

**40TH PARLIAMENT**



## **Report 123**

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

*Fair Trading Amendment Bill 2019*

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Presented by  
Hon Michael Mischin MLC (Chairman)  
August 2019

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

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## EXECUTIVE SUMMARY

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- 1 The Fair Trading Amendment Bill 2019 (Bill) proposes to amend the *Fair Trading Act 2010* (Act) by applying the Australian Consumer Law (ACL) as in force on 1 March 2019 as the *Australian Consumer Law (WA)* (ACL WA). It also introduces a mechanism for the automatic incorporation of future amendments to the ACL into the ACL WA unless the amendments are disallowed by Parliament. The disallowance process proposed in the Bill is to be satisfied before the Commonwealth amending laws become laws of Western Australia.
- 2 The Committee has identified that the proposed disallowance mechanism in the Bill impacts upon the sovereignty and law-making powers of the Parliament of Western Australia. This is because:
  - It makes no provision for Parliament to amend or partially disallow Commonwealth Acts that amend the ACL (Commonwealth amending laws).
  - If proposed section 19E is agreed to by the Legislative Council, it would involve the Legislative Assembly considering and deciding on a statutory modification to the application of procedural rules that only apply in the Legislative Council. The modification of Legislative Council Standing Order 67 in proposed section 19E may conflict with the principle of comity between the Houses of Parliament as it would involve the Legislative Assembly considering and deciding on a statutory modification to the application of procedural rules that apply only in the Legislative Council.
- 3 The Committee's suggestions to address those sovereignty issues require:
  - the Legislative Council to decide whether Commonwealth amending laws should be scrutinised by the Joint Standing Committee on Delegated Legislation or the Standing Committee on Legislation, or some other committee of Parliament to be established for that purpose
  - amendments to Legislative Council Standing Orders and the Bill.

## Recommendations

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

### RECOMMENDATION 1

Page 12

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

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

### RECOMMENDATION 2

Page 13

The Legislative Council amend Standing Order 67 of the Standing Orders of the Legislative Council as follows:

Delete Standing Orders 67(5)(a) and (b) and insert the following:

(5) Where on the 17th sitting day after the motion was moved (exclusive of the day on which the motion was moved) a motion to disallow a regulation

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

- (6) Subject to (7), where on the proposed last sitting day prior to a general election, a motion to disallow a regulation remains unresolved, then the question shall be put before the Council rises on that day.
- (7) Where a written law provides that a motion to disallow a regulation does not lapse on prorogation, dissolution, or expiry of a House, and:
- (a) a motion to disallow a regulation remains unresolved on the proposed last sitting day prior to a general election; and
  - (b) the last sitting day is the 16th or earlier sitting day after the motion was moved (exclusive of the day on which the motion was moved),
- the motion to disallow shall be an order of the day in the next Parliament and unless disposed of earlier, the question shall be put in accordance with (5) in the next Parliament.

### RECOMMENDATION 3

Page 14

The question on the third reading of the Fair Trading Amendment Bill 2019 not be put until Legislative Council Standing Order 67(1) and Legislative Council Standing Order 67 are amended in the terms set out in Recommendation 1 and Recommendation 2 respectively.

### RECOMMENDATION 4

Page 16

The Fair Trading Amendment Bill 2019 be amended as follows:

#### Clause 4

Page 2, lines 15 to 17 — To delete the lines and insert:

amends either or both of the following —

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

#### Clause 5

Page 3, lines 1 and 2 — To delete the lines and insert:

laws —

- (i) to the extent that they have effect for the purposes of this section under section 19B; and
  - (ii) when they come into operation under section 19C;
- and

Page 3, lines 12 and 13 — To delete the lines and insert:

of that Act unless and to the extent that the amending law has effect for the purposes of this section under section 19B and comes into operation under section 19C.

## Clause 6

Page 3, line 22 — To delete the line and insert:

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

Page 3, line 29 — To delete “law” and insert:

law, or part of an amending law,

Page 4, after line 4 — To insert:

***partial disallowance resolution*** means a resolution that part of an amending law be disallowed.

Page 4, lines 5 to 14 — To delete the lines and insert:

- (2) Subject to subsection (2A), an amending law has effect for the purposes of section 19 if the amending law is laid before each House of Parliament under section 19A and either —
- (a) no notice of a disallowance resolution is given in either House within the notice period; or
  - (b) if at least one notice of a disallowance resolution is given within the notice period then, for each such notice, one of the following applies —
    - (i) the notice is withdrawn or discharged within the disallowance period;
    - (ii) the disallowance resolution is lost in the House or not agreed to within the disallowance period;
    - (iii) the disallowance resolution is a partial disallowance resolution and is agreed to within the disallowance period.
- (2A) If a partial disallowance resolution is agreed to within the disallowance period, the part of the amending law to which the resolution relates does not have effect for the purposes of section 19.

Page 4, line 19 — To delete “dissolved, prorogued” and insert:

prorogued, dissolved

Page 4, lines 21 to 23 — To delete the lines and insert:

House of Parliament, or a motion that an amending law be disallowed in the House, does not lapse even though the House is prorogued, dissolved or expires.

Page 4, line 24 — To delete the line and insert:

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

Page 4, lines 26 to 29 — To delete the lines and insert:

***amending provision*** means a provision of an amending law that amends either or both of the following —

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

Page 5, lines 5 to 16 — To delete the lines and insert:

- (2A) However, if part of an amending law does not have effect under section 19B(2A), the Governor must declare in the proclamation the extent that the amending law does not have effect.
- (3) If an amending provision has come into operation in the Commonwealth before the proclamation is published in the *Gazette*, the amending provision comes into operation, other than to the extent that the provision does not have effect under section 19B(2A), on a day fixed by the proclamation.
- (4) If an amending provision has not come into operation in the Commonwealth before the proclamation is published in the *Gazette*, the amending provision comes into operation, other than to the extent that the provision does not have effect under section 19B(2A), when the amending provision comes into operation in the Commonwealth in accordance with the amending law.

Page 5, line 25 to page 6, line 28 — To delete the lines and insert:

**19E. Tabling of amending law taken to be publication for Standing Orders**

- (1) In this section —  
***parliamentary committee*** means a committee established by either or both Houses of Parliament.
- (2) If a Standing Order of a House of Parliament provides that on the publication of an instrument under a written law the instrument is referred to a parliamentary committee for consideration, the laying of an amending law under section 19A is taken to be publication of the amending law for the purposes of the Standing Order.
- (3) This section does not apply if the Standing Orders of the House provide specifically for how an amending law may be considered by a parliamentary committee.

**RECOMMENDATION 5**

Page 21

The Legislative Council insert a new Standing Order 67A of the Standing Orders of the Legislative Council as follows:

**67A. Referral to Legislation Committee**

An order of the day to disallow a regulation, which order does not lapse on prorogation, dissolution or expiry of the Council, is referred to the Legislation Committee for consideration and report.



**RECOMMENDATION 6**

Page 21

The Legislative Council amend the Standing Committee on Legislation's term of reference 4.3 in Schedule 1 of the Standing Orders of the Legislative Council as follows:

Insert paragraph (b) as follows:

- (b) regulation subject to a motion to disallow that does not lapse on prorogation, dissolution or expiry of the Council.

**RECOMMENDATION 7**

Page 21

The question on the third reading of the Fair Trading Amendment Bill 2019 not be put until Legislative Council Standing Order 67A is inserted and the Standing Committee on Legislation's term of reference 4.3 in Schedule 1 of the Standing Orders of the Legislative Council is amended in the terms set out in Recommendation 5 and Recommendation 6 respectively.

**RECOMMENDATION 8**

Page 22

The Fair Trading Amendment Bill 2019 be amended as follows:

**Clause 4**

Page 2, lines 15 to 17 — To delete the lines and insert:

amends either or both of the following —

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

**Clause 5**

Page 3, lines 1 and 2 — To delete the lines and insert:

laws —

- (i) to the extent that they have effect for the purposes of this section under section 19B; and
  - (ii) when they come into operation under section 19C;
- and

Page 3, lines 12 and 13 — To delete the lines and insert:

of that Act unless and to the extent that the amending law has effect for the purposes of this section under section 19B and comes into operation under section 19C.

**Clause 6**

Page 3, line 22 — To delete the line and insert:

**19B. Disallowance of amending laws**

Page 3, line 29 — To delete "law" and insert:

law, or part of an amending law,



Page 4, after line 4 — To insert:

***partial disallowance resolution*** means a resolution that part of an amending law be disallowed.

Page 4, lines 5 to 14 — To delete the lines and insert:

- (2) Subject to subsection (2A), an amending law has effect for the purposes of section 19 if the amending law is laid before each House of Parliament under section 19A and either —
- (a) no notice of a disallowance resolution is given in either House within the notice period; or
  - (b) if at least one notice of a disallowance resolution is given within the notice period then, for each such notice, one of the following applies —
    - (i) the notice is withdrawn or discharged within the disallowance period;
    - (ii) the disallowance resolution is lost in the House or not agreed to within the disallowance period;
    - (iii) the disallowance resolution is a partial disallowance resolution and is agreed to within the disallowance period.
- (2A) If a partial disallowance resolution is agreed to within the disallowance period, the part of the amending law to which the resolution relates does not have effect for the purposes of section 19.

Page 4, line 19 — To delete “dissolved, prorogued” and insert:

prorogued, dissolved

Page 4, lines 21 to 23 — To delete the lines and insert:

House of Parliament, or a motion that an amending law be disallowed in the House, does not lapse even though the House is prorogued, dissolved or expires.

Page 4, line 24 — To delete the line and insert:

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

Page 4, lines 26 to 29 — To delete the lines and insert:

***amending provision*** means a provision of an amending law that amends either or both of the following —

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

Page 5, lines 5 to 16 — To delete the lines and insert:

- (2A) However, if part of an amending law does not have effect under section 19B(2A), the Governor must declare in the proclamation the extent that the amending law does not have effect.

- (3) If an amending provision has come into operation in the Commonwealth before the proclamation is published in the *Gazette*, the amending provision comes into operation, other than to the extent that the provision does not have effect under section 19B(2A), on a day fixed by the proclamation.
- (4) If an amending provision has not come into operation in the Commonwealth before the proclamation is published in the *Gazette*, the amending provision comes into operation, other than to the extent that the provision does not have effect under section 19B(2A), when the amending provision comes into operation in the Commonwealth in accordance with the amending law.

Page 5, line 25 to page 6, line 28 — To delete the lines.

# 1 Introduction

- 1.1 On 3 April 2019, Hon Alannah MacTiernan MLC, Minister for Regional Development representing the Minister for Commerce, introduced the Fair Trading Amendment Bill 2019 (Bill) into the Legislative Council. The Bill was referred to the Standing Committee on Uniform Legislation and Statutes Review (Committee) under Standing Order 126.
- 1.2 The Committee was required to report to the Legislative Council by 4 June 2019, being the first Legislative Council sitting day following the expiry of the 45 day reporting period.
- 1.3 On 4 June 2019, the Committee sought, and was granted, an extension of time in which to report to the Legislative Council from 4 June 2019 to 22 August 2019.<sup>1</sup>
- 1.4 The Bill proposes to amend the *Fair Trading Act 2010* (Act) to align the *Australian Consumer Law (WA)* (ACL WA) with the Australian Consumer Law (ACL) in other Australian jurisdictions.<sup>2</sup> It also introduces a mechanism for automatically incorporating future amendments to the ACL into the ACL WA subject to those amendments being disallowed by Parliament.
- 1.5 There is no intergovernmental agreement supporting the Bill. The Bill has been drafted to address concerns identified by the Committee in its report on the Fair Trading Amendment Bill 2018 (2018 Bill).<sup>3</sup>
- 1.6 This report includes discussion and analysis of the:
  - 2018 Bill
  - Bill
  - Legislative Council Standing Orders.

## 2 Inquiry procedure

- 2.1 The Committee posted the inquiry on its website at [Uniform Legislation Committee homepage](#). The general public was immediately notified of the referral via social media.<sup>4</sup>
- 2.2 Given the Committee's terms of reference, the Committee considered that any broader advertising or invitation for submissions from the public was neither necessary nor warranted.

## 3 Supporting documents

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

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<sup>1</sup> Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 122, *Fair Trading Amendment Bill 2019 – Extension of time*, June 2019, and Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 4 June 2019, p 3669.

<sup>2</sup> What constitutes the ACL and the ACL WA was discussed in the Committee's Report 119: see Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 119, *Fair Trading Amendment Bill 2018*, November 2018 paras 5.18, 5.39 and 5.45. The application of the ACL and the ACL WA was discussed in paragraphs 5.45-5.48.

<sup>3</sup> Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 119, *Fair Trading Amendment Bill 2018*, November 2018.

<sup>4</sup> Legislative Council, 3 April 2019, retrieved from <https://twitter.com/WALegCouncil/status/1113708199431925760>.

- 3.2 On the day of referral, Hon John Quigley MLA, Minister for Commerce (Minister), forwarded to the Committee the information required pursuant to Ministerial Office Memorandum MM2007/01.
- 3.3 Legislative Council Standing Order 126(5) states:
- The Member in charge of a Bill referred to the Committee shall ensure that all documentation required by the Committee is provided to the Committee within 3 working days after referral ...
- 3.4 The Committee extends its appreciation to the Minister for the timely provision of the supporting documentation and information.
- 3.5 The Committee also extends its appreciation to Parliamentary Counsel's Office (PCO) for its timely, comprehensive and informative responses to the Committee's drafting instructions.

## **4 Fair Trading Amendment Bill 2018**

- 4.1 The 2018 Bill proposed to amend the Act to align the ACL WA with the ACL in other jurisdictions. It did this by:
- applying amendments to the ACL made by a number of Commonwealth Acts (Commonwealth amending laws) to the ACL WA
  - providing a mechanism for automatically incorporating future amendments to the ACL into the ACL WA unless those amendments were disallowed by Parliament.
- 4.2 The Committee found that the proposed disallowance mechanism in the 2018 Bill made an attempt at, but fell short of, preserving Western Australia's Parliamentary sovereignty.<sup>5</sup> The Committee recommended that the clause containing the disallowance mechanism be deleted and replaced with an alternative disallowance mechanism.<sup>6</sup>
- 4.3 The Committee recommended that the alternative disallowance mechanism should operate before the Commonwealth amending laws could become laws of Western Australia, and that there be timely and effective scrutiny of the Commonwealth amending laws by a Parliamentary committee.
- 4.4 The Committee suggested that an alternative disallowance mechanism could be based on that in section 43 of the *Land Administration Act 1997*, so that a Commonwealth amending law that amends the ACL does not take effect in Western Australia until certain conditions precedent are met.<sup>7</sup>
- 4.5 So that the ACL applying in Western Australia could be brought up to date, the Legislative Council agreed to pass the 2018 Bill with amendments that omitted the proposed incorporation and disallowance mechanism. This was on the understanding that the Government would introduce a fresh bill to provide for a revised incorporation and disallowance mechanism which would be referred to the Committee for consideration and report.
- 4.6 The 2018 Bill was passed with amendments in the Legislative Council on 21 March 2019.
- 4.7 The 2018 Bill was received by, and introduced in, the Legislative Assembly on 2 April 2019 but as at 12 August 2019 had not progressed further.

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<sup>5</sup> Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 119, *Fair Trading Amendment Bill 2018*, November 2018, Finding 3.

<sup>6</sup> *ibid.*, Recommendation 2.

<sup>7</sup> *ibid.*

- 4.8 If the 2018 Bill is passed in its current form, the Act will apply the ACL as in force on 26 October 2018 as the ACL WA.
- 4.9 All other Australian jurisdictions automatically incorporate any changes to the ACL as a law of their jurisdiction.

## 5 Fair Trading Amendment Bill 2019

- 5.1 The Bill addresses two key issues:
- It applies the ACL as in force on 1 March 2019 as the ACL WA (clause 5).
  - It provides an alternative disallowance mechanism to that in the 2018 Bill, which the Committee found derogated from Parliamentary sovereignty (clause 6 inserting new sections 19A to 19E).

### Clause 5 – application of Australian Consumer Law

- 5.2 Clause 5 of the Bill amends section 19 of the Act. Section 19 applies the ACL text as the ACL WA.
- 5.3 One effect of clause 5 of the Bill is to incorporate any amendments to the ACL made since 1 January 2013, and not otherwise incorporated, up to 1 March 2019 into the text of the ACL WA.
- 5.4 Any Commonwealth amending laws passed since 26 October 2018 and up to 1 March 2019 will not be subject to Parliamentary scrutiny or disallowance under the mechanism proposed in this Bill.<sup>8</sup> As it happens, no Commonwealth Acts have amended the ACL between 26 October 2018 and 1 March 2019.<sup>9</sup>
- 5.5 The other effect of clause 5 of the Bill is to incorporate all future amendments to the ACL into the text of the ACL WA, subject to the tabling and disallowance mechanism proposed in clause 6.<sup>10</sup> No Commonwealth Acts amended the ACL between 1 March 2019 and 11 April 2019 when the 45<sup>th</sup> Commonwealth Parliament was prorogued in preparation for the May 2019 federal election.<sup>11</sup>

### Different wording to 2018 Bill

- 5.6 The wording in clause 5 differs to that in clause 5 of the 2018 Bill.
- 5.7 The 2018 Bill incorporated Commonwealth amendments to the ACL ‘from time to time’ into the ACL WA. The Committee found that the ‘from time to time’ approach ensures immediate uniformity across jurisdictions. However, it also found that it would unquestionably erode Western Australian Parliamentary sovereignty. This was primarily because there would be no opportunity for the Parliament of Western Australia to consider a Commonwealth law before it was applied as a law of the State.<sup>12</sup>

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<sup>8</sup> The Legislative Council had the opportunity to consider and comment on Commonwealth amending laws passed between 1 January 2013 and 26 October 2018 during the course of debate on the 2018 Bill.

<sup>9</sup> Hon John Quigley MLA, Minister for Commerce, Letter, 29 April 2019, p 3.

<sup>10</sup> Fair Trading Amendment Bill 2019 cl 6 inserting ss 19A to 19E.

<sup>11</sup> Hon John Quigley MLA, Minister for Commerce, Letter, 29 April 2019, p 3.

<sup>12</sup> Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 119, *Fair Trading Amendment Bill 2018*, November 2018, para 6.24. The Committee noted that the 2018 Bill proposed a mechanism for Parliamentary oversight of future amendments. The Committee found, however, that the proposed disallowance mechanism made an attempt at, but fell short of, preserving Western Australia’s Parliamentary sovereignty: Finding 3.

- 5.8 The Bill provides that the ACL WA is only amended after Parliament is given the opportunity, and decides not, to disallow a Commonwealth amending law. Clause 5 amends section 19 of the Act so that the ACL WA will consist of all amendments in force as at 1 March 2019 plus any additional amending laws that:
- have been tabled under section 19A
  - have not been disallowed under section 19B
  - have been declared to have effect in Western Australia by a proclamation under section 19C.
- 5.9 The wording currently proposed is significant because, unlike in the 2018 Bill, the new disallowance mechanism in the Bill is to operate before the Commonwealth amending laws commence operation in Western Australia. This means that from 1 March 2019, a Commonwealth amending law sought to be applied in Western Australia will be subject to Parliament’s consideration and possible disallowance before it becomes law in this jurisdiction.
- 5.10 In that regard, clause 5 preserves the Western Australian Parliament’s sovereignty and law-making powers.

## **Clause 6 – proposed scrutiny and disallowance mechanism**

- 5.11 Clause 6 proposes, in proposed new sections 19A to 19E, an alternative disallowance mechanism to that in the original 2018 Bill.
- 5.12 Proposed sections 19A to 19E provide that all future Commonwealth amendments to the ACL must be tabled in both Houses of the Western Australian Parliament and be subject to disallowance by either House. The proposed alternative disallowance mechanism is to operate before the Commonwealth amending laws become laws of Western Australia.
- 5.13 The Parliamentary scrutiny and disallowance process proposed in clause 6 of the Bill provides for:
- a Commonwealth amending law to be tabled in both Houses within 18 sitting days of it receiving the Royal Assent<sup>13</sup>
  - a 14 sitting day period following tabling for a notice of disallowance to be given (‘notice period’)<sup>14</sup>
  - a 30 sitting day period within which the notice of disallowance can be resolved (‘disallowance period’)<sup>15</sup>
  - the application of any standing order of either House for dealing with a notice of motion for disallowance of regulations under section 42(2) of the *Interpretation Act 1984* but modified so that:
    - the Commonwealth amending law is treated as if it were a regulation
    - a 30 sitting day period is substituted for any different period specified in the standing order (for example, the 17 sitting day period specified in Legislative Council Standing Order 67 (SO 67) (attached as Appendix 1))

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<sup>13</sup> Fair Trading Amendment Bill 2019 cl 6 introducing proposed section 19A.

<sup>14</sup> *ibid.*, section 19B.

<sup>15</sup> *ibid.*

- the question on the disallowance motion is not to be put on the last sitting day before a general election (contrary to SO 67).<sup>16</sup>
- 5.14 The Committee notes that 30 sitting days is 10 sitting weeks. Depending on when notice is given, and unless it is discharged from the Notice Paper earlier, a motion for disallowance dealt with on the last possible day may take between five and nine months to be resolved.
- 5.15 The period within which Commonwealth amending laws must be tabled before each House of Parliament, the 14 sitting day notice period and the 30 sitting day disallowance period, may span a dissolution, prorogation or expiry of a House.<sup>17</sup>

## Clause 6 – specific issues in proposed sections

- 5.16 The Committee has identified the following issues arising from proposed sections 19A to 19E.

### Clause 6 – no publication in *Government Gazette* prior to tabling

- 5.17 The proposed new sections do not require a Commonwealth amending law to be published in the *Government Gazette* prior to tabling in Parliament, contrary to one of the Committee’s recommendations regarding the 2018 Bill.<sup>18</sup>
- 5.18 Publication in the *Government Gazette* is intended to alert the public to potential changes in the law. It also, as will be discussed below, initiates the referral of instruments to the Joint Standing Committee on Delegated Legislation (Delegated Legislation Committee) for its consideration.
- 5.19 The Minister for Regional Development representing the Minister for Commerce commented in her second reading speech on the lack of a requirement to publish prior to tabling in the Parliament:

This requirement has not been included based on recommendations by Parliamentary Counsel and the State Solicitor’s Office that gazettal would be inconsistent with current practice for publication of principal legislation, could give rise to unnecessary expense, and could potentially cause confusion about the content of state laws. Confusion is likely, for example, if commonwealth legislation is published prior to scrutiny by Parliament, such that it is in the public domain for an extended period before coming into effect as part of the ACL WA. In terms of expense, some commonwealth ACL amendments are in omnibus bills that have hundreds of pages. In such circumstances, gazettal would be very expensive. For example, a recent regulation amendment with 68 pages cost \$7659.56 to publish in the *Government Gazette*.<sup>19</sup>

- 5.20 The Committee queried whether an alternative process is contemplated by which the public can be informed of the proposed changes to the ACL WA. The Minister advised:

The Commonwealth Government requires regulatory proposals to be accompanied by a thorough assessment of the risks, costs and benefits. Proposed amendments to the ACL that will impact the rights or obligations of consumers or traders are subject to public consultation – both in respect of the original proposal and any proposed legislative instruments. The consultation process is conducted

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<sup>16</sup> *ibid.*, section 19E.

<sup>17</sup> *ibid.*, section 19B(3)(a).

<sup>18</sup> Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 119, *Fair Trading Amendment Bill 2018*, November 2018, Recommendation 2.

<sup>19</sup> Hon Alannah MacTiernan MLC, Minister for Regional Development, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 3 April 2019, p 1928.



by Commonwealth Treasury and promoted by Consumer Protection in Western Australia for stakeholders in this state.

As a result of these processes, stakeholders are well informed as to proposed amendments, and able to access information on proposed amendments prior to tabling in Parliament in WA.<sup>20</sup>

5.21 The PCO advised that:

- All Commonwealth amending laws will be available to the public on the Commonwealth Federal Register of Legislation website.<sup>21</sup>
- As Commonwealth amending laws will need to be tabled under new section 19A (as the Bill is currently drafted), they would ordinarily be available to the public on the Western Australian Parliament's website as a tabled paper.<sup>22</sup>

#### *Committee comment*

5.22 The Committee is satisfied with the rationale for the Government's reluctance to mandate the publication of Commonwealth amending laws in the *Western Australian Government Gazette* prior to their tabling in the Parliament.

#### **Clause 6 – application of Commonwealth amending laws**

5.23 In order that Commonwealth amending laws can be applied in Western Australia using the mechanism proposed by the Bill, proposed section 19A requires all Commonwealth amending laws to be tabled in both Houses of the Western Australian Parliament within 18 sitting days of the House after the day on which the Commonwealth law receives Royal Assent.

5.24 Unlike what was proposed in the 2018 Bill, the Bill preserves Parliamentary sovereignty by ensuring that Commonwealth amending laws will not apply to Western Australia without the Parliament having the opportunity to consider and disallow them.

5.25 A Commonwealth amending law that is not tabled in accordance with proposed section 19A could not be incorporated into the ACL WA under the mechanism provided by the Bill.

5.26 This would not preclude the application of a Commonwealth amending law through a separate Bill; for example, one such as the 2018 Bill currently in the Legislative Assembly.

#### **Clause 6 – tabling supporting information**

5.27 While proposed new section 19A requires a Commonwealth amending law to be tabled in each House of Parliament, there is no requirement for supporting information for a Commonwealth amending law to be tabled, such as the Commonwealth Explanatory Memorandum and second reading speech.

5.28 Second reading speeches inform Parliament of the policy underpinning a proposed law, the mischief sought to be addressed by it, and the objectives it seeks to achieve. Explanatory Memoranda are meant to assist Parliament in understanding how the legislation is to operate and its objectives attained.

5.29 The Minister has advised the Committee that the Government intends to table 'sufficient supporting information to provide a clear explanation of the content and effect of each

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<sup>20</sup> Hon John Quigley MLA, Minister for Commerce, Letter, 29 April 2019, pp 3-4.

<sup>21</sup> This is at <https://www.legislation.gov.au/>.

<sup>22</sup> Hon John Quigley MLA, Minister for Commerce, Letter, 29 April 2019, p 4.

amendment'.<sup>23</sup> He expects this to include the explanatory memorandum (which, he advised, will include the regulation impact statement) and the second reading speech.<sup>24</sup>

#### *Committee comment*

- 5.30 The ACL is complex. The Bill proposes a process to expedite incorporation into Western Australian law, subject to Parliament's decision to disallow, what may be far ranging and complicated amendments.
- 5.31 It is therefore important that, at the time of tabling, the Parliament be provided with all the material that it would ordinarily expect and rely upon to support a change to Western Australian law.
- 5.32 Notwithstanding the Minister's assurances, providing this information for Commonwealth amending laws is not mandated by the Bill.
- 5.33 However, provision of this information may make a notice of motion to disallow less likely.

#### **Clause 6 – when Commonwealth amending laws come into operation in the State**

- 5.34 The Committee has identified an ambiguity in the drafting of proposed sections 19B and 19C leading to uncertainty as to when Commonwealth amending laws come into operation in Western Australia:
- Proposed section 19B(2) suggests this will be once the conditions precedent in sections 19B(2)(a) or (b) are met.
  - The Explanatory Memorandum for section 19C states 'the laws will come into operation on proclamation of the Governor which will be published in the Gazette'<sup>25</sup> (proposed section 19C(2)).
  - Section 19C(3) provides that a Commonwealth amending law may have effect on a day fixed by the proclamation.
- 5.35 The Committee asked the Minister to clarify when Commonwealth amending laws would come into operation in Western Australia. He advised that:
- The time at which the amendment will come into effect is dictated by publication of a commencement date by proclamation.<sup>26</sup>
- 5.36 The PCO informed the Committee that section 19C(3)<sup>27</sup> is consistent with commencement provisions in Western Australian legislation commencing legislation by proclamation, and that:
- A day that is later than the day of publication in the Gazette is generally fixed in order to avoid the technical retrospectivity that results from fixing the day of publication in the Gazette.<sup>28</sup>
- 5.37 The Minister advised that it is not intended that the date fixed by proclamation would be a date earlier than the date of publication in the *Government Gazette*. He submitted that 'it is

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<sup>23</sup> *ibid.*

<sup>24</sup> *ibid.*

<sup>25</sup> Fair Trading Amendment Bill 2019, *Explanatory Memorandum*, Legislative Council, p 4.

<sup>26</sup> Hon John Quigley MLA, Minister for Commerce, Letter, 29 April 2019, p 5.

<sup>27</sup> Section 19C(3) provides that if an amending provision of a Commonwealth amending law has come into operation in the Commonwealth before the proclamation is published in the *Government Gazette*, the amending provision has effect for the purposes of section 19 of the *Fair Trading Act 2010* on a day fixed by the proclamation.

<sup>28</sup> Hon John Quigley MLA, Minister for Commerce, Letter, 29 April 2019, p 5.

preferable that consumers and traders are alerted to the amendments by publication prior to their coming into effect'.<sup>29</sup> He also noted that the date fixed by proclamation could not be earlier than the date on which the conditions precedent set out in section 19B have been satisfied.<sup>30</sup>

5.38 The PCO expressed the view that the provisions inserted by clause 6 of the Bill:

do not, as a matter of statutory interpretation, provide power to make a proclamation that fixes a date that is earlier than the day on which the proclamation is published in the Gazette. This is because a proclamation that did that would give the amending law retrospective effect. There is a strong presumption against retrospective laws, and in PCO's view there is no provision in the Bill that rebuts the presumption so as to authorise a proclamation to fix a day earlier than the day the proclamation is published.<sup>31</sup>

*Committee comment*

5.39 On the advice it has received, the Committee is satisfied that it is not necessary that there be a provision in section 19C(3) to say that the commencement date for Commonwealth amending laws cannot be earlier than the date on which the proclamation is published in the *Government Gazette*.

5.40 However, the Committee proposes amendments to the Bill to clarify what is meant by, and when, a Commonwealth amending law 'has effect' under section 19B(2) and it 'comes into operation' under section 19C(3) and (4) (see paragraphs 5.91 to 5.92). A marked-up copy of the Bill showing the Committee's proposed amendments is attached as Appendix 2.

**Clause 6 – consequences of disallowance for future Commonwealth amending laws**

5.41 Although the proposed tabling and disallowance mechanism in the Bill preserves the Western Australian Parliament's sovereignty and law-making powers, it may have an unintended consequence for the application of the ACL in Western Australia.

5.42 This would occur when a Commonwealth amending law is disallowed by the Western Australian Parliament and another Commonwealth amending law is subsequently introduced that is contingent upon those disallowed amendments. The Minister advised:

In practice, if an amending law is contingent upon an earlier amendment that has been disallowed, the amending law would not be tabled in Parliament. If the Western Australian Government wished to incorporate the amendment in some form it would be necessary to introduce a Bill to make the amendment.<sup>32</sup>

5.43 Of course, it would always be open for the Government to introduce, as it can now, a bill to apply a particular Commonwealth amending law independent of the procedure proposed by this Bill.

**Clause 6 – no ability to amend**

5.44 There may be instances where the Parliament considers that Western Australia's interests require a minor amendment to a Commonwealth amending law.

5.45 The inability to amend a Commonwealth amending law constrains Western Australia's Parliamentary sovereignty.

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<sup>29</sup> *ibid.*, p 6.

<sup>30</sup> *ibid.*

<sup>31</sup> *ibid.*

<sup>32</sup> *ibid.*, p 2.

- 5.46 Parliament can currently dictate the extent to which the ACL applies in Western Australia and modify its operation to the extent necessary to take into account local conditions (for example, section 36 of the Act which modifies sections 73(1) and 170(1) of the ACL).
- 5.47 As the Bill currently stands, Parliament only has the options of entirely accepting or entirely rejecting changes to the ACL. This is notwithstanding that an objectionable element in a Commonwealth amending law may be made acceptable if amended in some minor way that does not affect the substance of the national scheme.

*Committee comment*

- 5.48 The Committee accepts, however, that it is impractical, having regard to the mechanism proposed, to introduce a means of amending a Commonwealth amending law.

**Clause 6 – no ability to partially disallow**

- 5.49 There may be instances where the Parliament considers that a part of a Commonwealth amending law ought not to be applied as the ACL WA.
- 5.50 Parliament has power under section 42(8) of the *Interpretation Act 1984* to disallow part of a regulation.<sup>33</sup>
- 5.51 However, clause 6 of the Bill does not provide capacity for Parliament to partially disallow a Commonwealth amending law and, consequently, takes an ‘all or nothing approach’.
- 5.52 The Minister advised that the prospect of a partial disallowance was considered in the course of drafting the Bill but:

It was not considered appropriate to provide a mechanism for partial disallowance because the effective operation of the national scheme is dependent on maintaining the greatest possible degree of consistency.<sup>34</sup>

- 5.53 He said:

If, in the view of the WA Parliament, a particular amendment is not in the interests of WA stakeholders and should be disallowed, even in part, consultation and regulatory impact assessment may be required. This will permit the Government of the day to assess the potential impact of the proposed variation on WA’s participation in the national scheme and ensure that any proposed variation maintains national consistency with the ACL to the greatest extent possible. This will require development of a separate amendment Bill.<sup>35</sup>

- 5.54 According to PCO:

If an amending law is totally disallowed, any subsequent WA Bill considered necessary to introduce the amendments in the disallowed amending law in a modified form can take into account the concerns that led to the disallowance in a comprehensive manner.<sup>36</sup>

*Committee comment*

- 5.55 The inability to partially disallow Commonwealth amending laws constrains Western Australia’s Parliamentary sovereignty by obliging it to either entirely accept or entirely reject

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<sup>33</sup> *Interpretation Act 1984* s 42(8): ‘In this section – (a) a reference to regulations shall be construed as including a reference to a regulation or part of a regulation’.

<sup>34</sup> Hon John Quigley MLA, Minister for Commerce, Letter, 29 April 2019, p 2.

<sup>35</sup> *ibid.*

<sup>36</sup> *ibid.*

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

- 5.56 The Committee proposes amendments to the Bill to provide the capacity for partial disallowance of Commonwealth amending laws. These amendments are dispersed throughout the Bill. A marked-up copy of the Bill showing the Committee's proposed amendments is attached as Appendix 2.

### **Clause 6 – interaction with Parliamentary Standing Orders**

- 5.57 Proposed section 19E is unusual in that it proposes a legislative measure relying upon and referring to a standing order of the Parliament.
- 5.58 It purports to extend the operation of any standing order setting out a procedure for disallowance of a regulation to apply to the Commonwealth amending laws referred to in the Bill.
- 5.59 The Legislative Council is the only House of the Parliament of Western Australia that has a standing order specifically dealing with the disallowance of regulations. The Bill's proposed modifications to standing orders of a House therefore clearly refer to SO 67.

#### *Legislative Council Standing Order 67: how it operates*

- 5.60 SO 67(3) provides that a notice of motion for disallowance of regulations is moved automatically ('deemed to have been moved *pro forma*') after two sitting days and thereafter, by reason of SO 67(4), has precedence over other orders of the day.
- 5.61 Accordingly, orders of the day relating to disallowance of regulations are listed in precedence to other orders of the day on the Notice Paper and Daily Business Program.
- 5.62 If the House does not wish to debate a disallowance on any sitting day after it has been moved, it must agree to a motion to re-order its business so it can deal with other orders of the day. Importantly, SO 67(5) provides a default mechanism that prevents the repeated and indefinite postponement of a disallowance motion. For finality, it requires it to be dealt with on a certain day in the event that the question is not put earlier, namely either the:
- 17<sup>th</sup> sitting day after the disallowance motion was moved
  - proposed last sitting day prior to a general election.
- 5.63 This procedure ensures a vote on the disallowance motion. It prevents a disallowance motion remaining on the Notice Paper unresolved and, ultimately, expiring on prorogation of the House. Such an outcome would prevent the House exercising its responsibility to supervise the authority Parliament has delegated to the executive to make laws through subsidiary legislation.

#### *Problem 1: Legislative Council Standing Order 67 does not apply to Commonwealth amending laws*

- 5.64 SO 67(1) provides that for the purpose of the disallowance process in that standing order, a 'regulation' includes any 'statutory instrument made subject to disallowance by a written law'.

- 5.65 The term 'statutory instrument' is not defined in the Standing Orders or in the *Interpretation Act 1984*.<sup>37</sup>
- 5.66 A 'statutory instrument' is generally accepted to be:
- a rule, order, or administrative regulation having the force of law promulgated by the crown in council, a minister, a local authority, a corporation or other body under power delegated by Parliament.<sup>38</sup>
- 5.67 If the term 'statutory instrument' in SO 67 is interpreted accordingly (namely, as a form of delegated legislation), then instruments of primary legislation (Acts) made subject to disallowance by a written law of Western Australia would not be considered to be a 'regulation' within the meaning of SO 67(1) and, so, would not be subject to the SO 67 disallowance process.
- 5.68 As Commonwealth amending laws are primary legislation (albeit of the Commonwealth), they would not be 'regulations' under SO 67. Accordingly, they would not be subject to the disallowance process in SO 67.
- 5.69 Clause 6 of the Bill (in proposed section 19E) seeks to address the issue of a Commonwealth amending law not being a 'regulation' for the purposes of SO 67. It does this by way of a statutory modification to SO 67 (proposed section 19E(3)).

*Problem 2: Legislative Council Standing Order 67 may be amended or repealed*

- 5.70 If SO 67 is amended or repealed in the future, the disallowance mechanism proposed in the Bill may not apply, and the Western Australian Parliament may be unable to disallow a Commonwealth amending law as provided for by the Bill.

*Problem 3: Parliamentary comity*

- 5.71 If proposed section 19E is agreed to by the Legislative Council, it would involve the Legislative Assembly considering and deciding on a statutory modification to the application of procedural rules that only apply in the Legislative Council. The modification of SO 67 in proposed section 19E may conflict with the principle of comity between the Houses of Parliament as it would involve the Legislative Assembly considering and deciding on a statutory modification to the application of procedural rules that apply only in the Legislative Council.

**Parliamentary sovereignty issues**

- 5.72 The Committee considers that, in particular, the:
- inability for Parliament to amend or partially disallow Commonwealth amending laws
  - interaction with Standing Orders
- have an impact upon Parliamentary sovereignty and law-making powers.

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<sup>37</sup> The term 'statutory instrument' or 'legislative instrument' is defined in a number of Acts of other Australian jurisdictions, but appears limited in each definition to subordinate legislation; that is, an instrument 'made under an Act'. See, for example: *Legislation Act 2003* (Cth) s 8; *Interpretation Act 1987* (NSW) s 3. In *Liddell v Lembke (t/as Cheryl's Unisex Salon)*; *Gibson v Bosmac Pty Ltd* (1994) 127 ALR 342 the Industrial Relations Court of Australia determined that a Commonwealth Act was not a 'statutory instrument'. The court cited *Halsbury's Laws of England* (Halsbury's Laws of England, 4th edition, volume 44, Butterworths, London, 1973, paras 981 – 984) which stated that a statutory instrument is an instrument made under a statutory power and concluded that a statute did not fall within that description: see *Liddell v Lembke (t/as Cheryl's Unisex Salon)*; *Gibson v Bosmac Pty Ltd* (1994) 127 ALR 342 per Wilcox CJ and Keely J at 364.

<sup>38</sup> Merriam-Webster online dictionary, See: <https://www.merriam-webster.com/dictionary/statutory%20instrument>, Viewed 15 April 2019.

## Committee's proposals to address sovereignty and related issues

5.73 The Committee suggests the following solutions to address the issues identified above.

### *Amendment to Standing Order 67(1)*

5.74 A Commonwealth amending law can be made subject to the scrutiny and disallowance process in SO 67 by amending SO 67(1) as follows:

Delete SO 67(1) and insert instead -

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

5.75 The word 'instrument' is defined in Rule 10.8 of the Joint Rules governing the operation of the Delegated Legislation Committee as follows:

"instrument" means –

...

(b) an instrument, **not being subsidiary legislation**, that is made subject to disallowance by either House under a written law;

"subsidiary legislation" has the meaning given to it by section 5 of the *Interpretation Act 1984*. [Emphasis added]

5.76 This definition of 'instrument' is broad and paragraph (b) would include a Commonwealth amending law.

5.77 The effect of this amendment to SO 67(1) would be to include a Commonwealth amending law as a 'regulation' for the purposes of SO 67 and, accordingly, make it subject to the scrutiny and disallowance procedure in that standing order.

5.78 If SO 67 is amended as suggested, there is no need for current section 19E of the Bill.

## RECOMMENDATION 1

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

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

### *Amendments to the Bill*

5.79 Along with the amendment to SO 67(1), the Committee recommends amendments to the Bill. A marked-up copy of the Bill showing the Committee's suggested amendments is attached as Appendix 2. It should be noted that the Committee's proposed section 19E will only be necessary if the Legislative Council decides that the Delegated Legislation Committee should scrutinise Commonwealth amending laws, for the reasons given in paragraphs 5.99 to 5.114.

### *Notice periods, disallowance notices and motions to survive prorogation: proposed section 19B(3)*

5.80 The Bill in current section 19B(3) refers to when Parliament is 'dissolved, prorogued or expires'. The Committee's proposed amendments to section 19B(3)(a) and (b) correct the order in which these events may occur; namely prorogation, dissolution and expiry.



- 5.81 The Committee's proposed section 19B(3)(b) also provides that notices of a disallowance resolution and motions that a Commonwealth amending law be disallowed do not lapse even though a House is prorogued, dissolved or expires.
- 5.82 Under Standing Orders, a Member may give a notice of motion to disallow a regulation. They may also withdraw that notice at any time before the expiration of two sitting days after the day it was given.<sup>39</sup> After that time, it is deemed to have been moved automatically and the disallowance procedure in SO 67(5) applies.<sup>40</sup>
- 5.83 It is only if the notice moves automatically under SO 67(3) that it becomes subject to SO 67(5)(a) or (b) so that the question is put on either the:
- 17<sup>th</sup> sitting day after the notice moves (SO 67(5)(a))
  - last sitting day prior to a general election (SO 67(5)(b)).
- 5.84 A notice may survive into a new Parliament in certain situations depending on the time it is given. For example, if it is given on the proposed last, second last or third last sitting day prior to a general election it remains a notice because it has not yet been moved by operation of SO 67(3). If the last sitting week is three sitting days in length, any notice given that week will survive until the next Parliament.
- 5.85 Accordingly, notices of motion to disallow a regulation survive into a new Parliament by virtue of SO 67(2) and (3) if they are given on the proposed last, second last or third last sitting day prior to a general election.
- 5.86 By way of contrast, a notice of motion to disallow a regulation that has moved automatically under SO 67(3) is required to be resolved before the Council rises on the proposed last sitting day prior to a general election by virtue of SO 67(5)(b)<sup>41</sup> (see paragraphs 5.62 and 5.63).
- 5.87 As noted, the Committee's proposed section 19B(3)(b) provides that a motion that a Commonwealth amending law be disallowed does not lapse even though the House is prorogued, dissolved or expires. However, SO 67(5)(b) would ordinarily require a vote on the last sitting day prior to a general election.
- 5.88 Accordingly, should the House desire to have a *pro forma* disallowance motion in the Legislative Council (that is, one that has moved automatically after two sitting days) survive into a new Parliament after a general election, as proposed by the Bill, an exception is needed to SO 67(5)(b) and, so, the Committee makes the following recommendation.

## RECOMMENDATION 2

The Legislative Council amend Standing Order 67 of the Standing Orders of the Legislative Council as follows:

Delete Standing Orders 67(5)(a) and (b) and insert the following:

- (5) Where on the 17th sitting day after the motion was moved (exclusive of the day on which the motion was moved) a motion to disallow a regulation remains unresolved, then the question shall be put before the Council rises on that day.

<sup>39</sup> Legislative Council Standing Order 63.

<sup>40</sup> *ibid.*, SO 67(3).

<sup>41</sup> Standing Order 67(5)(b) requires a disallowance motion to be dealt with on the proposed last sitting day prior to a general election in the event the question is not put earlier.

- (6) Subject to (7), where on the proposed last sitting day prior to a general election, a motion to disallow a regulation remains unresolved, then the question shall be put before the Council rises on that day.
- (7) Where a written law provides that a motion to disallow a regulation does not lapse on prorogation, dissolution, or expiry of a House, and:
- (a) a motion to disallow a regulation remains unresolved on the proposed last sitting day prior to a general election; and
  - (b) the last sitting day is the 16th or earlier sitting day after the motion was moved (exclusive of the day on which the motion was moved),
- the motion to disallow shall be an order of the day in the next Parliament and unless disposed of earlier, the question shall be put in accordance with (5) in the next Parliament.

5.89 The effect of the amendment to SO 67 in the terms set out in Recommendation 2, together with the Committee's proposed section 19B(3), is that the period for tabling Commonwealth amending laws, notice periods, notices of disallowance resolutions and motions that a Commonwealth amending law be disallowed will survive into a new Parliament. The same timeframe for disallowance will apply as it does now, regardless of prorogation, dissolution or expiry. That is, a motion to disallow a Commonwealth amending law, if not resolved earlier, must be resolved before the Council rises on the 17<sup>th</sup> sitting day after the motion was moved (exclusive of the day on which the motion was moved) and notwithstanding that it may occur in a new Parliament. This time period is shorter than, but not inconsistent with, the 30 sitting days provided in the Bill.

*Committee comment*

5.90 In order that Parliament is in a position to utilise the disallowance mechanism proposed by the Bill, the amendments to SO 67(1) and SO 67 in the terms set out in Recommendation 1 and Recommendation 2 respectively should be coordinated with the passage of the Bill.

### RECOMMENDATION 3

The question on the third reading of the Fair Trading Amendment Bill 2019 not be put until Legislative Council Standing Order 67(1) and Legislative Council Standing Order 67 are amended in the terms set out in Recommendation 1 and Recommendation 2 respectively.

*When Commonwealth amending laws come into operation: proposed section 19C*

- 5.91 The Committee's view is that the use of the term 'has effect' in sections 19C(3) and (4) of the Bill creates confusion about when and how Commonwealth amending laws apply in Western Australia.
- 5.92 The Committee's proposed amendments to section 19C(3) and (4) clearly differentiate between when a Commonwealth amending law 'has effect' under section 19B(2) and when it 'comes into operation' under section 19C(3) and (4).

*Publication of Commonwealth amending laws: proposed section 19E*

5.93 By virtue of Joint Rule 10.5 of Schedule 1 of the Standing Orders of the Legislative Council, instruments stand referred to the Delegated Legislation Committee on 'publication'. Commonwealth amending laws must therefore be published under a written law of Western Australia to be referred to the Delegated Legislation Committee.

- 5.94 The Committee's proposed amendments to the Bill insert section 19E. This section provides that the tabling of Commonwealth amending laws is taken to be publication for the purposes of the Standing Orders. The effect of this is to ensure that Commonwealth amending laws are referred to the Delegated Legislation Committee under Joint Rule 10.5 without the need to reach agreement with the Legislative Assembly for the amendment of the Joint Rule.
- 5.95 The requirement for 'publication' of Commonwealth amending laws (in the Committee's proposed section 19E) is necessary only if Commonwealth amending laws are to be referred to the Delegated Legislation Committee.

#### *Minister's comment*

- 5.96 The Committee provided the Minister with its draft amendments to the Bill for his comment. The Minister advised:

I am satisfied that the amendments set out in the draft marked up copy of the Bill, while not our preferred position, would satisfy the policy objectives of the McGowan Government to provide for the timely incorporation of amendments to the [ACL] into state law.<sup>42</sup>

### **Parliamentary Committee scrutiny of Commonwealth amending laws**

- 5.97 It is ultimately a matter for the Legislative Council – and Legislative Assembly – to decide which existing Parliamentary committee or committees should scrutinise Commonwealth amending laws or whether a new committee be established for that specific purpose.
- 5.98 Should a current Legislative Council committee be utilised, the Committee considers the following to be best placed to scrutinise Commonwealth amending laws:
- Joint Standing Committee on Delegated Legislation
  - Standing Committee on Legislation (Legislation Committee).

#### **Joint Standing Committee on Delegated Legislation**

- 5.99 As explained in paragraph 5.59, the Bill presumes that a Commonwealth amending law will be subject to SO 67 and subject to disallowance in a manner akin to that for regulations. The Delegated Legislation Committee has the responsibility for inquiring into and recommending the disallowance of regulations and other subsidiary legislation.
- 5.100 At paragraphs 5.64 to 5.69 and 5.74 to 5.78, the Committee has canvassed the amendments necessary to ensure that a Commonwealth amending law can be subject to SO 67.
- 5.101 If the Legislative Council decides that the Delegated Legislation Committee should scrutinise Commonwealth amending laws:
- SO 67(1) requires amendment
  - Commonwealth amending laws need to be published under a law of Western Australia.

#### *Standing Order 67(1)*

- 5.102 For the reasons set out in paragraphs 5.64 to 5.69, SO 67 does not apply to Commonwealth amending laws.
- 5.103 That can be remedied in the manner suggested by the Committee in paragraphs 5.74 to 5.78 and Recommendation 1.

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<sup>42</sup> Hon John Quigley MLA, Minister for Commerce, Letter, 27 June 2019, p 1.

*Publication under a law of Western Australia*

- 5.104 As noted in paragraphs 5.93 to 5.95, by virtue of Joint Rule 10.5, instruments stand referred to the Delegated Legislation Committee on 'publication' and Commonwealth amending laws must therefore be published under a written law of Western Australia to be so referred.
- 5.105 The Committee's proposed amendments to the Bill insert section 19E, for the reasons set out in paragraph 5.94, to ensure that the tabling of a Commonwealth amending law will be its publication for the purposes of the Standing Orders and trigger its referral to the Delegated Legislation Committee under Joint Rule 10.5. Adoption of this amendment will eliminate the need to reach agreement with the Legislative Assembly to amend the Joint Rule.
- 5.106 As noted, the requirement for 'publication' of Commonwealth amending laws is necessary only if they are to be referred to the Delegated Legislation Committee (see paragraph 5.79).

#### **RECOMMENDATION 4**

The Fair Trading Amendment Bill 2019 be amended as follows:

##### **Clause 4**

Page 2, lines 15 to 17 — To delete the lines and insert:

amends either or both of the following —

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

##### **Clause 5**

Page 3, lines 1 and 2 — To delete the lines and insert:

laws —

- (i) to the extent that they have effect for the purposes of this section under section 19B; and
- (ii) when they come into operation under section 19C;

and

Page 3, lines 12 and 13 — To delete the lines and insert:

of that Act unless and to the extent that the amending law has effect for the purposes of this section under section 19B and comes into operation under section 19C.

##### **Clause 6**

Page 3, line 22 — To delete the line and insert:

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

Page 3, line 29 — To delete "law" and insert:

law, or part of an amending law,

Page 4, after line 4 — To insert:

**partial disallowance resolution** means a resolution that part of an amending law be disallowed.

Page 4, lines 5 to 14 — To delete the lines and insert:

- (2) Subject to subsection (2A), an amending law has effect for the purposes of section 19 if the amending law is laid before each House of Parliament under section 19A and either —
- (a) no notice of a disallowance resolution is given in either House within the notice period; or
  - (b) if at least one notice of a disallowance resolution is given within the notice period then, for each such notice, one of the following applies —
    - (i) the notice is withdrawn or discharged within the disallowance period;
    - (ii) the disallowance resolution is lost in the House or not agreed to within the disallowance period;
    - (iii) the disallowance resolution is a partial disallowance resolution and is agreed to within the disallowance period.
- (2A) If a partial disallowance resolution is agreed to within the disallowance period, the part of the amending law to which the resolution relates does not have effect for the purposes of section 19.

Page 4, line 19 — To delete “dissolved, prorogued” and insert:

prorogued, dissolved

Page 4, lines 21 to 23 — To delete the lines and insert:

House of Parliament, or a motion that an amending law be disallowed in the House, does not lapse even though the House is prorogued, dissolved or expires.

Page 4, line 24 — To delete the line and insert:

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

Page 4, lines 26 to 29 — To delete the lines and insert:

**amending provision** means a provision of an amending law that amends either or both of the following —

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

Page 5, lines 5 to 16 — To delete the lines and insert:

- (2A) However, if part of an amending law does not have effect under section 19B(2A), the Governor must declare in the proclamation the extent that the amending law does not have effect.
- (3) If an amending provision has come into operation in the Commonwealth before the proclamation is published in the *Gazette*, the amending provision

comes into operation, other than to the extent that the provision does not have effect under section 19B(2A), on a day fixed by the proclamation.

- (4) If an amending provision has not come into operation in the Commonwealth before the proclamation is published in the *Gazette*, the amending provision comes into operation, other than to the extent that the provision does not have effect under section 19B(2A), when the amending provision comes into operation in the Commonwealth in accordance with the amending law.

Page 5, line 25 to page 6, line 28 — To delete the lines and insert:

**19E. Tabling of amending law taken to be publication for Standing Orders**

- (1) In this section —  
***parliamentary committee*** means a committee established by either or both Houses of Parliament.
- (2) If a Standing Order of a House of Parliament provides that on the publication of an instrument under a written law the instrument is referred to a parliamentary committee for consideration, the laying of an amending law under section 19A is taken to be publication of the amending law for the purposes of the Standing Order.
- (3) This section does not apply if the Standing Orders of the House provide specifically for how an amending law may be considered by a parliamentary committee.

*Process on referral*

5.107 On referral to the Delegated Legislation Committee, the same process would apply to Commonwealth amending laws as currently applies to all other instruments.

5.108 The Delegated Legislation Committee considers instruments referred to it in accordance with Joint Rule 10.6, which directs it to inquire whether the instrument:

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

5.109 The Delegated Legislation Committee's terms of reference do not limit that committee's consideration to the specific matters referred to in paragraphs (a) to (d) in Joint Rule 10.6. While it must inquire into and report on those matters, it might also consider and report on whether or not a Commonwealth amending law would have an impact on Western Australia's sovereignty.

5.110 The Delegated Legislation Committee would consider the Commonwealth amending law and report to the Parliament only if it recommends that the Commonwealth amending law be disallowed in whole or in part.

*Provision of information*

5.111 Premier's Circular 2014/01 *Subsidiary Legislation – Explanatory Memoranda* requires the provision of certain supporting documents (including a detailed explanatory memorandum)

to the Delegated Legislation Committee within ten working days of the subsidiary legislation being published in the *Government Gazette*. The Delegated Legislation Committee may need to consider whether the Premier's Circular should be amended to ensure that information relevant to proper consideration of Commonwealth amending laws is supplied to it.

- 5.112 These materials could be tabled when a Commonwealth amending law is tabled under section 19A of the Bill. In any event, explanatory materials for Commonwealth amending laws are publicly available on the Federal Register of Legislation.

#### *Effect of dissolution of the Legislative Assembly on Delegated Legislation Committee*

- 5.113 The Delegated Legislation Committee is a joint committee. When the Legislative Assembly is dissolved prior to a general election the Delegated Legislation Committee ceases to exist. For the Delegated Legislation Committee to be re-established in a new Parliament, each House must agree to joint rules for its establishment and operation and then appoint its membership. The appointment of membership to the Delegated Legislation Committee does not occur until after the Legislative Council elected at the March general election meets following the swearing in of Members on 22 May. The Delegated Legislation Committee would not exist to report to the House from the dissolution of the Assembly until a date after 22 May in an election year.

#### *Conclusion*

- 5.114 Ultimately, the Legislative Council may determine which of its committees is best placed to scrutinise Commonwealth amending laws. The Delegated Legislation Committee is not prevented from doing so as long as a Commonwealth amending law is referred to it for its consideration under Joint Rule 10.5. As noted above, a referral occurs if a Commonwealth amending law is published and made subject to disallowance under a written law of Western Australia.

#### **Legislation Committee**

- 5.115 If the Legislative Council decides that the Legislation Committee should scrutinise Commonwealth amending laws:
- SO 67(1) requires amendment
  - a new Standing Order is required
  - an amendment to the Legislation Committee's terms of reference is required.

#### *Legislation Committee – function*

- 5.116 The Legislation Committee currently considers and reports on any bill referred by the Council.<sup>43</sup>

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<sup>43</sup> Item 4.3 of Schedule 1 of the Standing Orders of the Legislative Council.



- 5.117 The Legislation Committee considers:
- parliamentary sovereignty and privilege issues
  - rule of law issues<sup>44</sup>
  - technical issues<sup>45</sup>.
- 5.118 The Legislation Committee also considers the bill against 16 Fundamental Legislative Scrutiny Principles. These are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law. The principles fall under two headings:
- Does the bill have sufficient regard to the rights and liberties of individuals?
  - Does the bill have sufficient regard to the institution of Parliament?
- 5.119 Unless otherwise ordered, if a bill is referred after its second reading has been agreed, the Legislation Committee does not inquire into the policy of the bill.<sup>46</sup>
- 5.120 Of course, under the mechanism proposed in the Bill, a Commonwealth amending law is not a bill and is not read into the House.

*Standing Order 67(1)*

- 5.121 See paragraphs 5.102 and 5.103.

*Possible trigger for referral to Legislation Committee*

- 5.122 Any Member may give a notice of motion to disallow a regulation. They may also withdraw that notice at any time before the expiration of two sitting days after the day it was given.<sup>47</sup> After that time, it is deemed to have been moved automatically and the disallowance procedure in SO 67(5) applies unless the order of the day is discharged.<sup>48</sup>
- 5.123 A possible trigger for referral of Commonwealth amending laws to the Legislation Committee is after a notice of motion to disallow can no longer be withdrawn; that is, once a notice of motion to disallow has moved automatically to become an order of the day. This would give the Member who gave the notice an opportunity to undertake further research and obtain briefings on the Commonwealth amending law prior to a referral. If the issues of concern are addressed, the Member could withdraw their notice before it automatically moves and there would be no referral to the Legislation Committee. In the absence of any further notice to disallow, the Commonwealth amending law would have effect in Western Australia.<sup>49</sup>

*Amendment to Standing Orders*

- 5.124 If SO 67(5)(b) is amended in the terms set out in Recommendation 2, referral of Commonwealth amending laws to the Legislation Committee could be effected by introducing a new Standing Order.

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<sup>44</sup> Examples include: Is the bill clear and unambiguous, publicly available and consistent with the requirements of procedural fairness and appropriate merit and legal review of administrative decisions? Does the bill infringe or alter established common law 'rights' (for example, compensation for government acquisition of property and presumption of innocence).

<sup>45</sup> Examples include: Are there drafting errors that may cause confusion? Is the terminology in the bill consistent? How does the bill interact with or impact on State legislation?

<sup>46</sup> Legislative Council Standing Order 128(2).

<sup>47</sup> *ibid.*, SO 63.

<sup>48</sup> *ibid.*, SO 67(3).

<sup>49</sup> See the Committee's proposed section 19B(2)(b)(i) of the Fair Trading Amendment Bill 2019 at Appendix 2.

## RECOMMENDATION 5

The Legislative Council insert a new Standing Order 67A of the Standing Orders of the Legislative Council as follows:

**67A. Referral to Legislation Committee**

An order of the day to disallow a regulation, which order does not lapse on prorogation, dissolution or expiry of the Council, is referred to the Legislation Committee for consideration and report.

- 5.125 The effect of a new SO 67A as above, in conjunction with the amendment to SO 67(5)(b) and section 19B(3)(b) of the Committee's proposed amendments to the Bill, is that all disallowance motions that are expressed not to lapse on prorogation, dissolution or expiry, are referred to the Legislation Committee.
- 5.126 The proposed new Standing Order is expressed in general terms and does not limit the referral to Commonwealth amending laws. It would capture any regulation that can be disallowed on a motion that does not lapse on prorogation, dissolution or expiry of Parliament.

*Amendment to Legislation Committee's terms of reference*

- 5.127 The Legislation Committee's terms of reference would also require amendment, to include this new function in term of reference 4.3(b).

## RECOMMENDATION 6

The Legislative Council amend the Standing Committee on Legislation's term of reference 4.3 in Schedule 1 of the Standing Orders of the Legislative Council as follows:

Insert paragraph (b) as follows:

(b) regulation subject to a motion to disallow that does not lapse on prorogation, dissolution or expiry of the Council.

- 5.128 The effect of new term of reference 4.3(b) is that Commonwealth amending laws, and any regulations that are subject to a disallowance motion that does not lapse on prorogation, dissolution and expiry, are referred to the Legislation Committee.

*Committee comment*

- 5.129 If the Legislative Council decides that the Legislation Committee should be charged with the responsibility of considering and reporting on Commonwealth amending laws, the recommended amendments to the Standing Orders in the terms set out in Recommendation 5 and Recommendation 6 should be coordinated with the passage of the Bill.

## RECOMMENDATION 7

The question on the third reading of the Fair Trading Amendment Bill 2019 not be put until Legislative Council Standing Order 67A is inserted and the Standing Committee on Legislation's term of reference 4.3 in Schedule 1 of the Standing Orders of the Legislation Council is amended in the terms set out in Recommendation 5 and Recommendation 6 respectively.

## RECOMMENDATION 8

The Fair Trading Amendment Bill 2019 be amended as follows:

### Clause 4

Page 2, lines 15 to 17 — To delete the lines and insert:

amends either or both of the following —

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

### Clause 5

Page 3, lines 1 and 2 — To delete the lines and insert:

laws —

- (i) to the extent that they have effect for the purposes of this section under section 19B; and
- (ii) when they come into operation under section 19C;

and

Page 3, lines 12 and 13 — To delete the lines and insert:

of that Act unless and to the extent that the amending law has effect for the purposes of this section under section 19B and comes into operation under section 19C.

### Clause 6

Page 3, line 22 — To delete the line and insert:

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

Page 3, line 29 — To delete “law” and insert:

law, or part of an amending law,

Page 4, after line 4 — To insert:

***partial disallowance resolution*** means a resolution that part of an amending law be disallowed.

Page 4, lines 5 to 14 — To delete the lines and insert:

- (2) Subject to subsection (2A), an amending law has effect for the purposes of section 19 if the amending law is laid before each House of Parliament under section 19A and either —
  - (a) no notice of a disallowance resolution is given in either House within the notice period; or
  - (b) if at least one notice of a disallowance resolution is given within the notice period then, for each such notice, one of the following applies —
    - (i) the notice is withdrawn or discharged within the disallowance period;

- (ii) the disallowance resolution is lost in the House or not agreed to within the disallowance period;
- (iii) the disallowance resolution is a partial disallowance resolution and is agreed to within the disallowance period.

(2A) If a partial disallowance resolution is agreed to within the disallowance period, the part of the amending law to which the resolution relates does not have effect for the purposes of section 19.

Page 4, line 19 — To delete “dissolved, prorogued” and insert:

prorogued, dissolved

Page 4, lines 21 to 23 — To delete the lines and insert:

House of Parliament, or a motion that an amending law be disallowed in the House, does not lapse even though the House is prorogued, dissolved or expires.

Page 4, line 24 — To delete the line and insert:

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

Page 4, lines 26 to 29 — To delete the lines and insert:

**amending provision** means a provision of an amending law that amends either or both of the following —

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

Page 5, lines 5 to 16 — To delete the lines and insert:

- (2A) However, if part of an amending law does not have effect under section 19B(2A), the Governor must declare in the proclamation the extent that the amending law does not have effect.
- (3) If an amending provision has come into operation in the Commonwealth before the proclamation is published in the *Gazette*, the amending provision comes into operation, other than to the extent that the provision does not have effect under section 19B(2A), on a day fixed by the proclamation.
- (4) If an amending provision has not come into operation in the Commonwealth before the proclamation is published in the *Gazette*, the amending provision comes into operation, other than to the extent that the provision does not have effect under section 19B(2A), when the amending provision comes into operation in the Commonwealth in accordance with the amending law.

Page 5, line 25 to page 6, line 28 — To delete the lines.

#### *No requirement for publication in proposed section 19E*

5.130 As there is no requirement for Commonwealth amending laws to be ‘published’ under a written law of Western Australia for them to be referred to the Legislation Committee, there would be no need for the Committee’s proposed section 19E (see paragraph 5.79).

*Effect of dissolution of the Legislative Assembly on Legislation Committee*

5.131 The dissolution of the Legislative Assembly has no effect on the membership or operation of standing committees of the Legislative Council; they endure until the terms of their membership expire by the effluxion of time at midnight on 21 May. A standing committee comprising a membership elected in the previous Parliament would therefore be capable of reporting on a Commonwealth amending law during a period when the Delegated Legislation Committee could not.

A handwritten signature in blue ink, appearing to read "Mischin". The signature is stylized with a large, circular initial "M" that loops around the first part of the name.

Hon Michael Mischin MLC  
**Chairman**

# APPENDIX 1

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## STANDING ORDER 67: MOTIONS TO DISALLOW REGULATIONS

### Chapter VIII: Motions, Questions and Votes

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#### 67. Motions to Disallow Regulations

- (1) For the purposes of this Standing Order, a “regulation” includes any statutory instrument made subject to disallowance by a written law.
- (2) A notice of motion to disallow a regulation shall have precedence over other notices of motion.
- (3) If a notice of motion to disallow a regulation has not been moved at the expiration of 2 sitting days after the day on which notice was given, that motion shall be deemed to have been moved *pro forma* upon that expiration.
- (4) An order of the day to disallow a regulation has precedence over other orders of the day.
- (5) Where –
  - (a) on the 17th sitting day after the motion was moved (exclusive of the day on which the motion was moved); or
  - (b) on the proposed last sitting day prior to a general election,

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

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Standing Orders reprint January 2019

## APPENDIX 2

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### COMMITTEE'S PROPOSED AMENDMENTS TO THE FAIR TRADING AMENDMENT BILL 2019

Western Australia

## Fair Trading Amendment Bill 2019

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Western Australia

LEGISLATIVE COUNCIL

**Fair Trading Amendment Bill 2019**

**A Bill for**

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

The Parliament of Western Australia enacts as follows:

---

*Fair Trading Amendment Bill 2019* with amendments recommended by the  
Standing Committee on Uniform Legislation and Statutes Review page 1



**s. 1**

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1 **1. Short title**

2 This is the *Fair Trading Amendment Act 2019*.

3 **2. Commencement**

4 This Act comes into operation as follows —

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

8 **3. Act amended**

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

10 **4. Section 17 amended**

11 In section 17 insert in alphabetical order:

12  
13 *amend* includes replace;

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

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

21  
22 **5. Section 19 amended**

23 (1) In section 19(1):

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

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

1 1 March 2019 and as amended by all amending  
2 laws —

3 (i) to the extent that they ~~that~~ have effect  
4 for the purposes of this section under  
5 ~~sections 19B and~~ section 19B; and

6 (ii) when they come into operation under  
7 section 19C;

8 \_\_\_\_\_ and  
9

10 (b) in paragraph (b) delete “time.” and insert:  
11

12 time, subject to subsection (1A).  
13

14 (2) After section 19(1) insert:  
15

16 (1A) For the purposes of subsection (1)(b), an amending law  
17 does not amend regulations made under section 139G  
18 of that Act ~~until the amending law has effect for the~~  
19 ~~purposes of this section under sections 19B~~  
20 ~~and 19C.~~ unless and to the extent that the amending law  
21 has effect for the purposes of this section under  
22 section 19B and comes into operation under  
23 section 19C.  
24

25 **6. Sections 19A to 19E inserted**

26 After section 19 insert:  
27

28 **19A. Tabling amending laws**

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

1           **19B. ~~Whether Disallowance of~~ amending laws ~~have effect~~**  
2           **~~in the State~~**

3           (1) In this section —  
4           *disallowance period*, in relation to a disallowance  
5           resolution notice of which is given in a House of  
6           Parliament, means the period of 30 sitting days of the  
7           House after the day on which the notice is given;

8           *disallowance resolution* means a resolution that an  
9           amending law, or part of an amending law, ~~law~~ be  
10          disallowed;

11          *notice period*, in relation to an amending law laid  
12          before a House of Parliament under section 19A,  
13          means the period of 14 sitting days of the House after  
14          the day on which the amending law is laid before ~~it;~~ it;

15          *partial disallowance resolution* means a resolution that  
16          part of an amending law be disallowed.

17          ~~(2) An amending law has effect for the purposes of~~  
18          ~~section 19 if the amending law is laid before each~~  
19          ~~House of Parliament under section 19A and either —~~  
20          ~~(a) no notice of a disallowance resolution is given~~  
21          ~~in either House within the notice period; or~~  
22          ~~(b) each disallowance resolution, notice of which is~~  
23          ~~given in a House within the notice period, is —~~  
24          ~~(i) lost in the House; or~~  
25          ~~(ii) not agreed to within the disallowance~~  
26          ~~period for the resolution.~~

27          (2) Subject to subsection (2A), an amending law has effect  
28          for the purposes of section 19 if the amending law is  
29          laid before each House of Parliament under  
30          section 19A and either —

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

- 1                    (b) if at least one notice of a disallowance  
2                    resolution is given within the notice period  
3                    then, for each such notice, one of the following  
4                    applies —
- 5                    (i) the notice is withdrawn or discharged  
6                    within the disallowance period;
- 7                    (ii) the disallowance resolution is lost in the  
8                    House or not agreed to within the  
9                    disallowance period;
- 10                   (iii) the disallowance resolution is a partial  
11                   disallowance resolution and is agreed to  
12                   within the disallowance period.
- 13                   (2A) If a partial disallowance resolution is agreed to within  
14                   the disallowance period, the part of the amending law  
15                   to which the resolution relates does not have effect for  
16                   the purposes of section 19.
- 17                   (3) For the purposes of this section —
- 18                   (a) the period specified in section 19A, a notice  
19                   period or a disallowance period continues to  
20                   run even though a House of Parliament is  
21                   ~~dissolved, prorogued~~ prorogued, dissolved or  
22                   expires; and
- 23                   (b) notice of a disallowance resolution given in a  
24                   House of ~~Parliament~~ Parliament, or a motion  
25                   that an amending law be disallowed in the  
26                   House, does not lapse even though the House is  
27                   prorogued, dissolved ~~dissolved, prorogued~~ or  
28                   expires.
- 29                   **19C. When Commencement of amending laws have effect**  
30                   **in the State**
- 31                   (1) In this section —

- 1 ~~amending provision, of an amending law,~~ means a  
2 provision of ~~the an~~ amending law that amends either  
3 or both of the following —
- 4 (a) Schedule 2 to the *Competition and Consumer*  
5 *Act 2010* (Commonwealth); ~~(Commonwealth)~~;  
6 ~~or~~
- 7 (b) the regulations made under section 139G of that  
8 Act.
- 9 (2) If, under section 19B(2), an amending law has effect  
10 for the purposes of section 19, the Governor must  
11 declare that fact by proclamation as soon as  
12 practicable.
- 13 (2A) However, if part of an amending law does not have  
14 effect under section 19B(2A), the Governor must  
15 declare in the proclamation the extent that the  
16 amending law does not have effect.
- 17 (3) If an amending provision ~~of the amending law~~ has  
18 come into operation in the Commonwealth before the  
19 proclamation is published in the *Gazette*, the amending  
20 provision ~~has effect for the purposes of~~  
21 ~~section 19~~ comes into operation, other than to the extent  
22 that the provision does not have effect under  
23 section 19B(2A), on a day fixed by the proclamation.
- 24 (4) If an amending provision ~~of the amending law~~ has not  
25 come into operation in the Commonwealth before the  
26 proclamation is published in the *Gazette*, the amending  
27 provision ~~has effect for the purposes of section 19~~  
28 comes into operation, other than to the extent that the  
29 provision does not have effect under section 19B(2A),  
30 when the amending provision comes into operation in  
31 the Commonwealth in accordance with the amending  
32 law.

1           **19D.    Amending laws enacted after 1 March 2019 but**  
2           **before commencement day**

3           If an amending law receives the Royal Assent after  
4           1 March 2019 but before the day (*commencement day*)  
5           on which the *Fair Trading Amendment Act 2019*  
6           section 6 comes into operation, sections 19A to 19C  
7           apply to the amending law as if the amending law  
8           received the Royal Assent on commencement day.

9           **19E.    Tabling of amending law taken to be publication for**  
10           **Standing Orders**

11           (1) In this section —

12           *parliamentary committee* means a committee  
13           established by either or both Houses of Parliament.

14           (2) If a Standing Order of a House of Parliament provides  
15           that on the publication of an instrument under a written  
16           law the instrument is referred to a parliamentary  
17           committee for consideration, the laying of an amending  
18           law under section 19A is taken to be publication of the  
19           amending law for the purposes of the Standing Order.

20           (3) This section does not apply if the Standing Orders of  
21           the House provide specifically for how an amending  
22           law may be considered by a parliamentary committee.

23           ~~**19E. — Application of Standing Orders to disallowance**~~  
24           ~~**resolution**~~

25           ~~— (1) In this section, *disallowance resolution* has the~~  
26           ~~meaning given in section 19B(1).~~

27           ~~— (2) Subsection (3) applies if a Standing Order of a House~~  
28           ~~of Parliament —~~

29           ~~— (a) sets out a procedure for dealing with a notice of~~  
30           ~~motion given in the House under the~~

s. 7

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- 1 ~~Interpretation Act 1984 section 42(2) to~~  
2 ~~disallow a regulation; and~~
- 3 ~~(b) gives precedence to an order of the day to~~  
4 ~~disallow a regulation over other orders of the~~  
5 ~~day; and~~
- 6 ~~(c) provides that, if a motion to disallow a~~  
7 ~~regulation remains unresolved on the last of a~~  
8 ~~specified number of sitting days after the~~  
9 ~~motion was moved, the question on the motion~~  
10 ~~is to be put before the House rises on that day.~~
- 11 ~~(3) The Standing Order~~
- 12 ~~(a) applies with all necessary changes as if~~
- 13 ~~(i) an amending law were a regulation; and~~  
14 ~~(ii) a notice of a disallowance resolution~~  
15 ~~were a notice of motion to disallow a~~  
16 ~~regulation; and~~
- 17 ~~(iii) the specified number of sitting days~~  
18 ~~referred to in subsection (2)(c) were~~  
19 ~~30 sitting days;~~
- 20 ~~but~~
- 21 ~~(b) does not apply to the extent that it requires the~~  
22 ~~question on a motion to be put before the House~~  
23 ~~rises on the proposed last sitting day before a~~  
24 ~~general election.~~
- 25 ~~(4) This section does not apply if the Standing Orders of~~  
26 ~~the House provide specifically for how a notice of a~~  
27 ~~disallowance resolution relating to an amending law is~~  
28 ~~to be dealt with.~~  
29

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

- 31 (1) Delete section 36.

1           (2)   The *Fair Trading (Permitted Calling Hours) Regulations 2014*  
2           are repealed.

3



## GLOSSARY

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<b>Term</b>	<b>Definition</b>
<b>ACL</b>	Australian Consumer Law
<b>ACL WA</b>	<i>Australian Consumer Law (WA)</i>
<b>Act</b>	<i>Fair Trading Act 2010</i>
<b>Bill</b>	Fair Trading Amendment Bill 2019
<b>Committee</b>	Standing Committee on Uniform Legislation and Statutes Review
<b>Commonwealth amending law</b>	A Commonwealth Act that applies amendments to the ACL to the ACL WA
<b>Delegated Legislation Committee</b>	Joint Standing Committee on Delegated Legislation
<b>Legislation Committee</b>	Standing Committee on Legislation
<b>Minister</b>	Hon John Quigley MLA, Minister for Commerce
<b>PCO</b>	Parliamentary Counsel's Office
<b>SO 67</b>	Legislative Council Standing Order 67
<b>2018 Bill</b>	Fair Trading Amendment Bill 2018

## Standing Committee on Uniform Legislation and Statutes Review

### Date first appointed:

17 August 2005

### Terms of Reference:

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

#### '6. Uniform Legislation and Statutes Review Committee

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



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