



THIRTY-NINTH PARLIAMENT

REPORT 80

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

FAIR TRADING AMENDMENT BILL 2013

Presented by Hon Kate Doust MLC (Chair)

August 2013

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

Date first appointed:

17 August 2005

Terms of Reference:

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

“5. Uniform Legislation and Statutes Review Committee

- 5.1 *A Uniform Legislation and Statutes Review Committee is established.*
- 5.2 The Committee consists of 4 Members.
- 5.3 The functions of the Committee are –
- (a) to consider and report on Bills referred under Standing Order 126;
 - (b) on reference from the Council, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to Standing Order 126;
 - (c) to examine the provisions of any treaty that the Commonwealth has entered into or presented to the Commonwealth Parliament, and determine whether the treaty may impact upon the sovereignty and law-making powers of the Parliament of Western Australia;
 - (d) to review the form and content of the statute book; and
 - (e) to consider and report on any matter referred by the Council.
- 5.4 In relation to function 5.3(a) and (b), the Committee is to confine any inquiry and report to an investigation as to whether a Bill or proposal may impact upon the sovereignty and law-making powers of the Parliament of Western Australia.”

Members as at the time of this inquiry:

Hon Kate Doust MLC (Chair)

Hon Brian Ellis MLC (Deputy Chair)

Hon Mark Lewis MLC

Hon Amber-Jade Sanderson MLC

Linda Murdoch (Advisory Officer)

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EXECUTIVE SUMMARY AND RECOMMENDATIONS

OF THE

REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES
REVIEW

IN RELATION TO THE

FAIR TRADING AMENDMENT BILL 2013

EXECUTIVE SUMMARY

The *Fair Trading Act 2010* (WA) is the Principal Act and forms part of the Australian Consumer Law (**ACL**). The ACL is a uniform scheme, which is set out in an Intergovernmental Agreement (**IGA**) between the Commonwealth and the States and Territories in relation to “*a new national consumer policy framework to enhance consumer protection, reduce regulatory complexity for business and encourage the development of a seamless national economy.*” The IGA was signed by all States and Territories on 2 July 2009.

The Commonwealth ACL has been amended since 2011.

The Fair Trading Amendment Bill 2013 (**Bill**) incorporates Commonwealth amendments from 2011 to 2013 to realign the Australian Consumer Law (WA) with the ACL in force in all other jurisdictions and make other amendments to the *Fair Trading Act 2010* (**Act**) to improve the administration of the Act and correct a number of anomalies and drafting errors.

The Committee has inquired into the Bill and considered issues of Parliamentary sovereignty and law-making power.

RECOMMENDATION

The Committee’s recommendation appears at page fourteen:

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Recommendation 1: The Committee recommends that the Bill be passed without amendment.

**REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES
REVIEW**

IN RELATION TO THE

FAIR TRADING AMENDMENT BILL 2013

1 REFERENCE AND PROCEDURE

The Committee and its scope of inquiry

- 1.1 The Committee’s task in relation to its function under 5.4 of Schedule 1 of the Western Australia Legislative Council Standing Orders is, “*to confine any inquiry and report to an investigation as to whether a Bill or proposal may impact upon the sovereignty and law-making powers of the Parliament of Western Australia.*”

2 REFERENCE AND SCRUTINY

- 2.1 On 15 May 2013, the Fair Trading Amendment Bill 2013 (**Bill**) was referred by the Hon Michael Mischin MLC, Minister for Commerce under section 126 of the Legislative Council Standing Orders to the Standing Committee on Uniform Legislation and Statutes Review (**Committee**).¹
- 2.2 The Bill amends sections of the *Fair Trading Act 2010* (WA) (**Principal Act**) in accordance with changes to the Commonwealth Australian Consumer Law (**ACL**). These amendments are incorporated into state based legislation as Australian Consumer Law (WA).
- 2.3 Standing Order 126 (7) requires the Committee to report within 45 days of referral. Due to the recess of Parliament, the reporting date for the Bill is, in effect, the first sitting day after the winter recess, being 6 August 2013.
- 2.4 The inquiry was advertised in *The West Australian* on Saturday 25 May 2013 and on the Western Australian Parliamentary website. One submission was received by the closing date of 10 June 2013. Stakeholder details are listed at **Appendix 1**.
- 2.5 In a letter received by the Committee on 16 May 2013, the Hon Michael Mischin MLC, Minister for Commerce provided the following documents:
- Intergovernmental Agreement for the Australian Consumer Law, 2 July 2009

¹ Hon Michael Mischin MLC, Minister for Commerce, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 15 May 2013, p550b-551a.

- Explanatory Memorandum Fair Trading Amendment Bill 2013
 - *Competition and Consumer Act 2010* (Cth)
 - *Competition and Consumer Legislation Amendment Act 2011* (Cth)
 - Acts Interpretation Amendment Bill 2011 (Cth)
- 2.6 The Committee was briefed on the Bill at a hearing held in Perth on 17 June 2013, attended by Mr Gerald Milford, Manager, Strategic Policy, Department of Commerce and Ms Anne O'Brien, Senior Policy Officer, Department of Commerce. Mr Milford provided a supplementary submission as part of his briefing to the Committee on 17 June 2013 (**Appendix 2**)² and a letter correcting the transcript.
- 2.7 The Committee received a letter from Mr Sven Bluemmel, the Western Australian Information Commissioner (dated 30 May 2013) who raised no objections to the Bill.
- 2.8 The Committee's deliberations were informed by 56th Report of the Uniform Legislation and Statutes Review Committee on the Fair Trading Bill 2010 and the Acts Amendment Fair Trading Bill 2010.³
- 2.9 The Committee thanks the staff from the Department of Commerce for their assistance in its inquiry into the Bill.

Scope of Parliamentary Sovereignty and Law-making Power

- 2.10 The establishment of a Committee to scrutinise uniform legislation arose from the concern that the Executive is, in effect, exercising supremacy over a State Parliament when it enters agreements that, in practical terms, bind a State Parliament to enact legislation giving effect to national uniform schemes or intergovernmental agreements.⁴
- 2.11 The purpose of the Committee is to identify any provisions of uniform legislation that may impact on the parliamentary sovereignty and law making powers.⁵

² Supplementary Submission of 17 June 2013 from Mr Milford entitled Fair Trading Amendment Bill 2013. Transcripts of evidence may be accessed through the Committee's website at <http://www.parliament.wa.gov.au/uni>.

³ Western Australian Parliament, Legislative Council, 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, Chair.

⁴ See generally the Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 19, *Uniform Legislation and Supporting Documents*, 27 August 2004.

⁵ Western Australia Parliament Legislative Council *Standing Orders* Schedule 1, 5.4.

- 2.12 The Parliament of Western Australia (and all other States and Territories) retain the authority to exercise its law-making power as it wishes with the enforcement of provisions under Australian Consumer Law (WA).
- 2.13 The Intergovernmental Agreement for the Australian Consumer Law (IGA) requires Western Australia “*will use best endeavours to have its Parliament repeal, amend or modify any legislation that is inconsistent with or alters the effect of the Australian Consumer Law.*”⁶

3 BACKGROUND TO AUSTRALIAN CONSUMER LAW

- 3.1 On 2 July 2009, Western Australia became a party to an Intergovernmental Agreement between the Commonwealth and all States and Territories relating to consumer law in Australia.⁷
- 3.2 The IGA recitals state:

*The Council of Australian Governments met in Perth on 2 October 2008 and agreed to a new national consumer policy framework to enhance consumer protection, reduce regulatory complexity for businesses and encourage the development of a seamless national economy.*⁸

- 3.3 The Commonwealth government has made provision for state and territory consumer laws to operate concurrently where they apply the Commonwealth Australian Consumer Law as a law of their jurisdiction.
- 3.4 Any state or territory consumer law that purports to cover the same field cannot operate concurrently if it is not an “application law” and will therefore not apply to corporations.
- 3.5 The uniform legislation is described as having “*commenced on 1 January 2011 as a law of the Commonwealth and of each State and Territory. It applies in the same way*

⁶ Refer to Clause 3.2 of the Intergovernmental Agreement for the Australian Consumer Law, 2 July 2009, p6. Hon Michael Mischin, MLC, Minister for Commerce also referred to this provision of the IGA in the Explanatory Memorandum Fair Trading Amendment Bill 2013, p1.

⁷ The full title of the agreement signed on 2 July 2009 is the *Agreement between the Commonwealth of Australia, the State of New South Wales, the State of Victoria, the State of Queensland, the State of Western Australia, the State of South Australia, the State of Tasmania, the Australian Capital Territory and the Northern Territory of Australia*. Intergovernmental Agreement for the Australian Consumer Law.

⁸ IGA, p3.

*to all Australian consumers and businesses. At the same time, the name of the Trade Practices Act 1974 changed to the Competition and Consumer Act 2010.*⁹

- 3.6 The WA Government's implementation program differs from other States. *"The WA Government has implemented the ACL within the Fair Trading Act 2010. However, the WA Government has decided to adopt the ACL through a different mechanism to ensure that the WA Parliament has the opportunity to consider any changes to the ACL before they are made."*¹⁰
- 3.7 The Western Australian *Fair Trading Act 2010* replaced the *Consumer Affairs Act 1974*, *Fair Trading Act 1987* and *Door to Door Trading Act 1947*.
- 3.8 All amendments to the Commonwealth ACL to date have been agreed to by all jurisdictions, including Western Australia, under the voting arrangement provided in the Intergovernmental Agreement for the ACL.¹¹
- 3.9 The *Fair Trading Act 2010* however, does not provide for any subsequent amendments to the ACL to automatically apply in Western Australia.
- 3.10 Since 1 January 2011, the ACL has been amended by the *Competition and Consumer Legislation Amendment Act 2011* (Cth) and the *Acts Interpretation Amendment Act* (Cth) 2011.
- 3.11 The amendments include regulations made under Commonwealth Schedule 2 and Section 139G regulations made under the *Competition and Consumer Act 2010* (Cth).
- 3.12 The Bill incorporates amendments of the ACL as in force on 1 January 2011 and 1 January 2013 as law of Western Australia.
- 3.13 The object of the Bill is to *"realign the Australian Consumer Law (WA) with the Australian Consumer Law in force in all other jurisdictions and to make other amendments to the Fair Trading Act 2010."*¹²
- 3.14 The amendments are required to *"improve administration of the Act and correct a number of anomalies and drafting errors."*¹³

⁹ Commonwealth Government website, *Australian Consumer Law* located at http://www.consumerlaw.gov.au/content/Content.aspx?doc=the_acl/implementation.htm. Accessed 20 June 2013.

¹⁰ Ibid.

¹¹ Explanatory Memorandum, Fair Trading Amendment Bill 2013, Hon Michael Mischin MLC, Minister for Commerce, p1.

¹² Ibid, p2.

¹³ Ibid.

4 CLAUSES OF THE FAIR TRADING AMENDMENT BILL 2013

4.1 Clause 1 sets out the short title. This clause is a formality.

Clause 2 Commencement and Proclamation

4.2 Clause 2 of the Bill provides for sections 1 and 2 to come into operation on the day on which it receives Royal Assent and for the rest “*on a day or days fixed by proclamation*”.

4.3 The effect of clause 2 is to apply the Commonwealth ACL as in force from 1 January 2013 as a law of Western Australia. ACL text consists of Schedule 2 to the *Competition and Consumer Act 2010* and regulations made under s139G of that Act.

4.4 The Committee has previously considered the impact of similar commencement mechanisms on the Parliament’s sovereignty and law making power.

The proclamation method of commencement involves a Minister exercising the ultimate discretion, that is, whether or not to prepare a proclamation for consideration by the Executive.

The proclamation method means the Parliament gives the Executive discretion to indefinitely suspend the operation of laws passed by the Parliament. The Committee noted that where unfettered control is given to the Executive to decide the commencement of a particular Act, this can usurp the power that lies at the heart of the role of the Western Australian Parliament.¹⁴

4.5 At the hearing on 17 June 2013, the Committee asked staff from the Department of Commerce to clarify whether any clauses were likely to be introduced retrospectively and when proclamation was likely to occur.

4.6 Staff from the Department of Commerce said:

This Bill has no retrospective implications whatsoever. What the Bill does is adopt the version of the Commonwealth Australian Consumer Law as it existed on 1 January 2013 and will apply the version as a law of Western Australian as from the date of proclamation which will be a date after the bill is passed (it will not apply from 1 January 2013).¹⁵

¹⁴ Western Australian Parliament, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 35, *National Gas Access (WA) Bill 2008*, 10 March 2009, p22.

¹⁵ Supplementary Submission of 17 June 2013 from Mr Gerald Milford, Manager Strategic Policy Department of Commerce entitled Fair Trading Amendment Bill 2013, p3.

- 4.7 The Committee is satisfied that the amendments will not be introduced retrospectively and that the date of proclamation will be a date after the Bill is passed.

Clause 3 Act Amended

- 4.8 Clause 3 provides for the *Fair Trading Amendment Act 2013* to amend the Principal Act.

Clause 4 Section 15 Amended

- 4.9 The Explanatory Memorandum explains that clause 4 “*corrects an error which currently operates to give precedence to specific State Acts (listed in Schedule 1 of the Act) where that legislation (or any instrument made under that legislation) is inconsistent with any part of the Australian Consumer Law.*”¹⁶ In doing so, the original intention which was to give precedence to the Acts listed in Schedule 1 only where they are inconsistent with the product safety provisions of the ACL.¹⁷

Staff of the Department of Commerce later clarified:

*The Australian Consumer Law (WA) and all the Acts listed in Schedule 1 of the Fair Trading Act 2010 are all State laws. What the Fair Trading Amendment Bill 2013 is seeking to do is make it clear that where a product safety provision of an Act listed in Schedule 1 is inconsistent with a product safety provision of the Commonwealth Australian Consumer Law (WA) (as distinct from the Commonwealth Australian Consumer Law) then the Act listed in schedule 1 will prevail. Where there is an inconsistency between the Commonwealth Australian Consumer Law and any of those Acts listed in Schedule 1 or (indeed any State Law), the Commonwealth Australian Consumer will prevail to the extent of the inconsistency.*¹⁸

Clause 5 Section 19 amended

- 4.10 Clause 5 amends s19(1)(a) and provides for the ACL text that consists of Schedule 2 to the *Competition and Consumer Act 2010* (Cth) as in force on 1 January 2013. Section 19(2) makes it clear that the ACL is part of the *Fair Trading Act 2010*.
- 4.11 The inclusion of Schedule 2 to the *Competition and Consumer Act 2010* (Cth) in the WA amendments reflects the adoption of Commonwealth subsidiary legislation within the principal Act. The amendments to Schedule 2 of the *Competition and Consumer*

¹⁶ Explanatory Memorandum, Fair Trading Amendment Bill 2013, Hon Michael Mischin MLC, Minister for Commerce, p3.

¹⁷ Ibid.p3.

¹⁸ Letter from Mr Gerald Milford, Manager Strategic Policy, Department of Commerce, *Transcript of Evidence* Fair Trading Amendment Bill 2013, received 2 July 2013.

Act 2010 (Cth) reflect a minor change and include changes to the definition of the word “document”.

- 4.12 The definition of the word “*document*” means any record of information, and includes “*anything on which there is writing, anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; and anything from which sounds, images or writings can be reproduced with or without the aid of anything else, and a map, drawing or photograph.*”¹⁹

Staff from the Department of Commerce said:

*Firstly, the definition of document was amended to align it with the definition in the Commonwealth’s Acts Interpretation Act. The meaning of the document has been broadened so that it now includes maps, plans, drawing and photographs. Secondly, the reference to Standards Australia International Limited was updated to read Standards Australia, again to align it with the definition in the Commonwealth’s Acts Interpretation Act.*²⁰

- 4.13 These provisions include principles of unconscionable conduct to assist courts in applying the prohibition against unconscionable conduct and to help stakeholders understand the meaning and scope of the provisions.²¹

- 4.14 Staff from the Department of Commerce stated:

*In determining whether conduct is unconscionable, courts can have regard to matters such as the relative bargaining strengths of the parties, whether a person was required to comply with conditions that were reasonably necessary to protect the suppliers interests or whether the supplier engaged in unfair tactics.*²²

- 4.15 They further clarified;

*Just to be clear, the unconscionable conduct provisions themselves have not changed; but a set of principles have been added to include in the act to assist the courts to understand them and to apply them. The unconscionable conduct provisions themselves remain the same.*²³

¹⁹ Schedule 2, *Competition and Consumer Legislation Amendment Act 2011(Cth)*.

²⁰ Supplementary Submission of 17 June 2013 from Mr Gerard Milford, Manager Strategic Policy Department of Commerce entitled Fair Trading Amendment Bill 2013, p3.

²¹ Ibid.p2.

²² Ibid.p2.

²³ Mr Gerald Milford, Hansard Transcript of Evidence taken at Perth, 17 June 2013, p2.

4.16 The Committee was informed by the staff of the Department of Commerce that “*the amendments originally stemmed from the recommendations of a Senate Committee in November 2009 and the recommendations of an expert panel that was later established by the Commonwealth to consider whether a list of examples of unconscionable conduct should be included.*”²⁴

4.17 Whilst the Minister’s Explanatory Memorandum and Second Reading speech do not mention consultative mechanisms that included WA in the scrutiny of the unconscionable conduct principles after the IGA was signed, the Committee accepts that the principles are interpretive and reflect the intention of the IGA.²⁵

Clause 6 Section 20 deleted

4.18 Clause 6 removes redundant provisions that refer to the process required to amend legislation (s20 of the Act). This allows for a mechanism for amending the Australian Consumer Law (WA) by way of the ordinary legislative amendment process. This gives effect to changes requested by the previous Committee in its scrutiny of the Fair Trading Bill 2010.

Clause 7 Section 32 replaced

4.19 Clause 7 repeals and replaces the existing provision under s32 (of the Act) and specifies the criteria under which a person would be regarded as having been involved in the commission of offences.²⁶ This criteria includes persons found to have aided, abetted, counselled or procured the commission of the offence, or induced by way of threats or promises or otherwise the commission of the offence. This provision includes persons who conspire with others or attempt to commit the commission of a crime under this section. Summary conviction penalty is retained. (The lesser of a fine of \$36,000 or maximum penalty provided by the ACL (WA)).

²⁴ Supplementary Submission of 17 June 2013 from Mr Milford entitled Fair Trading Amendment Bill 2013, p2.

²⁵ In December 2008, the Senate Standing Committee on Economics (Senate Committee) released the Inquiry Report into the scope and definition of unconscionable conduct for the purposes of Part IVA of the *Competition and Consumer Act 2010 (Cth)*. On 5 November 2009, the Commonwealth government agreed to the recommendations of the Committee and proposed the establishment of an expert panel (refer to Parliament of Australia House of Representatives Explanatory Memorandum *Competition and Consumer Legislation Amendment Bill 2011*, p 16). The Expert Panel consisted of Professor Bryan Horrigan, Mr David Lieberman and Mr Ray Steinwall and their paper was entitled *Strengthening Statutory Unconscionable Conduct and the Franchising Code of Conduct*. The panel was appointed on 27 November 2009 by Federal Minister for Competition Policy and Consumer Affairs, the Hon. Craig Emerson to consider whether two specific proposals for amending the law of unconscionable conduct provisions would assist in clarifying its effect. The panel was also asked to examine aspects of the franchising sector.

²⁶ Explanatory Memorandum Fair Trading Amendment Bill 2013 Hon Michael Mischin MLC, Minister for Commerce, p4.

Clause 8 Section 36 amended

- 4.20 Clause 8 amends s36(1) to provide for the modification to the text of schedule 2 of the *Competition and Consumer Act (Cth) 2010* as in force 1 January 2013.²⁷ The Explanatory Memorandum clarifies that the text of schedule 2 “together with the regulations made under section 139G of the Act, form the ACL (WA).”²⁸

Clause 9(1) Section 48 amended

- 4.21 This clause amends s48 and provide for the powers and functions of a Commissioner, including powers to carry out investigations into alleged breaches.

Clause 9 (2)

- 4.22 The Commissioner already has the power under s48(2) to take or defend proceedings relating to a contravention of a code of practice. This clause will extend the Commissioner’s powers so that the Commissioner may assume the conduct or defence of proceedings that have been commenced by another party.²⁹
- 4.23 Section 48(3) specifies the limitations on the Commissioner’s assistance.

Staff from the Department of Commerce said:

*This power is being sought to ensure that consumers or businesses are not disadvantaged should the Commissioner decide that their case has merit and wishes to intervene.*³⁰

Clause 10 Section 49 amended

- 4.24 This clause provides for the Commissioner for Consumer Protection (**Commissioner**) to act on behalf of the complainant and has the same rights of the complainant. This includes settling the action or any part of the action at s49(1)(a), conduct the proceedings in whatever manner the Commissioner things appropriate or proper at s49(1)(b), and moneys (excluding costs) paid to the complainant at s49(1)(c).
- 4.25 This clause provides consequential amendments to the scope of s49(1) to reflect the Commissioner’s powers under the new s48(2).

²⁷ Explanatory Memorandum Fair Trading Amendment Bill 2013 Hon Michael Mischin MLC, Minister for Commerce, p4.

²⁸ Ibid.p4.

²⁹ Ibid, p4.

³⁰ Supplementary Submission of 17 June 2013 from Mr Gerald Milford, Manager Strategic Policy, Department of Commerce entitled Fair Trading Amendment Bill 2013, p4.

Clause 11 Section 58 amended

- 4.26 This clause amends s58(1)(a)(ii) and s58(1)(b) and sets out the Commissioner's powers to provide assistance to consumers and business and the conditions that must be satisfied before the Commissioner may provide assistance. This provision specifies the Commissioner's powers to make any investigation or inquiry that may be necessary to satisfy him or herself that is proper to assume the conduct or defence of legal proceedings on behalf of a business.
- 4.27 The Commissioner for Consumer Protection may institute, defend or assume conduct of legal proceedings on behalf of consumers or businesses (s58). The public interest provision remains s58(1)(a)(ii).
- 4.28 The Commissioner for Consumer Protection must not institute, defend or assume conduct or defence of proceedings unless the amount of claim does not exceed \$100,000 or specific performance without first obtaining the consumer's written consent and the consent of the Minister for Commerce (s58).

Clause 12 section 59 amended

- 4.29 Section 59 provides a consequential amendment to the scope of s59(1) to reflect the changes to the Commissioner's powers under the new s52(2). The heading of s59 is amended to read as, "*Provisions for proceedings Commissioner institutes, defends or assumes conduct or defence of.*"

Clause 13 section 90 amended

- 4.30 This clause amends s90 and corrects a drafting error with regard to the use of the word "Part" in place of "Division". Staff from the Department of Commerce advised that "*as currently drafted because the section has no application beyond the Division in which it sits, the Commissioner cannot take action against person involved in those related activities as was originally intended.*"³¹
- 4.31 By replacing "Division" with the word "Part", this amendment allows the Commissioner to "*take action against persons involved in those related activities as originally intended and is only able to take action against those persons who actually contravene the Act.*"

On 17 June 2013, staff from the Department of Commerce stated:

At present only a person that is directly involved in an offence can be charged. This was a drafting oversight when the Act was made in

³¹ Explanatory Memorandum, Fair Trading Amendment Bill 2013, Hon Michael Mischin MLC, Minister for Commerce, p6.

*2010. It came about because the relevant section applied to only one Division of the Act when it should have applied to the whole Part of the Act in which it sat. Under the previous Fair Trading Act 1987, people who were involved in a contravention could also be charged so this amendment simply restores us to that position.*³²

Clause 14 Section 107 amended

- 4.32 This clause amends s107 and creates an offence and a penalty for a person who contravene or fails to comply with an order of the Supreme Court or District Court under s106. This offence may be dealt with on indictment or summarily.

Clause 15 Schedule 1 heading

- 4.33 Schedule 1 heading is replaced as a consequence to amendments to s15. Schedule 1 is to be read as *Acts that override the Australian Consumer Law (WA) Part 3-3*.

On 17 June 2013, staff from the Department of Commerce said:

*It was originally intended that the Acts in Schedule 1 would only prevail where they are inconsistent with the product safety provision of the ACL as was the case under the old Fair Trading Act 1987 and Consumer Affairs Act 1971. Giving precedence to those Acts over all of the ACL was a drafting error. The Bill corrects that error and restores us to the position we were in before the 2010 Act was made.*³³

Clause 16 Schedule 2 amended

- 4.34 The heading of Schedule 2 of the Act reads as “*Registration Acts*”. Staff from the Department of Commerce clarified that the clause of the Bill will allow for the inclusion of the *Debt Collectors Licensing Act 1964*, *Employment Agents Act 1976* and the *Travel Agents Act 1985* into Schedule 2 of the Act. These acts were inadvertently excluded from schedule 2 in the original drafting. The schedule permits specific investigation and enforcement powers to be used in relation to the other licensing acts administered by the Commissioner for Consumer Protection.

³² Supplementary Submission of 17 June 2013 from Mr Gerald Milford, Manager, Strategic Policy, Department of Commerce entitled Fair Trading Amendment Bill 2013, p4.

³³ Ibid, p4.

Business Structures

- 4.35 The Committee clarified the types of business structures covered by the amendments.
- 4.36 Mr Gerald Milford, Manager Strategic Policy, Department of Commerce in his letter to the Committee, wrote:

Western Australia has a general power to make laws in respect of consumer protection. In doing so it applied the Commonwealth Australian consumer law as a law of its own, through the Fair Trading Act 2010, as from 1 January 2011. The applied law is referred to as the Australian Consumer Law (WA), and, being a general law, applies to corporations, individuals (sole traders), partnerships, cooperatives, public bodies and association, both incorporated and unincorporated.

The changes made to the Commonwealth Australian Consumer Law since 1 January 2011 have not yet been applied in Western Australia and therefore do not form part of the Australian Consumer Law (WA) at this time. Until these two laws are aligned, the amendments to the Commonwealth Australian Consumer law apply only to corporations and to transaction involving interstate trade. Successful passage of the Fair Trading Amendment Bill 2013 will realign the two laws to ensure that the law is the same for all parties.³⁴

5 CONCLUSION

- 5.1 The IGA was signed on 2 July 2009. The State of Western Australia is a party to the IGA. *The Fair Trading Act 2010* introduced uniform amendments in consumer law in accordance with the IGA.
- 5.2 The IGA requires the State of Western Australia to use its “*best endeavours to have its parliament repeal, amend or modify any legislation that is inconsistent with or alters the effect of the Australian Consumer Law.*”³⁵
- 5.3 The Committee observes the concerns of the Standing Committee on Legislation when scrutinising uniform legislation:

It is “important to take into account the role of the Western Australian Parliament in determining the appropriate balance

³⁴ Letter entitled “Fair Trading Amendment Bill 2013” from Mr Gerald Milford, Manager, Strategic Policy Department of Commerce (dated 20 June 2013) to the Committee.

³⁵ Explanatory Memorandum Fair Trading Amendment Bill 2013, Hon Michael Mischin MLC, Minister for Commerce, p1.

between the advantages to the State in enacting uniform laws, and the degree to which parliament, as a legislature, loses its autonomy through the mechanisms used to achieve uniform laws."³⁶

- 5.4 The Committee notes clause 26 and clause 45 of the IGA provides for the State to confer its powers to the Commonwealth in relation to enforcement and administration and product safety. Western Australia however, has not referred State powers to the Commonwealth on the amendments proposed.
- 5.5 The Standing Committee on Procedure and Privileges Report No. 8, adopted by the House on 20 September 2006, noted that the practice of the Legislative Council in relation to amendment bills has been that if a uniform scheme has been implemented by a previous Act then bills that propose further amendments to that uniform legislation do not stand referred to the Committee unless the particular bill implements additional uniform legislation.³⁷ The Procedure and Privileges Committee incorporated this approach into its "Guidelines on the Practice on Bills Standing Referred".³⁸
- 5.6 The Committee considered and scrutinised the Fair Trading Amendment Bill 2013 in accordance with its current Terms of Reference and the Australian Consumer Law as specified in the IGA.

Finding 1: The Committee finds that all clauses of the Fair Trading Amendment Bill 2013 give effect to the IGA that the Australian jurisdictions will implement the ACL (Standing order 126) and it is the view of the Committee that the Bill falls within this category of an amendment bill.

Finding 2: The Committee finds that the Bill is uniform legislation to which sub paragraphs of Standing Order 126 apply.

- 5.7 Under its current Terms of Reference, the Committee is confined to considering matters of parliamentary sovereignty and law making powers of the Parliament of Western Australia. These matters would have been considered by the House at the time it considered the Principal Act and remain unchanged by this Bill. The

³⁶ Western Australian Parliament, 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 2001, p2.

³⁷ Western Australian Parliament, Standing Committee on Procedure and Privileges Report No. 8, November 2005, Appendix 3, p34. This was adopted by the House on 20 September 2006.

³⁸ Ibid.

Committee is of the view that there are no other issues in the Bill impacting upon the sovereignty and law-making powers of the Parliament of Western Australia.

Recommendation 1: The Committee recommends that the Bill be passed without amendment.

5.8 The Committee commends its report and recommendation to the Legislative Council.



Hon Kate Doust MLC
Chair
6 August 2013

APPENDIX 1

LIST OF STAKEHOLDERS

| List of Stake Holders |
|---|
| Choice (Australian Consumers Association) – Mr Alan Kirkland, Chief Executive Officer |
| Information Commissioner – Mr Sven Bluemmel |
| Law Society of Western Australia – Mr David Price, Executive Director |
| Ombudsman Western Australia – Mr Chris Field |
| Murdoch University – Professor Jurgen Brohmer, Dean, School of Law |
| Sussex Street Community Law Services Inc. – Ms Jane Timmermanis, General Manager |
| University of Notre Dame – Professor Douglas Hodgson, Dean, School of Law |
| University of Western Australia – Professor Erika Techera, Dean, Faculty of Law |
| Western Australian Bar Association – Mr Peter Quinlan, President |

APPENDIX 2
SUPPLEMENTARY SUBMISSION OF 17 JUNE 2013 FROM MR
GERALD MILFORD, MANAGER STRATEGIC POLICY,
DEPARTMENT OF COMMERCE

FAIR TRADING AMENDMENT BILL 2013

Introduction - history

- In July 2009 all Australian Governments, including WA, signed the *Intergovernmental Agreement for the Australian Consumer Law* which required all the States and Territories to apply the Commonwealth Australian Consumer Law as a law of their jurisdiction, including any future changes.
- The Agreement also provided for those future changes to be agreed to by a voting arrangement whereby the Commonwealth and at least four other jurisdictions, of which at least three must be States, must agree to the change.
- About 2½ years ago the WA Parliament passed the Fair Trading Act 2010. That Act was the one that gave effect to the Intergovernmental Agreement. It provided for the adoption or application of the Commonwealth Australian Consumer Law as a law of Western Australia as it existed on the day the Act came in to force.
- The 2010 Act came into force on proclamation on 1 January 2011.
- The Australian Consumer Law (or ACL) is a generic law that regulates the conduct of business in the marketplace and the relationship between consumers and traders.
- It deals with matters such as unconscionable conduct, misleading advertising, consumer guarantees on goods and services, door to door trading and product safety.
- As a national law, its major advantage is that it provides certainty and lower compliance costs for businesses that operate nationally. It also ensures that consumers have the same rights and protections no matter where they are in Australia.
- Most of these protections previously sat in the WA Fair Trading Act 1987, Door To Door Trading Act 1987 and Consumer Affairs Act 1971. The 2010 Fair Trading Act replaced these three Acts.
- Since the 2010 Act came into force there have been a few amendments made to the Commonwealth ACL.

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- In all other Australian jurisdictions these changes were automatically adopted as a law of their own jurisdiction. However, the WA Parliament didn't agree to automatic adoption of changes. These changes can only be applied in Western Australia through amendment legislation.
- The main purpose of this Bill is to realign the WA ACL with the ACL as it exists in all other states and territories. There are of course other amendments in the Bill as well which I will talk about later.
- Since the ACL came into force on 1 January 2011, the Commonwealth Government has passed two Acts that included amendments to the ACL. These amendments were supported under the voting process provided for in the Intergovernmental Agreement, including support from WA.
- The most significant of the changes was the inclusion of interpretive principles into the Unconscionable Conduct provisions of the ACL.
- Under the ACL it is an offence for a business to engage in unconscionable conduct in connection with the supply or acquisition of goods or services.
- In determining whether conduct is unconscionable, courts can have regard to matters such as the relative bargaining strengths of the parties, whether a person was required to comply with conditions that were reasonably necessary to protect the suppliers interests or whether the supplier engaged in unfair tactics.
- In late 2011 the Commonwealth amended the ACL to include interpretive principles to assist the courts in applying the prohibition against unconscionable conduct and to help stakeholders understand the meaning and scope of the provisions.
- The amendments originally stemmed from the recommendations of a Senate Committee in November 2009 and the recommendations of an expert panel that was later established by the Commonwealth to consider whether a list of examples of unconscionable conduct should be included.

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- So just to be clear, the unconscionable conduct provisions themselves have not changed, but a set of principles has been added to assist the courts.
- As well as the unconscionable conduct principles, the Commonwealth also amended the meaning of a couple of terms in the ACL.
- Firstly, the definition of *document* was amended to align it with the definition in the Commonwealth's Acts Interpretation Act. The meaning of document has been broadened so that it now includes maps, plans, drawings and photographs.
- Secondly, the reference to *Standards Australia International Limited* was updated to read *Standards Australia*, again to align it with the definition in the Commonwealth's Acts Interpretation Act.
- This Bill seeks to apply all the amendments that have been made to the ACL since 1 January 2011 up to 1 January 2013. This will effectively pick up the unconscionable conduct amendments and these other minor definition changes. These are the only changes that have come into force in that period.
- Perhaps I could use this opportunity to answer the first question that I received in a letter from the Committee last week regarding the possibility of these amendments having retrospective application....
- This Bill has no retrospective implications whatsoever. What the Bill does is adopt the version of the Commonwealth Australian Consumer Law as it existed on 1 January 2013 and will apply that version as a law of Western Australian as from the date of proclamation which will be a date after the Bill is passed. (It will not apply from 1 January 2013)

What other amendments are contained in the Bill?

- This Bill also seeks to amend the *Fair Trading Act 2010* to address a number of drafting errors and oversights. However, there is one substantive amendment that will create an additional power.
 - At present the Commissioner for Consumer Protection has the power to start or defend proceedings on behalf of a consumer or business in any matter where the amount involved is up to \$100,000. But the Commissioner can't intervene if proceedings are already underway.
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- The Bill will amend the Fair Trading Act to enable the Commissioner to assume the conduct of legal proceedings already underway. This power is being sought to ensure that consumers or businesses are not disadvantaged should the Commissioner decide that their case has merit and wishes to intervene.
- Next, the Bill will address a drafting oversight to extend the scope of criminal responsibility to anyone who is "involved in a contravention" of a provision of the Act. At present only a person that is directly involved in an offence can be charged. This was a drafting oversight when the Act was made in 2010. It came about because the relevant section applied to only one Division of the Act when it should have applied to the whole Part of the Act in which it sat. Under the previous Fair Trading Act 1987, people who were involved in a contravention could also be charged so this amendment simply restores us to that position.
- Next, the Bill will correct an error in the Act which currently operates to give precedence to a list of State Acts (in Schedule 1 of the Act) if any provision of those Acts is inconsistent with the Australian Consumer Law.
- It was originally intended that the Acts in Schedule 1 would only prevail where they are inconsistent with the product safety provisions of the ACL as was the case under the old Fair Trading Act 1987 and Consumer Affairs Act 1971. Giving precedence to those Acts over all of the ACL was a drafting error. The Bill corrects that error and restores us to the position we were in before the 2010 Act was made.
- Next, the Bill will amend the Act so that the Commissioner can draw on specific investigation and enforcement powers in the Act relating to debt collectors, employment agents and travel agents. The Commissioner is the licensing authority for many occupations and businesses and has access to these powers already. The exclusion of debt collectors, employment agents and travel agents from the list of licensed occupations was a drafting oversight.
- Next, the Bill will make non-compliance with an order of the Supreme Court or District Court an indictable offence – the failure to include this as an indictable offence was a drafting oversight.
- Lastly, the Bill will remove a redundant provision that refers to the process required to amend legislation.