

FAIR TRADING AMENDMENT BILL 2021

First Reading

Bill read a first time, on motion by **Mr R.H. Cook (Minister for Commerce)**.

Explanatory memorandum presented by the minister.

Second Reading

MR R.H. COOK (Kwinana — Minister for Commerce) [1.29 pm]: I move —

That the bill be now read a second time.

The Western Australian Fair Trading Amendment Bill 2021 aims to improve the operation of consumer law in Western Australia by providing a mechanism for updating the contents of the Australian Consumer Law as it applies in this state to provide for consistency with the national consumer law. The amendments will enable all businesses and consumers to better understand their rights and obligations and enjoy the full range of protections provided under the national law.

The bill will update the ACL as it applies in Western Australia to incorporate amendments made to the commonwealth legislation between 26 October 2018 and 1 June 2021. It will also reduce the lag between future amendments that are made to the ACL as it applies in all other Australian jurisdictions and those amendments that are made to the ACL as it applies in Western Australia.

The amendments that will be made by this bill were originally included in the Fair Trading Amendment Bill 2018, which was introduced into Parliament on 27 June 2018 and referred to the Standing Committee on Uniform Legislation and Statutes Review. The committee acknowledged, in its 119th report, the desirability of reducing the prospect that WA would be out of step with other jurisdictions, but found that although the proposed 2018 disallowance mechanism made an attempt at preserving the sovereignty of WA's Parliament, it fell short of this aim. To address the concerns of the committee, a new bill to provide a revised mechanism, based on the committee's report, was subsequently introduced. The remaining uncontroversial components of the Fair Trading Amendment Bill 2018, to update the content of the Australian Consumer Law as it applied in WA to reflect amendments made between January 2013 and October 2018, passed and became the Fair Trading Amendment Act 2018.

A new bill, the Fair Trading Amendment Bill 2019, with the revised disallowance mechanism, was subsequently introduced and referred to the committee on 3 April 2019. The committee tabled its 123rd report but the debate did not resume during the last term of government and the bill lapsed. The bill was subsequently reintroduced as the Fair Trading Amendment Bill 2021 and referred to the committee on 23 June 2021. On 10 August 2021, the committee tabled its 133rd report, which made three recommendations. This bill is essentially the same as the 2019 bill, with amendments that seek to achieve the intent of, although not necessarily with the identical wording, the recommendations of the committee in its 123rd report under the previous Parliament, which are supported by the government, and also in its 133rd report in the current Parliament.

I will now expand on the key reforms included in this bill. The Fair Trading Act 2010 currently applies the commonwealth Australian Consumer Law as in force at a nominated point in time as the Australian Consumer Law Western Australia. The Fair Trading Act 2010 was last updated on 26 October 2018. The result of the interaction of commonwealth and state laws is that commonwealth amendments apply directly to constitutional corporations that trade in Western Australia, which comprises around 80 per cent of traders, but not to other enterprises such as sole traders or business partnerships. Inconsistency between the commonwealth ACL and the ACL WA is confusing for traders, especially small business, and consumers.

This inconsistency presents a serious issue for enforcement. Under the intergovernmental agreement for the Australian Consumer Law, the Western Australian Commissioner for Consumer Protection is responsible for enforcement of the state's consumer law, using powers under the Fair Trading Act 2010, but only in respect of the ACL WA. The commissioner will have no statutory authority to deal with breaches of the commonwealth ACL until changes to the commonwealth ACL have been inserted into the ACL WA. This denies consumers and small businesses the benefit of having consumer laws that operate in WA, because the commissioner is powerless to address noncompliance when national consumer laws have not been incorporated into local laws.

Although updating the Fair Trading Act 2010 to incorporate a more recent version of the commonwealth ACL addresses the current inconsistencies, it does not address the ongoing issue of the significant time lag between amendments being made to the commonwealth ACL and their incorporation into the ACL WA. If we do not address this issue by supporting the proposed mechanism in this bill, the number of inconsistencies and problems with unenforceability will increase. That is because a raft of amendments recommended by the 2017 review of the ACL will likely work their way through the commonwealth Parliament over the next few years. They include strengthening the unfair contract term protections; compelling manufacturers and traders to assess the safety of a product prior to offering it for sale; strengthening

consumer guarantees, especially for high-value goods that fail shortly after purchase; and ensuring that manufacturers, and not just traders, have a responsibility for the repair or replacement of defective products.

The bill seeks to replace the current ACL WA application provisions with a new application provision that provides for the timely insertion of changes to the commonwealth ACL into the ACL WA. The bill will introduce a mechanism to preserve the sovereignty of the WA Parliament, consistent with the recommendations of the uniform legislation committee. Importantly, the proposed mechanism will provide that all future amendments to the commonwealth ACL must be tabled in Parliament and may be disallowable before coming into effect in Western Australia.

The uniform legislation committee recommended in its 123rd report that the disallowance mechanism in the bill should permit the partial disallowance of commonwealth amendments. This recommendation has not been accepted by the government. Partial disallowance of amendments could give rise to issues with regard to participation by Western Australia in the national scheme. The intergovernmental agreement that supports the national operation of the ACL requires participating jurisdictions to maintain consistent legislation. If the WA Parliament were to pass a disallowance motion and decided that parts of the commonwealth ACL should not be incorporated into the ACL WA, the government of the day might recommit those amendments by way of a separate amendment bill rather than the automatic adoption mechanism, or, alternatively, might choose not to adopt the particular change in WA at all. The potential risk of any inconsistency could then be managed through the process of drafting and implementing an adopting bill. In its 133rd report, the committee considered that this risk justified not including partial disallowance. In its 123rd report, the committee recommended that amendments be made to the standing orders to ensure that amendments receive effective scrutiny where required, and that disallowance motions in respect of commonwealth ACL amendments receive appropriate priority in the course of parliamentary business. Amendments have now been made to standing orders to address the recommendations of the committee.

The committee also recommended an amendment to ensure that commonwealth amendments would be referred to the Joint Standing Committee on Delegated Legislation. An alternative amendment to the bill was moved and passed in the other place that addresses the committee's recommendation but will provide more flexibility to Parliament to determine to which committee it might refer commonwealth amendments. The proposed amendment will improve the operation of the ACL WA and the administration of the Fair Trading Act 2010.

A number of amendments have been made to the commonwealth ACL since the last amendments were made in WA. Clause 5 of the bill seeks to update the Fair Trading Act 2010 to incorporate into the ACL WA amendments to the commonwealth ACL made between 26 October 2018 and 1 June 2021. This will incorporate amendments made in the following three commonwealth acts: the Treasury Laws Amendment (2020 Measures No. 6) Act 2020, to improve protections to consumers by enabling a series of minor failures to be treated as a major failure, such as in the case of a "lemon" motor vehicle; the Competition and Consumer Amendment (Australian Consumer Law—Country of Origin Representations) Act 2020, to improve access to the "Made in Australia" logo for complementary medicines encapsulated in Australia; and the Financial Sector Reform (Hayne Royal Commission Response) Act 2020, to make minor amendments to update the Corporations Act 2001.

I commend the bill to the house.

Debate adjourned, on motion by **Mr P.J. Rundle**.