

FAIR TRADING AMENDMENT BILL 2021

Overview of Bill

The Fair Trading Amendment Bill 2021 (the Bill) amends the *Fair Trading Act 2010* (WA) (the FTA) to ensure ongoing consistency between the Australian Consumer Law in Western Australia (ACL WA) and the Australian Consumer Law (ACL) as it applies in all other Australian jurisdictions. The current requirement for the FTA to be updated by way of an amendment bill each time the ACL is amended creates a lack of consistency that adversely impacts small businesses and consumers and hampers enforcement in WA. The Bill will insert a mechanism in the FTA for the timely incorporation of future ACL amendments into the ACL WA following a process in which amendments are tabled and subject to scrutiny by Parliament.

The Bill will also make the following amendment to the FTA:

- Section 36 will be deleted as it is no longer required. In 2014, the permitted calling hours for negotiation of unsolicited contracts in Western Australia were amended to make them consistent with those applying under the ACL. As a result of those amendments, this section, which provides for different calling hours in WA, is now obsolete. The Fair Trading (Permitted Calling Hours) Regulations 2014 will also be repealed as they are no longer required as a result of the deletion of section 36.

A clause by clause commentary of the Bill is as follows:

Clause 1 PART 1 - PRELIMINARY

Short Title

This clause provides the short title of the *Fair Trading Amendment Act 2021*.

Clause 2 Commencement

This clause provides that sections 1 and 2 of the Act will commence on Royal Assent and remaining sections on the following day.

Clause 3 Act amended

Clause 3 provides that this Act amends the *Fair Trading Act 2010* (FTA).

Clause 4 Section 17 amended

Clause 4 adds two new definitions “amend” and “amending law” to section 17 of the FTA. Section 17 contains definitions for terms used in Part 3 of the Act that deals with the application of the Australian Consumer Law in WA -

“amend” is defined to include replacement of existing text; and

“amending law” is a Commonwealth law that amends the text of the ACL either by amending Schedule 2 of the *Competition and*

Consumer Act 2010 (Cwth) or the regulations made under section 139G of that Act which together make up the ACL.

The definitions are required to provide clarity with respect to terms used in new sections added to the Act by clauses 5 and 6 of the Bill.

Clause 5 Section 19 amended

Subclause 5(1) amends section 19(1)(a) of the FTA to provide that the part of the ACL text, which consists of Schedule 2 to the *Competition and Consumer Act 2010* (Commonwealth) is that in force on 1 June 2021 and as amended by all amending laws that come into effect under new sections 19B and 19C.

The effect of this amendment is to incorporate all amendments up to 1 June 2021, together with any future amendments to the Commonwealth ACL that are incorporated under the new process for incorporating amendments to the ACL provided for in new sections 19B and 19C.

Commonwealth laws passed before 1 June 2021 that will be incorporated into the ACL(WA) by this provision are:

Treasury Laws Amendment (2020 Measures No. 6) Act 2020

Received Assent 17/12/20

Schedule 4, Part 1 clarifies that multiple minor failures to comply with the consumer guarantee provisions in the ACL can constitute a major failure to comply with the consumer guarantee provisions. The proposed amendments insert additional tests to the definitions of a major failure in sections 260 (goods) and 268 (services) of the ACL. Following the amendment, a failure to comply with a relevant consumer guarantee would be a major failure if it is one of a series of failures AND if a reasonable consumer would not have acquired the good or service at the time of supply, if they were aware of the nature and extent of those failures taken as a whole.

Competition and Consumer Amendment (Australian Consumer Law – Country of Origin Representations) Act 2020

Received Assent 10/11/20

Creates an explicit power to prescribe one or more processes that will be deemed to satisfy the definition of ‘substantially transformed’ for the purposes of the country of origin provisions of the ACL. Specifically deals with transformation for the purposes of encapsulating complementary medicines, providing access to the ‘made in Australia’ logo for complementary medicines encapsulated in Australia though containing imported ingredients.

Financial Sector Reform (Hayne Royal Commission Response) Act 2020

Received Assent 17/12/20

Makes minor consequential amendments to the ACL only. Corrects references in the ACL to sections of the *Corporations Act 2001* that changed as a result of substantive amendments to parts of the Act.

Subclause 5(2) will add new subsection 19 (1A), to ensure that amendments made by Commonwealth Acts to regulations made under section 139G of the *Competition and Consumer Act 2010* (Commonwealth) will not apply as a law of WA until the amending law has effect in WA.

Clause 6 Sections 19A to 19E inserted

Clause 6 inserts new provisions 19A to 19E to insert a new mechanism for the incorporation of amendments to the ACL into the ACL WA. This mechanism will ensure that all Commonwealth legislation that will amend the ACL WA will be subject to scrutiny by the Parliament before becoming part of the ACL WA. The mechanism provides that an amending law can be disallowed by either House of Parliament.

The provisions will ensure that consistency is maintained between the Commonwealth ACL and the ACL WA by enabling Commonwealth amendments to apply in a timely manner, but protects the sovereignty of the WA Parliament by ensuring that they do not come into effect until such time as they have been reviewed by the Parliament.

Terms used in the new provisions are defined in the new sections.

Section 19A will introduce a requirement for all Commonwealth laws that amend the ACL to be tabled in each House of Parliament within 18 sitting days of the date on which the Commonwealth law receives Royal Assent.

Section 19B will provide that when a Commonwealth amending law is tabled, notice of a disallowance resolution may be given in either House within 14 sitting days of tabling of the amending law (***the notice period***). If no notice is filed within the notice period in either House, the amending law will come into effect. If a notice is filed a period of 30 sitting days (***the disallowance period***) is then provided for a vote to be held on the disallowance resolution. If no vote is held within the disallowance period, or if any disallowance resolution in respect of any notice has been lost, withdrawn or discharged the amending law will be incorporated into the ACL WA.

Under section 19B if a valid notice of disallowance is passed, the amending law will not be incorporated into the ACL WA.

New section 19B(3) provides that the periods for giving notice and voting on the resolution will continue to run, notwithstanding the proroguing, dissolution or expiry of a term of Parliament. It also

provides that a notice in respect of an amendment will not lapse in those cases. As a result, it will not be necessary for the process of consideration of the application of Commonwealth amendments to start again in the new Parliament.

Section 19C deals with the date of commencement of the Commonwealth amendments in WA. It provides that if a Commonwealth amending law has effect as WA law as a result of the operation of new section 19B, and the amendment has come into effect as part of the Commonwealth law prior to proclamation in WA, the law will come into operation in WA on a date fixed by proclamation of the Governor which will be published in the Gazette. Proclamation is to occur as soon as practicable after the conditions for incorporation of the law are satisfied.

If the Commonwealth amending Act has not come into effect as part of the Commonwealth law when the proclamation of the Governor is published, the amendment will come into effect in WA on the date that the Commonwealth provision subsequently comes into operation.

Section 19D provides that the mechanism set out for incorporation of amendments and the disallowance process set out in sections 19A to 19C will apply to any Commonwealth amendments that receive Royal Assent after 1 June 2021. This ensures that any amendments made after the Bill has been considered by a House of Parliament but before commencement of the Bill will be subject to review and disallowance. This ensures that all amendments incorporated into the WA legislation will be considered by Parliament, either (for those made prior to 1 June 2021) in the course of consideration of the Bill, or (for those made after 1 June 2021) through the disallowance process.

Section 19E clarifies that Commonwealth amendments tabled before each House of Parliament under section 19A will be taken to be published for the purposes of any Standing Orders which provide for the referral of instruments to a committee established by either or both Houses of Parliament (**parliamentary committee**) on publication. Where standing orders provide specifically for Commonwealth amendments to be considered by a Parliamentary Committee, then 19E will not apply.

This provides for an extra layer of scrutiny of Commonwealth amending laws and ensures Western Australian Parliament's sovereignty and law-making powers are maintained.

It also clarifies that the purpose of the Commonwealth amendments being taken to be published is for referral to a parliamentary committee, but also provides Parliament with the flexibility to provide in standing orders for referral to a different Parliamentary Committee should it see fit.

Clause 7 Section 36 deleted and related regulation repealed

Subclause 7(1) amends the FTA by deleting section 36. Section 36 modifies sections 73(1) and 170(1) of the ACL to provide different permitted calling hours for unsolicited consumer agreements under the ACL (WA) to those which apply under the ACL. These reflect the permitted calling hours which applied in Western Australia on commencement of the consumer law in 2010.

In 2014 permitted calling hours in WA were amended by the Fair Trading (Permitted Calling Hours) Regulations 2014 (the Regulations) to bring them into alignment with the ACL. As a result of the amendment, the variation set out in section 36 no longer applies. Section 36, and the Regulations are no longer required. Subclause 7(2) repeals the Regulations.