Introducing the New Australian Consumer Law (Stage I)

Kelli Longworth

e-Research Brief 2010/17

June 2010
INTRODUCTION

The Australian Consumer Law represents the largest reform to Australia’s consumer laws in a generation and will take full effect on 1 January 2011. It will introduce a single, national law for fair trading and consumer protection, which applies equally in all Australian jurisdictions, to all sectors of the economy and to all Australian consumers and businesses.

It is one of the highest priorities of the regulatory reform agenda being undertaken by the Business Regulation and Competition Working Group of the Council of Australian Governments (COAG) to develop a seamless national economy to the benefit of Australian consumers.

A new national consumer law framework is in the process of being rolled out by the Commonwealth Government. The implementation of these major consumer law reforms will take place in two stages:

| Stage 1 | • The establishment of a national consumer law which includes the introduction of new national unfair contract terms provisions.  
          • The introduction of new penalties, enforcement powers and consumer redress options relating to the new national consumer law framework. |
| Stage 2 | • The introduction of the new national product safety system.  
          • The implementation of reforms drawing on best practice from State and Territory laws.  
          • The introduction of a new national law concerning the guarantee of consumer rights when buying goods and services to replace existing laws on conditions and warranties.  
          • The enactment of complementary legislation by the States and Territories to implement the new national consumer protection regime by 1 January 2011. |

The new national regime will replace eight State and Territory regulatory regimes dealing with consumer protections across Australia. The overall aims of these reforms are to:

- enhance consumer protection;
- encourage the development of a seamless national economy; and
- reduce regulatory complexity for businesses, especially those operating nationally.

This publication mainly focuses on Stage 1 of the reforms which will come into effect under the Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010 (Cth) (the “Act”). Information in this e-Research Brief is current to June 28, 2010.

THE NEW AUSTRALIAN CONSUMER LAW

The Act is the first in a series of two federal laws that create a new national consumer law which is to be called the Australian Consumer Law (“ACL”).


The Act’s key objective is to simplify the consumer regulatory framework by removing the various differences between Commonwealth, State and Territory consumer protection legislation. The Act has four principal elements:

- the creation of the ACL, which will be a schedule to the TPA;
- the implementation of the new national unfair contract terms provisions;
- the introduction of new penalties for breaches of consumer law; and
- the introduction of new enforcement powers for the Australian Competition and Consumer Commission (“ACCC”) and the Australian Securities and Investment Commission (“ASIC”).

The Act was passed by both Houses of the Australian Parliament on 17 March 2010 and received Royal Assent on 14 April 2010.

Section 2 of the Act sets out a table with the following commencement information for different provisions of
the Act:

- the sections of the Act that relate to the new national unfair contract terms will commence on 1 July 2010, being the date fixed by Proclamation made on 20 May 2010;
- the new penalties, enforcement powers and consumer redress options that relate to the unfair contract terms provisions also commence on 1 July 2010;
- the new enforcement powers and remedies under the Act, which do not deal with unfair contract terms, commenced on 15 April 2010 (being the day after the Act received Royal Assent); and
- some minor miscellaneous and consequential amendments also commenced on 15 April 2010.

The second law, the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 (“Bill No. 2”) was introduced into the Commonwealth House of Representatives on 17 March 2010 and is yet to be passed. Bill No. 2 proposes to implement the matters referred to in Stage 2 above (see more detailed discussion below).

THE CONSULTATIVE PROCESS

INTRODUCTION

An overhaul of consumer law at the national level has been on the agenda for some time. In the Second Reading Speech to the legislation, the Minister for Competition Policy and Consumer Affairs, the Hon Dr Craig Emerson MP, explained that the reforms contained in the legislation “are the culmination of a long policy review and development process undertaken by the Australian government in close consultation with the states and territories”.6

This section outlines the main steps taken to date in the consultative process in relation to this legislation.

THE PRODUCTIVITY COMMISSION

On 11 December 2006, the then Commonwealth Treasurer, Peter Costello, requested the Australian Government’s Productivity Commission to undertake an inquiry into Australia’s consumer policy framework.7 In conducting the review, the Productivity Commission consulted widely with the public and industry stakeholders.

The “Terms of Reference” for the inquiry outlined that the Productivity Commission was to have particular regard to:

- the need to ensure that consumers and businesses, including small businesses, are not burdened by unnecessary regulation or complexity;
- the shared responsibility of the Australian Government and the State and Territory governments for consumer policy; and
- the importance of promoting certainty and consistency for business and consumers in the operation of Australia’s consumer protection laws.8

The Productivity Commission’s report, Review of Australia’s Consumer Policy Framework, published on 30 April 2008, found a number of shortcomings in the current consumer law in Australia. In particular, the report noted:

The current division of responsibility for the framework between the Australian and State and Territory Governments leads to variable outcomes for consumers, added costs for businesses and a lack of responsiveness in policy making. There are gaps and inconsistencies in the policy and enforcement tool kit and weaknesses in redress mechanisms for consumers.9

Failure to attend to these problems, the report outlined, would lead to increased costs for consumers and the community. Furthermore, the Productivity Commission estimated that these proposed reforms could actually provide an annual net gain to the community of between $1.5 billion and $4.5 billion.10

The Productivity Commission concluded with a number of recommendations, including:

- that Australian Governments should implement a new national generic consumer law to apply in all jurisdictions (Recommendation 4.1);
- that the new national generic consumer law should apply to all consumer transactions, including financial services (Recommendation 4.2); and
- that a provision should be incorporated in the new national generic consumer law that addresses
unfair contract terms (Recommendation 7.1).  

**TREASURY CONSULTATION PAPERS**

The Commonwealth Treasury then embarked on a further two-stage consultative process. On 17 February 2009, the Standing Committee of Officials of Consumer Affairs, being a division of the Treasury, issued an information and consultation paper entitled, “An Australian Consumer Law: Fair Markets – Confident Consumers”, which explained the nature and scope of the proposed changes and sought submissions from the public. Treasury received 102 submissions in response to this consultation paper.

On 11 May 2009, a more specific information and consultation paper, “The Australian Consumer Law: Consultation on draft unfair terms and provisions”, was released by the then Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, the Hon Chris Bowen MP, seeking public feedback on draft legislative provisions to implement a national unfair contract terms law. This paper attracted 96 submissions.

**COAG AND THE MINISTERIAL COUNCIL ON CONSUMER AFFAIRS**

The Business Regulation and Competition Working Group (“BRCWG”) of the Council of Australian Governments (“COAG”) has been given the task of advancing a regulatory reform agenda covering 27 areas of regulation. The reform of consumer laws is described as being among the most important of these reforms.


On 15 August 2008, the MCCA proposed that all Australian governments should agree to adopt a new national consumer law:

- to be based on the current consumer protection provisions of the TPA;
- with appropriate amendments reflecting best practice in State and Territory legislation; and
- incorporating provisions that address unfair contract terms.

At its 2 October 2008 meeting, COAG embraced the recommendations of the Productivity Commission and agreed to its proposed new consumer policy framework:

The new national consumer law will deliver on COAG’s commitment to a seamless national economy by providing a uniform and higher level of protection for Australian consumers and addressing weaknesses in existing laws. The new policy framework will improve consumer law enforcement powers, reduce compliance costs for business and increase access to information regarding dispute resolution and consumer issues.

On 4 December 2009, the MCCA held a meeting which discussed the national consumer policy objectives in detail and agreed the final form of the ACL. The Joint Communiqué from that meeting detailed the six operational objectives, being:

- to ensure that consumers are sufficiently well-informed to benefit from and stimulate effective competition;
- to ensure that goods and services are safe and fit for the purposes for which they are sold;
- to prevent practices that are unfair;
- to meet the needs of those consumers who are most vulnerable or who are at the greatest disadvantage;
- to provide accessible and timely redress where consumer detriment has occurred; and
- to promote proportionate, risk-based enforcement.

**SENATE ECONOMICS AND LEGISLATION COMMITTEE INQUIRY**

Upon introduction into the House of Representatives on 24 June 2009, the legislation was referred to the Senate Economics and Legislation Committee (the “Senate Committee”) for inquiry the very next day. After consultation with the public, the Senate Committee published its report on 9 September 2009.

The Senate Committee approved the draft legislation and recommended that it be passed with no amendments. The Senate Committee did recommend, however, that the ACCC and the ASIC publish guidelines on the operation of the provisions to assist parties to understand their rights and obligations under the new regime.
The Senate Committee also recommended that the ACCC and the ASIC consider the merit of a safe harbour for certain terms. A safe harbour would allow a business to seek permission from the regulator that a particular term is beyond challenge. However, the Government rejected this proposal and subsequently clarified that the Minister will not have the power to declare certain terms as “prohibited” nor will there be a “safe harbour” mechanism.18

**INTERGOVERNMENTAL AGREEMENT**

On 23 February 2009, the National Partnership Agreement to Deliver a Seamless National Economy (“NPA”) was launched by the COAG Reform Council. The implementation plan for the NPA was set out in a schedule to the NPA (“Implementation Plan”). On 2 July 2009, COAG entered into the Intergovernmental Agreement for the Australian Consumer Law (“IGA”) which was created to give effect to the Implementation Plan.

The IGA describes how the ACL will be implemented. First, the Commonwealth will introduce legislation (i.e., the Act) to:

- enact the text of the ACL as a schedule to the TPA;
- amend the relevant provisions of the ACL to ensure that they are consistent with the TPA; and
- enact changes to the investor protection provisions of the ASIC Act and, to the extent necessary, The Corporations Act 2001 (Cth), to ensure that they are consistent with the TPA.19

Each State and Territory will then introduce complementary legislation into its Parliament by no later than 31 December 2010 or such later date as is set out in the Implementation Plan.20 The States and Territories will also make such modifications to their laws as are required to give effect to the ACL, including repealing existing provisions which deal with matters covered by the ACL.21

By implementing the ACL and completing a range of other reforms, the States and Territories will receive certain payments as set out in the NPA and the Implementation Plan.22 The States and Territories will also make a range of savings arising from the consolidation or transfer of certain existing regulatory functions.23

The IGA briefly sets out the proposed content, administration and enforcement arrangements of the ACL together with the procedure for alterations to the draft ACL, which includes a period of consultation.24

**OUTLINE OF THE ACT**

The Act, which introduces the ACL, comprises two key components, being:

(a) an unfair contract terms regime; and
(b) consumer law remedies and enforcement powers.

**UNFAIR CONTRACTS LEGISLATION**

The new unfair contracts legislation will give regulators and affected parties the power to challenge unfair contract terms in non-negotiated standard form contracts. Previously, law of this type was only available in Australia under Victoria’s Fair Trading Act 1999 (Vic).

The unfair contract terms provisions set out in the Act have been incorporated into the TPA and the ASIC Act. In the context of the TPA, they have been included as a new schedule to the TPA (see new Schedule 2, Part 2 of the TPA). In relation to the ASIC Act, a new part has been inserted (see new Part 2, Division 2, Subdivision BA of the ASIC Act). These consumer protection provisions will be known as the “Australian Consumer Law”.

In essence, under the amendments to the TPA, a term in a “consumer contract” is void if:

- the term is “unfair”; and
- the contract is a “standard form contract”: see new subsection 2(1) of Schedule 2, Part 2 of the TPA.

In the context of the ASIC Act, a term in a “consumer contract” is void if:

- the term is “unfair”; and
- the contract is a “standard form contract”; and
- the contract is a financial product or a contract for the supply, or possible supply, of services that are financial services: see new subsection 12BF(1) of Part 2, Division 2, Subdivision BA of the ASIC Act.
Each of these key elements is considered in turn below.

What does the Act apply to?

The Act only applies to standard form consumer contracts under which an individual acquires goods, services or interests in land which are wholly or predominantly for personal, domestic or household use or consumption: see new subsection 2(3) of Schedule 2, Part 2 of the TPA and new subsection 12BF(3) of Part 2, Division 2, Subdivision BA of the ASIC Act.

The Exposure Draft of the legislation included business contracts as being subject to the unfair contract terms provisions. However, this element was removed when the legislation was introduced into the Australian Parliament (see also discussion below under “Disadvantages of a National Consumer Law”).

The unfair contracts provisions apply to a contract entered into on or after 1 July 2010. The provisions will not apply if a standard form consumer contract has been entered into before 1 July 2010. However, if the contract is renewed or varied after that time, then the provisions will apply to the contract as renewed in relation to conduct that occurs on or after the day the contract is renewed or varied: see item 2 of Part 1, Schedule 1 of the Act in the context of the TPA and see item 8 of Part 1, Schedule 3 of the Act in the context of the ASIC Act.

The new laws will affect contracts that “drive consumers crazy”, such as mobile phone contracts, gym memberships, home alarm monitoring contracts, car rental agreements, credit card contracts, utility service contracts and bank account contracts.

What is a standard form contract?

A contract is presumed to be a standard form contract unless another party to the proceeding proves otherwise: see new subsection 7(1) of Schedule 2, Part 2 of the TPA and new subsection 12BK(1) of Part 2, Division 2, Subdivision BA of the ASIC Act.

A court considering this issue can take into account any factors that it considers relevant, although it must also take into account the factors listed in the new provisions, which include whether:

- there is a significant imbalance in the bargaining power between the parties;
- the contract was prepared by one party before the transaction was contemplated; and
- the party asked to accept the contract had an effective opportunity to negotiate its terms: see new subsection 7(2) of Schedule 2, Part 2 of the TPA and new subsection 12BK(2) of Part 2, Division 2, Subdivision BA of the ASIC Act.

When is a term “unfair”? 

The definition of the term “unfair” has been somewhat controversial. When the legislation was first introduced into the Australian Parliament on 24 June 2009, a term was considered to be “unfair” if it satisfied the following two elements:

(a) it caused a significant imbalance in the parties’ rights and obligations arising under the contract; and

(b) the term was not reasonably necessary to protect the advantaged party’s legitimate interests: see new section 3(1)(a) and (b) of Schedule 2, Part 2 of the TPA and new subsection 12BG(1)(a) and (b) of Part 2, Division 2, Subdivision BA of the ASIC Act.

However, a subsequent amendment to the legislation, approved on 17 March 2010, resulted in a third element being added to the test of whether a term in a consumer contract is “unfair”. This third element was whether the term would cause financial or non-financial detriment: see new subsection 3(1)(c) of Schedule 2, Part 2 of the TPA, as amended by item (9) of the Schedule of Amendments to the legislation approved by the Senate on 17 March 2010 and new subsection 12BG(1)(c) of Part 2, Division 2, Subdivision BA of the ASIC Act, as amended by item (45) of the Schedule of Amendments to the legislation approved by the Senate on 17 March 2010.

There is a presumption that an unfair term is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the application or reliance on that term, unless that party can prove otherwise: see new subsection 3(4) of Schedule 2, Part 2 of the TPA and new subsection 12BG(4) of Part 2, Division 2, Subdivision BA of the ASIC Act.

In finding that a term in a consumer contract is unfair, a Court may take into account any matters it considers relevant. However, the Court must take into account the following factors:
• the extent to which it would cause detriment, or a substantial likelihood of detriment (whether financial or otherwise) to a party if the term was to be applied or relied on;
• the extent to which a term is “transparent”; and
• the contract as a whole: see new subsection 3(2) of Schedule 2, Part 2 of the TPA and new subsection 12BG(2) of Part 2, Division 2, Subdivision BA of the ASIC Act.

A term is “transparent” if the term is expressed in reasonably plain language, legible, presented clearly and readily available to any party affected by the term: see new subsection 3(3) of Schedule 2, Part 2 of the TPA and new subsection 12BG(3) of Part 2, Division 2, Subdivision BA of the ASIC Act.

The Act includes a non-exhaustive list of terms (i.e., "grey list") that may be regarded as unfair. For example:
• terms that penalise one party but not the other for breaching or terminating the contract;
• terms that allow one party to vary the upfront price payable under the contract;
• terms that permit unilateral variation of the contract;
• terms that assign the contract to the detriment of the other party without that party’s consent; and
• certain other terms that are prescribed in the regulations: see new subsection 4(1) of Schedule 2, Part 2 of the TPA and new subsection 12BH(1) of Part 2, Division 2, Subdivision BA of the ASIC Act.

Before a regulation may be made to add a new term to the “grey list” of potentially unfair terms, the Minister must consider:
• the detriment that a term of that kind would cause consumers;
• the impact on business generally of prescribing that kind of term; and
• the public interest: see new subsection 4(2) of Schedule 2, Part 2 of the TPA, as amended by item (12) of the Schedule of Amendments to the legislation approved by the Senate on 17 March 2010 and new subsection 12BH(2) of Part 2, Division 2, Subdivision BA of the ASIC Act, as amended by item (48) of the Schedule of Amendments to the legislation approved by the Senate on 17 March 2010.30

Exceptions

Not all terms in a standard form contract will be subject to the Act. The Act includes an exception for those terms that:
• define the main subject matter; or
• describe the “upfront price”31 of the goods or services supplied under the contract; or
• are required or expressly permitted by law: see new subsection 5(1) of Schedule 2, Part 2 of the TPA and new subsection 12BI(1) of Part 2, Division 2, Subdivision BA of the ASIC Act.32

Additionally, the unfair contract provisions will not apply to:
• shipping, marine salvage or towage contracts: see new subsection 8(1) of Schedule 2, Part 2 of the TPA;33
• constitutions of companies: see new subsection 8(3) of Schedule 2, Part 2 of the TPA and new subsection 12BL of Part 2, Division 2, Subdivision BA of the ASIC Act;34
• managed investments schemes or other bodies: see new subsection 8(3) of Schedule 2, Part 2 of the TPA and new subsection 12BL of Part 2, Division 2, Subdivision BA of the ASIC Act; or
• insurance contracts.35

What are the consequences?

If a provision in a standard form contract is found by a court to be “unfair”, then that provision will be declared void: see new subsection 2(1) of Schedule 2, Part 2 of the TPA and new subsection 12BF(1) of Part 2, Division 2, Subdivision BA of the ASIC Act. However, the contract will still continue to bind the parties if it is able to operate without the void term: see new subsection 2(2) of Schedule 2, Part 2 of the TPA and new subsection 12BF(2) of Part 2, Division 2, Subdivision BA of the ASIC Act. Accordingly, if the contract is not
capable of existing without the unfair term then the whole contract fails. It has been argued that “a more equitable outcome would be for an unfair term to be read down and applied so as to operate fairly, rather than being completely void”.36

Application and Enforcement

The ACL is an application law. As such, it will be applied and enforced as a law of each jurisdiction in Australia, as follows:

- the Australian Parliament will apply the ACL as a law of the Commonwealth in respect of the conduct of corporations and those associated with them; and
- each State and Territory parliament will enact mirror legislation to apply the ACL, as a law of its own jurisdiction, which will apply to the conduct of corporations and individuals.37

The enforcement of the new ACL will be shared between the ACCC, the ASIC and the State and Territory consumer protection agencies.38 The Act also provides avenues for individual consumers to enforce certain consumer rights.39 A number of the new consumer law remedies and enforcement powers available under the Act are described below.

For information regarding the constitutional basis of the ACL and how the ACL regulates the conducts of individuals, please refer to The Australian Consumer Law, An Introduction (p 17).

The Xenophon Amendments

Independent Senator, Mr Nick Xenophon, circulated proposed amendments to the legislation in November 2009 (the “Xenophon Amendments”). However, these amendments were not agreed to by the Senate.40 The main tenets of these amendments involved:

- a proposal to include business-to-business contracts involving transactions of $2 million or less to be subject to the unfair contract terms provisions of the Act on the basis that small businesses, like consumers, are increasingly victims of unfair contract terms;
- that references to “transparency” and “detriment” be deleted from the Act in the context of the definition of “unfair”; 
- the inclusion of a provision for “safe harbours” to give greater certainty to businesses by providing an opportunity to approach the ACCC to seek approval or authorisation of particular contracts or contract terms; and
- the removal of the exemption for insurance contracts.41

CONSUMER LAW REMEDIES AND ENFORCEMENT POWERS

The Act also introduces a number of enforcement powers and remedies:

- **Civil pecuniary penalties** will be available for certain specified conduct relating to consumer protection that does not warrant a criminal penalty under the TPA or the ASIC Act. The applicable penalty depends on the relevant provision, with the maximum being $1.1 million for corporations and $220,000 for individuals: see Schedule 2, Part 1 and Schedule 3, Part 2 of the Act and section 4AA of the Crimes Act 1914 (Cth).

- **Disqualification orders** will be available on application by the ACCC or the ASIC to the Court for breaches of certain provisions of the TPA or the ASIC Act, including the unfair contract terms provisions. Under these provisions, the Court may make an order disqualifying a person from managing corporations: see Schedule 2, Part 2 and Schedule 3, Part 3 of the Act.

- **Substantiation notices** will be available to the ACCC and the ASIC to require a person or a corporation, such as a supplier, to provide information or produce documents to substantiate or support a claim or representation promoting, or intending to promote, a supply of goods by a corporation, a sale or grant of an interest in land by a corporation or an offer of employment by a corporation: see Schedule 2, Part 3 and Schedule 3, Part 4 of the Act. A substantiation notice is a preliminary investigative tool permitting the ACCC and the ASIC “to seek information about claims or representations that may assist a regulator in determining whether to take action for a suspected breach of the consumer protection provisions of the ACL”.42

- **Redress orders** issued by the Court may be sought by the ACCC or the ASIC to require a person, such as a supplier, to provide redress to consumers who are not parties to a particular enforcement proceeding. This power is designed to be used where a large number of consumers...
suffer similar identifiable damage. The redress can take a number of forms, for example, refunds, repairs, the variation of a contract, apologies or orders to honour representations: see Schedule 2, Part 4 and Schedule 3, Part 5 of the Act.

- **Infringement notices** may be issued by the ACCC or the ASIC for minor contraventions as an alternative to court proceedings. Infringement notices involve relatively small financial penalties from $660 to $6,600: see Schedule 2, Part 5 and Schedule 3, Part 6 of the Act and section 4AA of the Crimes Act 1914 (Cth).

- **Public warning notices** may be issued by the ACCC or the ASIC, without the need for a court order, to inform the public of potentially harmful conduct of a corporation provided certain conditions are satisfied:
  - the ACCC or the ASIC has reasonable grounds to suspect that conduct may constitute a contravention of certain specified provisions of either the TPA or the ASIC Act;
  - that such conduct will cause detriment to be suffered; and
  - it is in the public interest to issue the notice.

This new power will also provide the ACCC and the ASIC with the ability to “name and shame”, as so described in the press, persons who have refused or failed to respond to a substantiation notice: see Schedule 2, Part 6 and Schedule 3, Part 7 of the Act.

- **Declaration Orders** may be sought from the Court:
  - by the ACCC or the ASIC that a term under a standard form consumer contract is unfair: see Schedule 2, Part 7 and Schedule 3, Part 8 of the Act; and
  - also by a party to a standard form consumer contract: see the amendments to the legislation made by the Senate on 17 March 2010; in particular see item 74 of Schedule 2, Part 7 and item 55 of Schedule 3, Part 8 of the Act.

### ADVANTAGES OF A NATIONAL CONSUMER LAW

In the Second Reading Speech, the Minister for Competition Policy and Consumer Affairs, the Hon Dr Craig Emerson MP, summarised the nature of the Act as follows:

> This bill represents the first part of a generational change in Australia’s consumer laws. It introduces reforms designed to make Australia’s markets work better, to improve protection for all consumers and to strip away layers of legislative and regulatory complexity from our laws, saving business time and money and contributing to the delivery of a seamless national economy.

Currently, the Australian consumer law regime consists of a combination of federal legislation and various State and Territory legislation, enforced by consumer regulators at the Commonwealth, State and Territory levels. In reference to the large number of generic consumer laws which are in force around Australia, the Minister explained:

> … this tangle of consumer laws must be rationalised. We must reduce confusion and complexity for consumers and provide consistency of consumer protection. We must reduce compliance burdens for business.
The main current laws in existence throughout Australia that deal with consumer protection are set out in the table below.  

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Legislation</th>
</tr>
</thead>
</table>
              | 2. *Australian Securities and Investment Commission Act 2001* (Cth)  
              | 3. *Corporations Act 2001* (Cth)  |
| NSW          | 4. *Fair Trading Act 1987 (NSW)*  
              | 5. *Contracts Review Act 1980 (NSW)*  |
| QLD          | 6. *Fair Trading Act 1989 (Qld)*  
| Vic          | 8. *Fair Trading Act 1999 (Vic)*  |
| WA           | 12. *Fair Trading Act 1987 (WA)*  
              | 13. *Consumer Affairs Act 1971 (WA)*  
              | 14. *Door to Door Trading Act 1987 (WA)*  |
| Tas          | 15. *Fair Trading Act 1990 (Tas)*  
              | 17. *Fair Trading (Reinstatement of Regulations) Act 2008 (Tas)*  
              | 18. *Door to Door Trading Act 1986 (Tas)*  |
| ACT          | 19. *Fair Trading Act 1992 (ACT)*  
              | 20. *Fair Trading (Consumer Affairs) Act 1973 (ACT)*  
              | 22. *Door to Door Trading Act 1991 (ACT)*  
              | 23. *Law by Sales Agreements Act 1963 (ACT)*  |
| NT           | 24. *Consumer Affairs and Fair Trading Act 1990 (NT)*  |

There are also currently eight lead consumer agencies that administer and enforce consumer protection policy in the States and Territories (see table below). These State and Territory agencies will jointly administer and enforce the ACL with the ACCC and the ASIC.  

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Consumer Agency</th>
</tr>
</thead>
<tbody>
<tr>
<td>NSW</td>
<td>NSW Fair Trading</td>
</tr>
<tr>
<td>QLD</td>
<td><em>Fair Trading (The Department of Employment, Economic Development and Innovation)</em></td>
</tr>
<tr>
<td>Vic</td>
<td><em>Consumer Affairs Victoria</em></td>
</tr>
<tr>
<td>SA</td>
<td><em>Office of Consumer and Business Affairs</em></td>
</tr>
<tr>
<td>WA</td>
<td><em>Department of Commerce</em></td>
</tr>
<tr>
<td>Tas</td>
<td><em>Consumer Affairs and Fair Trading</em></td>
</tr>
<tr>
<td>ACT</td>
<td><em>Office of Regulatory Services (Fair Trading)</em></td>
</tr>
<tr>
<td>NT</td>
<td><em>Consumer Affairs</em></td>
</tr>
</tbody>
</table>

The **Explanatory Memorandum** for the Act notes:

The division, in terms of jurisdictional and functional responsibilities, between the different enforcement agencies is not always straightforward and has been a long-term source of confusion for consumers and industry alike. In practice, it can result in a waste of resources as enforcement agencies try to ascertain jurisdiction in overlapping cases.

The advantages of the legislation were described in the **Explanatory Memorandum** as follows:

Businesses will benefit from consistent national regulation, which will reduce complexity and compliance costs by eliminating significant jurisdictional variation. This will provide:
- savings for businesses currently operating nationally;
- incentives for expansion and innovation for businesses previously unwilling to deal with the complexity of multi-jurisdictional regulation;
- greater incentives for new entrants to markets due to a simpler regulatory framework;
- greater clarity and certainty in relation to consumer law, allowing for more efficiency in the markets;
- easier understanding of consumer contracts and greater opportunities for exercising choice when considering consumption possibilities; and
- greater consistency in enforcement for businesses and a realignment of resources as more emphasis can be placed on effective enforcement by the most appropriate consumer law agency.

Consumers will also benefit from the changes through:
- greater confidence in dealing with businesses due to more consistent laws;
- easier understanding of consumer contracts and greater opportunities for exercising choice when considering consumption possibilities;
- greater confidence in dealing with businesses due to greater consistency in the enforcement of these laws; and
- lower prices for goods and services to the extent that businesses pass on the benefits of lower compliance costs to their customers.51

Many of the public submissions made during the consultation process for this legislation expressed support for the government’s intention to protect consumers through a national consumer law. For example, the Business Council of Australia stated in its submission to the Senate Inquiry that it “supports the proposed reform of consumer protection laws in Australia, and in particular the development of a nationally consistent approach in this area”.52

It would appear that the provisions of the Act, particularly those relating to the unfair contract terms, will be generally welcomed by consumers, especially the provisions giving consumers the right to challenge terms in standard contracts relating to the termination, default and penalty fees charged, for example, by banks,53 gyms54 and car rental companies.55

The anticipated compliance and commercial benefits of the legislation were summarised by Minter Ellison Lawyers in its submission to the Senate Inquiry:

[W]e welcome the Government’s proposal to implement uniform and consistent consumer protection laws in Australia. Any measure which simplifies the compliance regime for business will produce significant benefits for Australia both in terms of reducing the costs of doing business here and therefore increasing Australia’s attractiveness for local and foreign investment, but also for reducing the likelihood of non-compliance which will benefit consumers and businesses alike.56

DISADVANTAGES OF A NATIONAL CONSUMER LAW

A number of disadvantages have been raised in relation to the Act:

- **Uncertainty.** A number of submissions to the Senate Inquiry indicated concern about the uncertainty that the Act’s provisions would cause in commercial contracts because the parties cannot be sure what terms the Courts and the Minister will declare to be “unfair”.57

These concerns were evident in the submission from the Australian Institute of Company Directors:

If there is a risk that terms in a contract could be unenforceable for unfairness or for any other reason, the flow-on effects could be significant. Companies may be required to reconsider product structuring, risk allocation, insurance, prices and even the actual supply of some goods and services. … We anticipate that the lack of clarity in the bill’s drafting and the subjective nature of unfairness will also lead to an increase in litigation and costs for companies.58

The Australian Bankers’ Association voiced concerns from the banking sector about the Act’s impact on business certainty and business costs in its submissions to the Senate Committee:

Central to our concerns is that the regime will create uncertainty for banks … In practice the operation of this legislation is likely to see customers agreeing on the terms and conditions for their banking services before the customer accepts a financial product, only to later seek to avoid their obligations by claiming a particular term is unfair.59

The unfair contract provisions of the Act have also been criticised by University of New South Wales Associate Professor Frank Zumbo as being “watered down from the longstanding
Victorian legislation in the area”. Professor Zumbo further notes that:

The Victorian legislation, modelled on legislation in the United Kingdom, represents best practice in dealing with unfair contract terms and should have simply been copied at the Federal level. Instead, changes to the new national unfair contract terms law [make] it much harder to prove the existence of an unfair contract term will disadvantage consumers.

Additionally, the failure of the Federal Government to include “safe harbours” in the Act has been criticised as resulting in unnecessary uncertainty for businesses and consumers alike. Professor Zumbo explains that:

The provision of safe harbours under national law would have enabled businesses to voluntarily approach the ACCC for approval of consumer contracts or terms. If obtained, the ACCC approval would have operated to safeguard businesses from legal action in relation to the approved contract or term. Safe harbours would have provided businesses and consumers with certainty about the use of approved contracts or terms.

• Financial Implications and Transitional Costs. It is expected that “[t]here will be a transitional cost for these businesses as they adjust to the operation of the new, national regime”. However, the Productivity Commission noted in its Report that there was “little evidence in Victoria or in the other countries that have enacted laws against unfair contract terms, of significant business compliance or other burdens”. In any case, the annual benefits of between $1.5 billion and $4.5 billion anticipated by the Productivity Commission are expected to out-weigh these transitional costs.

• Costs to consumers. The Business Council of Australia (“BCA”) indicated that businesses may be required to prepare new contracts to replace standard form contracts that are widely used in business operations such as loan contracts, bank deposits and telecommunications contracts. The BCA warned further that:

Standard-form contracts are essential to business operations delivering cost savings and efficiencies – cost savings which are passed on to consumers. The unfair contracts provisions will introduce a high level of uncertainty into consumer transactions.

Additionally, it has been noted that the maximum pecuniary penalties of $1.1 million for corporations and $220,000 for individuals may result in a “more costly business environment, with costs likely to be passed on to consumers”.

• Frivolous claims. The threshold for bringing legal action in the original draft of the legislation that was submitted to the Australian Parliament was described as being “unduly low”. The original test for unfairness did not require consumers to show that they have suffered actual detriment because of an unfair term. Concerns were initially raised that this could lead to a “blow-out in lawsuits against companies”. However, in response to this concern of an increase in “unmeritorious or frivolous claims”, the final version of the Act included a third limb in the definition of “unfair” that required some form of detriment.

Another area of concern surrounds the creation by the Act of a new power for courts to order redress for consumers affected by breaches even if they were not involved in a court action. This non-party redress power has been perceived as potentially permitting regulators to take actions on behalf of consumers that will expose businesses to a significant number of claims. Further, in its submission to the Senate inquiry, Brambles Limited warned that the extra information gathering powers being given to ASIC and the ACCC in the Act will expose companies to “fishing expeditions” by the regulators.

• Excessive new powers for regulators. Concern has been raised that under the Act, the ACCC and the ASIC gain significant new powers. For example, the new powers to issue infringement notices will, in effect, reverse the onus of proof for people who are alleged to have committed a breach of the Act due to the new provisions requiring “parties who wish to challenge the notice to either run the risk of prosecution in a court or pay a penalty to avoid prosecution”. Additionally, the power to “name and shame” corporations under the public warning notice provisions of the Act has also been described as a “very blunt instrument”, with the hope expressed that such powers be rarely used. Under the new regime, the regulators can, in effect, force parties to either pay a fine or agree to remedy their behaviour if they wish to avoid court action, rather than requiring the regulators to first pursue parties in the courts for alleged breaches.

• Need for “Small Business” exemption. The Exposure Draft of the proposed legislation, issued on 11 May 2009, included business-to-business contracts but this aspect was excluded from the bill when it was introduced into the House of Representatives on 24 June 2009. In his Second Reading Speech, the Hon Dr Craig Emerson MP said:
In relation to the question of whether business-to-business contracts – and particularly those involving small businesses – should be included under the unfair contract terms provisions, the government is currently reviewing both the unconscionable conduct provisions of the Trade Practices Act and also the Franchising Code of Conduct. 81

A number of submissions to the Senate Inquiry called for the reinstatement of business contracts, at least in terms of those involving “small business”. 82 As noted above, Senator Xenophon also sought to include small businesses within the ambit of the legislation; however no amendments were made in this regard in the final version of the legislation.

On 17 March 2010, soon after the legislation was passed, Professor Zumbo made the following comments in the press:

… [t]he last minute removal of small businesses from the operation of the new national law dealing with unfair contract terms will disappoint those small businesses on the receiving end of unfair contract terms used by larger businesses. Unfair terms in retail leases, franchise agreements and supply agreements will escape scrutiny under the new national law and give unscrupulous larger businesses the green light to continue using unfair terms in contracts with small businesses. 83

THE SECOND BILL

As noted above, on 17 March 2010, the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 (“Bill No. 2”) was introduced into the Commonwealth House of Representatives. As the second bill in the series of two bills to reform Australia’s consumer laws, Bill No. 2 was introduced to implement the remaining COAG reforms including:

- renaming the TPA as the Competition and Consumer Act 2010;
- transferring the existing consumer protection and related provisions of the TPA into the ACL;
- augmenting or modifying the TPA’s existing consumer protection and related provisions to reflect best practice in existing State and Territory consumer laws (as agreed to by the Australian Government and the States and Territories);
- introducing a new national product safety regulatory framework;
- implementing a new national consumer guarantees law which will deal with implied warranties and conditions in consumer contracts for goods and services; and
- further amendments to the ASIC Act to ensure its consistency with the ACL. 84

To assist with the drafting of the second bill, on 26 July 2009, the Minister for Competition Policy and Consumer Affairs, the Hon Dr Craig Emerson MP, released an issues paper for the Commonwealth Consumer Affairs Advisory Council (CCAAC) Review of Statutory Implied Conditions and Warranties. This paper was followed by a report which was issued on 30 October 2009.

On 16 November 2009, the Standing Committee of Officials of Consumer Affairs released the Consultation Regulation Impact Statement (RIS) – Australian Consumer Law - Best Practice Proposals and Product Safety Regime. The consultation closed on 27 November 2009. The Treasury received 28 submissions in response to the consultation. After the consultation period, the proposals were presented to the MCCA at its 4 December 2009 meeting.

The Joint Communiqué issued by the MCCA after its 4 December 2009 meeting outlined in detail the key reforms to be included in Bill No. 2. In particular, the MCCA agreed that the Bill No. 2 will include:

- a new national product safety law that will:
  - include a reporting requirement for suppliers to notify the appropriate product safety regulator when it becomes aware of consumer goods it has supplied that have been associated with a serious injury or death;
  - apply the national product safety requirements to services related to the supply, installation or maintenance of consumer products; and
  - enhance the investigative powers of product safety regulators;
- a new national consumer guarantees law that will:
  - clarify and enhance the legal framework for consumer rights upon the purchase of goods and services anywhere in Australia;
  - be supported by effective redress;
- foster a greater ability to inform and educate all Australian consumers and businesses about their rights and obligations; and
- reduce the compliance burden for businesses;

- changes drawing on best practice in State and Territory laws, covering;
  - unsolicited sales practices, including door-to-door selling and telephone sales and other forms of direct selling which does not take place in a retail context;
  - lay-by sales transactions; and
  - simple rules relating to receipts and invoices.

The Ministers announced during the 4 December 2009 MCCA meeting that the second bill would commence on or before 31 December 2010.

To track the progress of Bill No. 2, click here.
LINKS TO FURTHER READING

ACT AND ACCOMPANYING MATERIAL

- Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010 (Cth)
- See this link for the Second Reading Speech, Explanatory Memoranda and amendments.

ACTS AMENDED

The main legislation amended by the Act is set out below:

- Trade Practices Act 1974 (Cth); and
- Australian Securities and Investments Commission Act 2001 (Cth).

MINISTERIAL MEDIA STATEMENTS

- Commonwealth Government Ministerial Media Statements:
  - The Hon Dr Craig Emerson MP, Minister for Competition Policy and Consumer Affairs, Minister for Small Business, Independent Contractors and the Service Economy and Minister Assisting the Finance Minister on Deregulation: 15 April 2010; 17 March 2010; 4 December 2009; 24 June 2009.

RELATED GOVERNMENT INFORMATION

- A Guide to the Unfair Contract Terms Law, ACCC, ASIC and the State and Territory consumer protection agencies, 1 June 2010
- The Commonwealth Government’s Treasury website on Consumer Policy
- The Commonwealth Government’s Treasury website on An Australian Consumer Law. In particular, see:
  - The Australian Consumer Law, An Introduction, The Australian Government, The Treasury, April 2010; and
- Ministerial Council of Consumer Affairs (includes all MCCA Communiqués)
- Council of Australian Governments’ Meetings (includes all COAG Communiqués)
- The Hon Dr Craig Emerson MP, Minister for Competition Policy and Consumer Affairs, Taking Action – Australian Consumer Law, Opening address at the National Consumer Congress, 15 March 2010.
- Dr Steven Kennedy, An Introduction to the Australian Consumer Law, Address to the Standing Committee of Officials of Consumer Affairs’ Forum for Consumer and Business Stakeholders, 27 November 2009.

RELATED COMMONWEALTH GOVERNMENT AGREEMENTS

- Intergovernmental Agreement for the Australian Consumer Law, Council of Australian Governments, 2 July 2009.

PRODUCTIVITY COMMISSION INQUIRY


SENATE COMMITTEE INQUIRIES

- Senate Economics Legislation Committee, Trade Practices Amendment (Australian Consumer Law) Bill
2009 (website).

- Report (7 September 2009)
- Submissions
- Public Hearings and Transcripts

Senate Economics Legislation Committee, Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 (website)

- Report (21 May 2010)
- Submissions
- Public Hearings and Transcripts

OTHER GOVERNMENTAL CONSULTATION

- Options Paper on Unfair Contracts in Insurance Contracts

This paper, released on 17 March 2010, examines the current carve-out of section 15 of the Insurance Contracts Act 1984 (Cth) for insurance contracts from the operation of the unfair contracts terms provisions of the Act. Public consultation on the paper has been sought with the closing date for submissions being 30 April 2010.

- Standing Committee of Officials of Consumer Affairs – Consultation Regulatory Impact Statement on Best Practice Proposals and Product Safety Regime

Consultation regulatory impact statements on reforms based on best practice in State and Territory consumer protection laws and a new national product safety regime were released on 16 November 2009. The consultation period closed on 27 November 2009. (Note that the content of this consultation relates to Bill No. 2).

- Commonwealth Consumer Affairs Advisory Council (CCAC) – Review of Statutory Implied Conditions and Warranties

An issues paper released by the Commonwealth Treasury on 26 July 2009. The report, Consumer Rights – CCAC Report on Statutory Implied Conditions and Warranties was issued on 4 December 2009. (Note that the content of this report and consultation relates to Bill No. 2).

- The Australian Consumer Law – Consultation on draft unfair contract terms provisions


- An Australian Consumer Law: Fair markets – Confident Consumers

An information and consultation paper released by the Standing Committee of Officials of Consumer Affairs (SCOCA) on 17 February 2009. This consultation closed on 17 March 2009.

RELATED PARLIAMENTARY LIBRARY PUBLICATIONS


RELEVANT STUDIES AND ANALYSES

- Prof Stephen Corones and Prof Sharon Christensen, Comparison of Generic Consumer Protection Legislation, Report prepared for Productivity Commission, Faculty of Law, Queensland University of Technology, 4 September 2007.

CONSUMER ADVOCACY GROUPS

- Choice (website)
- Consumer Action Law Centre (website)
NEWSPAPER ARTICLES

- Race to meet start date for contracts reform, *Australian Financial Review*, 28 June 2010
- Change for the worse (national reform to consumer protection laws), *Business Review Weekly*, 10 June 2010
- Regulator targets unfair bank fees, *Australian Financial Review*, 3 June 2010
- Lawyers are not above consumer laws: adviser, *Sydney Morning Herald*, 27 February 2010
- Retail alert over deaths, injuries, *Australian*, 27 February 2010
- Parliament to take bills by the horns, *Australian Financial Review*, 29 January 2010
- Consumer law “threat to housing recovery”, *Australian*, 13 November 2009
- Consumer laws may be diluted, *Australian Financial Review*, 2 November 2009
- Rudd’s consumer protection reforms keep lawyers in work, *Australian*, 9 October 2009
- Top unfair contracts named, *Sunday Mail*, 6 September 2009
- Quiet revolution – New laws to protect consumer, *Courier Mail*, 30 June 2009
- “Unfair” contract proposal boon for bank customers, *Canberra Times*, 20 April 2009
- Exit fees targeted in bank reprisal, *Sunday Mail*, 19 April 2009
- Banks warn of higher costs from new consumer laws, *Australian*, 13 April 2009
- Unfair bank fees to be scrapped, *Courier Mail*, 17 February 2009
- Consumers to get legal muscle, *Australian Financial Review*, 17 February 2009
The new national consumer law reform is being introduced in two stages with the first stage, relating to unfair contracts, commencing on 1 July 2010.


Clause 3.2 of the *Intergovernmental Agreement for the Australian Consumer Law* dated 2 July 2009.

The Hon Dr Craig Emerson MP, Trade Practices Amendment (Australian Consumer Law) Bill (No.1) 2010, *Second Reading Speech*, House of Representatives Hansard, 25 June 2009, p 6981. (This Bill was previously cited as the Trade Practices Amendment (Australian Consumer Law) Bill 2009.)


*Second Reading Speech*, p 6981.


*Second Reading Speech*, p 6981.

*Explanatory Memorandum*, p 8. The MCCA and its supporting bodies are responsible for considering consumer and fair trading matters and, where possible, developing a consistent approach to these issues. The membership of MCCA consists of the Australian Government, the governments of the States and Territories, and the New Zealand Government.


These guidelines, referred to as *A Guide to the Unfair Contract Terms Law*, were published on 1 June 2010.


Clause 3.1 of the *Intergovernmental Agreement for the Australian Consumer Law* dated 2 July 2009.

Clause 3.2 of the *Intergovernmental Agreement for the Australian Consumer Law* dated 2 July 2009.

See Part 5 of the NPA.

Explanatory Memorandum, p 8.


The Exposure Draft of the “Unfair Contract Terms Provisions” is an attachment to The Australian Consumer Law – Consultation on draft unfair contract terms provisions (see pp 23-35).

Note also that the Independent Senator, Mr Nick Xenophon, unsuccessfully proposed amendments to include business-to-business contracts for $2 million or less. In the Explanatory Notes to these proposed amendments, Senator Xenophon stated: “Like consumers, small businesses are increasingly victims of unfair contract terms and should, like consumers, also have access to those provisions” (see items (1) and (6) of Sheet 5898 of the Explanatory Notes issued by Senator Xenophon).

Rudd’s consumer protection reforms keep lawyers in work, Australian, 9 September, 2009.

Top unfair contracts named, Sunday Mail, 6 September, 2009.


See new subsection 5(2) of Schedule 2, Part 2 of the TPA and new subsection 12BI(2) of Part 2, Division 2, Subdivision BA of the ASIC Act.


Note that there is no equivalent provision in the ASIC Act. See also section 2.2.1 of the A Guide to the Unfair Contract Terms Law, 1 June 2010, p 8.

See section 2.2.2 of the A Guide to the Unfair Contract Terms Law, 1 June 2010, p 8.

While insurance contracts are not expressly excluded under the Act, the current carve-out under section 15 of the Insurance Contracts Act 1984 (Cth) effectively operates to exclude insurance contracts from the operation of the Act (see Australian Consumer Law reforms: Will insurance contracts be affected?, Mallesons Stephen Jaques, May 2009). However, on 17 March 2010, the Hon Mr Chris Bowen MP released an Options Paper on Unfair Terms in Insurance Contracts which sets out a number of possible options to deal with the potential for unfair terms in insurance contracts, including extending the generic provisions of the Act to insurance contracts. This issue will be finalised pending the outcome of public consultation on the options paper. The closing date for submissions was 30 April 2010. See also See section 2.2.3 of the A Guide to the Unfair Contract Terms Law, 1 June 2010, p 8.


A Guide to the Unfair Contract Terms Law, ACCC, ASIC and the State and Territory consumer protection agencies, 1 June 2010, p 23.

A Guide to the Unfair Contract Terms Law, ACCC, ASIC and the State and Territory consumer protection agencies, 1 June 2010, p 23.


See the Explanatory Notes to the amendments proposed by Senator Xenophon to the Trade Practices Amendment (Australian Consumer Law) Bill 2009.


Second Reading Speech, p 6987.

Second Reading Speech, p 6981.


Explanatory Memorandum, p 6.

See the Senate Inquiry Report into the Trade Practices Amendment (Australian Consumer Law) Bill 2009, p 11, paragraph 3.9 and also the submission by the Business Council of Australia (Submission 20, p 1).


Unfair gym contracts common, Choice, 29 April 2009.

Transcript of interview with the Hon Chris Bowen MP by Louise Maher for ABC Radio Canberra, 17 February 2009.

See the Senate Inquiry Report into the Trade Practices Amendment (Australian Consumer Law) Bill 2009, pp 11-12, paragraph 3.10 and also the submission by Minter Ellison Lawyers (Submission 45, p 1).


Senate Inquiry Report into the Trade Practices Amendment (Australian Consumer Law) Bill 2009, p 13, paragraph 3.17 and also Mr David Bell, Chief Executive Officer, Australian Bankers Association, Official Committee Hansard, 26 August 2009, p E34.


Explanatory Memorandum, p 5.

Explanatory Memorandum, p 5.

BCA policy director, Peter Crone, quoted in Hidden costs in consumer law changes, Australian Financial Review, 14 August 2009.


See the submission by Brambles Limited to the Senate Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Submission 16, p 2).

For the “meaning of unfair” when the legislation was first introduced into the Australian Parliament, see:

- p 5, line 23 of the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (First Reading Text) in the context of the TPA; and
- p 52, line 21 of the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (First Reading Text) in the context of the ASIC Act.


Hidden costs in consumer law changes, Australian Financial Review, 14 August 2009; and also the submission by Brambles Limited to the Senate Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Submission 16, p 2).


See submission by Brambles Limited to the Senate Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Submission 16, p 4).


The Exposure Draft of the “Unfair Contract Terms Provisions” is an attachment to The Australian Consumer Law – Consultation on draft unfair contract terms provisions (see pp 23-35).

Second Reading Speech, pp 6981-6990.

Second Reading Speech, p 6984.

See, for example, the submissions made to the Senate Inquiry by Associate Professor Frank Zumbo (Submission 12, pp 3-5), Mr Michael Peters (Submission 51, p 2), the Pharmacy Guild of Australia (Submission 42, pp 9-10) and the Minority Report by Senator Xenophon (see the Senate Inquiry Report, p 86). There were also a number of submissions that agreed with the Government’s stance to not include businesses within the ambit of the legislation (see, for example, the submissions by the Business Council of Australia (Submission 20, pp 3-4), Brambles Limited (Submission 16, pp 1-2), GE
Capital Finance Australasia Pty Ltd (*Submission* 26, p 2) and Minter Ellison Lawyers (*Submission* 45, p 2)).


84 *Explanatory Memorandum for Bill No. 2*, pp 3-10.