

EXPLANATORY MEMORANDUM

FAIR TRADING AMENDMENT BILL 2013

Overview of the Bill

The object of the Fair Trading Amendment Bill 2013 is to realign the Australian Consumer Law (WA) with the Australian Consumer Law in force in all other jurisdictions and to make other amendments to the *Fair Trading Act 2010* to improve administration of the Act and correct a number of anomalies and drafting errors.

The Australian Consumer Law is a nationally consistent consumer law that applies throughout Australia. The *Fair Trading Act 2010*, which came into force on 1 January 2011, contains provisions that apply the Commonwealth Australian Consumer Law as a law of Western Australia. However, unlike other Australian jurisdictions, the Act does not provide for amendments made to the Commonwealth Australian Consumer Law to automatically apply in Western Australia. Instead, these must be applied through amendment legislation.

The Australian Consumer Law in WA (ACL (WA)) is currently out of alignment with the Commonwealth ACL and the ACL in all other jurisdictions due to amendments passed by the Commonwealth that have come into effect since the ACL first came into force.

The amendments include the introduction of interpretative principles into the unconscionable conduct provisions to assist the Courts, consumers and businesses understand the scope of the prohibition against unconscionable conduct. The principles clarify, rather than alter, the effect of the statutory prohibition against unconscionable conduct. Other minor amendments affecting the definition of “document” and references to the “Standards Association of Australia” in the Australian Consumer Law have also come into force since 1 January 2011.

In Western Australia the Commonwealth Australian Consumer Law applies to any corporation. Due to limitations on Commonwealth legislative power in the Australian Constitution, businesses that operate under a different business structure are bound instead by the Western Australian version of the Australian Consumer Law ie. the ACL (WA). The Fair Trading Amendment Bill 2013 will ensure that the law under which businesses operate is the same, regardless of their business structure.

All amendments to the Commonwealth ACL to date have been agreed to by all jurisdictions, including Western Australia, under the voting arrangement provided for in the *Intergovernmental Agreement for the Australian Consumer Law*.

The Intergovernmental Agreement requires Western Australia to use its best endeavours to have its Parliament repeal, amend or modify any legislation that is inconsistent with or alters the effect of the Australian Consumer Law. Passage of the Fair Trading Amendment Bill 2013 will satisfy Western Australia’s obligations under the Intergovernmental Agreement.

Specifically, the Bill amends the *Fair Trading Act 2010* to:

- apply the Commonwealth ACL as in force on 1 January 2013, as a law of Western Australia, to bring the ACL (WA) back into alignment with the rest of Australia;
- remove a redundant provision that refers to the process required to amend legislation;
- address a drafting anomaly so that the scope of criminal responsibility extends to being “involved in the contravention” of a provision of the Act, as was the case under the previous *Fair Trading Act 1987*;
- correct an error in the Act which currently operates to give precedence to specific State legislation (listed in Schedule 1 of the Act) where that legislation is inconsistent with any part of the Australian Consumer Law (the correction will reflect the original intention which was to ensure that the provisions of the Acts listed in Schedule 1 prevail only where they are inconsistent with the product safety provisions of the Australian Consumer Law);
- enable the Commissioner to assume the conduct of legal proceedings already underway (as an adjunct to the power the Commissioner already has to institute or defend proceedings on behalf of a consumer or business);
- make non-compliance with an order of the Supreme Court or District Court under section 106, an indictable offence; and
- include the *Debt Collectors Licensing Act 1964*, the *Employment Agents Act 1976* and the *Travel Agents Act 1985* in Schedule 2 to the Fair Trading Act so as to enable the specific investigation and enforcement powers under the *Fair Trading Act 2010* to be used in relation to the licensing and regulatory provisions contained in those Acts, as was intended in the conception of the Fair Trading Act (their exclusion from the Act was an oversight).

Clause 1 Short title

Provides for this Act to be known as the *Fair Trading Amendment Act 2013*.

Clause 2 Commencement

Provides for the commencement of sections 1 and 2 on the day the Act receives Royal Assent and for the rest of the Act to come into operation on a day or days fixed by proclamation.

Clause 3 Act amended

Provides for this Act to amend the *Fair Trading Act 2010*.

Clause 4 Section 15 amended

Amends section 15(1) of the Act so that where a provision of Part 3-3 of the Australian Consumer Law or an “applied regulation” is inconsistent with a provision of any of the Acts set out in Schedule 1 (or of any instrument made under those Acts) the provision of that Act (or any instrument made under that Act) will prevail.

Inserts a new subsection (2A) into section 15 to provide a definition for “applied regulation” as a consequence of the amendment to section 15(1).

This amendment corrects an error which currently operates to give precedence to specific State Acts (listed in Schedule 1 of the Act) where that legislation (or any instrument made under that legislation) is inconsistent with any part of the Australian Consumer Law. The correction will reflect the original intention which was to give precedence to the Acts listed in Schedule 1 only where they are inconsistent with the product safety provisions of the Australian Consumer Law (Part 3-3) as distinct from all of the Australian Consumer Law.

Clause 5 Section 19 amended

Amends section 19(1)(a) of the Act to provide that the Australian Consumer Law text consists of Schedule 2 to the *Competition and Consumer Act 2010* (Commonwealth) as in force on 1 January 2013.

Amends section 19(3) by removing a reference to section 20 of the Act as that section will be redundant upon the commencement of clause 6 of the Bill.

Clause 6 Section 20 deleted

Deletes section 20 of the Act.

Section 20 currently provides for the Governor to amend the Australian Consumer Law (WA) by bill. This section, as originally introduced into the Legislative Council, provided for the Governor to amend the Australian Consumer Law (WA) by order, approved by both Houses of Parliament. The proposed mechanism for amending the Australian Consumer Law (WA) in the original bill was amended in the Committee stage as a result of amendments proposed by the Uniform Legislation and Statutes Review Committee.

Section 19(2) of the Act makes it clear that the Australian Consumer Law (WA) is part of the *Fair Trading Act 2010*. Section 20 incorrectly refers to amendments being made by the Governor. Deleting section 20 will make it clear that any amendment of the Australian Consumer Law (WA) will be by way of the ordinary legislative amendment process.

Clause 7 Section 32 replaced

Repeals and replaces section 32 to set out the criteria under which a person would be regarded as having been involved in the commission of an offence against the Australian Consumer Law (WA).

New section 32 also extends the range of persons that may be found guilty of a crime to include those involved in the commission of an offence against the Australian Consumer Law (WA). At present, section 32 applies only to persons actually committing an offence (as distinct from being involved in the commission of an offence).

New section 32 will restore the position in respect of criminal liability as it existed under the *Fair Trading Act 1987*, as was originally intended in the drafting of the *Fair Trading Act 2010*.

Clause 8 Section 36 amended

Amends section 36(1) to provide for the modification of the text of Schedule 2 to the *Competition and Consumer Act 2010* (Commonwealth), as in force on 1 January 2013 which, together with the regulations made under section 139G of that Act, form the *Australian Consumer Law* (WA).

The amendment to section 36(1) ensures that the modifications detailed in section 36(2) apply to the amended text of Schedule 2 to the *Competition and Consumer Act 2010* (Commonwealth) as in force on 1 January 2013.

Clause 9 Section 48 amended

Clause 9(1) repeals and replaces section 48(1)(b)(ii). The new section requires the Commissioner for Consumer Protection to satisfy himself or herself that it is in the public interest to take or defend proceedings in relation to a contravention of a code of practice or assume the conduct or defence of proceedings already commenced, as a pre-condition to exercising the powers conferred on him or her by section 48(2).

The replacement section is required as a consequence of the extension of the Commissioner's powers under section 48(2). The Commissioner already has the power under section 48(2) to take or defend proceedings relating to a contravention of a code of practice. The amendment in Clause 9(2) will extend the Commissioner's powers so that the Commissioner may assume the conduct or defence of proceedings that have already been commenced by another party.

Clause 9(2) also amends section 48(3) to make it clear that the limitations imposed on assistance that may be provided by the Commissioner, also apply where the Commissioner intends to assume the conduct or defence of legal proceedings already commenced.

Clause 10 Section 49 amended

Makes a consequential amendment to the scope of section 49(1) to reflect the changes to the Commissioner's powers under new section 48(2) as amended by Clause 9(2).

Clause 11 Section 58 amended

Amends section 58(1)(a)(ii) and 58(1)(b) to set out the extended scope of the Commissioner's power under section 58, to provide assistance to consumers and businesses and the conditions that must be satisfied before the Commissioner may provide assistance. The amendment is consistent with the amendment in Clause 9 of the Bill. Section 58 of the Act empowers the Commissioner to institute or defend legal proceedings on behalf of a consumer or business. The amendment in Clause 11(1) will extend the Commissioner's powers so that the Commissioner may assume the conduct or defence of proceedings that have already been commenced by another party.

Amends section 58(3) to make it clear that the limitations imposed on assistance that may be provided by the Commissioner, also apply where the Commissioner intends to assume the conduct or defence of legal proceedings already commenced.

Amends section 58(4)(a) to extend the scope of the Commissioner's powers to include the power to make any investigation or inquiry that may be necessary to satisfy him or herself that it is proper to assume the conduct or defence of legal proceedings on behalf of a business.

Amends section 58(4)(b) to extend the scope of the Commissioner's powers to include the power to make any investigation or inquiry that may be necessary to assume the conduct or defence of legal proceedings on behalf of a business. At present the power is limited to investigations or inquiries necessary to institute or defend a legal action where proceedings have not yet been commenced.

Clause 12 Section 59 amended

Makes a consequential amendment to the scope of section 59(1) to reflect changes to the Commissioner's powers under new section 58(2).

Clause 13 Section 90 amended

Amends section 90 by deleting the word “Division” and inserting the word “Part” to correct a drafting error. Section 90 extends the meaning of “person involved in a contravention” to include a person involved in those related activities set out in subsections (a) to (e). As currently drafted, because the section has no application beyond the Division in which it sits, the Commissioner cannot take action against persons involved in those related activities as was originally intended, and is only able to take action against those persons who actually contravene the Act.

Clause 14 Section 107 amended

Amends section 107 of the Act so that a person who contravenes or fails to comply with an order of the Supreme Court or the District Court under section 106 is guilty of a crime. The effect of this is to enable this particular offence to be dealt with on indictment as well as summarily.

Clause 15 Schedule 1 heading replaced

Replaces the heading of Schedule 1 as a consequence of the amendments to section 15.

Clause 16 Schedule 2 amended

Inserts the *Debt Collectors Licensing Act 1964*, *Employment Agents Act 1976* and the *Travel Agents Act 1985* into Schedule 2 of the Act.

Incorporating these Acts into Schedule 2 enables specific investigation and enforcement powers set out in Division 4A of part 6 of the *Fair Trading Act 2010* to be used in relation to the licensing and regulatory provisions contained in those Acts. These Acts were inadvertently excluded from Schedule 2 in the original drafting of the *Fair Trading Act 2010*. Schedule 2 already permits these specific investigation and enforcement powers to be used in relation to the other licensing Acts administered by the Commissioner for Consumer Protection.