

FAIR TRADING BILL 2010

Introduction and First Reading

Bill introduced, on motion by **Mr W.R Marmion (Minister for Commerce)**, and read a first time.

Explanatory memorandum presented by the minister.

Second Reading

MR W.R. MARMION (Nedlands — Minister for Commerce) [12.22 pm]: I move —

That the bill be now read a second time.

The primary purpose of the Fair Trading Bill 2010 is to implement a decision made in 2008 by the Council of Australian Governments to introduce a single national consumer law—the Australian Consumer Law. As part of the process of enacting the new Australian Consumer Law in Western Australia, the bill also amalgamates three existing state acts into one act, and provides for the expiry of those acts, which are: the Consumer Affairs Act 1971, the Door to Door Trading Act 1987 and the Fair Trading Act 1987. The bill provides for the continuation of the office of commissioner and all related administration and enforcement matters and, importantly, also provides for the standardisation of investigation and enforcement powers that currently sit across a range of acts in the consumer protection portfolio.

The introduction of the Australian Consumer Law represents the most significant reform of consumer laws in Australia since the introduction of state and territory fair trading acts in the late 1980s. Nationally, this reform will replace a complex array of 17 commonwealth, state and territory generic consumer laws. The single greatest benefit of Australian Consumer Law is that it will result in the uniformity of the foundation consumer law in Australia at commonwealth, state and territory levels. This will mean certainty and lower compliance costs for businesses that operate in more than one jurisdiction in Australia, and it will ensure that all Australian consumers will have the same rights and protections wherever they live in Australia. These are very important outcomes.

In addition to the benefits of uniformity, the Australian Consumer Law will introduce some significant specific reforms to consumer law, and I will deal with these in a moment. The development of the Australian Consumer Law came about as a result of an agreement by COAG in October 2008 to introduce a single national consumer law. At this time, it was agreed that the Australia Consumer Law would be a commonwealth law, and that it would be applied as a law of each state and territory. This Australian Consumer Law has already been introduced nationally in two acts that amended the commonwealth Trade Practices Act. The first act took effect on 1 July 2010 and the second act is currently intended to take effect on 1 January 2011. The commonwealth version of the Australian Consumer Law is a schedule to the Trades Practices Act 1974, which will, as part of these reforms, be renamed the Competition and Consumer Act 2010.

Each state and territory is also introducing the Australian Consumer Law separately, as a law of their own state or territory. All state and territory versions of the Australian Consumer Law are currently intended to come into operation on 1 January 2011. All states and territories other than Western Australia are applying the commonwealth version of the Australian Consumer Law, as amended from time to time, as a law of that state or territory. The Barnett government has concerns about applying laws of other jurisdictions in this state in such a way that future amendments to those laws will take effect automatically, without consideration by the Western Australian Parliament. As a matter of principle, we do not believe this is in the best interests of parliamentary democracy. The government believes that the Western Australian Parliament should always have the final say on what laws are introduced as laws of Western Australia. As a result, this bill proposes to introduce the Australian Consumer Law into Western Australia in a modified way to that being used by other states and territories. In order to meet a commitment under COAG's intergovernmental agreement for the Australian Consumer Law, and to protect Western Australia's consumer law jurisdiction over corporations, the bill applies the Australian Consumer Law as set out in schedule 2 of the commonwealth Trade Practices Act—the Competition and Consumer Act, as it will be—as at 1 January 2011, or such other date as the commonwealth version of the Australian Consumer Law comes into effect as a law of Western Australia, to be referred to as the Australian Consumer Law (WA).

However, future amendments to the commonwealth version of the Australian Consumer Law will not automatically apply in Western Australia. To assist Parliament to assess the consequences of the bill applying the Australian Consumer Law as set out in schedule 2 of the commonwealth Trade Practices Act as it is at 1 January 2011, as a law of Western Australia, the entirety of schedule 2 is set out as a note to the bill. Although it is in the interests of all Australian consumers and businesses to ensure that the Australian Consumer Law remains uniform, this bill reserves the right of the Western Australian Parliament to reject future amendments made by the commonwealth government. This is particularly important when it is noted that all future amendments to the commonwealth version of the Australian Consumer Law will require the approval of the commonwealth

government and four other jurisdictions, of which three must be states. If the government had proceeded with the automatic adoption of future amendments to the commonwealth version of the Australian Consumer Law, the result would have been that an amendment that the Western Australian government did not agree with could have automatically applied in this state; this would apply to future governments also.

Equally, amendments to the Australian Consumer Law as it applies in Western Australia, that were desired by the Western Australian government but not supported by the commonwealth, could not be validly made. I am sure members will agree that this would not be an acceptable outcome. The legislative mechanism the government has adopted is similar to that which applied in the past to the regulation of consumer credit in this state, until that responsibility was transferred to the commonwealth with effect from 1 July this year.

The process is as follows: when the commonwealth version of the Australian Consumer Law is amended, in order for those amendments to take effect in Western Australia, the amendments will require an order of the Governor. Before the Governor can make such an order, a draft of that order will need to be approved by both houses of the Western Australian Parliament. This process will ensure that any future amendments to the Australian Consumer Law in Western Australia will require the approval of both houses of the state Parliament.

The bill further provides that any regulations or legislative instruments that are made under the commonwealth version of the Australian Consumer Law will apply in Western Australia. However, those regulations or legislative instruments will be required to be published in the Western Australian *Government Gazette*, and will be subject to disallowance by the state Parliament in the ordinary way.

The government believes that this legislative process, which is consistent with the state's commitments under the COAG intergovernmental agreement, is the best of both worlds. It provides for continuing national uniformity of the Australian Consumer Law, while still preserving the supremacy of the Western Australian Parliament in determining the laws of Western Australia. Once the Australian Consumer Law is in place throughout Australia, the administration and enforcement of the Australian Consumer Law will continue to be a joint commonwealth, state and territory responsibility. The commonwealth will administer its version of the Australian Consumer Law at a national level, and the states and territories will administer the Australian Consumer Law in their jurisdictions. In Western Australia, the day-to-day administration of the Australian Consumer Law will be the responsibility of the Commissioner for Consumer Protection.

I now turn to the key provisions of the bill, looking first at those that relate to the Australian Consumer Law. It was agreed at COAG that the Australian Consumer Law should be firmly based on existing consumer protection provisions in part V of the Trade Practices Act. COAG further agreed that the Australian Consumer Law should enhance the existing provisions of the Trade Practices Act by implementing new unfair contract terms provisions and adopting best practice provisions from the states' and territories' fair trading acts. As a result, many of the provisions contained in the Australian Consumer Law are substantially the same as those that already exist in our Fair Trading Act 1987, although they have been redrafted to reflect modern drafting conventions and draw on the existing legislative approaches in the states and territories, and also New Zealand. The case law associated with the understanding and interpretation of these existing protections will continue to be relevant to the interpretation and application of the Australian Consumer Law.

The Australian Consumer Law contains general consumer protections, including new unfair contract terms provisions. The unfair contract terms provisions are possibly the biggest reform arising out of the law. These provisions regulate terms in standard form "take it or leave it" consumer contracts that are so commonplace, particularly in new electronic commerce contracts. The unfair contract terms provisions will mean that terms in such standard form consumer contracts will be void if they are found to be unfair by assessment against the criteria set out in the bill. Unfair contract terms provisions have been operating successfully in Victoria for several years. Like the current Fair Trading Act, the Australian Consumer Law prohibits misleading or deceptive conduct and includes provisions prohibiting persons who are operating in trade or commerce from engaging in unconscionable conduct towards consumers. The Australian Consumer Law also provides for a wide range of specific consumer protections covering unfair practices, which include false or misleading representations or conduct, unsolicited supplies, pyramid schemes, pricing, referral selling, and harassment and coercion; consumer transactions, which include consumer guarantees, unsolicited selling and lay-by agreements; the safety of consumer goods and product-related services; and information standards and the liability of manufacturers for goods with safety defects.

The Australian Consumer Law includes a harmonised product safety regime for consumer goods and services related to the supply, installation or maintenance of consumer goods. Under this new regime, state and territory ministers will retain the right to issue interim product safety bans, compulsory recall notices and public warning statements. However, to ensure national coordination and consistency, only the relevant commonwealth minister will have the power to issue permanent bans, to make safety and information standards and to conduct voluntary recalls.

The Australian Consumer Law provides for a national approach to enforcement that will mean that regulators can take effective and proportionate action against unprincipled operators. Contraventions of specific consumer protections in the law have associated criminal offence provisions. A corporation convicted of an offence could be fined up to \$1.1 million, whereas an individual could face a fine of up to \$220 000.

Under the new law, regulators can accept administrative undertakings, and will have the power to issue substantiation notices and public warning notices. A suite of remedies is available for contraventions of certain provisions of the Australian Consumer Law. These include civil pecuniary penalties, injunctions, damages, compensation orders, orders seeking redress for consumers not party to enforcement proceedings, non-punitive orders, adverse publicity orders and orders disqualifying persons from managing corporations.

The Australian Consumer Law introduces a new system of statutory consumer guarantees to replace the nine existing commonwealth, state and territory implied condition and statutory warranty schemes. In addition to the general remedies available under the law, consumers will be able to take action against suppliers of goods and services, and action for damages against manufacturers of goods, where there has not been compliance with a relevant guarantee.

Western Australia is the only jurisdiction in Australia with two acts that separately provide the administrative machinery for consumer protection and the regulation of trader conduct in the marketplace; namely, the Consumer Affairs Act 1971 and the Fair Trading Act 1987. As I have already mentioned, this bill consolidates the administrative provisions of the Consumer Affairs Act and Fair Trading Act and provides for the expiry of both of these acts. The bill also provides for the expiry of the Door to Door Trading Act 1987 as door-to-door trading is regulated under the Australian Consumer Law's new unsolicited selling provisions.

In addition to amendments to implement the Australian Consumer Law, the bill includes some new powers for the Commissioner for Consumer Protection to address changes in technology, such as the right to access passwords or other information to enable access to computer data. The bill also standardises the scope of investigation and enforcement powers available to the Commissioner for Consumer Protection that currently sit across a range of acts in the consumer protection portfolio for which the commissioner has responsibility. The disparate powers available under a multiplicity of acts create a source of confusion and uncertainty for investigators, which can compromise the success of enforcement action. They also create compliance difficulties for businesses that are subject to different acts. Standardising these provisions will allow the commissioner to draw down the relevant investigative provision in relation to the performance of any function under any act that might involve investigative action.

This bill marks an exciting and important development for consumer protection in Western Australia. It introduces reforms that will significantly reduce regulatory complexity for businesses and take Australia further towards a seamless national economy. It will empower consumers and free businesses to make our markets work better, delivering tangible benefits for all. In introducing this bill, the Western Australian government has met its obligation to introduce a single National Consumer Law, which is among the most important of the 27 seamless national economy reforms currently being pursued through the Council of Australian Governments. The government will be seeking to have this bill passed before Parliament rises this year to achieve the goal of a single consumer law for Australia being able to commence nationally by 1 January 2011. This will enable, for the first time, all Australian consumers to enjoy the benefits of consistent rights wherever they may be, and will allow all Australian businesses to obtain greater efficiencies through a single, simplified national law.

I commend the bill to the house.

Debate adjourned, on motion by **Mr D.A. Templeman**.