

**FAIR TRADING AMENDMENT BILL 2021**

*Introduction and First Reading*

Bill introduced, on motion by **Hon Alannah MacTiernan (Minister for Regional Development)**, and read a first time.

*Second Reading*

**HON ALANNAH MacTIERNAN (South West — Minister for Regional Development)** [3.11 pm]: I move —

That the bill be now read a second time.

The purpose of the Fair Trading Amendment Bill 2021 is 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 going forward. The amendments will enable all businesses and consumers in WA to better understand their rights and obligations and enjoy the full range of protections provided at any given time under the national law.

The bill will update the Australian Consumer Law as it applies in WA to incorporate amendments made to the commonwealth legislation between the current adoption date of 26 October 2018 and 1 June 2021. More significantly, it will reduce the time lag between future amendments being made to the Australian Consumer Law as it applies in all other Australian jurisdictions and those amendments being made to the Australian Consumer Law as it applies in WA.

The amendments made by this bill were originally included in the Western Australian Fair Trading Amendment Bill 2018, which was introduced into this house on 27 June 2018 and immediately referred to the Standing Committee on Uniform Legislation and Statutes Review for consideration and report. The committee acknowledged in its 119<sup>th</sup> report dated November 2018 the desirability of eliminating or reducing the prospect of WA being out of step with other jurisdictions in the context of the national scheme. It found, however, that the proposed disallowance mechanism made an attempt at, but fell short of, preserving the sovereignty of WA's Parliament.

During the second reading debate on the Fair Trading Amendment Bill 2018 in this house on 20 and 21 March 2019, it was agreed that in order to address the concerns of the committee, a new bill to provide a revised mechanism, drafted by Parliamentary Counsel and based on the preferred option set out in the committee's report, would be introduced. The remaining uncontroversial components of the Fair Trading Amendment Bill 2018, which primarily updated the contents of the Australian Consumer Law as it applied in WA to reflect amendments from January 2013 to October 2018, progressed through this house with unanimous support; and, following its passage in the Legislative Assembly, it 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 123<sup>rd</sup> report on 20 August 2019, but the debate did not resume during the course of the fortieth Parliament and the bill lapsed. The bill has now been reintroduced as the Fair Trading Amendment Bill 2021. It is essentially the same as the 2019 bill, with minor drafting amendments to implement the recommendations of the committee in its 123<sup>rd</sup> report, which are supported by the government.

I will now provide some details about 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 of WA. This point in time is currently 26 October 2018, being the date on which the Fair Trading Act 2010 was last updated. The result of the interaction of commonwealth and state laws is that commonwealth amendments apply directly to constitutional corporations trading in WA—around 80 per cent of traders—but not to other forms of enterprise, such as sole traders or business partnerships. The lack of consistency between the commonwealth ACL and the ACL WA is confusing for traders and consumers, with small businesses particularly disadvantaged. This inconsistency presents a serious issue for enforcement. Under the Intergovernmental Agreement for the Australian Consumer Law, the Commissioner for Consumer Protection in WA has primary responsibility for enforcement of the state's consumer law. The commissioner draws enforcement powers from the Fair Trading Act 2010 but only in respect of the ACL WA. The commissioner has no statutory authority to deal with breaches of the commonwealth ACL by traders in WA until such time as changes to the commonwealth ACL have been inserted into the ACL WA. This effectively denies consumers and small businesses the benefit of having consumer laws operate in WA because the commissioner is powerless to address noncompliance when national consumer laws have not been incorporated into the local version.

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 there being a significant time lag between the application of commonwealth ACL amendments to constitutional corporations and the enactment of legislation to incorporate those amendments into the ACL WA. Unless the WA Parliament agrees to address this issue by supporting the proposed mechanism in this bill, the number of inconsistencies and problems with unenforceability will increase because a raft of amendments recommended by the 2017 review of the Australian Consumer Law will, over the next few years, work their way through the commonwealth Parliament. These will potentially include the insertion of a general safety provision into the commonwealth ACL to compel manufacturers and traders to assess

the safety of a product prior to offering it for sale; strengthening the consumer guarantees regime, particularly with regard to 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. For this reason, the bill will 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 WA ACL.

The bill includes a mechanism to preserve the sovereignty of the WA Parliament that is consistent with recommendations of the Standing Committee on Uniform Legislation and Statutes Review in its 119<sup>th</sup> report. Importantly, the proposed mechanism provides that all future amendments to the commonwealth ACL must be tabled in the Parliament and may be disallowed by either house prior to coming into effect in WA.

In its 123<sup>rd</sup> report, the Standing Committee on Uniform Legislation and Statutes Review recommended that the disallowance mechanism in the bill should permit the partial disallowance of commonwealth amendments. This recommendation has not been accepted by the government. The Department of Mines, Industry Regulation and Safety has advised that partial disallowance of amendments could give rise to issues with regard to participation by WA in the national scheme. The intergovernmental agreement that supports the national operation of the Australian Consumer Law requires participating jurisdictions to maintain consistent legislation. It is important that if the WA Parliament decides that parts of the commonwealth ACL should not be incorporated into the WA ACL, that amendments are incorporated by way of an amendment bill. This will permit consideration of the potential impact of any inconsistency so that this risk can be managed through the process of drafting and implementing an adopting bill.

I also note that in its 123<sup>rd</sup> report, the committee recommended amendments to 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. Parliamentary Counsel is of the strong view that the legislation should not make reference to standing orders, and that these procedural issues are a matter for separate consideration by the Parliament.

The proposed amendments will improve the operation of the WA ACL and the administration of the Fair Trading Act 2010 to the benefit of all stakeholders. As there have been a number of amendments to the commonwealth ACL since the last amendments were made in WA, clause 5 of the bill will update the Fair Trading Act 2010 to incorporate amendments to the commonwealth ACL made between 26 October 2018 and 1 June 2021 into the WA ACL. This will result in the incorporation of amendments made in three commonwealth acts. The first is the Treasury Laws Amendment (2020 Measures No. 6) Act 2020, which received royal assent on 17 December 2020. The amendments improve protections provided to consumers where there are a series of failures, such as is the case of a “lemon” motor vehicle, by providing that a series of minor failures can be treated as a major failure for the purposes of access to remedies. The second is the Competition and Consumer Amendment (Australian Consumer Law—Country of Origin Representations) Act 2020, which received assent on 10 November 2020 and provides improved access to the “Made in Australia” logo for complementary medicines encapsulated in Australia. The third is the Financial Sector Reform (Hayne Royal Commission Response) Act 2020, which received assent on 17 December 2020 and makes minor consequential amendments to update references to sections of the Corporations Act 2001.

In previous reports, the Standing Committee on Uniform Legislation and Statutes Review has confirmed that the previous bills, through the proposal of a mechanism for automatic adoption of commonwealth law, proposed to introduce a uniform scheme or uniform laws within the meaning of standing order 126(2)(b). On that basis, pursuant to standing order 126(1), I advise that this bill is a uniform legislation bill. It is a bill that, by reason of its subject matter, is a part of a uniform scheme or uniform laws throughout the commonwealth.

I commend the bill to the house and table an explanatory memorandum.

[See paper [341](#).]

Debate adjourned and bill referred to the Standing Committee on Uniform Legislation and Statutes Review, pursuant to standing orders.