

## Trade practices

The new Australian Consumer Law (ACL) creates a single national regime to replace disparate national, state and territory consumer protection legislation, and aims to increase consistency and clarity for Australian consumers and businesses. The new law represents the culmination of a comprehensive review of Australia's consumer policy framework by the Productivity Commission in 2008, and agreement of the Council of Australian Governments to reform Australia's consumer protection laws.

Implemented in two phases, the first bill was passed through Federal Parliament on 17 March 2010. It introduced laws regulating unfair contract terms, new penalties, additional enforcement powers for regulators, and consumer redress options. The first bill is expected to come into effect some time after 1 July 2010.

The second bill containing the remainder of the legislative reforms was introduced into Parliament on 17 March 2010. It will implement general and specific consumer protections, a new system of statutory consumer guarantees and a new safety law for consumer goods and product related services. The government hopes that the second bill will be passed over winter, to take effect by the beginning of 2011.

### Key changes introduced by the second bill

#### Name of legislation

The name of the *Trade Practices Act 1974* (Cth) (TPA) will change to the *Competition and Consumer Act 2010*—a name which the Minister suggests is “much more accessible and which reflects the focus of Australia's main law which regulates markets”.

#### A new definition of consumer

As in the existing legislation, some protections in the ACL will only be available to a defined class of ‘consumer’. The new definition removes a significant element from the current definition, which treats a person as a consumer where they acquire goods or services for less than \$40,000. Price is irrelevant in the new definition, which considers only whether the goods or services are acquired for personal, domestic, or household use.

#### General and specific consumer protections

The new consumer protections against misleading or deceptive conduct, unconscionable conduct and unfair practices substantially reflect the current law, although they have been redrafted ‘to reflect modern, easier to comprehend drafting conventions’. Existing case law will remain relevant to the understanding and interpretation of these protections.

The ACL also introduces new specific protections, including:

- a requirement that where multiple prices are displayed, goods must not be sold for more than the lowest of those prices;
- a requirement that suppliers provide proof of transaction to consumers where goods or services are more than \$75, or on request if less than \$75. Consumers may also request an itemised bill;

- penalties for false or misleading representations about testimonials; and
- a prohibition on false or misleading representations that a person is required to pay for a right to which the person is already legally entitled.

#### New consumer guarantees

Part of the current consumer protection regime implies particular conditions and warranties into consumer contracts. This will be replaced by specific statutory guarantees. These guarantees cannot be excluded by contract. The new system is intended to make business obligations clearer, and to give consumers more effective laws to protect their rights when buying goods and services.

In summary, the new system will give consumers a statutory remedy when:

- goods are not of acceptable quality;
- goods are not fit for their purpose;
- goods do not match their description;
- goods do not correspond with sample or demonstration models;
- the consumer does not acquire proper title to the goods;
- spare parts and repair facilities are not available for a reasonable period;
- a person does not comply with an express warranty regarding goods;
- services are not rendered with due care and skill;
- services, and any product resulting from the services, are not fit for their purpose; or
- services are not supplied within a reasonable time.

The nature of the remedy will depend on which guarantee has not been complied with and the nature of the failure to comply. Remedies might include a refund, replacement or repairs. Consumers will also be able to seek compensation from manufacturers if 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.

#### Display notices of consumer rights

Regulators will be able to require suppliers to display a notice at the point of sale alerting consumers to their rights under consumer protection legislation. Regulators will also be able to determine what information needs to be included in the notice, where it must be displayed and how it must be drawn to the attention of consumers.

#### Unsolicited selling

The ACL contains a new regime to deal with unsolicited sales practices and the formation of unsolicited selling agreements. This is useful for businesses that use direct selling, as this area has previously been governed by inconsistent State and Territory laws. The new provisions will not disturb the Do Not Call Register, which has been in operation since 2007 and enables Australians to opt out of receiving unsolicited commercial marketing calls.



Under the new scheme, a consumer agreement will be 'unsolicited' if it is for more than \$100, was made at a place other than the business premises of the seller, or by telephone, and was not invited by the consumer.

A seller will also be required to give the person certain information prior to making an unsolicited consumer agreement, including their right to terminate the agreement during specified termination periods and the way in which that right can be exercised. A copy or evidence of the agreement will need to be given to the consumer, and there will be a 10-day cooling off period.

The ACL restricts sellers from negotiating unsolicited agreements outside of Monday to Friday from 9am to 6pm, and Saturday from 9am to 5pm. A seller will be prohibited from calling on a person outside of these times or on a public holiday.

### Lay-by sales

The new laws will replace the various state and territory laws concerning lay-by agreements. The ACL will require lay-by agreements to be written and use transparent language. It will also regulate the termination of such agreements, entitling a consumer who terminates before receiving the goods to receive a full refund (less a cancellation fee reflecting the business' reasonable costs). Restrictions are placed on when a supplier can terminate a lay-by agreement, only allowing this if a consumer breaches the agreement, if the supplier stops trading or if the goods are no longer available.

### Safety

The ACL replaces product safety provisions in the TPA and state and territory legislation with a new national framework. The new laws affect goods which are intended or likely to be used for personal, domestic or household purposes. They also extend to the installation, maintenance, repair, cleaning, assembly or delivery of particular consumer goods.

Regulators will be able to publish safety standards in relation to particular goods or services online. Supplying goods or services that do not comply with these safety standards will be prohibited. The Australian Competition and Consumer Commission (ACCC) is developing a website on consumer safety which will contain all safety standards in force.

Where goods or services pose a risk of injury regulators will have powers to issue warnings, recall them, or even ban them temporarily or permanently.

All participants in the supply chain (retailer, dealer, distributor, repairer, importer, manufacturer and/or exporter) will be subject to reporting requirements if they become aware that their goods or services have been associated with a death, serious injury or illness. Suppliers will also need to notify regulators if they undertake a voluntary recall of goods. The regulator may publish details of the recall on the internet.

The ACL introduces an enhanced suite of product safety, market surveillance and enforcement provisions. In certain circumstances the ACCC will be able to enter public premises and exercise search and seizure powers such as taking videos, photographs and samples, inspecting manufacturing and storage processes, and embargoing or securing goods or services. The ACCC may also require suppliers to provide information, documents or evidence.

### Penalties, offences and remedies

Breach of the new laws will attract both civil penalties and in some circumstances, criminal charges. The suite of civil remedies will include financial penalties, injunctions, damages, compensation orders, orders seeking redress for consumers not party to enforcement proceedings, non-punitive orders, adverse publicity orders and an order disqualifying a person from managing a corporation. Regulators will be able to accept administrative undertakings, and will have the power to issue substantiation notices and public warning notices. The ACCC will also be able to issue infringement notices for certain breaches. These will be similar to a parking infringement, and will provide for penalties that can be paid to avoid further action by the ACCC.

### Conclusion

The reforms introduced by the ACL are significant. Despite inevitable initial compliance costs, a single, national consumer law will ultimately reduce regulatory complexity and cost for Australian businesses.

The Senate Economics Committee has a new inquiry into the second bill and is seeking written submissions from interested individuals and organisations. The Committee is scheduled to release a report on 21 May 2010. For further information, go to [http://www.aph.gov.au/senate/Committee/economics\\_ctte/tpa\\_consumer\\_law\\_09/info.htm](http://www.aph.gov.au/senate/Committee/economics_ctte/tpa_consumer_law_09/info.htm)

### Contacts

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