

2010

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**FAIR TRADING (AUSTRALIAN CONSUMER LAW) AMENDMENT
BILL 2010**

EXPLANATORY STATEMENT

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FAIR TRADING (AUSTRALIAN CONSUMER LAW) AMENDMENT BILL 2010

Overview of the Bill

- In the *National Partnership Agreement to Deliver a Seamless National Economy*, the Council of Australian Governments (COAG) agreed to work together to implement a coordinated national approach to the consumer policy framework, known as the Australian Consumer Law (ACL).
- On 2 July 2009, Jon Stanhope MLA signed the COAG Intergovernmental Agreement for the Australian Consumer Law Agreement, which underpins the ACL and outlines the implementation process for the legislation.
- It was agreed that all jurisdictions would complete the legislative process to implement the ACL by 31 December 2010 with the new laws commencing in all jurisdictions on 1 January 2011.
- In March 2010, the Australian Government passed the *Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010*, the first of two Acts to implement the ACL. This Act includes provisions on unfair contract terms, enhanced performance and redress provisions for the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC).
- In June 2010, the Australian Parliament passed the *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010* which implements the remainder of the ACL, including consumer protections, and provisions relating to unfair practices and consumer transactions.
- This Bill amends the *Fair Trading Act 1992* to apply the ACL as a law of the Territory, and to make consequential amendments.
- The ACL will, for the first time, provide a set of nationally consistent consumer laws for both businesses and individuals.
- Some of the changes being implemented through the ACL include:
 - a single set of definitions and interpretive provisions, some of which differ from those currently used in the Trade Practices Act (TPA).
 - a single set of statutory consumer guarantees to replace the existing system of implied conditions and warranties in the TPA;
 - a new, national law on unfair contract terms;
 - a single set of provisions about unfair practices and fair trading, including amendments and additions which reflect existing provisions in State and Territory consumer laws;
 - a new national regime for unsolicited consumer agreements, which will replace existing State and Territory laws on door-to-door sales and other direct marketing;

- simple national rules for lay-by agreements;
- a new, national product safety legislative regime; and
- new, national provisions on information standards which apply to services as well as goods.

The amendments preserve the Commissioner of Fair Trading's enforcement powers through retention of Part 3 of the *Fair Trading (Consumer Affairs) Act 1973*. The ACT Office of Regulatory Services (along with the ACCC and ASIC) will enforce the ACL. In addition, other legislation in the Territory, such as the Liquor Act, relies on the enforcement powers provided by the *Fair Trading (Consumer Affairs) Act 1973*.

Section 51D of the *Fair Trading Act 1992* will be retained as it allows for a maximum annual percentage rate for a credit contract to be determined by Regulation (currently 48%). This means that when the ACL commences in the States and Territories on 1 January 2011, ACT consumers will continue to be protected from unfair and extreme interest rates.

Part 3 of the *Fair Trading Act 1992*, relating to Codes of Practice, is preserved. The *Fair Trading (Fitness Industry) Code of Practice 2009* and the *Retirement Villages Industry Code of Practice* are codes of practice under the *Fair Trading Act 1992*, and will also be preserved.

Human rights impact

The ACL provides for a range of offences relating to unfair practices, consumer transactions, and safety of consumer goods and product related services. A range of penalties apply. The level of penalty may vary depending on whether the person is a body corporate or not. The majority of offences are strict liability, or include limbs that are strict liability, and would be prosecuted before a court rather than dealt with by an infringement notice.

Strict liability offences engage section 22(1) of the *Human Rights Act 2004*, the right to be presumed innocent.

Most rights contained with the *Human Rights Act 2004* are not considered absolute. Section 28 of the Act provides that human rights may be subject to reasonable limitations that can be demonstrably justified. That is, the limitations are proportionate having considered the relevant factors as set out in section 28(2).

The purpose of the ACL is to afford protection to consumers against unfair practices and ensure safety of consumer goods. The offences are contained within legislation that is widely known. It is reasonable to expect that a person operating within the scope of the ACL ought to be aware of their legal obligations.

Given the regulatory nature of the ACL and the protection it is seeking to afford consumers, the limitations on human rights contained within the Bill are considered to be proportionate; that is, they are reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

Summary of Clauses

Clause 1 *Name of Act*

This clause names the Act as the *Fair Trading (Australian Consumer Law) Amendment Act 2010*.

Clause 2 *Commencement*

This clause provides that the Act will commence on 1 January 2011. Schedule 1, amendment 1.42 commences on the later of the commencement of the *Plastic Shopping Bags Ban Act 2010*, section 3, and 1 January 2011 to ensure that when the *Plastic Shopping Bags Ban Act 2010* commences it is included in the new definition of ‘fair trading legislation’ in the Fair Trading (Australian Consumer Law) Bill.

Clause 3 *Legislation amended*

Provides that legislation in schedules 1 to 3 is amended.

Clause 4 *Legislation repealed*

Provides for the following legislation, and legislative instruments under these Acts, to be repealed:

- *Door-to-Door Trading Act 1991* and *Door-to-Door Trading Regulation 2009*
The ACL regulates unsolicited sales practices and the formation of unsolicited selling agreements. These rules will replace the ACT *Door-to-Door Trading Act 1991* and will also cover telephone sales and other forms of direct selling which do not take place in a retail context.
- *Fair Trading (Consumer Affairs) Act 1973*. The ACL will create a new, national product safety legislative regime which will replace the ACT product safety provisions in the *Fair Trading (Consumer Affairs) Act 1973*.
- *Fair Trading (Consumer Product Standards) Regulation 2009*.
- *Lay-by Sales Agreements Act 1963*. The ACL includes rules that apply to lay-by agreements and which will replace the ACT *Lay-by Sales Agreement Act 1963*.

Schedule 1 **Fair Trading Act 1992**

Clause 1.1 *Long title*

Changes the long title to reflect the amended scope of the Act.

Clause 1.2 *Section 1*

Changes the name of the Act to reflect the amended scope of the Act.

Clause 1.3 *Section 2*

Amends notes in the dictionary section to refer to the Australian Consumer Law (ACT).

Clause 1.4 New section 4

Inserts a new section 4 identifying that other legislation applies in relation to offences against the Act, with specific notes about the Criminal Code and the meaning of penalty units under the *Legislation Act 2001*.

Clause 1.5 Sections 5 to 10

Provides for the omission of section 5 to 10 of the Act, the content of which is covered in the ACL.

Clause 1.6 Substitution of Part 2 of the Fair Trading Act 1992

Provides for the application of the ACL as a law of the Australian Capital Territory, including but not limited to definitions, application of Australian Consumer Law in the Territory and in other participating jurisdictions. The new part defines activities that are not “business” for the purposes of the Act.

Clause 1.6 provides that a person cannot be punished for the same offence in more than one jurisdiction. This clause also contains amendments relating to enforcement of undertakings by application to the Magistrates Court.

Clauses 1.7 to 1.10 Sections 33 to 35

These clauses make minor amendments to language and removes redundant provisions, including Approval of codes of practice (section 34) and Evidence of approved code (section 35) which has been omitted because it is already covered by the Evidence Act.

Clause 1.11 Section 36

Amends the existing wording of s.36 of the *Fair Trading Act 1992* relating to undertakings following contravention of approved code. This amendment does not alter the meaning of the existing provision.

Clause 1.12 Section 36

Amends the *Fair Trading Act 1992* by removing section 36(3) of the Act, which will be redundant.

Clause 1.13 Substitution of section 37 – Enforcement of undertakings

Amends existing provisions of the *Fair Trading Act 1992* to ensure undertakings made under s.36 can be enforced.

Clause 1.14 Substitution of section 39 – Register of Undertakings

Expands the provisions relating to the Register of undertakings to allow as follows:

- inclusion of any other information the commissioner considers appropriate (s.39(2));
- the register to be kept in any form, including electronically (s.39(3)),
- the commissioner to correct any mistake, error or omission in the register (s.39(4)); and
- the commissioner to change a detail in the register to keep it up-to-date (s.39(5)).

The amended provision retains the provision that the register must be available for public inspection, free of charge during normal business hours on any business day.

Clause 1.15 Sections 32 to 39

Renumbers sections 32 to 39 of the *Fair Trading Act 1992*.

Clause 1.16

Removes part 4 of the *Fair Trading Act 1992* which relates to Enforcement and Remedies. Clause 1.13 above amends s.36 to include enforcement of undertakings which are currently included in this part. Clause 1.16 also preserves the powers and procedures relating to the Fair Trading Advisory Committee.

Clause 1.17 Part 4A – heading

Renumbers part 4A as part 6.

Clause 1.18 Section 51C, new definition of code

Inserts a new definition of code to refer to the new National Credit Code.

Clause 1.19 Sections 51C to 51E (as amended)

Renumbers sections as a result of amendments.

Clause 1.20 New part 5

Substitutes part 5 for a new Miscellaneous part providing for certificate evidence of an investigation and a person's status as an investigator, which must be accepted by a court as proof of the matter stated unless there is evidence to the contrary.

This part also provides for protection of officials from liability and regulation-making power by the executive with a maximum penalty level of 20 penalty points.

Clause 1.21 New schedule 1

Inserts a new schedule 1 into the *Fair Trading Act 1992* covering the Australian consumer law transitional provisions.

Section 1.1 provides definitions of terms in the new schedule 1.

Section 1.2 relates to reference to a repealed Act

New Section 1.3 preserves the current Fair Trading Advisory Committee.

New section 1.4 relates to regulations, including that regulations may prescribe transitional matters and may modify the schedule to make provision for anything that is not, or not adequately, dealt with in the schedule.

Under the new section 1.5 the new schedule 1 expires on 1 January 2014.

Clauses 1.22 to 1.61 Dictionary notes

The above clauses provide technical amendments to the *Fair Trading Act 1992*, including dictionary notes and new definitions.

Schedule 2 *Fair Trading (Consumer Affairs) Act 1973*

Clauses 2.1 to 2.23 Technical amendments to various sections

The above clauses provide technical amendments to the *Fair Trading (Consumer Affairs) Act 1973*, primarily updating language and references to other sections.

Clause 2.24 Section 15

Provides for the substitution of section 15 which presents definitions of secrecy and reflects current drafting of secrecy provisions.

Clause 2.25 Section 16

Redrafts section 16 in accordance with current drafting principles.

Clauses 2.26 and 2.27

Relocates these sections and schedules to the *Fair Trading Act 1992* and renumbers them as necessary.

Schedule 3 Consequential amendments

Part 3.1 Agents Act 2003

Clauses 3.1 to 3.5

Technical amendments to the *Agents Act 2003*, primarily updating references to other legislation.

Part 3.2 Cemeteries and Crematoria Act 2003

Clause 3.6 Section 30 (5)

Updating reference to another Act.

Part 3.3 Civil Law (Sale of Residential Property) Act 2003

Clause 3.7 Section 8(2)(c)

Amends reference to other legislation.

Part 3.4 Civil Law (Wrongs) Act 2002

Clauses 3.8 to 3.11

Updates references to the Australian Consumer Law (ACT).

Part 3.5 Competition Policy Reform Act 1996

Clauses 3.12 to 3.16

Amends reference to other legislation.

Part 3.6 Crimes (Child Sex Offenders) Regulation 2005

Clauses 3.17 to 3.19

Amends reference to other legislation.

Part 3.7 Fair Trading Regulation 2009

Clause 3.20 Section 3 heading and note

Amends reference to another section number.

Clause 3.21 – Section 4(7)

Amends reference to section numbers.

Part 3.8 Fair Trading (Motor Vehicle Repair Industry) Act 2010

Clauses 3.22 to 3.29

Amends reference to other legislation.

Part 3.9 Financial Management Act 1996

Clause 3.30 Section 103(3)

Amends reference to other legislation.

Part 3.10 Government Procurement Act 2001

Clause 3.31 Section 8(5)

Amends reference to other legislation.

Part 3.11 Health Act 1993

Clauses 3.32 to 3.33

Amends reference to other legislation.

Part 3.12 Insurance Authority Act 2005

Clause 3.34 Section 13(4)

Amends reference to other legislation.

Part 3.13 Jurisdiction of Courts (Cross-vesting) Act 1993

Clauses 3.34 to 3.36

Amends reference to other legislation.

Part 3.14 Leases (Commercial and Retail) Act 2001

Clause 3.37 Section 100(4)

Amends reference to other legislation.

Part 3.15 Legislation Act 2001

Clauses 3.38 to 3.40

Amends reference to other legislation.

Part 3.16 Liquor Act 2010

Clauses 3.41 to 3.44

Amends reference to other legislation.

Part 3.17 Magistrates (Agents Infringement Notices) Regulation 2003

Clause 3.45 Section 12

Amends reference to other legislation.

Part 3.18 Magistrates Court (Sale of Residential Property Infringement Notices) Regulation 2004

Clause 3.46 Section 11

Amends reference to other legislation.

Part 3.19 Magistrates Court (Security Industry Infringement Notices) Regulation 2003

Clause 3.47 Section 12

Amends reference to other legislation.

Part 3.20 Racing Act 1999

Clauses 3.48 and 3.49

Amends reference to other legislation.

Part 3.21 Road Transport (Public Passenger Services) Act 2001

Clauses 3.50 and 3.51

Amends reference to other legislation.

Part 3.22 Sale of Motor Vehicles Act 1977

Clauses 3.52 and 3.53

Amends reference to other legislation.

Part 3.23 Second-hand Dealers Regulation 2002

Clauses 3.54 to 3.56

Amends reference to other legislation.

Part 3.24 Security Industry Act 2003

Clause 3.57 Section 41(4)

Amends reference to other legislation.

Part 3.25 Security Industry Regulation 2003

Clause 3.58 Section 6(1)(g)

Amends reference to other legislation.

Part 3.26 Territory Records Act 2002

Clause 3.59 Section 39(5)

Amends reference to other legislation.

Part 3.27 Utilities Act 2000

Clauses 3.60 and 3.61

Amends reference to other legislation.