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Introducing the New Australian Consumer Law (Stage II)

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e-Research Brief 2010/29

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INTRODUCTION

A new national consumer law framework is in the process of being rolled out by the Commonwealth Government. This national regime will replace eight State and Territory regulatory regimes dealing with consumer protection 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 and compliance burdens for businesses, especially those operating nationally.\(^1\)

The implementation of these major consumer law reforms involves two new federal laws which are being introduced in two stages:

<table>
<thead>
<tr>
<th>Stage I</th>
<th>The first stage involved the introduction of the national unfair contract terms provisions, associated penalties and consumer redress options under the \textit{Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010 (Cth)} (“Act No. 1”). The substantive provisions of Act No. 1 came into effect on 1 July 2010.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stage II</td>
<td>The second stage involves a number of remaining reforms to fully implement the national consumer law changes, including product safety provisions, under the \textit{Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010 (Cth)} (“Act No. 2”).</td>
</tr>
</tbody>
</table>

Act No. 1 was discussed in detail in the Queensland Parliamentary Library e-Research Brief titled “Introducing the New Australian Consumer Law (Stage I)” dated June 2010, whereas this publication will focus on Stage II of the reforms to come into effect under Act No. 2.

Act No. 2 received Royal Assent on 13 July 2010, after being passed by both Houses of the Australian Parliament on 24 June 2010. Section 2 of Act No. 2 sets out a table with the commencement information for the different provisions of Act No. 2. Most of the provisions of Act No. 2 will commence on 1 January 2011.

The key objective of Act No. 2 is to simplify the consumer regulatory framework by removing the various differences between Commonwealth, State and Territory consumer protection legislation. The main changes to come into effect under Act No. 2 include the following:

- renaming the \textit{Trade Practices Act 1974 (Cth)} (“TP Act”) as the \textit{Competition and Consumer Act 2010 (CC Act)};
- transferring the existing consumer protection and related provisions of the TP Act into the Australian Consumer Law (“ACL”);
- augmenting or modifying the TP Act’s existing consumer protection and related provisions to reflect best practice in existing State and Territory consumer laws;
- introducing a new national product safety regulatory framework which strengthens the Australian Competition and Consumer Commission’s (ACCC’s) powers of enforcement including the power to undertake product recalls;
- implementing a new national consumer guarantees law which will replace implied warranties and conditions in consumer contracts for goods and services and introduce a new guarantee of “acceptable quality”; and
- introducing a new national regulation of lay-by sales to replace the current regime under the State and Territory legislation and new regulations concerning unsolicited consumer agreements made face-to-face and in the course of telephone marketing.\(^2\)

Act No.1 and Act No. 2 together represent a sweeping national reform of consumer protection in Australia involving not only significant amendments to the TP Act but also the \textit{Australian Securities and Investments Commission Act 2001 (Cth)} (“ASIC Act”), the \textit{Corporations Act 2001 (Cth)} (“Corporations Act”) and other laws.

Information in this e-Research Brief is current to 25 October 2010.
REFORM HISTORY AND THE CONSULTATIVE PROCESS

INTRODUCTION

While Stage I of the ACL, which was implemented by Act No. 1, was lauded by some stakeholders as “being the product of extensive consultation”, a number of submissions to the Senate Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 (“Senate Inquiry”) were critical of the lack of consultation in relation to Act No. 2. In particular, criticism was levelled at the fact that the lack of an exposure draft of the legislation made it difficult to provide feedback.

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

THE PRODUCTIVITY COMMISSION

The specific reforms contemplated by Act No. 2 can be traced back to 11 December 2006 when the then Commonwealth Treasurer, Peter Costello, requested the Australian Government’s Productivity Commission to undertake an inquiry into Australia’s consumer policy framework. The Productivity Commission’s report, Review of Australia’s Consumer Policy Framework, published on 30 April 2008, found a number of shortcomings in Australia’s consumer law and recommended an overhaul at the national level. Taken together, Act No. 1 and Act No. 2 address many of the concerns specified in this report.

In particular, Act No. 2 deals with the concerns involving the additional costs for business and increased uncertainty for consumers due to the variations that exist in different consumer and product safety laws across Australia as outlined in Recommendations 4.3 and 8.1 – 8.3 of the Productivity Commission Report (see Volume 2, pp xvi and xxi-xxii). 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.

COAG AND THE MINISTERIAL COUNCIL ON CONSUMER AFFAIRS

In the Second Reading Speech to Act No. 2, the Minister for Competition Policy and Consumer Affairs, the Hon Dr Craig Emerson MP, explained that the legislation will implement decisions made in 2008 by the Council of Australian Governments (COAG) to introduce a single national consumer law – to be called the Australian Consumer Law.

In fact, as early as August 2003, the Ministerial Council on Consumer Affairs (MCCA) had announced that product safety was a key consumer issue to be considered in the context of the MCCA strategy of facilitating and encouraging “[n]ationally coordinated and consistent policy development and implementation”. The MCCA and COAG proceeded to regularly consider various aspects concerning the reform of Australia’s product safety policy at subsequent meetings. The key developments are summarised below:

- At its 27 August 2004 meeting, the MCCA discussed the release of its Discussion Paper titled a “Review of the Australian Consumer Product Safety System” which sought public comment with a view to creating a “world best practice product safety framework” in Australia.
- The MCCA then issued an options paper in August 2005 with the same title, the Review of the Australian Consumer Product Safety System, and engaged the Productivity Commission “to conduct a research study into the financial and other impacts of reform options”.
- The completed report by the Productivity Commission, the Review of the Australian Consumer Product Safety System, was issued on 16 January 2006 and was considered by the MCCA at its meeting held 16-17 May 2006, after which it “directed officials to investigate how the Productivity Commission’s recommendations would work in practice including concurrent work on the mechanics of a single law and regulator approach and on a uniform approach to product safety.”
- At the MCCA meeting held on 15 September 2006, it was “agreed in principle that there should be uniformity in product safety legislation across the country”.
- The 12 months timeframe for the development of “a uniform approach to product safety” discussed by COAG at its 13 April 2007 meeting was agreed to by the MCCA at its meeting held on 18 May 2007.
At the MCCA meeting held on 23 May 2008, the MCCA “agreed to a significant reform of product safety regulatory arrangements in Australia … to address overlap and inconsistency between jurisdictions in the existing product safety regulatory arrangements”.19

COAG agreed at its 3 July 2008 meeting “that the Commonwealth will assume responsibility for the making of permanent product bans and standards” thereby paving the way for the introduction of a national consumer product safety system.20

The Joint Communiqué issued by the MCCA after its 4 December 2009 meeting outlined in detail the key reforms to be included in proposed national legislation. In particular, the MCCA agreed to the introduction of:
- a new national product safety legislative and regulatory framework;
- a new national consumer guarantees law; and
- reforms that draw on best practice in State and Territory laws.21

The Ministers also announced at the 4 December 2009 meeting that the new national product safety law would commence on or before 31 December 2010 “in line with the remainder of the Australian Consumer Law”.22

INTERGOVERNMENTAL AGREEMENT

In February 2009, the National Partnership Agreement to Deliver a Seamless National Economy (“NPA”) was entered into by the Commonwealth, States and Territories.23 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 the legislative scheme surrounding the implementation of the ACL as follows:

- First, the Commonwealth will introduce legislation (i.e., Act No. 2) to:
  - enact the text of the ACL as a schedule to the TP Act;
  - amend the relevant provisions of the TP Act to ensure that they are consistent with the ACL; and
  - enact changes to the investor protection provisions of the ASIC Act and, to the extent necessary, the Corporations Act, to ensure that they are consistent with the ACL.24
- Then each State and Territory is to 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.25 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.26

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.27 It is anticipated that the States and Territories will also make a range of savings arising from the consolidation or transfer of certain existing regulatory functions.28

The IGA also 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.29

TREASURY CONSULTATION PAPERS

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 titled “Consumer Rights: Reforming Statutory Implied Conditions and Warranties” 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 this consultation. This RIS, which was considered by the Office of Best Practice Regulation (OBPR) and passed on 1 December 2009,30 is included in its entirety in Chapter 23 of the Explanatory Memorandum.

On 27 November 2009, the Treasury issued an issues paper on The Nature and Application of Unconscionable Conduct Regulation and called for public consultation. The Treasury received 50 submissions to this
consultation which resulted in a report titled **Strengthening Statutory Unconscionable Conduct and the Franchising Code of Conduct**.

**SENATE ECONOMICS LEGISLATION COMMITTEE INQUIRY**

Upon introduction into the House of Representatives on 17 March 2010, the legislation was referred to the Senate Economics Legislation Committee (the “Senate Committee”) for inquiry the next day. After consultation with the public, the Senate Committee presented its **Senate Inquiry Report** on 21 May 2010.31

The Senate Committee approved the draft legislation and recommended that it be passed (Recommendation 1), preferably after adopting the recommendations set out in its **Senate Inquiry Report** (Summary and Recommendations: pp 1-4). These included:

- that the Minister look at requiring plain English explanations be provided to consumers of the additional benefits, or otherwise, of any extended warranty beyond existing statutory rights (Recommendation 2);
- that the Government introduce a programme to educate Australian consumers about their statutory rights in relation to express warranties and other consumer guarantees (Recommendation 3);
- that the definition of “unsolicited consumer agreement” be amended to include circumstances in which consumers are contacted through indirect means (Recommendation 6);32 and
- that the provisions of the legislation relating to product safety be reviewed within three years of implementation, particularly with regard to the costs of compliance versus the benefits obtained, the integrity of confidentiality of reports and any requirement to review definitions of product safety and risk in mandatory reporting (Recommendation 8).

A number of these Senate Committee recommendations were taken up by the Government and included in the legislation as amendments which were ultimately agreed to by both Houses of the Commonwealth Parliament on 24 June 2010.33

**FURTHER CONSULTATION AND REGULATION**

On 24 September 2010, the Treasury released a **Consultation Paper** which appended an exposure draft of the **Competition and Consumer (Australian Consumer Law) Amendment Regulations 2010**. The period for public consultation of these documents closed on 13 October 2010, with over 40 submissions received to date.

Under the timetable released by the Treasury in its Information Note titled “**Implementing the Australian Consumer Law**” issued on 2 July 2010, these regulations and associated legislative instruments are due to be placed before the Federal Executive Council for consideration by the Governor-General by 31 October 2010 with a view to their commencement on 1 January 2011, in conjunction with the commencement of the ACL: p 8.

Additionally, in conjunction with the release of the ACL Regulations, the following four draft guides were released for public comment on 24 September 2010:

- **General Law Draft Guide**: covering misleading or deceptive conduct, unconscionable conduct, false or misleading representations and related offences, information standards and country of origin representations;
- **Consumer Guarantees Draft Guide**: covering what consumer guarantees apply to goods and services, who is responsible for these guarantees and when remedies, such as refund, repair and replacement are available;
- **Product Safety Draft Guide**: covering the new national product safety regime; and
- **Sales Practices Draft Guide**: covering unsolicited supplies, unsolicited consumer agreements, pyramid schemes, multiple pricing, lay-by agreements, referral selling, harassment and coercion.

**OUTLINE OF ACT NO. 2**

**INTRODUCTION**

This bill is the second legislative step to give effect to the most far-reaching consumer law reforms since the inception of the Trade Practices Act 35 years ago.
As noted above, the ACL and related national consumer law reforms are being introduced in two stages through two separate statutes:

- Act No. 1, which was discussed in the Queensland Parliamentary Library e-Research Brief titled “Introducing the New Australian Consumer Law (Stage I)” (June 2010), introduced the national unfair contract terms regime and also dealt with provisions relating to new penalties, enforcement powers and consumer redress. These provisions, representing only part of the ACL, were inserted as Schedule 2 of the TP Act; and

- Act No. 2, which is the focus of this publication, introduces the ACL in its entirety (including repeating the unfair contract terms provisions) into Schedule 2 of the TP Act (which will also be renamed the CC Act as part of the reforms), together with numerous provisions covering other consumer law protections, product safety provisions, offences and remedies.

Act No. 2 consists of 7 schedules. The key schedules are Schedule 1 which incorporates the ACL and Schedule 2 which deals with the application of the ACL. A majority of the other schedules deal with amendments to other legislation that result from Act No. 2 and other related transitional provisions.

This e-Research Brief will focus on Schedule 1 of Act No. 2 which sets out the ACL in its entirety. Given the vast scope of this legislation and the number of provisions involved, this publication aims to cover a number of the key issues arising from the proposed changes rather than discussing each of the provisions clause by clause.

**SCHEDULE 1 OF ACT NO. 2: THE ACL**

The main components of the ACL are set out in the diagram below:

- General Protections (Chapter 2)
- Specific Protections (Chapter 3)
- Offences (Chapter 4)
- Enforcement and Remedies (Chapter 5)

As noted above, upon coming into force from 1 January 2011, the ACL as set out in Schedule 1 of Act No. 2 will replace the existing Schedule 2 of the TP Act (which currently only includes the unfair contract terms regime part of the ACL). Also from that date, the TP Act will become known as the CC Act.

The ACL consists of 5 chapters, being:
• Chapter 1: Introduction;
• Chapter 2: General protections;
• Chapter 3: Specific protections;
• Chapter 4: Offences; and
• Chapter 5: Enforcement and remedies.

The key aspects of each chapter are discussed below.

**Chapter 1 - Introduction**

This Chapter sets out many of the housekeeping details of the ACL, for example, how the ACL is to apply and various key definitions.

**Definition of “Consumer”:** One of the more controversial definitions of the ACL is the definition of “consumer” which is set out in section 3 of the ACL.\(^{35}\)

In broad terms, the TP Act currently provides that, in relation to the acquisition of particular goods, a person is considered to be a “consumer” if:

- the price of the goods does not exceed $40,000; or
- where the goods are priced at more than $40,000, the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption, or the goods consisted of a commercial road vehicle or trailer acquired for use principally in the transport of goods on public roads; and
- the person did not acquire the goods for the purpose of re-supply, or transforming them, in trade or commerce.\(^{36}\)

The definition of “consumer” in the original draft of the legislation presented to the Parliament on 17 March 2010 removed the monetary threshold of $40,000.\(^{37}\)

A number of submissions were made to the Senate Inquiry criticising this change on the basis that the definition may have limited consumer protection when consumers purchase items that are not ordinarily acquired for personal, domestic or household use or consumption but are priced at less than $40,000 (for example, purchases of cement mixers or elevators by consumers for use in or about their homes).\(^{38}\)

The Commonwealth Government subsequently published amendments to the definition of “consumer” in Act No. 2 which re-instated the $40,000 threshold in the definition of “consumer”.\(^{39}\) The amendments, approved by both Houses of Parliament on 24 June 2010, affect all of the provisions of the ACL that involve the term “consumer” except for “acquisitions where the person acquired the goods for the purpose of re-supply or for the purpose of using them up or transforming them in trade or commerce”.\(^{40}\)

The original draft of the legislation also included the requirement that for a person to acquire particular goods or services as a consumer then those goods or services must be “of a kind ordinarily acquired for personal, domestic or household use or consumption”.\(^{41}\) Concerns were raised during the Senate Inquiry that this provision unduly narrowed the definition of consumer. For example, the Law Council of Australia noted in its submission to the Senate Inquiry:

> This is particularly concerning in relation to persons with special needs which may require them to purchase specialised goods and services that are not ordinarily acquired for personal, household or domestic use. ... For example, a mobility impaired person may require a lift to be installed in their two storey home in order to provide access to the upper storey. The person would likely not be protected by the proposed consumer guarantees under the Bill if the lift is not held to be a good ordinarily acquired for personal, domestic or household use since it would ordinarily only be installed in commercial buildings.\(^{42}\)

The Government heeded this concern and removed this restriction in the final version of the definition of “consumer” in the legislation. The amendments also included additional changes to the definition of consumer that related to circumstances where goods or services are acquired otherwise than by way of purchase or through using credit.\(^{43}\)

Another concern raised in this regard is that, in addition to the general reference to a “consumer” in section 3 of the ACL, the legislation also refers to:

- “consumer goods” in section 2 for the purposes of the product safety provisions;
- “consumer” and “business consumer” in sections 21 and 22 for the purposes of the unconscionable conduct provisions; and
- a “consumer contract” in section 23 for the purpose of the unfair terms provisions.\(^{44}\)
The lack of consistency between these concepts is anticipated to cause confusion for the business community and consumers alike. In this regard, the law firm Freehills notes in its submission to the Senate Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 (Submission 35, p 3) that:

[It is difficult, as a matter of principle, to understand why, in a Bill which makes fundamental changes to Australian law, the decision was not also taken to rationalise this central concept of consumer.]

This point was acknowledged by the Senate Inquiry which recommended that “the Government should aim to arrive at a single definition of ‘consumer’ throughout the provisions of the Bill in future consultations and amendments to the legislation”.

Chapter 2 – General Protections

Chapter 2 of the ACL covers three general consumer protections, being (1) misleading or deceptive conduct; (2) unconscionable conduct; and (3) unfair contract terms.

Part 2-1: Misleading and deceptive conduct

Chapter 2, Part 2-1 of the ACL deals with misleading and deceptive conduct. Section 18 of the ACL provides for a general prohibition against misleading and deceptive conduct in trade and commerce that is similar to section 52 of the TP Act and the various equivalents in the fair trading laws of the States and Territories.

A table comparing the key features of the law relating to misleading and deceptive conduct under the TP Act and the proposed law under the ACL is set out in the Explanatory Memorandum (p 36).

The key difference between the proposed new law under the ACL and the existing law under the TP Act is that, in the case of the ACL, the prohibition relates to a “person” rather than a “corporation”, as section 18(1) of the ACL prohibits a person from engaging in conduct in trade or commerce “that is misleading and deceptive or is likely to mislead or deceive”.

The Explanatory Memorandum specifically provides that “the jurisprudence associated with the understanding and interpretation of section 52 of the TP Act and the equivalent provisions in State and Territory fair trading laws is still relevant”.

Part 2-2: Unconscionable Conduct

Chapter 2, Part 2-2 of the ACL includes provisions prohibiting persons from engaging in unconscionable conduct towards consumers or businesses. A table comparing the key features of the law relating to unconscionable conduct under the TP Act, the ASIC Act and the fair trading laws of certain States and Territories and the proposed law under the ACL is set out in the Explanatory Memorandum (pp 44-47).

The TP Act has three substantive provisions relating to unconscionable conduct, being:

- section 51AA, which prohibits a corporation from engaging in unconscionable conduct within the meaning of the unwritten law of the States and Territories (introduced in 1992);
- section 51AB, which prohibits a corporation from engaging in conduct in connection with the supply of goods or services to a person that is, in all the circumstances, unconscionable (introduced in 1986); and
- section 51AC, which prohibits a corporation from engaging in conduct that is, in all the circumstances, unconscionable, in connection with the supply of goods or services to a person (other than a listed public company), or in connection with the acquisition of goods or services from a person (other than a listed public company) (introduced in 1998).

The ACL includes the following similar provisions relating to unconscionable conduct:

- section 20 of the ACL which is similar to section 51AA of the TP Act;
- section 21 of the ACL which is similar to section 51AB of the TP Act; and
- section 22 of the ACL which is similar to section 51AC of the TP Act.

The main difference between the TP Act and the ACL provisions is that the new law prohibits a “person” from engaging in unconscionable conduct, while the main provisions of the TP Act (other than section 51AC(2) of the TP Act) refer to a “corporation”, although the ASIC Act and the fair trading laws of certain States and Territories impose the prohibitions on a “person”.

The Federal Government attempted to pass separate legislation which included a statement of interpretative principles concerning the unconscionable conduct provisions in the ACL. This bill, the Competition and Consumer Legislation Amendment Bill 2010, proposed to repeal and replace sections 21 and 22 of the ACL.
described above. However, this bill lapsed upon the calling of the Australian federal election and the dissolution of Parliament on 19 July 2010. As at the date of this e-Research Brief, the Competition and Consumer Legislation Amendment Bill 2010 has not been re-introduced.

Part 2-3: Unfair Contract Terms

The unfair contract terms that came into effect from 1 July 2010 under Act No. 2 are repeated in Chapter 2, Part 2-3 of the ACL. These provisions were discussed in detail in the e-Research Brief titled “Introducing the New Australian Consumer Law (Stage I)” dated June, 2010. A table discussing the key features of the unfair contract terms provisions is set out in the Explanatory Memorandum (pp 60-61).

In essence, a term in a consumer contract is void if the term is unfair and the contract is a standard form contract. A finding by a court that a term is unfair and therefore void, means that the term is treated as if it never existed and the contract will continue to bind the parties without that term, if it is capable of doing so.51 The scope of these provisions is restricted to business-to-consumer transactions, as the provisions apply only to a consumer contract in which at least one of the parties is an individual. Accordingly, contracts between businesses are excluded from the scope of these provisions, except in circumstances involving “sole traders”.52

Chapter 3 – Specific Protections

Chapter 3 of the ACL covers five specific consumer protections, involving (1) unfair practices; (2) consumer transactions; (3) product safety; (4) information standards; and (5) manufacturer’s liability for safety defects.

Part 3-1: Unfair practices

Chapter 3, Part 3-1 of the ACL deals with unfair practices. Comprising 5 divisions, this part of the ACL includes prohibitions that are “targeted at particular kinds of activities rather than the effect that more general conduct might have on a consumer”.53 The five different divisions of unfair practices are:

- Division 1: False or misleading representations, etc.;
- Division 2: Unsolicited supplies;
- Division 3: Pyramid schemes;
- Division 4: Pricing; and
- Division 5: Other unfair practices.

A table comparing the key features of the law relating to unfair practices under the TP Act and the proposed law under the ACL is set out in the Explanatory Memorandum (pp 95-106).

Division 1: False or misleading representations, etc.

Under section 53 of the TP Act:

- certain representations are prohibited from being false;54
- some representations are prohibited from being false or misleading;55 and
- other representations are prohibited from being about qualities that goods or services do not have.56

The Explanatory Memorandum notes that “[t]here appears to be no rationale as to why, through various amendments, the different forms of wording were used for different elements of section 53 of the TP Act”.57

The ACL expands on the TP Act provisions relating to false or misleading representations by:

- providing that specific representations are prohibited on the basis that they are either false or misleading (section 29(1) of the ACL);
- including prohibitions relating to representations that are testimonials and representations about testimonials (sections 29(1)(e) and (f) of the ACL);
- shifting the evidentiary burden to the respondent to adduce evidence in court that representations concerning testimonials are not false or misleading (section 29(2) of the ACL);
- including representations concerning consumer guarantees (section 29(1)(m) of the ACL); and
- prohibiting false or misleading representations concerning a requirement to pay for a contractual right which is wholly or partly equivalent to any condition, warranty,
guarantee, right or remedy (including a guarantee under Part 3-2, Division 1 of the ACL) that a person has under a law of the Commonwealth, a State or a Territory (section 29(1)(n) of the ACL).

**Division 2: Unsolicited supplies**

Sections 39-43 of the ACL deal with unsolicited supplies (e.g., unsolicited credit or debit cards and the assertion of a right to payment for unsolicited goods or services). These provisions are substantially similar to the equivalent provisions in the TP Act. However, there is no TP Act equivalent of a number of the new provisions in the ACL, including the following:

- new provisions requiring that any invoice or other document that seeks payment for unsolicited goods or services must contain a warning statement to the effect that the document is not a bill (section 40(3)(b) of the ACL);
- new provisions providing that a person is not liable for unsolicited services, nor for any loss or damage arising as a result of the supply of those services (section 42 of the ACL); and
- new provisions relating to an assertion of a right to the payment for an unauthorised entry (e.g., in a directory) or advertisement (section 43 of the ACL), although a similar provision exists in the respective NSW, Victorian and Queensland fair trading legislation.

**Division 3: Pyramid schemes**

Sections 44-46 of the ACL deal with pyramid schemes. These provisions are substantially similar to the equivalent provisions in the TP Act. However:

- in the ACL, in determining whether a scheme is a marketing scheme rather than a pyramid scheme, a court must have regard to whether the participation payments bear a reasonable relationship to the value of the goods or services that participants are entitled to be supplied under the scheme (section 46(1)(a) of the ACL), whereas
- under section 65AAE of the TP Act the court may have regard to the extent to which the participation payments bear a reasonable relationship to the value of the goods or services that participants are entitled to be supplied under the scheme.

**Division 4: Pricing**

Sections 47 and 48 of the ACL relate to pricing.

There is no equivalent in the TP Act to section 47 of the ACL which provides that if more than one selling price is displayed for goods, a supplier must not sell the goods for more than the lowest of those prices. However, a similar requirement exists in section 40 of the Fair Trading Act 1987 (NSW) and section 22 of the Fair Trading Act 1992 (ACT).

One of the purposes of this provision is to be consistent with the Commonwealth Government’s policy concerning clarity in pricing. The provision is also partly in response to a number of cases concerning catalogues advertising “was/now” prices in circumstances where the price comparison was misleading.

**Division 5: Other Unfair Practices**

Division 5 of Part 3-1 of Chapter 3 of the ACL contains the following two sections:

- **Section 49** deals with “Referral Selling” which is similar to section 57 of the TP Act and various State and Territory equivalents.
- **Section 50** deals with “Harassment and Coercion” which is similar to section 60 of the TP Act and various State and Territory equivalents.

**Part 3-2: Consumer Transactions**

Chapter 3, Part 3-2 of the ACL implements specific protections relating to consumer transactions including the following:

**Division 1: Consumer Guarantees**

Background: The objective of this division is to create a national law on consumer guarantees to replace the provisions that imply conditions and warranties into consumer contracts that are currently within Part V, Division 2 of the TP Act and the equivalent State and Territory fair trading
legislation. In 2008, the Productivity Commission noted in its Review of Australia’s Consumer Policy Framework that a number of differences exist in the application of the statutory conditions across the various Australian jurisdictions:

The main differences relate to such matters as:

- whether the conditions are excludable (the case in Queensland, Tasmania and the Australian Capital Territory);
- variations in purchase value and use thresholds for eligibility;
- factors to be considered (such as price, terms of supply and condition of goods) in determining whether the provisions apply;
- obligations on the buyer to examine goods prior to purchase;
- the extent to which they rely on the skill or judgement of the supplier; and
- whether the supplier could reasonably be aware of the defect or whether the defect was brought to the attention of a consumer.

As a consequence of these differences creating confusion for consumers and additional costs for business, the Productivity Commission recommended that “[t]he adequacy of existing legislation related to implied warranties and conditions should be examined as part of the development of the new national generic consumer law”: (Recommendation 8.1).

Summary of Provisions: In his Second Reading Speech, the Hon Dr Craig Emerson MP noted that these statutory consumer guarantees will “give consumers clearer and more effective laws regarding their rights when buying goods and services” and “make business obligations clearer”.

A table comparing the key features of the law relating to consumer guarantees under the TP Act and the proposed law under the ACL is set out in the Explanatory Memorandum (pp 181-183).

The Explanatory Memorandum (p 179, paragraph 7.9) notes that the provisions set out in Part 3-2, Division 1 of the ACL are “broadly similar to those used in the New Zealand Consumer Guarantees Act 1993 and the jurisprudence applicable to that Act is of relevance to those provisions”.

In summary, Chapter 3, Part 3-2, Division 1, Subdivision A of the ACL sets out a number of consumer guarantees relating to the supply of goods, including:

- a guarantee as to title (section 51 of the ACL);
- a guarantee as to undisturbed possession (section 52 of the ACL);
- a guarantee as to undislosed securities (section 53 of the ACL);
- a guarantee as to acceptable quality (section 54 of the ACL);
- a guarantee of fitness for any disclosed purpose (section 55 of the ACL);
- a guarantee that goods match their description (section 56 of the ACL);
- a guarantee that goods match a sample or demonstration model (section 57 of the ACL);
- a guarantee as to repairs and spare parts (section 58 of the ACL); and
- a guarantee that any express warranty is complied with (section 59 of the ACL).

Chapter 3, Part 3-2, Division 1, Subdivision B of the ACL also sets out a number of consumer guarantees relating to the supply of services, including:

- a guarantee that services will be provided with due care and skill (section 60 of the ACL);
- a guarantee that services will be fit for a particular purpose that the person makes known to the supplier (section 61 of the ACL); and
- a guarantee that services will be supplied within a reasonable time (section 62 of the ACL).

Comparison with the TP Act: A significant difference of the ACL in comparison with the TP Act law is the replacement of the implied condition of “merchantable quality” with a guarantee of “acceptable quality”. The term “merchantable quality” is undefined in the TP Act and the various
fair trading statutes, whereas the ACL defines “acceptable quality” in detail (see sections 54(2) and (3) of the ACL). The inclusion of a statutory definition was considered favorably in a number of submissions to the Senate Inquiry.68

**Exemptions:** Chapter 3, Part 3-2, Division 1, Subdivision C of the ACL provides that the various consumer guarantees cannot be excluded by contract (section 64 of the ACL). The Explanatory Memorandum (p 179, paragraph 7.10) explains that this provision ensures that a supplier or manufacturer is not able to avoid its obligations under the consumer guarantees by entering into an agreement with a consumer to the effect that the consumer guarantees do not apply.

However, the ACL does include three specific industry sector exemptions:

- **Architects and Engineers Exemption from “Fitness for Purpose” Guarantee**
  
  Section 61(4) of the ACL provides that the “fitness for purpose” guarantee under section 61 “does not apply to a supply of services of a professional nature by a qualified architect or engineer”.
  
  This exemption was not originally included in the first draft of the legislation. However, a number of submissions to the Senate Inquiry, including a recommendation by the Coalition Senators, resulted in the Government reinstating the TP Act exemption.69 The Supplementary Explanatory Memorandum and Corrections to the Explanatory Memorandum notes that the arguments considered by the Government to reconsider this exemption included that:
  
  - architects or engineers might be held responsible for actions of third parties, such as builders, if the relevant guarantees apply to those occupations;
  - insurance costs will rise if the relevant guarantees apply to those occupations;
  - architects and engineers often experience difficulties ascertaining the wishes of consumers when contracted to provide the relevant services; and
  - consumers are adequately protected by other sources of redress, such as actions for negligence and the guarantee of due care and skill, when services do not meet the standard that consumer[s](sic) are entitled to expect.70
  
  The inclusion of this architects and engineers exemption will be reviewed during the proposed comprehensive review of the ACL which is due to occur three years after its commencement.71

- **Gas and Electricity Suppliers’ Exemption**
  
  Section 65(1) of the ACL provides that the division does not apply if the supply “(a) is a supply of a kind specified in the regulations; and (b) is a supply of gas, electricity or a telecommunications service”.
  
  In its submission to the Senate Inquiry, the Treasury explained the rationale behind this new exemption for gas, electricity and telecommunications suppliers is that:
  
  As gas, electricity and telecommunications are supplied through an interconnected system of wires or pipes, a disruption to supply can affect many consumers. Losses can also be substantial for each consumer since these goods and services are crucial to many areas of human activity. These factors point to a potential need for industry-specific regulation that deals with mass claims in an efficient way and also limits the risk that mass claims will lead to the collapse of businesses that provide essential goods and services to consumers.72

  In relation to this issue, the Senate Committee noted in its Senate Inquiry Report that the:
  
  regulations created under section 65 limit the exemption of the utilities industries to situations of service failure such as unforeseeable weather events or phenomena or third party asset failures, as these exemptions can be justified. The Committee also notes that these industries are also subject to specific, additional regulation in some markets and where this does not conflict with the objective of the Australian Consumer Law, this is also appropriate and enhances consumer rights with regard to essential services.73

- **Telecommunications Suppliers’ Exemption**
  
  As noted above, section 65(1)(b) of the ACL also provides for an exemption in relation to the supply of “a telecommunications service”. The Australian Communications Consumer Action Network (ACCAN) was quite critical of the move to include an exemption of this nature:
Firstly, this provision has come out of nowhere. Neither the Productivity Commission’s inquiry into consumer protection nor the Commonwealth Consumer Affairs Advisory Committee investigation into warranties recommended that this carve-out be written into the new national Consumer Law. Secondly, this provision weakens the existing trade practices law, in our view creating greater confusion and fewer protections for consumers. Thirdly, the government has failed to be sufficiently clear about how this provision would be applied. The explanatory memorandum states that the carve-outs would only be applied in circumstances where the relevant minister is satisfied that other laws make adequate provision for consumer protection in relation to the relevant services, being telecommunications services. Yet this is not actually reflected in the bill itself. Next, there are no telco industry specific regulations that relate to consumer guarantees, nor are there any such plans to develop these rules – nor would we support that particular approach. Lastly, once created, examples such as these have proved notoriously difficult to reverse.74

In relation to this exemption, the Senate Committee recommended in its Senate Inquiry Report that caution should be applied in relation to exemptions concerning telecommunications services and “that no regulation made under section 65 should limit any of the consumer guarantees relating to goods sold by telecommunications suppliers”.75

**Division 2: Unsolicited Consumer Agreements**

As noted above, the Joint Communiqué issued by the MCCA after its 4 December 2009 meeting announced that:

> The Australian Consumer Law will include a single national law covering unsolicited sales practices, including door-to-door selling, telephone sales (to the extent not already covered by the Do Not Call Register Act 2006) and other forms of direct selling which do not take place in a retail context: p 4.

A table comparing the key features of the law relating to unsolicited consumer agreements under the current State and Territory regulatory regimes and the proposed law under the ACL is set out in the Explanatory Memorandum (pp 214-216) and also discussed in the Supplementary Explanatory Memorandum and Corrections to the Explanatory Memorandum (pp 18-19).

The proposed provisions include express obligations on suppliers about the manner in which consumers may be approached, including provisions regarding visiting hours and duties to disclose their purpose and identity, to leave the premises on request and to inform consumers of their rights to terminate the agreement (including a 10 day termination right).

The Senate Committee highlighted four key issues concerning these provisions of the ACL in its Inquiry Report:

- that the definition of “unsolicited consumer agreements” was too narrow to protect vulnerable consumers from “solicited” door-to-door selling;
- that there should also be a restriction on the hours during which an unsolicited consumer agreement can be negotiated;
- concerns about the proposed 10 business day cooling off period; and
- the prohibition of supplies to the consumer during the cooling off period.76

The Senate Committee reviewed a number of submissions in relation to the first issue concerning the definition of “unsolicited consumer agreements”.77 It noted that there were circumstances where dealers could solicit a consumer agreement in a manner which would by-pass the consumer protections as originally drafted in the legislation (for example, where consumers provide their contact details for the purpose of entering a competition78 or a consumer responds to a “missed call” from a dealer79).80 The Senate Committee recommended that the legislation be amended to define an “unsolicited consumer agreement” to include circumstances in which consumers are contacted or where they contact dealers through indirect means (Recommendation 6).81 This recommendation was largely addressed by the inclusion of a new paragraph in section 69 of the ACL when the legislation was amended prior to being passed.82

The Senate Committee did not recommend any changes to the legislation after considering the various submissions in relation to the other remaining three issues above.

**Division 3: Lay-By Agreements**

The Joint Communiqué issued by the MCCA after its 4 December 2009 meeting also noted that the Ministers at that meeting agreed that the ACL will include provisions relating to lay-by
agreements. There are no existing provisions that deal with lay-by agreements in the TP Act, as all relevant existing laws involve state or territory legislation.

A table comparing the key features of the law relating to unsolicited consumer agreements under the current State and Territory regulatory regimes and the proposed law under the ACL is set out in the Explanatory Memorandum (pp 235-236).

Under the ACL, a lay-by agreement is described as an agreement between a supplier and a consumer for the supply of consumer goods on terms which provide that:

(a) the goods will not be delivered to the consumer until the total price of the goods has been paid; and

(b) the price is paid in either three or more instalments (or two or more instalments if the agreement specifies it is a lay-by agreement): section 96(3) of the ACL. (Note that any deposit paid by the consumer is taken to be an instalment: section 96(4) of the ACL).

The advantage for consumers is that they are able to “afford a more expensive purchase through paying by instalments without having to become a borrower”.83

The main issue with the current situation concerning lay-by agreements is that there are no minimum standards concerning key aspects of the transaction, such as cancellation and refund rights, which vary significantly from supplier to supplier.84 Accordingly, the majority of the provisions concerning lay-by agreements in the ACL relate to rights surrounding the termination of a lay-by agreement.85 For example:

- A consumer who is party to a lay-by agreement may terminate the agreement at any time before the goods are delivered: section 97(1) of the ACL; and

- Upon termination of a lay-by agreement by either party, the supplier must refund any money paid by the consumer, less any applicable reasonable termination charge: sections 97(3) and 99 of the ACL.

Additionally, to the extent that the lay-by agreements are standard form consumer contracts, they will also be covered by the unfair contract terms provisions set out in Chapter 2, Part 2-3 of the ACL.86

Part 3-3: Product Safety

Chapter 3, Part 3-3 of the ACL implements specific protections relating to the safety of consumer goods and product related services. A table comparing the key features of the law relating to product safety laws under the current State and Territory regulatory regimes and the proposed law under the ACL is set out in the Explanatory Memorandum (pp 244-245). This part includes the following:

Division 1: Safety standards

This division outlines the way in which safety standards are to be determined and published by the relevant Commonwealth Minister.

Division 2: Bans on consumer goods and product related services

This division provides an outline of the circumstances when goods will be banned under the legislation and the responsibilities of suppliers when a ban is in effect.

Division 3: Recall of consumer goods:

This division determines the circumstances when the Commonwealth Minister may institute a compulsory recall of consumer goods and the notification requirements for suppliers when they voluntarily recall their product.

Division 4: Safety warning notices:

This division stipulates the contexts of warning notices which may be published by the Commonwealth Minister.

Division 5: Consumer goods, or product related services, associated with death, serious injury or illness:

This division was the most contentious as the first draft of the legislation introduced a new reporting regime requiring all suppliers to provide written notice to the Commonwealth Minister within two days where they become aware that a consumer good of a particular kind has been associated with
the death, serious injury or illness of any person. Failure to comply can result in fines of up to $16,650.87.

A number of submissions to the Senate Inquiry were critical of this originally proposed wording of these provisions. Some of the issues raised include the following:

- "associated with": Concern was expressed in a number of submissions that the phrase "associated with" in the first draft of the legislation was not appropriate language because it lacked legal clarity and did "not necessarily connote a causative relationship".

- duplication of reporting regulations: The peak bodies representing car manufacturers and the automotive industry submitted that the reporting regulations under these provisions were duplicated under state and territory incident reporting regulations in respect of the car manufacturing industry. While the Senate Committee sympathised with these industries, it noted that "making exceptions causes complexity and its own ambiguity in the legislation".

The Senate Committee noted the Productivity Commission had "also acknowledged the uncertainty of the potential benefits and costs in this new measure". Subsequently, the Senate Committee recommended that the provisions of the legislation relating to product safety be reviewed within three years of implementation.

Although the Senate Committee did not necessarily recommend any changes to the language of this part of the legislation, the Government did make amendments to this division based on a number of the points raised in submissions to the Senate Inquiry in this regard. The amendments made to Division 5 of Part 3-3 of Chapter 2 of the ACL (discussed in detail in the Supplementary Explanatory Memorandum and Corrections to the Explanatory Memorandum) include:

- changing the reporting triggers by replacing the concept of a product being "associated with" an incident with the concept of an incident being "caused by" a product;

- widening the reporting triggers to include the situation where the supplier becomes aware that a good may have been the cause of an accident when the supplier is notified by another person; and

- the insertion of a new section requiring that any reported information be treated confidentially unless one of the specified exemptions applies.

Clayton Utz partners Colin Loveday and Jocelyn Kellam note in their in-house publication released on 29 June 2010 that the new two day notification requirement for suppliers under Act No. 2:

… represents a major shift away from the current system, in which the only general reporting requirement is to notify recalls after the recall has been initiated. Instead of a system where product safety incidents are largely investigated and managed by suppliers (as is currently the case), it is now likely that there will be greater involvement by the Australian Competition and Consumer Commission ("ACCC") from the earliest stages of a potential product safety incident.

They also describe the two day notification period as being "an unreasonably short period of time" as it requires suppliers to ensure that their internal reporting and investigation processes are sufficiently efficient to be able to make a report within that period. Furthermore, they conclude:

If a supplier is unable to reassure the ACCC that its product is "safe" then the supplier may be pressured into taking recall or other remedial action – even if an investigation later demonstrates that this was premature.

Part 3-4: Information Standards

Chapter 3, Part 3-4 of the ACL implements specific provisions empowering the Commonwealth Minister to prescribe information standards for goods and services. A table comparing the key features of the law relating to information standards under the TP Act, the current State and Territory regulatory regimes and the proposed law under the ACL is set out in the Explanatory Memorandum (p 281).

Overall, the proposed amendments are not significantly different from the existing provisions under the TP Act and the state and territory regimes.

Part 3-5: Manufacturer’s Liability

Chapter 3, Part 3-5 of the ACL implements a statutory liability regime for manufacturers of goods with a safety defect. A table comparing the key features of the law relating to manufacturers’ liability provisions under the TP Act, the current State and Territory regulatory regimes and the proposed law under the ACL is set out in the Explanatory Memorandum (p 291).
The new national statutory liability regime, which provides for consumers to recover against manufacturers of goods that contain safety defects, is based on the manufacturers’ liability provisions of the TP Act, although the drafting style has been altered to “reflect the drafting style used for other provisions of the ACL.”

The new regime also provides manufacturers with a number of defences to claims brought against them under these provisions. These provisions are similar to the existing TP Act provisions.

Chapter 4 – Offences

Serious breaches of certain provisions of the ACL will attract criminal penalties. Most of these offences also exist under the TP Act and carry maximum fines of $220,000 for a person and $1.1 million for a body corporate. Chapter 4 also contains a number of defences. A table comparing the key features of the law relating offence provisions under the TP Act, the current State and Territory regulatory regimes and the proposed offences under the ACL is set out in the Explanatory Memorandum (pp 304-305).

An issue that arises under Chapter 4 relates to the increased number of occasions where the onus of proof is reversed. Of the 10 examples in Act No. 2 identified by the Treasury in its submission to the Senate Inquiry, five relate to existing reversals of the onus of proof in the TP Act and five relate to new instances where the onus of proof is reversed. A number of submissions to the Senate Inquiry indicated concern about this aspect. The Senate Inquiry took the view that it was appropriate for there to be a reversal of the onus of proof in circumstances “where it is impossible or unreasonable to expect a regulator to meet the conventional standard of proof”. There were no amendments made by the Commonwealth Government to the original text of the legislation in this regard.

Chapter 5 – Enforcement and Remedies

Another issue under the current law is the lack of uniformity of remedies available to different regulators involved in enforcing the TP Act and the various State and Territory fair trading regimes. For example, certain State and Territory regulators have “the power to issue substantiation notices, but this power was not available to the ACCC under the TP Act”. Accordingly, one of the objectives of Act No. 2 is to provide a national regime that allows all regulators to have access to the same enforcement actions and remedies.

The following federal, state and territory consumer agencies will jointly administer and enforce the ACL in accordance with the Memorandum of Understanding entered into in June 2010:

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Consumer Agency</th>
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<tbody>
<tr>
<td>National</td>
<td>Australian Competition and Consumer Commission (ACCC);</td>
</tr>
<tr>
<td>National</td>
<td>Australian Securities and Investments Commission (ASIC)</td>
</tr>
<tr>
<td>NSW</td>
<td>NSW Fair Trading</td>
</tr>
<tr>
<td>QLD</td>
<td>Fair Trading (Department of Employment, Economic Development and Innovation)</td>
</tr>
<tr>
<td>Vic</td>
<td>Consumer Affairs Victoria</td>
</tr>
<tr>
<td>SA</td>
<td>Office of Consumer and Business Affairs</td>
</tr>
<tr>
<td>WA</td>
<td>Department of Commerce</td>
</tr>
<tr>
<td>Tas</td>
<td>Consumer Affairs and Fair Trading</td>
</tr>
<tr>
<td>ACT</td>
<td>Office of Regulatory Services (Fair Trading)</td>
</tr>
<tr>
<td>NT</td>
<td>Consumer Affairs</td>
</tr>
</tbody>
</table>

Part 5-1 of the ACL (Enforcement)

Part 5-1 deals with the enforcement powers available to the regulators under the ACL, being:

- enforceable undertakings;
- substantiation notices; and
- public warning notices.

While undertakings have been an available enforcement measure under section 87B of the TP Act, substantiation and public warning notices are relatively new, having only been introduced at the Commonwealth level by Act No. 1, the relevant provisions of which came into effect on 1 July 2010.

A table comparing the key features of the law relating to enforcement powers under the TP Act, the current State and Territory regulatory regimes and the proposed law under the ACL is set out in the Explanatory Memorandum (p 320).
Part 5-2 of the ACL (Remedies)

Part 5-2 contains provisions for civil pecuniary penalties, injunctions, damages, compensation orders and other remedies and defences applicable to court proceedings for breaches of the ACL.

A table comparing the key features of the remedies available under the TP Act, the current State and Territory regulatory regimes and the proposed law under the ACL is set out in the Explanatory Memorandum (pp 334-6).

Part 5-3 of the ACL (Country of Origin Representations)

Part 5-3 deals with country of origin representations and “provides a specific methodology for determining whether claims about the country of origin or goods are false, misleading or deceptive.”

A table comparing the key features of the country of origin provisions under the TP Act, the current State and Territory regulatory regimes and the proposed law under the ACL is set out in the Explanatory Memorandum (pp 363-4).

Two new country of origin representations are introduced by Act No. 2, being that:

- goods were “grown in” a particular country; or
- “ingredients” or “components” of goods were grown in a particular country.

These amendments have been included in the legislation as a result of an election promise made by the Australian Labor Party during the 2007 election.

Part 5-4 of the ACL (Remedies relating to Guarantees)

Part 5-4 sets out the remedies that are available when there has been non-compliance with the consumer guarantees set out in Chapter 3, Part 3-2, Division 1 of the ACL. The applicable remedy depends on whether the failure can be remedied and the nature of the failure to comply. The ACL introduces the concept of major failures and minor failures (i.e., failures that are not major).

In terms of actions against the suppliers of goods, Part 5-4, Division 1, Subdivision A of the ACL applies as follows in relation to minor failures and major failures:

- **Minor failures**: Where there has been a failure to comply with a guarantee that can be remedied and where the failure is not a major failure, then the consumer may require:
  
  (a) the supplier to remedy the failure within a reasonable time, or
  
  (b) if the failure is not remedied by the supplier, in accordance with section 261 of the ACL, then the consumer may either:
    
    (i) have the goods remedied elsewhere or replaced and recover the costs from the supplier; or
    
    (ii) reject the goods, unless certain conditions set out in section 262 of the ACL apply to prevent this (see section 259(2) of the ACL).

- **Major failures**: Where there has been a failure to comply with a guarantee that cannot be remedied or the failure is a major failure, as defined in section 260 of the ACL, then the consumer may:
  
  (a) reject the goods (unless certain conditions set out in section 262 of the ACL apply to prevent this) and choose between a refund or replacement goods; or
  
  (b) recover compensation for any reduction in the value of the goods below the price paid by the consumer (see section 259(3) of the ACL).

It is also possible to recover damages for any reasonably foreseeable loss or damage (i.e., consequential loss) arising from the failure by the supplier to comply with the guarantee: see section 259(4) of the ACL.

Similar provisions apply for actions against the suppliers of services: see Part 5-4, Division 1, Subdivision B of the ACL.

In certain circumstances, consumers will be able to seek damages from the manufacturer, for example, if the goods are not of acceptable quality, do not match their description or if spare parts and repair facilities are not made available for a reasonable period: see Part 5-4, Division 2 of the ACL.

Schedules 2-7 of Act No. 2

As noted above, this e-Research Brief mainly focuses on Schedule 1 of Act No. 2, which sets out the provisions of the ACL; however, a brief synopsis of the other schedules is set out below.
Schedule 2 – Application of the ACL

This schedule operates to:

- apply the ACL as a law of the Commonwealth to the conduct of corporations, except in relation to financial products and services: see Division 2 of new Part XI of the TP Act (to be renamed the CC Act from 1 January 2011);
- insert additional provisions into Part XI of the TP Act “that are either relevant only at the Commonwealth level, or are not compatible with State and Territory legal systems and are not able to be included in the ACL”. These provisions include Commonwealth product safety market surveillance and enforcement powers (such as the new search and seizure powers), certain provisions relating to remedies and other miscellaneous provisions: see Divisions 3 to 8 of new Part XI of the TP Act (to be renamed the CC Act from 1 January 2011);
- insert new Part XIAA of the TP Act (to be renamed the CC Act from 1 January 2011) which deals with the enactment by the States and Territories of legislation to apply the ACL as part of the law in each respective jurisdiction. In this regard, a number of jurisdictions have already introduced bills into their respective jurisdictions to achieve this aim. For example, in Queensland, the Fair Trading (Australian Consumer Law) Amendment Bill 2010 (Qld) was introduced into the Queensland Parliament on 31 August 2010 for this purpose.

Schedule 3 – Amendment of the Corporations Legislation

This schedule deals with the amendments to the ASIC Act and the Corporations Act that are necessary to ensure consistency with the ACL.

Schedule 4 – Enforcement of Industry Codes

This schedule amends the TP Act to provide for additional enforcement and remedies in respect of contraventions of mandatory or voluntary industry codes that are made under Part IVB of the TP Act. At present, there are four mandatory industry codes under Part IVB of the TP Act:

- the Franchising Code of Conduct;
- the Horticulture Code of Conduct;
- the Oilcode; and
- the Unit Pricing Code.

The new enforcement and redress measures introduced to the TP Act by this schedule are:

- public warning notices that the ACCC can issue relating to suspected breaches of an applicable industry code: see proposed section 51ADA of the TP Act;
- orders for non-party redress in proceedings initiated by the ACCC for contravention of an applicable industry code: see proposed sections 51ADB-51ADC of the TP Act; and
- the power of the ACCC to conduct random audits on a corporation to provide information or documents that are required to be provided under an applicable industry code: see proposed sections 51ADD-51ADG of the TP Act.

Schedule 5 – Other Amendments to the TP Act

The key provision in Schedule 5 is the change of the name of the TP Act to the Competition and Consumer Act 2010 (“CC Act”). This name change was regarded favourably by the Consumer Action Law Centre which noted in its submission to the Senate Inquiry:

We support this name change as an important recognition of current best practice understandings in this area that both competition and consumer protection laws mutually support a well functioning and fair market. The new title also better reflects that the law contains both competition or trade practices provisions and consumer law provisions.

A summary of the evolution of the TP Act under the current reforms is set out below:

<table>
<thead>
<tr>
<th>As at 30 June 2010</th>
<th>As at 1 July 2010</th>
<th>As at 1 January 2011</th>
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<tbody>
<tr>
<td>Schedule 2: ACL (unfair terms only)</td>
<td>Schedule 2: ACL (in full)</td>
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<tr>
<td>State and Territory Fair Trading legislation etc.</td>
<td>State and Territory Fair Trading legislation etc.*</td>
<td></td>
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<tr>
<td>*Note: Consequential amendments were made to the Victorian FT Act unfair terms provisions.</td>
<td>State and Territory Application Acts**</td>
<td></td>
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<tr>
<td>**Note: This legislation is yet to be passed in all states. For example, the Queensland application bill, the <em>Fair Trading Act (Australian Consumer Law) Bill 2010</em>, is currently before the Queensland Parliament. The progress of this bill can be tracked on the Queensland Parliament's Bills Register.</td>
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</table>

Schedule 5 clarifies that “competition provisions” and the “consumer protection provisions” of the CC Act will be segregated quite distinctly in the CC Act. The competition provisions which existed under the original TP Act will continue to remain in the main body of the CC Act, whereas the consumer protection provisions are to be found in Schedule 2 of the CC Act in the form of the ACL. The separate nature of the competition and the consumer protection provisions are highlighted by:

- the fact that different definitions apply for each of these different provisions; and
- new section 4KA provides that, unless a contrary intention appears, sections 4 to 4K of the CC Act, being the main interpretation provisions of the CC Act, do not affect the meaning of any expression used in Part XI or Schedule 2 of the CC Act, which deal with the ACL: see item 22 of Schedule 5 of Act No. 2.

### Schedule 6 – Amendments to Other Statutes

Part 1 of Schedule 6 lists the specific sections in 44 different Acts that reference the TP Act which must be replaced with references instead to the CC Act.

Part 2 of Schedule 6 sets out the necessary amendments to 17 different Acts where specific sections of the TP Act need to be replaced with the new section references for the CC Act.

### Schedule 7 – Transitional Matters

This schedule deals with matters of a transitional nature involving the TP Act as in force immediately before the commencement of Schedule 7, being 1 January 2011.

### CONCLUDING COMMENTS

The advantages and the disadvantages of a national consumer law were discussed in detail in the e-Research Brief titled “Introducing the New Australian Consumer Law (Stage I)” dated June, 2010.

A number of the key advantages and disadvantages of Act No. 2 are also covered separately above in connection with the relevant sections of the ACL.

From a practical perspective, the new legislation will also bring certain practical challenges to the legal profession due to the renumbering of familiar provisions and the relatively complicated referencing which will result under the changes. For example, “section 52 of the TP Act” will become “section 18 of the ACL in Schedule 2 of the CC Act”.

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LINKS TO FURTHER READING

ACT NO. 2 AND ACCOMPANYING MATERIAL

- Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010 (Cth)
- See this link for the Second Reading Speech, Explanatory Memoranda and amendments.

ACT NO. 1 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 Act No. 1 and Act No. 2 is set out below:

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

MINISTERIAL MEDIA STATEMENTS

- Commonwealth Government Ministerial Media Statements in relation to both Act No. 1 and Act No. 2:
  - The Hon Wayne Swan MP, Deputy Prime Minister and Treasurer: 26 September 2010 (Treasurer’s Economic Note).
  - The Hon David Bradbury MP, Parliamentary Secretary to the Treasurer: 24 September 2010.

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 INQUIRIES**

- Regarding Act No. 1, see the Senate Economics Legislation Committee, Trade Practices Amendment (Australian Consumer Law) Bill 2009 (website).
  - Report (7 September 2009)
  - Submissions
  - Public Hearings and Transcripts
- Regarding Act No. 2, see the Senate Economics Legislation Committee, Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 (website).
  - Report (21 May 2010)
  - Submissions
  - Public Hearings and Transcripts

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• Consumers to get legal muscle, *Australian Financial Review*, 17 February 2009
ENDNOTES

1  The Hon Dr Craig Emerson MP, Trade Practices Amendment (Australian Consumer Law) Bill 2009, Second Reading Speech, House of Representatives, Hansard, 24 June 2009, p 6981. (This legislation was subsequently cited as the Trade Practices Amendment (Australian Consumer Law) Bill (No.1) 2010.)


4  The Senate Economics Legislation Committee Inquiry Report, p 9, paragraph 1.28 and see also the comments by the Coalition Senators at pp 99-101.

5  The Senate Economics Legislation Committee Inquiry Report, p 10, paragraph 1.29.


13 MCCA, Joint Communiqué, 22 April 2005, p 2.


15 MCCA, Joint Communiqué, 16-17 May 2006, p 2.

16 MCCA, Joint Communiqué, 15 September 2006, p 2.

17 COAG meeting, 13 April 2007, p 3.

18 MCCA, Joint Communiqué, 18 May 2007, p 2.


20 COAG meeting, 3 July 2010, p 3.

21 MCCA, Joint Communiqué, 4 December 2009, p 2.

22 MCCA, Joint Communiqué, 4 December 2009, p 3.
Section 8 provides that the NPA “will commence as soon as the Commonwealth and one other Party signs the Agreement”. This condition was satisfied in February, 2009 after Kevin Rudd signed on behalf of the Commonwealth at that time, while the other States and Territories signed the NPA in December 2008 (except South Australia which executed the NPA in February 2009).


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

Implementing the Australian Consumer Law, Information Note, Treasury, July 2010, p 5.

See Part 5 of the NPA.

Explanatory Memorandum for Bill No. 1, p 8, paragraph 1.9.

Clauses 6-27 of the Intergovernmental Agreement for the Australian Consumer Law dated 2 July 2009. Note also that the full text of the IGA is included as an appendix to the information note titled “Implementing the Australian Consumer Law” published by the Treasury in July 2010.

Explanatory Memorandum, p 455, paragraph 23.2.

The Senate Inquiry Report was presented to the temporary chair of committees, Senator Ryan, on 21 May 2010 and was tabled in the Senate on 15 June 2010 by the Acting Deputy President, Senator Barnett (see Senate, Hansard, 15 June 2010, pp 3266-3267).

For more details, see also Senate Inquiry Report, pp 49-54.

See Supplementary Explanatory Memorandum and Corrections to the Explanatory Memorandum and the Schedule of the Amendments made by the Senate dated 24 June 2010.


The entire ACL will be contained in Schedule 2 of the TP Act (which will be known as the Competition and Consumer Act, or more commonly, as the CC Act, after 1 January 2011).

See section 4B of the TP Act.

See the original version of section 3 of the ACL in Schedule 1 of Bill No. 2, as presented and read for the first time to the Commonwealth Parliament on 17 March 2010 and also paragraph 1.6 of the Supplementary Explanatory Memorandum and Corrections to the Explanatory Memorandum.

See Freehills’ submission (Submission 35, p 4) and the Law Council of Australia submission (Submission 18, p 5) to the Senate Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 and also paragraph 1.6 of the Supplementary Explanatory Memorandum and Corrections to the Explanatory Memorandum.

Section 3 of the ACL, as amended on 24 June 2010 by item (5) of the Schedule of the Amendments made by the Senate dated 24 June 2010.

Supplementary Explanatory Memorandum and Corrections to the Explanatory Memorandum, p 6, paragraph 1.7.

See section 3 of the ACL (first reading text).

See the Law Council of Australia submission (Submission 18, p 5) to the Senate Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010.
See section 3(6)-(9) of the ACL, as amended on 24 June 2010 by item (5) of the Schedule of the Amendments made by the Senate dated 24 June 2010, and also Supplementary Explanatory Memorandum and Corrections to the Explanatory Memorandum, paragraphs 1.11-1.14, pp 7-8.


The Senate Economics Legislation Committee Inquiry Report, p 21, paragraph 3.11.

Explanatory Memorandum, p 35, paragraph 3.4.


See s22 of Trade Practices Revision Act 1986 (Cth). Note that s51AB was originally inserted as s52A but was renumbered as s51AB by s8(2) of the Trade Practices Legislation Amendment Act 1992 (Cth).

See item 2 of Schedule 2 of the Trade Practices Amendment (Fair Trading) Act 1998 (Cth).

Explanatory Memorandum, pp 44-47.

See sections 23(1) and (2) of the ACL in Schedule 1 of Act No. 2.

Explanatory Memorandum, p 62, paragraphs 5.15 and 5.16.

Second Reading Speech, p 2719.

See s53(a)-(bb) of the TP Act.

See s53(e)-(g) of the TP Act.

See s53(c) and (d) of the TP Act.

Explanatory Memorandum, pp 79-80, paragraphs 6.11.

See sections 63A-65 of the TP Act.

While section 40(3)(b) of the ACL refers to a “warning statement that complies with the requirements set out in the regulations” and these regulations have not yet been released, the Explanatory Memorandum (p 102) indicates that the document “must contain a statement to the effect that the document is not a bill” and also notes that this ACL provision is similar to section 58A of the Fair Trading Act 1987 (NSW).

Although a similar provision exists in s26 of the Fair Trading Act 1999 (Vic).

See s58A of the Fair Trading Act 1987 (NSW), s27 and s28 of the Fair Trading Act 1999 (Vic) and s52 of the Fair Trading Act 1989 (Qld).


Explanatory Memorandum, p 177, paragraph 7.2.


68 See the *Senate Economics Legislation Committee Inquiry Report*, p 32. See also the article by P Stubbs and J Varcoe, “Acceptable quality” under the Australian Consumer Law: The NZ perspective, Clayton Utz, 13 September 2010.

69 See the Consult Australia submission (Submission 14) and the Australian Institute of Architects submission (Submission 16) to the *Senate Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010*; and in relation to the Coalition’s recommendations, see pp 90-92 of *The Senate Economics Legislation Committee Inquiry Report*.

70 Supplementary Explanatory Memorandum and Corrections to the Explanatory Memorandum, paragraph 1.24, p 10.

71 Supplementary Explanatory Memorandum and Corrections to the Explanatory Memorandum, paragraph 1.26, p 10.

72 See the Treasury submission (Submission 46, p 24) to the *Senate Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010*.

73 *The Senate Economics Legislation Committee Inquiry Report*, p 41, paragraph 4.52.


75 *The Senate Economics Legislation Committee Inquiry Report*, p 42, paragraph 4.56.


78 *The Senate Economics Legislation Committee Inquiry Report*, p 50, paragraph 5.5.


81 *The Senate Economics Legislation Committee Inquiry Report*, p 54, paragraph 5.16.

82 See section 69(1A) of the ACL, as amended on 24 June 2010 by item (10) of the Schedule of the Amendments made by the Senate dated 24 June 2010, and also the discussion in the Supplementary Explanatory Memorandum and Corrections to the Explanatory Memorandum, paragraphs 1.63-1.66, pp 18-19.

83 See the Consumer Action Law Centre submission (Submission 28, p 17) to the *Senate Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010*.

84 See the Consumer Action Law Centre submission (Submission 28, p 17) to the *Senate Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010*.

85 See sections 97–99 of the ACL.

See section 202 of the ACL.

See the Freehills submission (Submission 35, p 16) to the Senate Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010. See also the Hasbro submission (Submission 6, p 3) to the Senate Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 where Hasbro Australia Limited noted that this language meant that "all other suppliers in the supply chain, would have to report the same incident". See also the comments and recommendations made by the Coalition Senators in The Senate Economics Legislation Committee Inquiry Report at pp 91-98.

See the Motor Trades Association of Australia submission (Submission 21, pp 3-4) and the Federal Chamber of Automotive Industries submission (Submission 29, pp 2-3) to the Senate Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010.

The Senate Economics Legislation Committee Inquiry Report, p 70.

The Senate Economics Legislation Committee Inquiry Report, p 70.

Supplementary Explanatory Memorandum and Corrections to the Explanatory Memorandum, paragraphs 1.32 and 1.37, pp 11-12.

Supplementary Explanatory Memorandum and Corrections to the Explanatory Memorandum, paragraphs 1.32-1.36, pp 11-12.

See section 132A of the ACL and the Supplementary Explanatory Memorandum and Corrections to the Explanatory Memorandum, paragraphs 1.53 and 1.54, pp 15-16.


Explanatory Memorandum, p 281.

Explanatory Memorandum, p 289, paragraph 12.1.

Second Reading Speech, p 2721.

Second Reading Speech, p 291 and Second Reading Speech, p 2721.

Second Reading Speech, p 2721.

These five new reversals of the onus of proof are listed in The Senate Economics Legislation Committee Inquiry Report, p 79.

See the Treasury submission (Submission 46, pp 9-11) and the Law Council of Australia submission (Submission 18, pp 4-5) to the Senate Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010.

The Senate Economics Legislation Committee Inquiry Report, p 81, paragraph 7.30.

Explanatory Memorandum, p 317, paragraph 14.4.

Explanatory Memorandum, p 317, paragraph 14.4.
Section 218 of the ACL, which deals with undertakings, replaces section 87B of the TP Act.

Explanatory Memorandum, p 361, paragraph 16.1.


Explanatory Memorandum, p 374, paragraph 17.10.

See Division 6 of Schedule 2 of Act No. 2.

See the Implementation page of the Australian Consumer Law website which sets out the latest information concerning the legislation which has been introduced by the relevant States and Territories to apply the ACL in each respective jurisdiction.

Explanatory Memorandum, p 445, paragraph 22.1.

See the Consumer Action Law Centre submission (Submission 28, p 4) to the Senate Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010.

See the Implementation page of the Australian Consumer Law website which sets out the latest information concerning the legislation which has been introduced by the relevant States and Territories to apply the ACL.