

## FAIR TRADING AMENDMENT BILL 2013

### Introduction - history

- In July 2009 all Australian Governments, including WA, signed the *Intergovernmental Agreement for the Australian Consumer Law* which required all the States and Territories to apply the Commonwealth Australian Consumer Law as a law of their jurisdiction, including any future changes.
- The Agreement also provided for those future changes to be agreed to by a voting arrangement whereby the Commonwealth and at least four other jurisdictions, of which at least three must be States, must agree to the change.
- About 2½ years ago the WA Parliament passed the Fair Trading Act 2010. That Act was the one that gave effect to the Intergovernmental Agreement. It provided for the adoption or application of the Commonwealth Australian Consumer Law as a law of Western Australia as it existed on the day the Act came in to force.
- The 2010 Act came into force on proclamation on 1 January 2011.
- The Australian Consumer Law (or ACL) is a generic law that regulates the conduct of business in the marketplace and the relationship between consumers and traders.
- It deals with matters such as unconscionable conduct, misleading advertising, consumer guarantees on goods and services, door to door trading and product safety.
- As a national law, its major advantage is that it provides certainty and lower compliance costs for businesses that operate nationally. It also ensures that consumers have the same rights and protections no matter where they are in Australia.
- Most of these protections previously sat in the WA Fair Trading Act 1987, Door To Door Trading Act 1987 and Consumer Affairs Act 1971. The 2010 Fair Trading Act replaced these three Acts.
- Since the 2010 Act came into force there have been a few amendments made to the Commonwealth ACL.

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- In all other Australian jurisdictions these changes were automatically adopted as a law of their own jurisdiction. However, the WA Parliament didn't agree to automatic adoption of changes. These changes can only be applied in Western Australia through amendment legislation.
- The main purpose of this Bill is to realign the WA ACL with the ACL as it exists in all other states and territories. There are of course other amendments in the Bill as well which I will talk about later.
- Since the ACL came into force on 1 January 2011, the Commonwealth Government has passed two Acts that included amendments to the ACL. These amendments were supported under the voting process provided for in the Intergovernmental Agreement, including support from WA.
- The most significant of the changes was the inclusion of interpretive principles into the Unconscionable Conduct provisions of the ACL.
- Under the ACL it is an offence for a business to engage in unconscionable conduct in connection with the supply or acquisition of goods or services.
- In determining whether conduct is unconscionable, courts can have regard to matters such as the relative bargaining strengths of the parties, whether a person was required to comply with conditions that were reasonably necessary to protect the suppliers interests or whether the supplier engaged in unfair tactics.
- In late 2011 the Commonwealth amended the ACL to include interpretive principles to assist the courts in applying the prohibition against unconscionable conduct and to help stakeholders understand the meaning and scope of the provisions.
- The amendments originally stemmed from the recommendations of a Senate Committee in November 2009 and the recommendations of an expert panel that was later established by the Commonwealth to consider whether a list of examples of unconscionable conduct should be included.

- So just to be clear, the unconscionable conduct provisions themselves have not changed, but a set of principles has been added to assist the courts.
- As well as the unconscionable conduct principles, the Commonwealth also amended the meaning of a couple of terms in the ACL.
- Firstly, the definition of *document* was amended to align it with the definition in the Commonwealth's Acts Interpretation Act. The meaning of document has been broadened so that it now includes maps, plans, drawings and photographs.
- Secondly, the reference to *Standards Australia International Limited* was updated to read *Standards Australia*, again to align it with the definition in the Commonwealth's Acts Interpretation Act.
- This Bill seeks to apply all the amendments that have been made to the ACL since 1 January 2011 up to 1 January 2013. This will effectively pick up the unconscionable conduct amendments and these other minor definition changes. These are the only changes that have come into force in that period.
- Perhaps I could use this opportunity to answer the first question that I received in a letter from the Committee last week regarding the possibility of these amendments having retrospective application....
- This Bill has no retrospective implications whatsoever. What the Bill does is adopt the version of the Commonwealth Australian Consumer Law as it existed on 1 January 2013 and will apply that version as a law of Western Australian as from the date of proclamation which will be a date after the Bill is passed. (It will not apply from 1 January 2013)

#### **What other amendments are contained in the Bill?**

- This Bill also seeks to amend the *Fair Trading Act 2010* to address a number of drafting errors and oversights. However, there is one substantive amendment that will create an additional power.
- At present the Commissioner for Consumer Protection has the power to start or defend proceedings on behalf of a consumer or business in any matter where the amount involved is up to \$100,000. But the Commissioner can't intervene if proceedings are already underway.

- The Bill will amend the Fair Trading Act to enable the Commissioner to assume the conduct of legal proceedings already underway. This power is being sought to ensure that consumers or businesses are not disadvantaged should the Commissioner decide that their case has merit and wishes to intervene.
- Next, the Bill will address a drafting oversight to extend the scope of criminal responsibility to anyone who is "involved in a contravention" of a provision of the Act. At present only a person that is directly involved in an offence can be charged. This was a drafting oversight when the Act was made in 2010. It came about because the relevant section applied to only one Division of the Act when it should have applied to the whole Part of the Act in which it sat. Under the previous Fair Trading Act 1987, people who were involved in a contravention could also be charged so this amendment simply restores us to that position.
- Next, the Bill will correct an error in the Act which currently operates to give precedence to a list of State Acts (in Schedule 1 of the Act) if any provision of those Acts is inconsistent with the Australian Consumer Law.
- It was originally intended that the Acts in Schedule 1 would only prevail where they are inconsistent with the product safety provisions of the ACL as was the case under the old Fair Trading Act 1987 and Consumer Affairs Act 1971. Giving precedence to those Acts over all of the ACL was a drafting error. The Bill corrects that error and restores us to the position we were in before the 2010 Act was made.
- Next, the Bill will amend the Act so that the Commissioner can draw on specific investigation and enforcement powers in the Act relating to debt collectors, employment agents and travel agents. The Commissioner is the licensing authority for many occupations and businesses and has access to these powers already. The exclusion of debt collectors, employment agents and travel agents from the list of licensed occupations was a drafting oversight.
- Next, the Bill will make non-compliance with an order of the Supreme Court or District Court an indictable offence – the failure to include this as an indictable offence was a drafting oversight.
- Lastly, the Bill will remove a redundant provision that refers to the process required to amend legislation.