) (which is about display notices);*
>
> *(iv) a provision (other than section 85) of Division 2 of Part 3-2 (which is about unsolicited consumer agreements);*

(v) a provision (other than section 96(2)) of Division 3 of Part 3-2 (which is about lay-by agreements);

(vi) section 100(1) or (3) or 101(3) or (4) (which are about proof of transactions and itemised bills);

(vii) section 102(2) or 103(2) (which are about prescribed requirements for warranties and repairers);

(viii) section 106(1), (2), (3) or (5), 107(1) or (2), 118(1), (2), (3) or (5), 119(1) or (2), 125(4), 127(1) or (2), 128(2) or (6), 131(1) or 132(1) (which are about safety of consumer goods and product related services);

(ix) section 136(1), (2) or (3) or 137(1) or (2) (which are about information standards);

(x) section 221(1) or 222(1) (which are about substantiation notices); or

(b) has attempted to contravene such a provision; or

(c) has aided, abetted, counselled or procured a person to contravene such a provision; or

(d) has induced, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene such a provision;

(e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or

(f) has conspired with others to contravene such a provision.

5.99 Traditionally, "*contravention*" of provisions of the nature of the provisions cited in section 224 would constitute a criminal offence. By not designating these contraventions "*offences*", and applying civil evidence and procedure, the standard of proof of contravention is the lower test of balance of probabilities.

5.100 Expanded use of "*pecuniary penalty*" provisions is in accord with the Productivity Commission's recommendations in respect of a national consumer law.[174]

[174] See Recommendation 10.1, Productivity Commission of Australia, Inquiry Report 45, *Review of Australia's Consumer Policy Framework*, 30 April 2008, Vol 2, pXXIV.

Commonwealth Explanatory Memorandum

5.101 The Explanatory Memorandum to the First ACL Bill explains the expanded pecuniary penalty provisions as being directed at achieving "*timely outcomes*" for consumers:

> *While criminal sanctions provide an important deterrent against the most serious forms of contravening misconduct, and civil remedies can achieve timely outcomes for consumers, there is currently no means of obtaining sanctions in the timely manner available under the civil regime.*[175]

Productivity Commission recommendations and rationale

5.102 The Productivity Commission also identified difficulty in meeting the requirements of the criminal justice system and resource constraints as problems that might be overcome by a civil penalty regime:

> *for a range of reasons, regulators are constrained in their ability to pursue criminal actions in some consumer cases where a financial penalty might be warranted. These include circumstances where:*
>
> - *there is a need for timely action to provide redress such as corrective advertising or compensation and to stop further detriment occurring;*
> - *the nature of the evidence may not support a criminal conviction;*
> - *the cost of criminal investigations limits the number of cases that can be pursued given resource constraints faced by regulators and prosecutors; or*
> - *there are disparities in the enforcement priorities of regulators and the jurisdictional Directors of Public Prosecutions (in those jurisdictions where regulators cannot bring criminal cases to the court directly).*[176]

5.103 It noted that criminal sanctions were rarely pursued under current legislation:

---

175 The Hon. Dr Craig Emerson, Second Reading Speech, *House of Representatives Hansard*, 24 June 2009, p. 6987, quoted in Commonwealth of Australia, Senate, Standing Committee on Economics Legislation, *Inquiry into Trade Practices Amendment (Australian Consumer Law) Bill 2009*, 7 September 2009, p55.

176 (Productivity Commission of Australia, Inquiry Report 45, *Review of Australia's Consumer Policy Framework*, 30 April 2008, Vol 2, p235.

> *civil proceedings will be preferred in some situations where criminal actions may be an intrinsically stronger but less costeffective form of deterrent. This is reflected in the paucity of criminal cases either referred to the DPP or prosecuted directly by Australian consumer regulators.2 Indeed, if there is a reluctance to pursue criminal actions, then the practical deterrent effect of criminal penalties may actually be weaker than from civil penalties were these to be available.*[177]

5.104 The Productivity Commission was of the view that the existing civil remedies, (including injunctions, compensation and corrective advertising) did not provide a strong deterrent.[178] It concluded:

> *the introduction of a civil penalty regime, including fines, disgorgement of profits and banning orders (see below) has the potential to allow for a more layered enforcement approach to deter breaches of the generic consumer law that may not justify criminal sanctions. It would also facilitate more cost-effective enforcement as redress and punishment could be achieved in a single proceeding.*[179]

MCCA

5.105 The Productivity Commission report included a rare insight into the reasoning of the MCCA. The MCCA submission to its inquiry was that:

> *Civil penalties are a middle ground between criminal penalties and civil remedies and may assist in ensuring a proportionate regulatory response to breaches of the law, as well as allowing enforcement agencies to achieve consumer redress in the same proceeding. The level of civil penalties is often higher than criminal fines. Since a consumer law breach will often result in an economic benefit to the trader, a civil penalty of some significance will act as an economic sanction. Like criminal penalties, civil penalties are designed to deter conduct in breach of the law. (MCCA 2005a, p. 4*)[180]

5.106 The Productivity Commission noted concerns that civil pecuniary penalties might just be regarded as 'cost of business' and passed onto consumers, but did not consider this precluded its recommendation.[181]

---

177 Ibid, p235.

178 Ibid, p236.

179 Ibid

180 Ibid.

181 Ibid, p240.

Senate Committee report

5.107 The Senate Committee report into the First ACL Act noted submissions that the civil penalty provisions should not apply to the unconscionable conduct provisions of the Australian consumer law, an issue also considered by the Productivity Commission:

> *…civil pecuniary penalties should not apply to the unconscionable conduct provisions, for the same policy reasons underpinning the decision not to apply penalties to section 52. Civil pecuniary penalties are intended to bridge the gap between civil remedies and criminal penalties and apply only to those consumer protection provisions that attract criminal sanction.*
>
> *Currently, no criminal sanctions apply to unconscionable conduct under the Trade Practices Act … The Committee considers that appropriate and adequate sanctions already apply under the Trade Practices Act to address unconscionable conduct and the imposition of civil pecuniary penalties is inappropriate and unwarranted.*[182]

5.108 The Senate Committee, however, expressed no view on those submissions.

CLAUSE 37 - UNSOLICITED CONSUMER AGREEMENT (DOOR - TO - DOOR SALES)

Introduction

5.109 Clause 37 of the FT Bill proposes the only modification that will be made to the Commonwealth Schedule 2 in applying that legislation in Western Australia.

5.110 Clause 37 proposes different hours than those set out in the Commonwealth Schedule 2 during which a dealer may call on a person, without that person's consent, for the purpose of negotiating an "*unsolicited consumer agreement*". It alters the particular hours set out in sections 73 and 170(1) of the Commonwealth Schedule 2, which respectively provide the hours in which a dealer may not make an unsolicited call on a person and that calling during the specified hours is an offence.

5.111 Sections 73 and 170(1) of the Commonwealth Schedule 2 stipulate the following hours during which unsolicited calls cannot be made:

> *(a) at any time on a Sunday or a public holiday; or*
>
> *(b) before 9 am on any other day; or*

---

182 Law Council of Australia, *Submission 47*, p. 6 quoted in Commonwealth of Australia, Senate, Standing Committee on Economics Legislation, *Inquiry into Trade Practices Amendment (Australian Consumer Law) Bill 2009*, 7 September 2009, p56.

(c) after 6 pm on any other day (or after 5 pm if the other day is a Saturday).

5.112 Under the Australian Consumer Law (WA), a dealer will, in addition, be able to call:

- on a public holiday; and
- between 6 and 8 pm on weekdays,

without the consent of the recipient of that call.

"Unsolicited consumer agreement" - Henry VIII clauses in Australian Consumer Law (WA)

5.113 Section 69 of the Australian Consumer Law (WA) defines an "*unsolicited consumer agreement*". That section provides:

Meaning of unsolicited consumer agreement

(1) An agreement is an unsolicited consumer agreement if:

(a) it is for the supply, in trade or commerce, of goods or services to a consumer; and

(b) it is made as a result of negotiations between a dealer and the consumer:

(i) in each other's presence at a place other than the business or trade premises of the supplier of the goods or services; or

(ii) by telephone;

whether or not they are the only negotiations that precede the making of the agreement; and

(c) the consumer did not invite the dealer to come to that place, or to make a telephone call, for the purposes of entering into negotiations relating to the supply of those goods or services (whether or not the consumer made such an invitation in relation to a different supply); and

(d) the total price paid or payable by the consumer under the agreement:

(i) is not ascertainable at the time the agreement is made; or

(ii) if it is ascertainable at that time—is more than $100 or such other amount prescribed by the regulations.

(1A) The consumer is not taken, for the purposes of subsection (1)(c), to have invited the dealer to come to that place, or to make a telephone call, merely because the consumer has:

(a) given his or her name or contact details other than for the predominant purpose of entering into negotiations relating to the supply of the goods or services referred to in subsection (1)(c); or

(b) contacted the dealer in connection with an unsuccessful attempt by the dealer to contact the consumer.

(2) An invitation merely to quote a price for a supply is not taken, for the purposes of subsection (1)(c), to be an invitation to enter into negotiations for a supply.

*(3) An agreement is also an **unsolicited consumer agreement** if it is an agreement of a kind that the regulations provide are unsolicited consumer agreements.*

*(4) However, despite subsections (1) and (3), an agreement is not an **unsolicited consumer agreement** if it is an agreement of a kind that the regulations provide are not unsolicited consumer agreements.*

5.114 Sections 69(3) and (4) are Henry VIII clauses, in that they authorise prescription by regulation of agreements that do or do not constitute unsolicited consumer agreements despite the meaning of that terms in section 69(1). Regulations for the purposes of section 69 are to be made by the Commonwealth (Governor General) under section 139G of the CCA 2010.

Other section 139G regulation-making powers

5.115 Other aspects of the regulation of unsolicited consumer agreements that may occur by exercise of the section 139G regulation-making power are:

- the minimum amount at which an "*unsolicited consumer agreement*" arises for the purposes of the ACL (section 69);
- identify information that must be disclosed by a person calling on another for the purpose of negotiating an *unsolicited consumer agreement* (section 74);
- information that is to be provided before an *unsolicited consumer agreement* is made and the form and way in which that information is to be provided (section 76);

- information to be included on the front page of any *unsolicited consumer agreements* and any other requirements in respect of that page (section79);

- requirements of a notice that may be used by a consumer to terminate an unsolicited consumer agreement (section 79);

- prescription of the circumstances, kinds of agreements or businesses that may be excluded from the Division of the Australian Consumer Law (WA) that deals with unsolicited consumer agreements, or part of that Division (section 94).

Henry VIII clause in 'front end' of FT Bill

5.116 The FT Bill also contains a separate Henry VIII clause in respect of unsolicited consumer agreements. Clauses 117(3), (4) and (5) of the FT Bill authorise regulations, made by the State (Governor), which:

- prescribe calling hours with respect to unsolicited consumer agreements that alter the operation of section 73 of the Australian Consumer Law (WA); and

- provide that the Division of the Australian Consumer Law (WA) that deals with unsolicited consumer agreements, or part of that Division, does not apply to agreements of a kind specified in the regulations.

Uncertainty in unsolicited consumer agreement regulation

5.117 The number of provisions allowing for exclusions and additions to the agreements regulated by the Division of the Australian Consumer Law (WA) that deals with unsolicited consumer agreements suggested to the Committee that there was no clear intergovernmental consensus as to the agreements that should be subject to the Australian Consumer Law.

Rationale

Different hours from Commonwealth Schedule 2

5.118 In being asked to explain the rationale for the different hours in Western Australia during which a dealer may call for the purpose of making an unsolicited consumer agreement, the Department of Commerce advised that clause 37 preserved the status quo under the *Door to Door Trading Act*. The Department advised that the Commonwealth Schedule 2 hours were based on Queensland hours.[183]

[183] Department of Commerce Transcript, 1 November 2010, p28.

5.119 The Department of Commerce pointed out that this 'modification' did not result in inconsistency with the ACL IGA or CCA 2010 as it was a specifically agreed area of variation.

Matters left to regulation - Henry VIII clause

5.120 The Committee inquired why it was necessary to confer powers (sections 69(3) and (4) and 94) to make regulations prescribing the kinds of agreements that are or are not unsolicited consumer agreements despite section 69(1) and (2) of the Australian Consumer Law (WA). The Department's initial response was:

> *But there is a range of provisions in the unsolicited consumer agreements provision which provide for the detail to be prescribed in regulations. There are a number of them and it was always, as there are in many acts, powers to make regulations to prescribe the detail, which is what regulations are about.*[184]

5.121 When asked why these matters were in regulations not the FT Bill, the Department said:

> *There is always a judgement about the dividing line about what goes in. But there was a view that there was quite a lot of detail that still needed to be sorted in some areas in terms of how it would apply. There was also a desire to consult more particularly with industry in relation to the detail and the way this would operate because what you find is that the existing regulation is different in different jurisdictions and, so, to have settled that in advance in the commonwealth bill would have been quite difficult, and there was an agreement that these were appropriate matters to be prescribed.*[185]

5.122 The Department disagreed that the legislation was not ready to be incorporated into the FT Bill.[186]

Comment

No inconsistency with uniform legislative scheme

5.123 Clause 37 of the FT Bill is not inconsistent with the uniform legislative scheme. Section 131C of the CCA 2010 provides:

184 Ibid, p27.

185 Ibid.

186 Ibid.

> *(2) Section 73 of the Australian Consumer Law does not operate in a State or a Territory to the extent necessary to ensure that no inconsistency arises between:*
>
> *(a) that section; and*
>
> *(b) a provision of a law of the State or Territory that would, but for this subsection, be inconsistent with that section.*

Lack of certainty

5.124 Although the Department disagreed that the legislation regulating unsolicited consumer agreements was not ready for inclusion in the Australian consumer law, in addition to the passage quoted above, when discussing the hours during which a dealer might call it said:

> *The view was there had not been opportunity to have appropriate consultation with the local industry and consumer groups about this. There are conflicting views. … But what is proposed is there will be consultation in Western Australia specifically on this issue in the new year.*[187]

Conclusions

5.125 The Committee is of the view that sections 69(3) and (4) and 94 of the Australian Consumer Law (WA) go beyond authorising the prescription of "*detail*". Regulations made under section 139G of the CCA 2010 under powers conferred by those sections will dictate the ambit of a fundamental concept to the FT Bill, that of "*unsolicited consumer agreement*".

5.126 Sections 69(3) and (4) and 94 of the Australian Consumer Law (WA) do not have sufficient regard for the institution of Parliament in that they offend Fundamental Legislative Scrutiny Principle 12 - *Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?*

5.127 The Committee is of the view that any significant amendments to the definition of "*unsolicited consumer agreement*" should be by way of primary legislation.

[187] Ibid, p28.

Finding 16: The Committee finds that sections 69(3) and (4) and 94 of the Australian Consumer Law (WA) allow amendment of the agreements which constitute "*unsolicited consumer agreements*" for the purposes of the FT Bill. This is an inappropriate delegation of legislation-making power.

5.128 As set out above, the Department's advice was that there was a need to "*sort out*" different legislation regulating unsolicited consumer agreements in different jurisdictions and that to consult with industry would have been "*difficult*" in advance of the Commonwealth legislation.

5.129 However, the Committee notes the Department of Commerce's view is:

> *I think if that were changed, we run into the risk that we would be directly inconsistent with the commonwealth legislation and our provisions may well be invalid if you wanted to amend that provision.*[188]

5.130 In the limited time available to it, the Committee has not been able to determine whether that is the case. It, therefore, has made no recommendation.

Additional information in respect of unsolicited consumer agreements:

5.131 At the hearing, the Department of Commerce provided the following summary of the Australian Consumer Law (WA) provisions in respect of unsolicited consumer agreements:

> *There are some new provisions in relation to unsolicited consumer agreements. At the moment we have the Door to Door Trading Act, which regulates people coming to your door. In Western Australia we do not regulate people who call you by telephone out of the blue to sell you something. The unsolicited consumer agreements provisions will replace the Door to Door Trading Act, so that is an act that has been repealed. They will apply a number of provisions also to telemarketing, although a number of provisions about telemarketing, like the hours and so on, will still be covered by the Do Not Call Register, but it will expand into telemarketing. That will extend the cooling off period — the 10-day cooling off period, which currently applies to door-to-door — to unsolicited telephone sales, and that does not apply the moment.*[189]

188 Ibid, pp27-8.

189 Ibid, p14.

5.132 The Department also said:

> *There will be no liability to pay for unsolicited services. The classic example of this, without reflecting on any particular industry, is the motor vehicle repair industry, where you might go back after your car has been repaired and be told, "Oh, by the way, your muffler was a bit dodgy. We fixed that and we fixed your gearbox, and the bill is $5 000". There will be no obligation for you to pay for that and also no liability for any damage or loss that is incurred by the person who has undertaken it. So the obligation, obviously, in those cases, is to get authority before people progress.*[190]

[190] Ibid, p13.

CHAPTER 6

PARTS 4, 5 AND 6 OF THE FT BILL - INVESTIGATION, ENFORCEMENT AND REMEDY PROVISIONS

6.1 Due to the time constraints imposed on the Committee, the Committee has not been able to complete its inquiry. In particular, as reported in Chapter 5, the Committee has not been able to scrutinise the way in which the FT Bill, in conjunction with the CCA 2010, has resolved the issues raised by the High Court in the *Wakim* and *Hughes* decisions.

6.2 The Committee has, however, been provided with some information in respect of the administration, enforcement and remedy provisions of the FT Bill. This information is set out in **Appendix 4**.

CHAPTER 7
AUSTRALIAN CONSUMER LAW (WA)

INTRODUCTION

Australian Consumer Law (WA) as a Note to FT Bill

7.1 The FT Bill 'applies' a modified version of the Australian consumer law as a law of Western Australia under the title *Australian Consumer Law (WA)*. It does not set out the provisions of the *Australian Consumer Law (WA)* as text of the FT Bill. Instead, the provisions are incorporated by reference to the CCA 2010. By clause 19 of the FT Bill, the *Australian Consumer Law (WA)* consists of:

> *(a) Schedule 2 to the Competition and Consumer Act 2010, as in force on commencement of section 19 (but as modified by section 37); and*
>
> *(b) the regulations made under section 139G of that Act, as those regulations are in force from time to time.*

Note does not comprise the whole Australian Consumer Law (WA)

7.2 Only that part of the Australian Consumer Law (WA) that is comprised by the Commonwealth Schedule 2, as amended by clause 37 of the FT Bill, is a note to the FT Bill.

7.3 At the time of reporting, no section 139G Regulations have been made. The Commonwealth Treasury released draft regulations for public consultation. The consultation period closed on 13 October 2010. The draft section 139G Regulations can be viewed at: www.treasury.gov.au.[191]

7.4 The State Parliament, therefore, is being asked to pass a law for the State when the full text of that law is not known.

Finding 17: The Committee finds that the State Parliament is asked to pass the FT Bill applying the Australian Consumer Law (WA) (as defined in clause 19) as a law of Western Australia prior to the full text of that law being known.

[191] http://www.consumerlaw.gov.au (viewed on 16 November 2010).

Note not part of FT Bill

7.5 A note is not part of a written law.[192]

Previous Committee criticism of text of law as note

7.6 With respect to the text of the National Gas Law being set out as a note to the National Gas Access (WA) Bill 2008, the Committee said:

> *As it stands, for the Committee's scrutiny purposes, only modifications to the National Gas Law as outlined in Schedule 1 of the Bill are open to committee and parliamentary scrutiny. The operative provisions of the National Gas Law itself attached in a 337 clause length Note within the Bill cannot be scrutinised or amended as the Note does not form part of the Bill*.[193]

7.7 In the case of the Australian Consumer Law (WA), there are 287 clauses occupying 259 pages.

7.8 In respect of the National Gas Access (WA) Bill 2008, the Committee also said:

> *The Commonwealth has already passed its Application Act and thus, if the Western Australian Parliament was able to make statutory form amendments regarding sections in the Note, any inconsistency between Western Australian and Commonwealth provisions, would result in the Commonwealth provisions prevailing to the extent of any inconsistency.[18] This has fettered the Committee's capacity to effectively scrutinise the Note and recommend narrative or statutory form amendments. However, the Committee has commented on various aspects of law in the Note at* ***Appendix 5***.[194]

7.9 The same issues arise in scrutiny of the Australian Consumer Law (WA).

'NOTE' TO FAIR TRADING BILL 2010

Introduction

7.10 Provision of part of the text of the Australian Consumer Law (WA) as a note raises a number of issues, including:

---

192 Both the *Interpretation Act 1984* (WA) (section 32(2)) and *Acts Interpretation Act 1901* (Cwlth) (section 13(3)) provide that a note is not part of an Act.

193 Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 35, *National Gas Access (WA) Bill 2008*, 10 March 2009, p7.

194 Ibid.

- avoidance of clause by clause scrutiny in the Legislative Council's Committee as a whole consideration of a bill;
- difficulty in framing and effecting statutory form amendment recommendations and motions;
- no process for subsequent amendment of the note after enactment of the bill, resulting in a point-in-time version of legislation that is confusing to the public and stakeholders; and
- difficulty in ascertaining a consolidated version of the current law.

Rationale for provision of Australian Consumer Law (WA) as note

Introduction

7.11 The Second Reading Speech and Department advise that provision of Australian Consumer Law (WA) as a note to the FT Bill is a device 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:

> *The question for us was: is there a way to address that and to make it clear both to Parliament to consider and to anyone else who wanted to know, what is being applied? The purpose of that was not just to make it clear, but if Parliament looked at what was in the note and took a view that it was dissatisfied with it and wanted to amend it, it would not amend the note, but it could include amendments in the front of the bill to deal with that issue. It could modify the Australian Consumer Law and you could have any other provision you wanted. It gave Parliament the information to know what it was enacting and also the opportunity to consider whether it wanted to enact that and make amendments. The note is a snapshot of the legislation at that time.*[195]

7.12 The Committee appreciates that efforts have been made to respect the Parliament's privileges and that the FT Bill has been drafted in a way such that amendments to clause 19 or clause 37, or some other clause, may have effected an amendment to the Australian Consumer Law (WA).

7.13 However, where the Department has been anxious to emphasise that any proposed amendment needs to be viewed with:

---

[195] Department of Commerce Transcript, 1 November 2010, p31.

- section 109 of the *Constitution* in mind; and

- regard to the fact that, an amendment viewed as being in breach of the uncertain intergovernmental agreement requirement for consistency in respect of the uniform consumer law, will have significant financial consequences for the State,

- the Committee observes that provisions of the text as a note would have been more useful in the event the Parliament was given sufficient time to consider the terms of that note and the consequences of any particular amendment.

7.14 For the Committee, the real question is why the text of the Australian Consumer Law (WA) has not been included in the FT (or some other) Bill.

Rationale for not including text of Australian Consumer Law (WA) in the FT Bill

7.15 The Department of Commerce explained failure to include the text of the Australian Consumer Law (WA) in the FT Bill as a consequence of the Commonwealth legislation which:

> *save state legislature but talk about application law.*[196]

7.16 While there was "*some debate*" about what the Commonwealth legislation required, the Department took the "*safest position*" of not restating the law in a schedule to the FT Bill because:

> *the provisions that relate to the definition of what constitutes an application law under the commonwealth's legislation talks about — and there is a series of them — applying by reference. … That was not incorporated by reference or upon a reference. It was by reference to the law sitting somewhere else*.[197]

Comment

7.17 There are, indeed, a series of definitions in the CCA 2010 that establish what is meant by an application law.

---

196 Ibid.

197 "*The reason it is not a schedule is that … There was some debate about what that actually meant, but the view about what was the safest position was that it was not restating it as a schedule. That was not incorporated by reference or upon a reference. It was by reference to the law sitting somewhere else. That is why the note was seen as satisfying that. We applied the law by reference to it in the bill. We refer to the commonwealth Australian Consumer Law applied by reference, but the note is seen as an innovative way of trying to ensure that Parliament at the same time sees what it is applying and tries to deal with that fundamental question that Parliament knows what it is that it is applying at the time it is agreeing and can modify or vary it if it chooses.*" (Department of Commerce Transcript 1 November 2010, p31).

7.18 Section 140 of the CCA 2010 contains the following definitions:

> ***application law*** *means:*
>
> *(a) a law of a participating jurisdiction that applies the applied Australian Consumer Law, either with or without modifications, as a law of the participating jurisdiction; or*
>
> *(b) any regulations or other legislative instrument made under a law described in paragraph (a); or*
>
> *(c) the applied Australian Consumer Law, applying as a law of the participating jurisdiction, either with or without modifications.*
>
> ***applied Australian Consumer Law*** *means (according to the context):*
>
> *(a) the text described in section 140B; or*
>
> *(b) that text, applying as a law of a participating jurisdiction, either with or without modifications.*
>
> ***apply****, in relation to the applied Australian Consumer Law, means apply the applied Australian Consumer Law by reference:*
>
> *(a) as in force from time to time; or*
>
> *(b) as in force at a particular time.*
>
> …
>
> ***participating jurisdiction*** *means a participating State or participating Territory.*

7.19 Section 140B of the CCA 2010 provides:

> ***The applied Australian Consumer Law***
>
> *The applied Australian Consumer Law consists of:*
>
> *(a) Schedule 2; and*
>
> *(b) the regulations made under section 139G of this Act.*

7.20 While clearly the word "*reference*" is used in the definition of "*apply*", there does not seem to the Committee to be any requirement that the reference be to a law located "*somewhere else*" than the application law.

7.21 Interestingly, the CCA 2010, which sets out the Australian Consumer Law (as amended by the Commonwealth Parliament) in Schedule 2, describes itself as a law applying the Australian Consumer Law. The heading to Part XI is:

> ***Part XI — Application of the Australian Consumer Law as a law of the Commonwealth,***

(by section 13(1) of the *Acts Interpretation Act 1901* (Cwlth), the headings to Parts of Acts are part of an Act) and section 130 provides:

> ***Australian Consumer Law*** *means Schedule 2 as applied under Subdivision A of Division 2 of this Part.*

7.22 Sections 131 and 131A of the CCA 2010 provide, in part:

> ***131 Application of the Australian Consumer Law in relation to corporations etc.***
>
> *(1) Schedule 2 applies as a law of the Commonwealth to the conduct of corporations, and in relation to contraventions of Chapter 2, 3 or 4 of Schedule 2 by corporations.*
>
> *Note: Sections 5 and 6 of this Act extend the application of this Part (and therefore extend the application of the Australian Consumer Law as a law of the Commonwealth).*
>
> *(2) Without limiting subsection (1):*
>
> > *(a) section 22 of Schedule 2 also applies as a law of the Commonwealth in relation to:*
> >
> > > *(i) a supply or possible supply of goods or services by any person to a corporation (other than a listed public company); or*
>
> …
>
> ***131A Division does not apply to financial services***
>
> *(1) Despite section 131, this Division does not apply (other than in relation to the application of Part 5-5 of Schedule 2 as a law of the Commonwealth) to the supply, or possible supply, of services that are financial services, or of financial products.*

"Application law" may apply schedule that is part of application Act

7.23 The Committee did not identify any barrier to applying the Australian consumer law, as modified, by reference to a Schedule - or even a Part - of the FT Bill.

7.24 Given the increasing incidence of application of foreign laws by reference, and the problems arising from that practice, the Committee considers provision of the Australian Consumer Law (WA) as a note to the FT Bill warrants further explanation and consideration by the Legislative Council.

Recommendation 16: The Committee recommends that the responsible Minister explain to the Legislative Council why the application method employed in Part XI of the CCA 2010 was not replicated in the FT Bill.

Note will not be updated, leading to confusion

Introduction

7.25 Whenever the text of a different law comprises a note to an Act, there is concern that failure to update the note whenever the relevant law is amended may result in persons basing their decisions on an incorrect understanding as to the current law.

7.26 Although the note is not part of the law, persons may not appreciate that the text of the relevant law - particularly as it appears on the website of the State Law Publisher - has not been updated.

7.27 There is a further obstacle to ascertaining the law in there being no obligation for any entity to produce a consolidated version of the Australian Consumer Law (WA) for public release.

7.28 Instead, a person will be required, not only to appreciate that the current Commonwealth Schedule 2 may not represent the law in Western Australia, but to appreciate that the note to the FT Bill may have been amended by order published in the *Gazette* and to locate all of those orders and consolidate them with the note.

7.29 There is also the additional matter of identifying the section 139G Regulations that are in force in Western Australia at any given time.

Department's view

7.30 The Department acknowledged that the note would not be amended in the event the Australian Consumer Law (WA) was amended by order published in the *Gazette*. The Department did not see this as a problem. The Department was satisfied that amendments were published and pointed out that the purpose of the note was to provide a point-in-time version of the Australian Consumer Law (WA):

> *There is no need to modify the note because it is intended to represent a snapshot: what is the law that is being applied at the particular time.*[198]

7.31 Again in respect of the section 139G Regulations, the Department saw publication of any amendments as adequate notification of a change in the law, without need for a consolidation.

Committee comment

7.32 It is a basic principle of 'rule of law' that a person be able to ascertain the legal rights and obligations imposed on them. Where ignorance of the law is no defence to prosecution or imposition of a civil penalty, it is important that the law be readily accessible by the public and, in the context of this law, suppliers.

7.33 The Committee has extensive experience of the difficulties that arise in trying to read legislation that has been subject to unconsolidated amendment.

7.34 The Committee is of the view that legislation as important and far-reaching as the Australian Consumer Law (WA), with the significant consequences that may flow from breach - both in terms of consumer protection (including safety) and supplier liability - require public access to an authorised, up-to-date, consolidated version of the law.

Finding 18: The Committee finds that legislation as important and far-reaching as the Australian Consumer Law (WA), with the significant consequences that may flow from breach - both in terms of consumer protection (including safety) and supplier liability - require public access to an authorised, up-to-date, consolidated version of the law.

7.35 Subject to acceptance of Recommendation 3, which provides for treatment of the section 139G Regulations as subsidiary legislation, the Committee is of the view that

198 Ibid, p32.

the primary legislation constituting the Australian Consumer Law (WA) should form part of the text of the FT Bill.

Recommendation 17: The Committee recommends that Schedule 2 to the Competition and Consumer Act 2010, as in force at the time of commencement of section 19 of the Fair Trading Act 2010, be Schedule 2 to the FT Bill.

Recommendation 18: The Committee recommends that the responsible Minister advise the Legislative Council of the measures to be put in place to ensure that there is a publicly available authorised, up-to-date, consolidated version of the Australian Consumer Law (WA), which includes:

- **the modified Commonwealth Schedule 2 amended by order published in the Gazette; and**
- **the regulations made pursuant to section 139G of the CCA 2010 that are not disallowed by the Parliament.**

7.36 In the event Recommendation 17 is not accepted, to avoid confusion as to the content of the Australian Consumer Law (WA) at any point in time after enactment of the FT Bill, the Committee is of the view that the note to Schedule 1 should be deleted from the FT Bill.

Recommendation 19: The Committee recommends that, in the event Recommendation 17 is not accepted, the note to Schedule 1 of the FT Bill deleted. This can be effected in the following manner:

Page vii - after "*Schedule 1 - Acts that override this Act*" - To delete -

Pages viii to xxii - delete the pages

Pages 98 to 351 - delete the pages

'UNFAIR' CONTRACT PROVISIONS

Introduction

7.37 Due to the time constraints imposed on it, the Committee has not been able to complete its inquiry into the Australian Consumer Law (WA). The Committee has, however, been provided with some information in respect of that law. This information is set out in **Appendix 5.**

7.38 The Second Reading Speech identifies the provisions of the Australian Consumer Law (WA) in respect of unfair contracts as:

> *possibly the biggest reform arising out of this law.*[199]

7.39 The Committee, therefore, gave priority to reporting on these provisions.

MCCA amendments to Productivity Commission recommendations

7.40 Productivity Commission of Australia, Inquiry Report 45, *Review of Australia's Consumer Policy Framework*, 30 April 2008 recommended that the proposed generic national consumer law include a provision that established a term as unfair if it was contrary to the requirements of "*good faith*":[200] The MCCA, however, did not recommend such a term.

7.41 The MCCA also qualified the Productivity Commission's recommendation that a term is unfair when it causes a "*significant imbalance in the parties' rights and obligations arising under the contract*" with the proviso "*and it is not reasonably necessary to protect the legitimate interests of the supplier*". [201]

7.42 While agreeing the Productivity Commission recommendation that the unfair contract provisions apply only to standard-form contracts, the MCCA recommended that the onus be on the supplier to establish that a contract is not a standard-form contract.[202]

Senate Committee report

7.43 The Senate Committee report on the First ACL Bill noted broad support for national unfair contract provisions, across business and consumer groups.[203]

---

199 Hon Norman Moore MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 20 October 2010, p8001.

200 Recommendation 7.1 states: *"A provision should be incorporated in the new national generic consumer law that addresses unfair contract terms. The Commission's preferred approach would have the following features: a term is established as 'unfair' when, contrary to the requirements of good faith*" (Productivity Commission of Australia, Inquiry Report 45, *Review of Australia's Consumer Policy Framework*, 30 April 2008, vol 1, p69).

201 Ibid, p6. See also MCCA Joint Communique meeting of 15 August 2008, p5

202 MCCA Joint Communique meeting of 15 August 2008, p5.

7.44 There was, however, some concern:

- from big business - that failure to define unfair resulted in uncertainty as to whether contract provisions would later be found to be unfair;
- at uncertainty in the meanings of "*detriment*" and "*transparency*" as used in the First ACL Bill;
- from business - at the reversal of onus of proof requiring a supplier to establish a contract is not a standard-form contract;
- at omission of business-to-business transactions; and
- omission of insurance contracts.

*Uncertainty as to what terms of contracts will be "*unfair*"*

7.45 The Senate Committee considered that concerns about certainty had been overstated. It observed:

> *Similar legislation has been operation in Victoria and the United Kingdom for a considerable period of time, without any evidence that the costs imposed by these laws outweigh the benefits.*
>
> …
>
> *To suggest that businesses would need to review all their standard consumer contract terms seems to imply that all the terms they use currently fall foul of the various thresholds set by the bill.*[204]

7.46 It also observed:

> *The committee recognises it is important that this legislation minimises any uncertainty that may arise for businesses in setting standard form contracts. By and large, it believes that the bill does provide adequate safeguards to ensure that consumers do not challenge contract terms indiscriminately.*
>
> …

---

203 Commonwealth of Australia, Senate, Standing Committee on Economics Legislation, *Inquiry into Trade Practices Amendment (Australian Consumer Law) Bill 2009*, 7 September 2009, pp11-12.

204 Ibid, p67.

> *Notwithstanding these and other checks, the committee is interested to pursue the proposal of a 'safe harbour'.*[25] *A safe harbour would operate by allowing a business to gain authorisation from the regulator to ensure that a term is beyond challenge. The Consumer Action Law Centre has cautioned that a safe harbour may have limited impact in that a court must take into account a contract as a whole when considering a particular term. It noted that any change to other terms of the contract would probably require the business to go back and seek approval for the new contract.*
>
> …
>
> *The committee believes the idea of a safe harbour could be considered and suggests that the ACCC and ASIC consider the merit of a safe harbour for certain contract terms.* [205]

7.47 The Senate Committee recommended that guidelines be developed to address concerns as to what will constitute an unfair provision in a contract.

7.48 The recommended guidelines have been developed and can be found at: http://www.consumerlaw.gov.au.

*Uncertainty in the meanings of "*detriment*" and "transparency"*

7.49 The Senate Committee received a number of submissions raising uncertainty in the terms "*detriment*" and "*transparency*". It expressed interest in pursuing the proposal of a 'safe harbour':

> *A safe harbour would operate by allowing a business to gain authorisation from the regulator to ensure that a term is beyond challenge.*[206]

7.50 The Senate Committee recommended:

> *That the Bill include provisions for 'safe harbours'.*[207]

Recommendation 20: The Committee recommends that responsible Minister advise the Legislative Council whether the Australian Consumer Law (WA) makes provision for safe harbours.

205 Ibid, pp38-9.

206 Ibid, p39.

207 Ibid.

Omission of business-to-business transactions

7.51 The Senate Committee observed:

> *This inquiry has indeed gathered considerable evidence supporting the application of unfair contract terms laws to protect small businesses in their dealings with businesses with greater bargaining power and market power. The committee believes it is important that the government responds to these concerns after completing its reviews of this committee's December 2008 inquiry into section 51AC of the Trade Practices Act and the Joint Committee on Corporations and Financial Services' inquiry into the Franchising Code of Conduct*.[208]

Omission of insurance contracts

7.52 Section 15 of the *Insurance Contracts Act 1984* provides that a contract of insurance is not capable of being made the subject of 'relief' under any Commonwealth or State Act. 'Relief', in this instance, is in the form of the judicial review of a contract on the ground that it is harsh, oppressive, unconscionable unjust, unfair or inequitable or relief for insureds from the consequences in law of making a misrepresentation.[209] Insurance contracts covered by the *Insurance Contracts Act 1984* (Cwlth) are, therefore, excluded from the 'unfair contract' provisions of the Australian consumer law.

7.53 The Senate Committee noted:

> *In June 2004, a government-commissioned review of the Insurance Contracts Act was made public.18 The review noted that the Standing Committee of Officials of Consumer Affairs (SCOCA) had appointed a Working Party to review the issue of unfair contract terms generally and including insurance contracts in the national model. The review stated that while the exclusion provided by section 15 was still valid:*
>
> > *If a nationally consistent model for review of consumer unfair contracts is developed, the balance of consideration may shift and the issue should be revisited*.[210]

208 Ibid, p32.

209 Ibid, p47 Clause.

210 Ibid, p51

7.54 The Senate Committee recommended;

> *That insurance contracts not be exempt from the legislation.*[211]

7.55 The Committee raised application of the Australian Consumer Law (WA) to insurance contracts with the Department of Commerce. The Department advised:

> *Insurance is expressly excluded in a number of areas. For example, unfair contract terms do not apply to insurance contracts, unfortunately. I am not sure off the top of my head whether all of the false, misleading and deceptive provisions are excluded from insurance. I am not immediately certain.*[212]

7.56 The Department later advised:

> *The misleading conduct provisions of the ACL (WA) apply to the conduct of insurers generally, including conduct relating to insurance contracts, subject to section 15 of the Commonwealth Insurance Contracts Act 1984, which provides that a contract of insurance is not capable of being made the subject of relief under a State Act and that "relief" includes relief in the form of:*
>
> *(a) judicial review of a contract on the ground that it is harsh, oppressive, unconscionable, unjust, unfair or inequitable; or*
>
> *(b) relief for insureds from the consequences in law of making a misrepresentation;*
>
> *but does not include relief in the form of compensatory damages.*[213]

---

211 Ibid, p87.

212 Department of Commerce Transcript, 1 November 2010, p13.

213 Email from Mr Gary Newcombe, Director, Strategic Policy and Development, Consumer Protection, Department of Commerce, 5 November 2010, p1.

Recommendation 21: The Committee recommends that the responsible Minister advise the Legislative Council whether there is any current proposal before the:

- **Commonwealth;**
- **COAG; or**
- **MCCA,**

to implement the Senate Committee's recommendation that insurance contracts be subject to the Australian consumer law.

Additional information in respect of 'unfair contract' terms

7.57 At the hearing, the Department of Commerce provided the following overview of the 'unfair contract' provisions of the Australian Consumer Law (WA):

> ***Mr Newcombe****: … Unfair contract terms legislation has been in place in Victoria for a number of years and is in place in the United Kingdom and the European Union. …*
>
> *The purpose of this legislation is to focus on the standard form; if it is a negotiated contract, it is not within the scope of unfair contract terms. It is intended to deal with provisions that unfairly change the balance of power in favour of one party. Now, obviously, it is pretty well almost in the supplier's advantage, but it does not say that. It is where it unfairly changes the balance of power in the negotiating arrangement. If a provision is found to be unfair, that provision will be void. The contract itself can continue as long as it is able to do so, but that provision would be void. As I say, this is seen as a major reform in dealing with areas where people do not have bargaining power. Standard form contracts have become very common. One of the most common areas now, unfortunately, is with online trading. I do not know if any of you do online shopping, but you will see when you do, in software agreements, "Click here", and "I agree", and it is page after page of material that probably says you are governed by the law of Wisconsin or something. We see this really as being a fundamental reform. So that is all completely new. There are two new provisions —*
>
> ***The CHAIRMAN****: Does that mean you don't have to click on "I agree"?*

***Mr Newcombe**: No, you do. But the answer is if you enter into a contract that you then believe is unfair, there are two options: you can take private legal action or you can come to us. We would have a look at that and if the contract is deemed to be unfair you are not bound by the provision. A couple of things I should say: one thing it does not cover is upfront price. The view is that the one thing that people focus on when they are negotiating or entering a contract is how much it costs. If the contract is not clear upfront and cannot easily be ascertained, then it is covered.*

The methodology that has been used in Victoria, which is the methodology that most of the agencies are looking at, is that Victoria has not engaged in a lot of litigation. What it has done is it has gone into the marketplace and said, "Okay, this year we are going to focus on, let us say, retirement village contracts." It goes out to the market place, gets every retirement village contract it can find, and does an assessment of those against the criteria for whether it is unfair or not. When they believe it is unfair, they then negotiate with the providers. They have been very successful in negotiating changes, which is a good outcome because it changes the behaviour of the marketplace, it stops people being prosecuted and achieves an outcome in the friendliest way possible. That is really how I expect that it will continue, but all the agencies are obviously focusing on the way they are going to approach unfair contract terms. This is also an important area for community legal centres and others in terms of how they might relate to it, and obviously for industry associations that use standard form contracts in terms of them reassessing contracts that they use nationally.

***The CHAIRMAN**: Is it the case that when a term is declared unfair and void because it is unfair, it would be replaced with another fair term?*

***Mr Newcombe**: No.*

***The CHAIRMAN**: Would it just drop out altogether?*

***Mr Newcombe**: It would just be void. The judgement then is: can the contract stand without that provision or not? But no, there is no replacement. The point about this — I think this was one of the earlier questions — is that these provisions only apply to new contracts entered into after the date the legislation commences, or a contract that is varied or amended after that date, but it is not*

> *retrospective in terms of applying to contracts already in existence and already negotiated.*[214]

7.58 The Committee questioned application of the provisions to renewals or variations of existing contracts:

> *Yes, contract renewals are covered as well. If a contract is renewed after the commencement of this legislation, it will be covered. The reason for having that is that if you do not, it is a significant avoidance mechanism, because if I were a trader and I knew renewals were not going to be covered, I would include in my contracts now that I can renew them ad infinitum, and every contract I have in the marketplace now would never be subject to unfair contract terms.*[215]

7.59 The Committee also queried extraterritorial application of the laws:

> ***Hon LIZ BEHJAT**: Presumably only across Australian jurisdictions. Can it have any effect internationally in relation to the law of Wisconsin applying?*
>
> ***Mr Newcombe**: That is true. However, all of the acts have extraterritorial application. So if the consumer is resident in Western Australia and enters into the contract in Western Australia, notwithstanding that the contract is with another party outside, we would assert jurisdiction. You get into all sorts of issues, of course. They seek enforcement in the Supreme Court of Wisconsin, but if they were to seek enforcement in Western Australia, they would certainly be subject to the laws here, notwithstanding that the contract might purport to be governed by laws in other jurisdictions.*[216]

214 Department of Commerce Transcript, 1 November 2010, p12.

215 Ibid.

216 Ibid.

CHAPTER 8
CONCLUSION

DISREGARD OF THE INSTITUTION OF PARLIAMENT

Introduction

8.1 An issue the Committee examines in considering uniform legislation is whether, in practical terms, an intergovernmental agreement or uniform scheme to which a bill relates, or provision of a uniform bill itself, derogates from the sovereignty of the State and, in particular, the State Parliament.

8.2 In a sense, all uniform legislation has this effect. As the Standing Committee on Uniform Legislation and General Purposes pointed out in its Report 19:

> *Where a State Parliament is not informed of the negotiations prior to entering the agreement and is pressured to pass uniform bills by the actions of the Executive, its superiority to the Executive can be undermined.*

8.3 The Committee acknowledges that the Government has addressed some previous concerns in consideration of a law applying the law of another jurisdiction by providing the text of the applied law (albeit the mechanism is subject to Committee comment in Chapter 7). The FT Bill also contains provisions (clauses 20 and 21) which, the Department of Commerce advises, are directed at preserving the Parliament's role in scrutinising the legislation that it is asked to make. The efficacy of these provisions, in the context of section 109 of the *Constitution* and the terms of the ACL IGA as it appears to have been altered, have been discussed in Chapters 2 and 4.

8.4 However, the limited time available to the Parliament to consider this "*foundation consumer law*"[217] constitutes, in the Committee's opinion, a derogation of the superiority of the Parliament beyond the norm.

Considerations

8.5 The Second Reading Speech to the FT Bill describes the Australian consumer law as:

> *the most significant reform of consumer laws in Australia since the introduction of state and territory fair trading acts in the 1980s.*[218]

---

217 Hon Norman Moore MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 20 October 2010, p8000.

8.6 Yet the Committee, which is given the remit of scrutinising uniform legislation on behalf of the Legislative Council, has been given only 30 days to not only consider, but prepare its report on, some 477 pages of legislation.

8.7 In the limited time available to the Committee, it has identified (amongst other things):

- a constitutional issue;
- an unnecessary Henry VIII clause;
- clauses that are inconsistent with the general criminal law of the State; and
- a clause that allows transfer of State administration, investigation and enforcement powers without recourse to the Parliament.

These are all matters of interest to the Parliament.

8.8 As Appendices 4 and 5 reveal, there are several similar matters extant. For example, clause 58 of the FT Bill appears to raise the same issues as those raised by clause 32, which is discussed in Chapter 5 of this report. In explaining the need for substantiation notices, reversing the onus of proof in requiring an advertiser to prove that something said is true, the Department of Commerce said:

> *It is often very difficult to obtain any evidence in that regard,*[219]

8.9 While the Department was of the view that evidence in a court case that a third party, not party to the action, had been "*affected*" by the action the subject matter of that case was sufficient to constitute a "*testing*" of a third party claim for the purpose of the court exercising power to order third party compensation as part of the proceedings,[220] the Committee is not persuaded that was the case on the information it has received to date.

---

218 Hon Norman Moore MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 20 October 2010, p8000.

219 Department of Commerce Transcript, 1 November 2010, p15.

220 "***The CHAIRMAN****: In relation to the issue of being able to get compensation for third parties, how do you test whether a third party has actually incurred a cost if it is not tested in the court?* ***Mr Newcombe****: That will be tested in the court. The action will be tested in the court and you will need to identify that there are parties who are not party to the actual action in the court but who may well have been affected by it. So it is a matter of evidence in the particular circumstances. We have had some similar provisions in relation to consumer credit, where there are people who have signed contracts but they are not a party to the action but you know they have been a party to the same contract. So let us say there is an error in the calculation of interest that is applied to every single contract that is in place. We might know that the four of you have contracted with a particular bank. You may not be a party to the particular action that is being taken but you would have suffered the same loss.*" (Ibid.)

8.10 A further issue is the extent to which infringement notices may be used in respect of offences designated 'crimes' and carrying the risk of significant penalty. Provisions such as these may change the texture of the general criminal law of the State. The Parliament needs sufficient time to give proper consideration to the arguments for and against such provisions when it is asked to make a law.

8.11 As the evidence of the Department of Commerce shows (in the case of the bills currently under consideration and the trade measurement legislation considered in the Committee's report 55), passage of particular provisions in one piece of legislation leads to those provisions being replicated in other legislation despite the circumstances not being the same.

8.12 The limited time for scrutiny of the FT Bill and Amendment Bill appears to have arisen from a combination of: late presentation of the FT Bill due to a need to redraft to reflect changes made to the Second ALC Act by the Commonwealth Parliament; introduction (in accordance with convention) of the bills in the Legislative Assembly prior to introduction in the Legislative Council; and inflexible deadlines imposed by the Seamless Economy IGA with the sanction of the withholding of substantial reward payments.

8.13 The Standing Committee on Uniform Legislation and General Purposes identified derogation in State Parliament sovereignty in: fiscal imperatives to pass uniform legislation; limited time frames for consideration of uniform legislation; and lack of notice and detailed information as to negotiations inhibiting Members formulating questions and performing their legislative scrutiny role.[221]

8.14 Again in its Report 19, the Standing Committee on Uniform Legislation and General Purposes said:

> *it is important to take into account the role of the Western Australian Parliament in determining the appropriate balance between the advantages to the State in enacting uniform laws, and the degree to which Parliament, as legislature, loses its autonomy through the mechanisms used to achieve uniform laws*.[222]

8.15 In clauses 20 and 21, the FT Bill provides mechanisms directed at preserving Parliamentary scrutiny of future consumer legislation.

---

221 Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 19, *Uniform Legislation and Supporting Documents*, 27 August 2004.

222 Ibid.

8.16 However, at the intergovernmental level, it appears that little heed has been paid to State or Territorial Parliamentary scrutiny of this "*foundation consumer law*".[223]

8.17 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.

Finding 19: The Committee finds that the deadline for implementation of the Australian Consumer Law legislative scheme, imposed by the ACL IGA and Seamless National Economy IGA, results in an unreasonably limited time for Parliamentary scrutiny of this "*foundation consumer law*" that amounts to a serious disregard for the institution of State Parliament.

FT Bill confers defendant rights as well as "*facilitating*" enforcement

8.18 In making the comments above, the Committee has focussed on possible issues arising in the enforcement and remedy provisions of the FT Bill.

8.19 The Committee, therefore, wishes to draw attention to the fact that many of the provisions of the FT Bill confer protection and rights on persons facing prosecution, or defending a pecuniary penalty action, that are not available under current law. For example, the Department of Commerce advised:

> *There is a new right for people where we execute a warrant to seek compensation if we have acted carelessly.*

and:

> *There is a new power to enable the person who is being interviewed to request that it be in private.*[224]

8.20 The FT Bill also contains provisions improving the remedies available to a consumer.

---

223 Hon Norman Moore MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard),* 20 October 2010, p8000.

224 Department of Commerce Transcript, 1 November 2010, p9.

8.21 The Committee wishes to make it plain that its criticism is directed at the limited regard for the institution of Parliament and the way in which particular provisions have implemented the identified policy, not at the overall impact of the FT Bill.

ADVANTAGES AND DISADVANTAGES TO THE STATE IN ENACTING THE FT BILL

Advantages in enacting FT Bill

8.22 The Minister for Commerce identifies the key advantages to the State of participation in the uniform consumer law scheme as being:

- creation and maintenance of a nationally consistent set of generic consumer laws;
- greater clarity and certainty in relation to consumer law, leading to: enhanced consumer confidence; promotion of nationally competitive markets; and enhanced productivity and innovation;
- better access to and use of each jurisdiction's policy and administrative capacity and expertise, with potential to reduce overall government costs; and
- receipt of a "*reward payment*" under the Seamless National Economy IGA.[225]

8.23 The Department of Commerce advised that:

> *The estimation was that there would be a saving of up to $4.5 billion a year from the implementation of the Australian Consumer Law. So that is the major part of what the bill is about.*[226]

8.24 In introducing the First ACL Bill, the Minister for Competition Policy and Consumer Affairs, the Hon. Dr Craig Emerson MP, explained the need for a national consumer law as follows:

> *Australians are facing serious economic challenges. In confronting those challenges, we have to deal with complex, sophisticated markets. Marketing is becoming cleverer. Consumers can now shop online and through their mobile phones. They have access to money through new and sophisticated payment systems. And, the range of goods and services available today is enormous. We need national laws that can keep pace with these changes.*
>
> *This bill will introduce changes that will make life easier for all consumers — through clearer, fairer standard-form contracts and*

225 Letter from Hon Bill Marmion MLA, Minister for Commerce, 6 October 2010, pp2-3.

226 Department of Commerce Transcript, 1 November 2010, p2.

> *more effective enforcement of our consumer laws. A single national law, supported by better policy development and decision-making processes, is the best means of achieving better results for consumers and business. Rather than relying on nine parliaments to make changes, this new framework will ensure responsive consumer laws with a truly national reach.*[227]

Disadvantages in not participating in uniform scheme

8.25 The Department of Commerce identified loss of the 'reward payment' of "*multimillions*" of dollars as a disadvantage that would flow from non-participation.[228] (See also Appendix 1)

8.26 The FT Bill is also seen as necessary to preserve the State's power to make consumer law in respect of corporations.

8.27 The Minister for Commerce expressed a concern that section 140H of the CCA 2010, read together with the definition provisions of the CCA 2010 in respect of "*application law*" and 109 of the *Constitution*, might "*invalidate*" the *Fair Trading Act 1987* and *Door To Door Trading Act 1987* in so far as they apply to corporations. This risk, the Minister advises, arises from section 140H's provision that the CCA 2010 is not intended to exclude the operation of an "*application law*" and the fact that the current State Acts do not meet the definition of "*application law*" in the CCA 2010 (being a law that applies the Australian Consumer Law).[229] The concern is that the current State Acts would be invalidated, as the CCA 2010 is intended to 'cover the field' except for application Acts.

Disadvantages in enacting FT Bill

8.28 The Minister for Commerce identified a disadvantage to participation in the uniform consumer law scheme in the ACL IGA's requirement that amendments to the Commonwealth Schedule 2 to apply in Western Australia, whether or not Western Australia agreed with those amendments.[230]

8.29 However, clauses 20 and 21 in the FT Bill are seen by the Minister as preserving the supremacy of the Western Australian Parliament in determining the laws applying in the State.

---

227 Quoted in Commonwealth of Australia, Senate, Standing Committee on Economics Legislation, *Inquiry into Trade Practices Amendment (Australian Consumer Law) Bill 2009*, 7 September 2009, p9.

228 Department of Commerce Transcript, 1 November 2010.

229 Letter from Hon Bill Marmion MLA, Minister for Commerce, 6 October 2010, p3.

230 p3. (See clauses 3.2 and 15-19 of the ACL IGA)

COMMENTS

Uncertainty as to invalidity of State legislation

8.30 It is not clear to the Committee that section 140H of the CCA 2010 has the effect argued by the Minister for Commerce. Section 131C of the CCA 2010 provides:

> *(1) This Part is not intended to exclude or limit the concurrent operation of any law, whether written or unwritten, of a State or a Territory,*

and it is open to question whether the definition of "*application law*" does, or can, limit the operation of this section.

8.31 In this regard, it is to be recalled that in construing the CCA 2010 a court may, if the circumstances dictate, have regard to the ACL IGA or MCCA Communiqué of the meeting of 4 December 2009.[231]

8.32 This is a complex matter of statutory interpretation and constitutional law that the Committee was not able to explore in the limited time available to it.

8.33 However, the Department of Commerce pointed to the uncertainty as being a disadvantage in itself:

> *Any business that operates in Western Australia and in any other jurisdiction would be subject to significant uncertainly in terms of their legal obligations because they would have to comply with both laws. Although there are savings provisions in the various acts about allowing the operation of consistent state legislation, any inconsistencies would render the state law invalid in relation to corporations. It may or may not eventuate that it is inconsistent, but it would be very fertile ground to challenge every action taken in this state in relation to a corporation if we are still using the Fair Trading Act and everyone else is using Australian Consumer Law.*[232]

Limited ability to amend the Australian Consumer Law (WA)

8.34 The extent to which clause 20 and 21 of the FT Bill will, in fact, preserve the sovereignty of the State in respect of the Australian consumer law will depend, to some extent, on how firm the current intergovernmental agreement is on maintaining consistency.

---

231 *The Queen v Hughes* (2000) 171 ALR 155.

232 Department of Commerce Transcript, 1 November 2010, p19.

8.35 The Standing Committee on Uniform Legislation and General Purposes observed in respect of the *Consumer Credit (Western Australia) Act 1996*:

> *Under the alternative consistent model of uniform legislation, amendments to the WA Code did come before the Western Australian Parliament. However the ability of the State Parliament to amend that legislation was strictly limited to inconsequential amendments in order to avoid the State being in breach of the 1993 Agreement.*[233]

8.36 As the Committee found in Chapter 2, in light of developments after the signing of the ACL IGA, the extent to which absolute uniformity of the Australian consumer law must be maintained is not clear. However, as the Department of Commerce observed, the primary consistency 'control' is section 109 of the *Constitution*:

> *The primary controlling point is that the commonwealth has constitutional authority in some areas, and if the states introduced inconsistent legislation under their application of laws legislation, they might be overridden by the commonwealth law, particularly in relation to the regulation of corporations.*[234]

8.37 This observation is equally applicable to amendment legislation. This is illustrated by the Department of Commerce's response to the Henry VIII clauses in the Australian Consumer Law (WA) relating to identification of "*unsolicited consumer agreement*s" for the purposes of that law. (See Chapter 5)

8.38 The Commonwealth Schedule 2 has significantly broadened the ambit of Commonwealth regulation and, therefore, the circumstances in which section 109 of the *Constitution* will come into play.

8.39 While this is an outcome of the intergovernmental agreement to implement a national uniform law, the fact of the Commonwealth having applied the Australian Consumer Law as a law of the Commonwealth, and the constitutional consequences flowing from that, will not be reversed by failure to pass the FT Bill.

Wider ability to amend 'front end' of FT Bill as it applies to the Australian Consumer Law (WA)

8.40 Clauses 19 and 20 of the FT Bill do, however, provide scope to consider and improve provisions governing the application, and certain aspects of, the administration, investigation and enforcement of the Australian Consumer Law (WA).

---

233 P12.

234 **Department of Commerce Transcript, 1 November 2010**, p5.

8.41 It is in these aspects, and the transitional provisions, that the limited time for the Parliament to consider the FT Bill has most practical impact.

8.42 The Committee has made various recommendations in this report for the improvement of the provisions relating to the application of the Australian Consumer Law (WA). In particular, it draws attention to the constitutional issues raised by clause 20 (see Chapter 4).

Report Recommendation

8.43 The Committee is disappointed that its reporting deadline did not allow it to provide a full and proper consideration of both bills.

8.44 Subject to acceptance of its recommendations, the Committee recommends that the FT Bill be passed.

Recommendation 22: The Committee recommends that, subject to acceptance of its recommendations, the FT Bill be passed.

Hon Adele Farina MLC
Chairman
Date: 23 November 2010

APPENDIX 1

MEMORANDUM - REASONS NOT TO DELAY

APPENDIX 1

MEMORANDUM - REASONS NOT TO DELAY

Reasons not to delay the Fair Trading Bill 2010

and

Acts Amendment (Fair Trading) Bill 2010

1) The Fair Trading Bill 2010 will implement the new, nationally uniform Australian Consumer Law.

2) All Australian jurisdictions have agreed to implement the Australian Consumer Law with effect from 1 January 2011.

3) The Commonwealth version of the Australian Consumer Law is drafted so as to commence on 1 January 2011. There is now no time left to get the Commonwealth Government to amend its legislation, so the Commonwealth's Australian Consumer Law will commence on 1 January 2011, regardless of what happens in Western Australia.

4) Despite some delays in other jurisdictions, all other Australian States and Territories currently intend to commence the Australian Consumer Law on 1 January 2011.

5) The Western Australian Government has moved as quickly as it could to progress this legislation. Western Australia was the third State or Territory to introduce into parliament its legislation to implement the Australian Consumer Law and this is despite the fact that our legislation is necessarily more complicated because it does not simply apply the Australian Consumer Law of the Commonwealth as amended from time to time but rather contains provisions to protect the right of the Western Australian Parliament to accept or reject national amendments and to disallow national regulations.

6) The commencement of the Australian Consumer Law in Western Australia at the same time as in every other jurisdiction has widespread stakeholder support – both from business and consumer groups.

7) The Fair Trading Bill 2010 had the support of the ALP in the Legislative Assembly. All parties in the Legislative Assembly supported the passage of the Bill in time for it to commence in Western Australia on 1 January 2011.

8) Failure to pass this Bill in time for its commencement on 1 January 2011 will mean Western Australia will have different consumer laws to those in every other Australian State and Territory and at the Commonwealth level. This will mean that consumers in Western Australia will be denied the benefits that the Australian Consumer Law will bring. There are also benefits for business in the Bill, in addition to the benefit of uniform laws, and business in Western Australia will be denied these benefits (see **Attachment A for summary of new provisions**).

9) Failure to pass this Bill in time for commencement on 1 January 2011 will also mean that in the case of any inconsistency between the existing Western Australian Acts – the Consumer Affairs Act 1971, the Door to Door Trading Act 1987 and the Fair Trading Act 1987 – and the Commonwealth's version of the Australian Consumer Law, then the Commonwealth law will prevail in relation to the actions of corporations.

10) The Commonwealth can rely on its corporations power under the constitution to give it legislative supremacy in relation to corporations. This will have two consequences:

- In some cases there will be a clear inconsistency and the State's laws will not apply to the actions of companies and the State's Commissioner for Consumer Protection will not be able to act on behalf of consumers. Two obvious areas where this will apply are product safety and door to door trading. Failure to pass the Fair Trading Bill 2010 will mean that the State's product safety laws will be unenforceable except against individuals. As almost all business is conducted by companies, this will mean that the State's consumers and businesses will be entirely dependent on the Commonwealth and the ACCC to take action to enforce product safety laws. Similarly, any door to door trading undertaken by a company will be outside the jurisdiction of the Commissioner for Consumer Protection. Consumers will be exposed to being ripped off and good businesses will be subject to competition from unscrupulous businesses.

- The second, and perhaps even worse, consequence will be that even where there is no clear inconsistency between the State's laws and the Commonwealth's Australian Consumer Law, every action by the Commissioner for Consumer Protection in relation to the actions of a company in Western Australia will be subject to legal challenge. There will be enormous uncertainty and great disincentives for the Commissioner to take any action at all.

11) Failure to pass this Bill in time for commencement on 1 January 2011 will not just create uncertainty for consumers and the Commissioner for Consumer Protection, it will create great uncertainty and additional costs for businesses operating in this State. Any individual who operates a business in Western Australia and any other State or Territory will need to comply with different sets of laws. Any company operating a business in Western Australia will be uncertain as to whether the Commonwealth's Australian Consumer Law alone applies to their behaviour or whether they will have to comply with both the Commonwealth's Australian Consumer Law and the State's consumer laws.

12) The whole purpose of the implementation of the Australian Consumer Law is to achieve uniformity in the basic consumer laws operating throughout Australia. The Productivity Commission has estimated the savings of such a move to the Australian economy to be in the order of $4.5 billion per annum. This purpose will be defeated if the Fair Trading Bill 2010 is not passed in time to commence on 1 January 2011.

13) The implementation of the Australian Consumer Law was endorsed by the previous Carpenter Government, as well as the current Barnett Government. Failure to commence the State's version of the Australian Consumer Law on 1 January 2011 will be a breach of the relevant Council of Australian Government Intergovernmental Agreement and will virtually guarantee that the State will be subject to a financial penalty and not receive all the $55million in national partnership payments that it is due for implementing COAG's seamless national economy reforms.

14) Just as the Fair Trading Bill 2010 needs to be in place by 1 January 2011, so does the Acts Amendment (Fair Trading) Bill 2010. Part 8 of that Bill makes a number of essential consequential amendments to Acts that would be affected by the Fair Trading Bill. A series of these amendments relate to the definition of "Commissioner" in a number of Acts. If the Acts Amendment (Fair Trading) Bill 2010 is not passed at the same time as the Fair Trading Bill 2010 then these other Acts will be left with meaningless definitions of "Commissioner" and, consequently be incapable of administration.

An option to consider if there is strong support for the Committee's position

The Uniform Legislation and Statutes Review Committee has an important role to fulfil. It has, however, had the full 30 days to consider these Bills provided for in the Standing Orders. The Committee has received full co-operation and extensive evidence from the Department of Commerce on the Bills. The Bills have the strong support of stakeholders.

If the Committee can identify key concerns with the Fair Trading Bill 2010 within its normal reporting time, the Government will undertake to examine those concerns and report back to the Committee when Parliament resumes in 2011.

If that report does not satisfy the Committee, the Government would support a referral of the Fair Trading Act 2010 back to the Committee for more detailed consideration and report during 2011.

This approach would enable the State's version of the Australian Consumer Law to commence in Western Australia on 1 January 2011, along with every other Australian jurisdiction.

This would avoid all the uncertainties that failure to pass these Bills will bring to consumers, businesses and the regulator in Western Australia but it would enable further, measured reflection on the legislative framework and content of the Australian Consumer Law in Western Australia and the consideration of amendments if required in 2011.

ATTACHMENT A

Fair Trading Bill 2010

Significant new provisions in the Bill giving benefits to consumers

Codes of Practice

- Codes of practice will be made more effective and easier to enforce – addressing some significant issues that have arisen in enforcing the Retirement Villages Code of Practice.

Requirement that key documents be "transparent"

- When a document is required by the ACL to be "transparent" it must be expressed in reasonably clear language, be legible and be presented clearly. See for example – unsolicited consumer agreements, lay by agreements, receipts and itemised bills.

Unfair contract terms

- There are completely new provisions making unfair terms in standard form contracts void.

Offering rebates, gifts, prizes etc

- Any rebate, gift, prize or other free item must be provided to a consumer within a reasonable time after being offered.

Wrongly accepting payment

- A trader will not be able to accept payment if there are reasonable grounds for believing the goods or services can't be provided within the agreed time or a reasonable time if none agreed and a trader who accepts payment must supply the goods or services within the agreed time or a reasonable time if none agreed.

Payment for unsolicited services

- Consumers will not be liable to pay for unsolicited services and no liability for any loss or damage resulting from the supply of unsolicited services.

Multiple pricing

- If goods have more than one displayed price, the trader must either sell to a consumer at the lowest price or withdraw the goods from sale.

Single pricing

- A trader must not supply goods or services to a consumer or advertise them, with only part of the cost unless they also include a statement of the full price for the goods or services. Eg, the price must include known taxes and charges – also includes delivery if trader knows there is a minimum delivery charge that must be paid.

Consumer guarantees

- There is a new statutory guarantee that the manufacturer of goods will take reasonable steps to ensure that repair facilities and spare parts are reasonably available for a reasonable period after supply of the goods.
- There is a new statutory guarantee that any express warranty voluntarily provided by the trader will be complied with.
- New guarantee that where consumer makes known what results they expect from particular services, then the services and any product resulting from the services will be of such nature and quality that they might reasonably be expected to achieve that result.
- New guarantee that services will be provided within the agreed time or a reasonable time if none agreed.

Unsolicited consumer agreements

- The cooling off period of 10 days for door to door transactions will be extended to 10 business days (currently includes non-business days) and will extend to sales resulting from unsolicited telephone calls.

Lay by agreements

- There are completely new provisions regulating lay bys.
- All lay by agreements must be in writing and be provided to the consumer and must be "transparent".
- Consumers will have a statutory right to terminate a lay by agreement before goods are delivered and there is to be no termination charge unless the agreement is terminated by the consumer and there has been no breach by the trader.
- If a lay by agreement is terminated then the trader will have to refund payments to the consumer, less any allowable termination charge.

Receipts

- For the first time, traders will be required to provide consumers with a receipt for transactions for goods or services over $75. A consumer will be able to request a receipt for transactions less than $75 and trader must provide as soon as practicable. A GST receipt will be a sufficient receipt.

Itemised bills

- Consumers will be able to request an itemised bill for services provided. The bill must show how the price was calculated, the number of hours of labour involved and list of all materials used and the charges for them.

Significant new provisions in the Bill giving benefits to Western Australian businesses

Commissioner empowered to take representative action on behalf of businesses

- For the first time, the Commissioner for Consumer Protection will be able to institute or defend legal proceedings on behalf of a business where they have been adversely affected by a breach of consumer laws by another business and a matter of public interest is involved.

Businesses will be "consumers" in certain cases and have access to the protections of the Australian Consumer Law

- A business will be a "consumer" for the purposes of the Australian Consumer Law if they purchase goods or services for $40,000 or less; or purchase goods or services of a kind ordinarily acquired for personal, domestic or household consumption; or when they purchase a vehicle or trailer (regardless of cost) acquired principally for use in transporting goods on public roads.

Unconscionable conduct in a business transaction subject to pecuniary penalties

- A business or the Commissioner for Consumer Protection, will be able to institute proceedings for a civil pecuniary penalty (effectively a fine) in relation to unconscionable conduct by another business in a business to business transaction.

APPENDIX 2

BACKGROUND TO THE UNIFORM CONSUMER LAW

APPENDIX 2

BACKGROUND TO THE UNIFORM CONSUMER LAW

Introduction

8.45 The emergence of the TPA and Fair Trading Acts legislative scheme has been dealt with above. This part looks at the more recent background to the uniform consumer law scheme.

COAG, MCCA, Productivity Commission and other Reviews of Consumer Protection Regulation

Uniform protection of consumer rights part of National Competition Policy reforms

8.46 In 1994, COAG agreed to:

> *a national competition policy legislative package providing for uniform protection of consumer and business rights and increased competition in all jurisdictions.*

8.47 In 2004 and 2005 there were a number of reviews of the National Competition Policy, which highlighted continuing concerns with the framework for regulation of consumer protection. The Productivity Commission's review identified:

> *improving the effectiveness and efficiency of consumer protection policies,*

as an area for priority action.

8.48 In May 2006, the MCCA set up a working group to look at Australia's consumer protection framework and administration. It also agreed to consider uniform application of Victoria's 'unfair contract' provisions.

8.49 National regulation of product safety was contemporaneously on the reform agenda of MCCA, which released a discussion paper in 2004. The Productivity Commission was instructed to undertake a review of the consumer product safety system in 2005. It released its report in January 2006. That report recommended a national approach and a single, Commonwealth regulator.

8.50 The MCCA largely agreed with the recommendations of the Productivity Commission and in May 2006 commenced work on a 'harmonised' product safety law.

8.51 In July 2006, COAG agreed product safety as a priority area for reform under its proposed new national reform agenda. The MCCA then agreed 'in principle' uniformity in regulation of product safety and for model legislation to be developed

for introduction in 2007.[235] It seems that was not achieved. When COAG agreed its new National Reform Agenda in April 2007, a national product safety scheme was to be introduced within 12 months.[236]

8.52 In December 2006, the Commonwealth instructed the Productivity Commission to conduct a review of Australia's consumer policy framework.[237] The Productivity Commission's report is dated April 2008.

8.53 The Productivity Commission concluded that Australia's policy framework had "*considerable strengths*" but that there were differences in interpretation and enforcement and that there were gaps in regulation. It recommended:

- a single, generic national law that drew on the TPA provisions and incorporated 'best practice' from State regulation;
- the generic law include provisions in respect of: unfair contract; clarification of statutory warranties; standardisation of redress option and ability for the regulator to take redress actions; provision for civil pecuniary penalties; consistent enforcement; and greater clarity in disclosure documents; and
- stream-lining of industry specific legislation.[238]

8.54 The Productivity Commission favoured transfer of responsibility for administration and enforcement of the generic national law to the Commonwealth but, noting State and Territory opposition, recommended dual responsibility with an option for the States to refer powers to the Commonwealth.[239]

8.55 This 2008 report dealt with product safety within the ambit of the recommended generic national consumer protection legislation.

8.56 The Productivity Commission made a number of specific recommendations for the content of legislation, which have largely been implemented in the Australian consumer law.

Intergovernmental agreements as to uniform consumer law, including product safety

8.57 At the MCCA meeting of May 2008 the product safety framework recommended by the Productivity Commission in 2005 was agreed, being:

---

235 MCCA Communiqué in respect of meeting 15 September 2006, p2.

236 Productivity Commission of Australia, Inquiry Report 45, *Review of Australia's Consumer Policy Framework*, 30 April 2008, Vol 1.

237 Ibid.

238 Productivity Commission of Australia, Inquiry Report 45, *Review of Australia's Consumer Policy Framework*, 30 April 2008, Vol 1,p2.

239 Ibid, p58.

- the Commonwealth would assume responsibility for permanent product bans;
- the States retain the right to issue interim bans; and
- the ACCC and State and Territory fair trading offices share enforcement and administration.

8.58 The implementation date for a uniform law was extended to mid-2010.

8.59 At that meeting there was 'high-level' commitment to reach 'in principle' agreement to overcome gaps and inconsistencies in consumer protection laws but no intergovernmental agreement to implement a uniform consumer protection law outside product safety.

8.60 By August 2008 a broader intergovernmental agreement appears to have evolved. MCCA proposed a national consumer law, which:

> *should be developed by the agreement of all Australian governments and made law through an application legislation scheme, with the Commonwealth as the lead legislator and the States and Territories applying the new national consumer law (as amended from time to time) as part of their own laws.*

8.61 MCCA made specific recommendations for 'features' of 'unfair contract' provisions in the new law and shared enforcement provisions but observed that development of generic implied warranties and conditions provisions required review and amendments to create greater consistency in court and tribunal processes were still under consideration.

8.62 While holding to the new deadline of 2010 for product safety legislation, MCCA proposed a deadline of the end of 2011 for the national consumer law.

8.63 COAG subsequently agreed to a national law for consumer protection, incorporating (amongst other things) 'best practice' from State legislation, at its meeting in October 2008.

8.64 By May 2009, MCCA was speaking of deadlines of:

- mid 2010 for the commencement of the 'unfair contract' provisions; and
- early 2010 for introduction of product safety and other consumer protection provisions.

8.65 When the ACL IGA was agreed in July 2009, stipulating a deadline of 31 December 2010 for commencement of the uniform legislative scheme, the final text of the Australian Consumer Law had not been agreed.

8.66 Nor, it appears from the subsequent legislation, was there true consensus on application of the Commonwealth version of the Australian consumer law "*as amended from time to time*".

APPENDIX 3

IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

APPENDIX 3

IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

The former Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements identified and classified nine legislative structures relevant to the issue of uniformity in legislation which were endorsed by the 1996 Position Paper. A brief description of each is provided below.

Structure 1: *Complementary Commonwealth-State or Co-operative Legislation*. The Commonwealth passes legislation, and each State or Territory passes legislation which interlocks with it and which is restricted in its operation to matters not falling within the Commonwealth's constitutional powers.

Structure 2: *Complementary* or *Mirror Legislation*. For matters which involve dual, overlapping, or uncertain division of constitutional powers, essentially identical legislation is passed in each jurisdiction.

Structure 3: *Template, Co-operative, Applied* or *Adopted Complementary Legislation*. Here a jurisdiction enacts the main piece of legislation, with the other jurisdictions passing Acts which do not replicate, but merely adopt that Act and subsequent amendments as their own.

Structure 4: *Referral of Power*. The Commonwealth enacts national legislation following a referral of relevant State power to it under section 51 (xxxvii) of the Australian Constitution.

Structure 5: *Alternative Consistent Legislation*. Host legislation in one jurisdiction is utilised by other jurisdictions which pass legislation stating that certain matters will be lawful in their own jurisdictions if they would be lawful in the host jurisdiction. The non-host jurisdictions cleanse their own statute books of provisions inconsistent with the pertinent host legislation.

Structure 6: *Mutual Recognition*. Recognises the rules and regulation of other jurisdictions. Mutual recognition of regulations enables goods or services to be traded across jurisdictions. For example, if goods or services to be traded comply with the legislation in their jurisdiction of origin they need not comply with inconsistent requirements otherwise operable in a second jurisdiction, into which they are imported or sold.

Structure 7: *Unilateralism*. Each jurisdiction goes its own way. In effect, this is the antithesis of uniformity.

Structure 8: *Non-Binding National Standards Model*. Each jurisdiction passes its own legislation but a national authority is appointed to make decisions under that legislation. Such decisions are, however, variable by the respective State or Territory Ministers.

Structure 9: *Adoptive Recognition*. A jurisdiction may choose to recognise the decision making process of another jurisdiction as meeting the requirements of its own legislation regardless of whether this recognition is mutual.

APPENDIX 4

CHAPTER 6 - EXCERPTS FROM TRANSCRIPT 1 NOVEMBER 2010

APPENDIX 4

CHAPTER 6 - EXCERPTS FROM TRANSCRIPT 1 NOVEMBER 2010

***Mr Newcombe**: First, there is a new definition of what is called a transparent document. In relation to a number of documents in the Australian Consumer Law, the provisions will say that the document must be transparent. Where it says it is transparent, that document must be legible, it has to be expressed in clear language and it has to be presented clearly. It is an attempt to try to deal with the nature of the document itself so it is more easily understood. Not every document meets that test but some, such as any unsolicited consumer agreements, such as door-to-door trading agreements, lay-by agreements, receipts, itemised bills and so on are in that category. That is a new step to say you have to give documents that people can understand.*

Prepayment

***Mr Newcombe**: The new provisions will be that you cannot accept payment if you have reasonable grounds for believing that you cannot provide them within either an agreed time or a reasonable time, and that if you accept payment you must provide the goods and services either within the agreed time, or a reasonable time if none is agreed to. So this is an attempt to try to tighten up on the prepayment arrangements.*

Dual or multiple pricing

***Mr Newcombe**: There is provision in relation to dual pricing or multiple pricing of goods for sale. You have probably experienced this, this is the classic post-sale, for example at David Jones — the product has got three or four different price stickers on it. The seller will be obliged to do one of two things: sell it at the lowest price or withdraw it from sale. But they will have to make that choice. The reason that they are not forced to sell it to you, as probably all of you would be aware, is that you actually make the offer to purchase; by having it on display, they are not offering to sell it. They will have the right not to sell the product to you, which will obviously impact on the effect of this provision, and that is acknowledged, but at least it clarifies what the position is in relation to multiple pricing. It is a very clear option.*

No component pricing

***Mr Newcombe**: There is also a provision in here that will apply to state legislation, which has been in place under the Trade Practices Act, which is single pricing, not component pricing. The classic examples are travel plus tax— the airport taxes. So, you know, it is going to cost you $90 and by the way, in the small print, there are $3 200 in taxes. Also the other classic is motor vehicle purchases where it is the drive-away price — delivery and so on. The requirement will be that you must have one single statement of what the full price is — you can have the other statements as well, but you must have one single statement where there are components involved in the prices. And it must be at least as large as the other price that is being promoted.*

Consumer guarantees

***Mr Newcombe**: Consumer guarantees: this is replacing what is currently called "implied conditions and statutory warranties", and even for people who spend a lot of time on it, it is a pretty arcane area of the law. As part of the development of the Australian Consumer Law, the commonwealth's Consumer Advisory Council was asked to do a full review of this area and a little surprisingly, the figures showed that very few consumers understood what their rights were in terms of the warranty. More particularly surprising was that, from memory, fewer than 30 per cent of traders could actually articulate what their obligations were. One of the reasons for this is that the law is complex; the terminology is very complex — lots of implied conditions, what is a statutory warranty and all the rest of it. New Zealand has had a Consumer Guarantees Act in place for a number of years and it is the best known piece of consumer legislation in New Zealand. It has very high recognition; it is enforced, promoted and so on. So, the New Zealand model has been looked at. Whilst the funding law has not, in all circumstances, been overturned — lots of it is the same — the language is different, and we are now talking about consumer guarantees. It is hoped that that will resonate with people a bit more — they will understand what a guarantee is, and that it is something that we use in ordinary speak. And in addition there are a number of enhancements to the guarantees that are provided. Just running through these briefly: there is a new guarantee that manufacturers of goods will take reasonable steps to provide facilities for repair and spare parts in Australia for those goods. So, they have to take reasonable steps for those. If a provider gives you an express warranty — you will often see this — you will get a little warranty*

card or something else that someone has given you, and there will also actually be a statutory guarantee that they will actually comply with what they told you. So, their volunteering will actually become part of the law, binding them to comply. If consumers say what they want particular services to do, and a number of areas of the Australian Consumer Law are expanding into services and treatment equivalent to goods, then there is a guarantee that the services will basically deliver what the consumer made the provider know they wanted them to do. That is quite important; that is really outside the scope of guarantees at the moment. There is also a guarantee that services will be provided within an agreed time or a reasonable time. Again, that is the classic, if you are waiting for a tradie who is never turning up to do the repairs. They are the fundamental changes to the guarantees. The coverage is similar and there has been an attempt to make the language a little easier for people to understand. There will be a heavy focus from all of the consumer agencies in promoting that. That is one of the key areas of promotion on the education side.

Lay-bys

***Mr Newcombe**: Lay-bys, which I think a lot of people feel were dead and buried a few years ago, have made a bit of resurgence. They largely did so at the time when credit became expensive and difficult to get, so a number of the major retailers certainly provide lay-by at the moment and a number of regional stores will do that as well. There has never been any regulation in Western Australia of a lay-by agreement, what is involved, what are the obligations, what happens if you cancel it and what sort of costs can be charged to you if you cancel your agreement. There are a number of provisions here; one is that the agreement has got to be in writing and it has got to be given to the consumer, so it is setting out what the arrangement is. There is a guaranteed right to terminate the agreement, so the consumer can terminate the agreement up to the date they receive the goods and there are some controls over what charges can be imposed for termination. They have to be in the agreement firstly; the charges have to be set out, what they are; and you cannot impose a charge if the trader has breached the agreement. If the trader has breached the agreement and caused it to fall over, it does not matter if there is a termination charge. There are constraints on when the trader can terminate the agreement. They can do it if the consumer breaches the agreement, if they are going out of business or have gone out of business themselves, or if the goods cannot be obtained from a third party when they used to be — they will be able to terminate the agreement. On termination you have to refund any payments that*

have been made by the consumer, less any approved termination charge, so it sort of sets out a new regime for lay-bys.

Product safety

***Mr Newcombe**: Product safety I have gone through, and there are all those changes. But the one thing that I would indicate, which is particularly new here, is that the provisions regulate services that are related to a product. At the moment the focus is entirely on the product. So we will look at a couple of things — let us say, pool skimmer boxes, which have been the source of major problems. There are standards about skimmer boxes; for new pools they should all meet standards and be safe. But what can happen is that they are replaced or older ones installed or whatever, and it is the installation that actually causes the future injury.*

We have also seen, obviously, the home insulation installation issue, which as well was a major issue. This now enables the creation of standards to regulate the way in which products are installed to make sure that is done safely and to enable the regulation of the people who do install goods, to make sure that that is done in a safe way.

APPENDIX 5

CHAPTER 7 - EXCERPTS FROM TRANSCRIPT 1 NOVEMBER 2010

APPENDIX 5

CHAPTER 7 - EXCERPTS FROM TRANSCRIPT 1 NOVEMBER 2010

***Mr Newcombe**: That is the major change, but I will run through a series of changes and probably pre-empt some of your other questions as well. When I talk about the bill, I talk about the front end and the back end. The front end is the bits that relate to WA as a state. They are the bits that relate to the Commissioner for Consumer Protection; the back end is the Australian Consumer Law — just the standard bit. If I lapse into that language, I just want you to know what I am talking about.*

Commissioner for Consumer Protection - power to implement or defend proceedings on behalf of business

***Mr Newcombe**: In relation to the Commissioner for Consumer Protection, there are some changes. We have a new power to implement or defend legal proceedings on behalf of business. We do not do that at the moment. We do not generally take complaints from business, but the concern was that, particularly for small businesses, there are many circumstances where small business suffers exactly the same problem as a consumer does and are in no better position to actually exercise their rights. Indeed, matters that affect small businesses may be a great canary for things that are affecting consumers. We are all affected by the same thing. And the government is also looking at some other initiatives in relation to small business, such as the small business commissioner and so on. So, it has been agreed that we would incorporate this capacity for the commissioner where a public interest test was satisfied. Where it was seen to be in the public interest to institute or defend proceedings on behalf of small business, the commissioner would have that capacity.*

Power to disclose information to officers enforcing another act

***Mr Newcombe**: There is a power to disclose information that we receive under one act to officers involved in another act. So this deals partly with the issue I raised with licensing acts that we might learn information under one act we administer and it is directly relevant to another but we may be prohibited from disclosing it even to our own officers. That will be removed. And the Acts Amendment (Fair Trading) Bill obviously gives the commissioner licensing*

authority, so the commissioner gets new functions in relation to licensing occupations and taking over all of those sorts of things.

Codes of practice

***Mr Newcombe**: There are codes of practice which already exist under the fair trading legislation and which will be preserved under the Fair Trading Bill. These will be state specific, so just introduced at the state level. We currently have two in place: one is for the fitness industry and one is for retirement villages. They operate without being inconsistent with the Trade Practices Act, and going forward we believe they can operate and, indeed, they are drafted so as not to be inconsistent. They are seen as light-touch regulation of particular industries. If you need to ramp up then you obviously have to have amendments, but they deal with the day-to-day transactions involved in the affected industries. We are keeping that power. A number of other states are doing the same. But we are improving the way in which they can be enforced. A major problem which has come up — you may well be aware retirement villages has been an issue of some concern and the capacity to enforce the retirement villages code of conduct has been an issue. Under the legislation as it stands at the moment, if a person breaches the code of practice, the first step we have to take is we have to go to SAT to get a deed of undertaking that they will not do it again. And, then, if they do it again, then we can go back to SAT and get either a penalty or binding orders that they will not breach the code.*

***Mr Newcombe**: It seems rather silly, and it is a rather complicated process. That interim step has been removed and any breach of the code will empower the commissioner to take action to go to SAT immediately to have the code enforced without the need to get a deed of undertaking. Otherwise the existing codes will carry over, although, ultimately, the retirement villages code will move under retirement villages legislation.*

Appointment of non-Departmental investigators

***Mr Newcombe**: There are quite a few changes relating to investigation and enforcement, which I will touch on briefly. At the moment appointment of investigators is a very simple process. The commissioner delegates somebody. That is all there is. Nothing articulates the whole process of appointment. The bill sets out a much more formal, modern and appropriate process for appointing investigators. One of the problems in appointing investigators at the moment is we can only have as investigators people who are*

permanent employees of the department. As you would appreciate, the two areas that are becoming more and more involved in consumer protection inquiries are matters relating to IT — computer systems, networks and all the rest—and quite complex accounting issues. We do not employ forensic accountants. We do not employ IT investigators. It would be very inefficient for us to do so. It is very expensive. We only use them from time to time. At the moment if we want an IT person, we have to ask one of our IT corporate services people if they would be prepared to come along. Naturally, they are pretty reluctant to do that because all of a sudden they are involved in an investigation, they have to be a witness and they have no training in that area. One of the things we are changing is the capacity for the director general of the department to engage a person to assist in investigations. We see that as extending to those two areas in particular — forensic accountants and specialist IT investigators. We have had a case just recently involving Mr Tomarchio from Laverton/Warburton, who was a money lender to Aboriginal communities. Both those issues were fundamental to the assessment of his IT records and also assessment of his accounts. We see that as a significant improvement for us. There is still the accountability because they must be engaged by the director general but they can assist us with investigations.

There is also a capacity to engage someone as an assistant to an investigator. There are two areas in which we see this being used. The first is with translators when we are dealing with people for whom English is a second language. At the moment we cannot do that unless they are a formal investigator who has second language skills. Technically, we do not have the capacity to involve an interpreter unless it is by consent. The second area is in some IT areas where we want access to a hard disk or want to copy a hard disk or something else. Both of those areas are fundamentally important to our capacity to respond to current issues in the marketplace.

Interview in private

***Mr Newcombe**: We can interview people. There is a new power to enable the person who is being interviewed to request that it be in private. That does not exist at the moment. Also, we can recommend it be in private. We might be interviewing a person in a workplace. They will have the right to say, "I want this in private", which seems to be entirely appropriate but it is not a right that they currently have.*

Warrants

***Mr Newcombe**: In relation to warrants, which we do use from time to time, you will find pretty much all the provisions of warrants in one section of our Consumer Affairs Act. It is very light on, it does not really explain what is involved in the whole warrant process and it reflects the fact that that act is from 1971. We have a whole set of provisions about warrants. They do not expand our capacity to obtain warrants in a formal legal sense. They do deal with things such as being able to obtain them by email or radio. If we are out bush, we can use some other means than fronting up to a magistrate to obtain a warrant, and that is consistent with a number of other provisions in different legislation. We have the capacity to require people who have knowledge of the computer system to assist us. If we go in and a computer is password protected, we have the capacity to require that person to assist us to access the data otherwise we cannot access it.*

There is a new right for people where we execute a warrant to seek compensation if we have acted carelessly. One classic example is if we have accessed data on someone's network, we have not exercised due care and we have wrecked their data, they have a statutory right for compensation. They might have a common-law right to do that but obviously the statute creates far greater certainty for them in seeking compensation. Also, for the first time we have covered what we do when we seize goods under warranty. At the moment that is all up in the air. What happens if people want to access those things when we seize them? What happens if nobody claims them? None of that is covered in the current legislation. That is all dealt with in the legislation.

Entry onto premises

***Mr Newcombe**: There is one other provision I should touch on, which is in the Acts Amendment (Fair Trading) Bill. This relates to the capacity to enter licensed premises without a warrant during ordinary business hours. We have this power at the moment in the finance brokers legislation. You can probably imagine why it was included in that legislation. At the moment the boards that run licensing have programs called proactive compliance where they seek to go out to licensed premises to see that the person is complying with the conditions of their licence and the obligations of the code. It is largely an educative function. It is not a process for looking for breaches but it is used in a way to assist and educate people in compliance. However, in the real estate and settlement industries, that right of entry is purely by consent of the person. As you can*

imagine, if you say to somebody, "We would just like to come out and have a look at your trust accounts to see that things are all going okay" and they say no, we cannot go in without a warrant and we may not have enough evidence to go in without a warrant but immediately our antennae are going to go up, particularly if a person says, "It's not convenient today, it's not convenient next week. Can you come back in a few weeks' time?" Carolyn, who in a previous life was working with the real estate board, has some experience in many cases in which that refusal reflected a future problem which has eventuated. This power extends the power that already exists in relation to finance brokers to each of the licensed area s— motor vehicles, real estate settlement and land valuers. It is a right to enter only during ordinary business hours and only for the purposes of determining whether they are applying with the conditions of their licence or a code. We see that as fundamental to underwriting an effective, proactive compliance or regime which is intended to avoid problems getting out of hand, particularly in the real estate settlement areas where large amounts of trust funds can be held.

Penalties

***Mr Newcombe**: There is a significant increase in maximum penalties to bring them in line from a state level to the Trade Practices Act, so at the furthest, the maximum penalty is $1.1 million for a body corporate and $220 000 for an individual. That is the maximum end. There is a categorisation of offences. We largely take matters to summary jurisdiction, so we do not get into that field, but they are available.*

Substantiation notices

***Mr Newcombe**: There are new enforcement powers in the Australian Consumer Law as well. We have a number of them, but there are a couple of new ones. One is a substantiation notice. When an advertiser says something about their product, at the moment we have to prove that is false or misleading if we believe so. It is often very difficult to obtain any evidence in that regard. Substantiation notices, which are in place in New South Wales, enable the regulator to say, "You have advertised this. You tell us; you substantiate. What is the basis of your claims?" You are entitled to refuse to provide that if it would incriminate you, but you cannot provide a false statement, and you must respond to the substantiation notice.*

Pecuniary penalties

***Mr Newcombe**: Very briefly — I am at the end of this, you will be happy to know — there is a whole new range of pecuniary penalties, so basically fines, again which go up to that maximum limit of $1.1 million, and they apply across the board, and they are seen as the most likely route. Those penalties can be used not just as a payment to the state, but to compensate persons affected. The Australian Consumer Law says that in judging the award the court must give priority to compensating people. If there is a choice about how much money is there — is there enough money to pay the state or compensate people, and there is not — they have got to give priority to compensation for individuals. And there is also a new provision that enables us to seek compensation for people who are not parties to the actual contract but who are affected by it. They might be party to the contract but they are not party to the action that is involved. So where you have a large group of people who are affected by the same particular contract but they are not identified or not a party to the action, compensation can be awarded and can either go to those people or go to a general form of account.*

Disqualification from managing a corporation

***Mr Newcombe**: The last one is that we can seek an order to disqualify a person from managing a corporation. Many of those orders for Western Australia we could probably get under the inherent jurisdiction of the court at the moment. There is a whole range of things the Supreme Court could obviously order. But the Australian Consumer Law articulates these, sets them out more clearly and sets a whole lot of rules around them, and so those enforcement powers, we believe, will be a significant improvement to the process.*

Compensation for third parties

***The CHAIRMAN**: In relation to the issue of being able to get compensation for third parties, how do you test whether a third party has actually incurred a cost if it is not tested in the court?*

***Mr Newcombe**: That will be tested in the court. The action will be tested in the court and you will need to identify that there are parties who are not party to the actual action in the court but who may well have been affected by it. So it is a matter of evidence in the particular circumstances. We have had some similar provisions in relation to consumer credit, where there are people who have signed contracts but they are not a party to the action but you know they have been a party to the same contract. So let us say there is an error in the*

calculation of interest that is applied to every single contract that is in place. We might know that the four of you have contracted with a particular bank. You may not be a party to the particular action that is being taken but you would have suffered the same loss.