The Senate

Economics Legislation Committee

Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 [Provisions]

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Senate Economics Legislation Committee

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Abbreviations

ACCAN	Australian Communications Consumer Action Network
ACCC	Australian Competition and Consumer Commission; Australia's trade practices and consumer protection authority
ACL	Australian Consumer Law; the suite of legislation of which the bill on which this inquiry reports is part.
CCAAC	Commonwealth Consumer Affairs Advisory Council
CoAG	Council of Australian Governments
MCCA	Ministerial Council on Consumer Affairs
MTAA	Motor Trades Association of Australia
RIS	Regulatory Impact Statement
SCOCA	Standing Committee of Officials of Consumer Affairs
TPA	*Trade Practices Act 1974*, current Commonwealth legislation governing competition and consumer protection in Australia

Summary and Recommendations

Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010

This bill is the second in a suite of trade practices reforms. It renames the *Trade Practices Act 1974* as the *Competition and Consumer Act 2010*. While transferring many protections from the existing act, it changes the drafting to conform to modern plain English. It also replaces a variety of federal, state and territory legislation with uniform national law. In addition, the bill introduces specific protections such as consumer guarantees and addresses some undesirable practices of unsolicited sellers. Finally, the bill introduces new remedies and enforcement mechanisms for regulators and consumers.

The Committee believes the bill represents a substantial achievement which will bring real benefits to consumers.

Recommendation 1

The Committee recommends that the Senate pass the bill, preferably adopting the other recommendations in the report.

The Committee notes the overwhelming support for uniformity of consumer protection legislation. The greater clarity this brings could be enhanced if the occasional inconsistencies in the definition of 'consumer' in the bill could be removed. The Committee believes that the Government should aim to arrive at a single definition of 'consumer' throughout the provisions of the ACL in future consultations and amendments to the legislation.

The Committee heard a number of suggestions as to how 'consumer' should be defined, but on balance did not find any of the alternatives better than the main definition used in the bill, which regards 'consumer goods' as those 'of a kind ordinarily acquired for personal, domestic or household use or consumption'.

The bill will help consumers avoid paying for 'additional' warranties that are really only duplicating their legal rights. This will be more effective if consumers can readily comprehend the benefits they would receive from buying an additional warranty.

Recommendation 2

The Committee recommends 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.

A theme that emerges at a few places in the report is that the new legislation will need to be accompanied by education of consumers to enable its full benefits to be realised.

Recommendation 3

The Committee notes the low rate of Australian consumers' awareness, compared with that of New Zealand consumers, of their statutory rights when purchasing goods and services, particularly in relation to warranties. The Committee recommends the Government introduce a programme to educate Australian consumers about their statutory rights in relation to express warranties and other consumer guarantees. The programme should particularly aim to educate consumers about the guarantee that goods must be of "acceptable quality", which may offer protection above that included in manufacturers or extended warranty contracts.

Recommendation 4

ACCC and consumer regulators should issue national guidance in relation to the new consumer guarantees to ensure regulators, consumers and businesses have a consistent understanding of their new rights and responsibilities.

The bill envisages a distinction between 'minor' and 'major' breaches of consumer guarantees. This concerned some witnesses.

Recommendation 5

The Committee recommends that an appropriate agency monitor and, as soon as practicable after 1 July 2013, provide a comprehensive report on:

- **(a) the application of the distinction in Part 5-4 of the bill between major and minor based on consumer behaviour (with a view to ascertain whether improved definitions are required or amendments are warranted); and**
- **(b) consumers' behavioural awareness of consumer guarantees and use of remedial relief.**

The Committee welcomes that the bill will extend consumer protection by requiring that services be 'fit for purpose'. The Committee believes exemptions from these provisions should be strictly limited. The exemption of utilities industries in cases such as unforeseeable weather events can be justified, especially as these industries are also subject to specific, additional regulation. The Committee was not, however, convinced by the argument of architects and engineers for their services to be exempted (although they should not be held responsible if their designs are poorly realised by builders).

Another attractive feature of the bill is that it gives consumers more protection in situations of 'unsolicited selling', such as door-to-door sales, where they may be vulnerable to high-pressure sales techniques. The Committee supports the bill's restricting these activities to 9 am to 6 pm on weekdays and 9 am to 5 pm on Saturdays. It considers the field sales industry's fears of higher product prices and industry unemployment are an insufficient counterargument to the householders' interests in relation to safety and freedom from nuisance.

The Committee believes these provisions could be strengthened to avoid sellers trying to get around them.

Recommendation 6

The Committee recommends that the bill defines an 'unsolicited consumer agreement' as to include circumstances in which consumers are contacted (and contact dealers) through indirect means. This should include circumstances:

- **where a consumer is contacted in relation to the supply of goods or services after providing his or her name or contact details to a person, and the predominant purpose for providing those details was not to supply those goods or services; and**
- **where a consumer contacts a dealer in response to a 'missed call'.**

Recommendation 7

The Committee recommends that the Minister review the $100 exemption limit after consultation with direct sellers, other direct marketers and other interested parties.

The bill also introduces a nationally consistent scheme for product safety reporting. This information will be transmitted to the public through a new website.

Some submitters, however, were concerned that the requirement to report incidents involving death, serious injury or illness 'associated with' a product rather than 'caused by' the product could be casting the net too widely. In the case of motor vehicles it could also duplicate existing reporting obligations. The Committee is sympathetic to the need to balance protection of consumers and avoidance of overwhelming both suppliers and regulators with unproductive paperwork, but is also aware that making exceptions to legislation causes complexity and ambiguity. Furthermore, replacing 'associated with' by 'caused by', would probably raise more problems by putting an onus on the reporter to verify or investigate the incident before reporting.

Recommendation 8

The Committee recommends 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.

The bill has been criticised for sometimes reversing the onus of proof. The Committee believes, however, that this has only been done in instances where it is justified.

Finally, committee inquiry processes have unearthed some apparent drafting errors which the Committee suggests be investigated.

Recommendation 9

The Committee notes the claim of drafting errors. The Committee does not believe that these issues are of sufficient magnitude to delay passage of the bill. Notwithstanding this, the Committee recommends that the Minister seek further advice and rectifies any drafting errors where warranted.

Chapter 1

Introduction

1.1 The Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 is the second in a suite of trade practices reforms.

1.2 The Trade Practices Amendment (Australian Consumer Law) Act 2009 was the subject of a report by this Committee in September 2009 and received royal assent on 14 April 2010. It introduced a new national unfair contract terms law, which is scheduled to commence on 1 July 2010. It also included the first wave of new enforcement penalties and redress options for the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission.

1.3 This second bill was introduced into the House of Representatives on 17 March 2010 and provisions of the bill were referred to the Senate Economics Legislation Committee on 18 March 2010 for report by 21 May 2010.

1.4 A third bill, reforming 'unconscionable conduct' provisions, is expected later in 2010.

1.5 This bill amends the *Trade Practices Act 1974*, *Australian Securities and Investments Commission Act 2001* and *Corporations Act 2001* to implement a national consumer law regime in relation to: misleading and deceptive conduct; unconscionable conduct; unfair practices; consumer transactions; statutory consumer guarantees; a standard consumer product safety law for consumer goods; and product related services.

1.6 To reflect more accurately the purpose, scope and affected parties of the law, the bill amends section 61 of the *Trade Practices Act 1974* (TPA) to rename it as the *Competition and Consumer Act 2010*.

1.7 The bill amalgamates 17 pieces of federal, state and territory legislation into a single bill.[1] One-third of the bill replicates existing protections under the TPA, but changes the drafting to conform to modern plain English standards. The Minister's second reading speech explains:

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1 Parts IVA, V VA, VC, *Trade Practices Act 1974 (Cth)*; *Fair Trading Act 1992 (ACT)*; *Fair Trading (Consumer Affairs) Act 1973 (ACT)*; *Door to Door Trading Act 1991 (ACT)*; *Lay by Sales Agreements Act 1963 (ACT)*; *Fair Trading Act 1990 (Tas)*; *Fair Trading (Reinstatement of Regulations) Act 2008*; *Door to Door Trading Act 1986 (Tas)*; *Fair Trading Act 1999 (Vic)*; *Fair Trading Act 1987 (NSW)*; *Fair Trading Act 1989 (Qld)*; *Fair Trading Act 1987 (SA)*; *Consumer Transactions Act 1972 (SA)* and the *Manufacturers Warranty Act 1974 (SA)*.

> …although [provisions] have been redrafted to reflect modern, easier to comprehend drafting conventions – and draw variously on the existing legislative approaches in the states and territories, and in New Zealand.[2]

1.8 The Minister has characterised the resulting bill as:

> The most far-reaching consumer law reforms since the inception of the Trade Practices Act 35 years ago.[3]

1.9 The Minister indicated that some of the risk associated with the new protections would be ameliorated through the use of legal authority from the parent jurisdiction:

> ...the case law associated with the understanding and interpretation of these protections...will continue to be relevant to the interpretation and application of the Australian Consumer Law.[4]

1.10 This report focuses on the aspects of the bill which stakeholders considers carried the most risk, or which may have not achieved the overall policy intent expressed by the Minister. For this reason, there is little discussion of those provisions of the TPA which have been translocated into the new bill.

Reform history

1.11 The reforms proposed in the bill implement a series of recommendations to government by agencies charged with maximising efficiency in the Australian economy and improving consumer understanding of their rights.

1.12 The Treasury indicated that the initial catalyst for reform was:

> ...the recommendations made by the Productivity Commission in its 2008 review of Australia's consumer policy framework.[5]

1.13 The Productivity Commission's 2008 *Review of Australia's Consumer Policy Framework* found that many minor variations exist in different laws across Australia and these differences create additional costs for business and increase uncertainty for consumers.[6] It also stated that this inconsistent and complex enforcement regime

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2 The Hon. Dr Craig Emerson MP, Minister for Competition Policy and Consumer Affairs, *House of Representatives Hansard*, 17 March 2010, p. 2720.

3 The Hon. Dr Craig Emerson MP, Minister for Competition Policy and Consumer Affairs, *House of Representatives Hansard*, 17 March 2010, p. 2719.

4 The Hon. Dr Craig Emerson MP, Minister for Competition Policy and Consumer Affairs, *House of Representatives Hansard*, 17 March 2010, p. 2720.

5 Mr Simon Writer, Manager, Consumer Policy Framework Unit, Treasury, *Proof Committee Hansard*, 27 April 2010, p. 2.

6 Productivity Commission 2008, *Review of Australia's Consumer Policy Framework: Final Report*, Sydney.

deterred consumers from pursuing their rights and regulators from pursuing breaches of the law. The report concluded that:

> ...[the current consumer protection regime] will make it increasingly difficult to respond to rapidly changing consumer markets, meaning that the associated costs for consumers and the community will continue to grow.[7]

1.14 The Productivity Commission estimated that reforms consistent with its recommendations could provide a net gain to the community of between $1.5 billion and $4.5 billion a year.[8]

1.15 On 24 May 2008, following the Productivity Commission's report, the Ministerial Council on Consumer Affairs (MCCA) recommended that the Council of Australian Governments (CoAG) agree to:

> ...introduce a single, national law for fair trading and consumer protection, [applied] equally in all Australian jurisdictions, to all sectors of the economy and to all Australian consumers and businesses.[9]

1.16 In developing a new regime for national consumer protection, the MCCA expressed its guiding principles as:

- maintaining consumer protection for all Australian consumers;
- minimising the compliance burden on business;
- creating a law which can apply to all sectors of the economy and to all Australian businesses;
- ensuring that the Australian Consumer Law is clear and easily understood; and
- having laws which can be applied effectively by all Australian courts and tribunals.[10]

1.17 Together these principles outline the policy rationale for harmonising these laws (see chapter 2 for a discussion of harmonising consumer laws).

1.18 CoAG agreed the introduction of a national consumer product safety system recommended by the MCCA in July 2008. At the November 2008 meeting, CoAG

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7 Productivity Commission 2008, *Review of Australia's Consumer Policy Framework*, Key Points released at time of report 8 May 2008, (accessed online 11 May 2010): http://www.pc.gov.au/projects/inquiry/consumer/docs/finalreport/keypoints; see also Dr Steven Kennedy, *Proof Committee Hansard,* 27 April 2010, p. 2.

8 Executive Summary, Productivity Commission 2008, *Review of Australia's Consumer Policy Framework: Final Report*, Sydney, p. 55.

9 Ministerial Council on Consumer Affairs, *Joint Communiqué of 22nd meeting,*4 December 2009 http://www.consumer.gov.au/html/download/MCCA_Meetings/Meeting_22_4_Dec_09.pdf (accessed 6 April 2010).

10 Treasury, 2010, *Australian Consumer Law: an introduction*, Consultation paper, Canberra. p. 14.

further agreed two frameworks for the consumer protection reforms: the National Partnership Agreement to Deliver a Seamless National Economy (November 2008) and the Inter-Governmental Agreement for the Australian Consumer Law (July 2009). Under the agreement, the Australian Consumer Law will be fully implemented by 1 January 2011; it will apply nationally and in all states and territories and to all Australian businesses.

1.19 In March 2009, the Australian Government asked the Commonwealth Consumer Affairs Advisory Council (CCAAC) to undertake a review of the current laws on implied conditions and warranties in federal, state and territory legislation. The CCAAC report recommended the creation of a nationally consistent consumer protection system 'to replace existing laws which only imply such protections' and commented that 'unlike consumers in the United Kingdom and the United States, Australia does not need special laws dealing with extended warranties'.[11]

Consultation on the bill

Policy development consultations

1.20 The majority of stakeholders who provided evidence to the Committee on this inquiry had also participated in range of consultations on specific reforms proposed by the Treasury to streamline competition, consumer, credit and financial services regulation.

1.21 Following the CoAG agreement, the Standing Committee of Officials of Consumer Affairs (SCOCA) released a consultation paper with initial information about harmonisation of laws, entitled *An Australian Consumer Law: Fair markets — Confident consumers*,[12] which expounded on measures agreed by CoAG, including unfair contract terms, new penalties, enforcement powers and remedies, and redress for consumers. The paper also gave suggestions for reform:

> ...as to how the TPA could be augmented, if appropriate, by incorporating additional provisions based on best practice from state and territory legislation, for example, door-to-door trading or telemarketing.[13]

1.22 Treasury received 102 submissions and conducted consultations with a number of contributors. This consultation closed on 17 March 2009.

1.23 On 11 May 2009, the Minister for Competition Policy and Consumer Affairs Chris Bowen, released for public consultation a consultation paper entitled *The*

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11 *Explanatory memorandum*, p. 177.

12 Treasury, *An Australian Consumer Law: Fair markets — Confident consumers*, 17 February 2009, Canberra.

13 Treasury, *An Australian Consumer Law: Fair markets — Confident consumers*, 17 February 2009, Canberra. Online summary, (accessed 11 April 2010). http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1482

Australian Consumer Law: Consultation on draft provisions on unfair contract terms. Consultation on this draft, which closed on 22 May 2009, informed the first Australian Consumer Law bill.

1.24 Following this, CCAAC conducted a review of statutory implied conditions and warranties between 26 July and 24 August 2009. The terms of reference included the need to consider ways to improve the current implied terms, protect consumers who purchase goods which continually fail and identify other means for improving the operation of existing statutory conditions and warranties.[14] The consultation, which closed on 24 August 2009, received 33 submissions from stakeholders. The report to Minister Bowen contained recommendations which formed the basis of the consumer guarantee provisions in the bill.

1.25 Finally, SCOCA provided a regulatory impact statement on consumer protection and a national product safety regime. The impact on regulation was based on the best practice in operation in state and territory laws. The consultation on the statement, which received 28 submissions, closed on 27 November 2009.[15]

Consultation on this bill

1.26 A number of submissions and witnesses to this inquiry acknowledged and commented positively on the initial consultation processes undertaken by the Government on the Australian Consumer Law suite. In particular, the first bill, dealing with unfair contracts, was regarded by some stakeholders as being the product of extensive consultation.[16]

1.27 The bill is the product of a large number of submissions to the above listed consultations run by the Productivity Commission, the CCAAC, the MCCA and SCOCA.

1.28 A significant number of submissions to the inquiry, however, were critical of the level of consultation undertaken by Treasury and its consultative committees in relation to the draft language in the second bill. It would appear that the impact on some industries was not clear in the policy documents, and became clear only once the bill was tabled in the House of Representatives on 17 March 2010. The Consumer Action Law Centre, wrote:

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14 The Treasury, Commonwealth Consumer Affairs Advisory Council (CCAAC), *Review of Statutory Implied Conditions and Warranties*; (accessed online 3 May 2010) http://www.treasury.gov.au/contentitem.asp?ContentID=1521&NavID=014.

15 The Treasury, Standing Committee of Officials on Consumer Affairs, *Consultation Regulation Impact Statement - Australian Consumer Law - Best Practice Proposals and Product Safety Regime*, consultation website: (accessed online 3 May 2010) http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1665.

16 Consumer Action Law Centre, *Submission 28*, pp. 3-4.

> …in contrast with the ACL 1 Act, regardless of one's views on the content of the current Bill, in our view the provisions have not been subject to appropriate public consultation.[17]

1.29 In particular, stakeholders commented that it was difficult for them to comment on the regulatory impact on business or consumers of this bill without Treasury releasing an exposure draft of the bill.[18]

1.30 To enable businesses to prepare for their new responsibilities under the bill, the Motor Trades Association of Queensland recommended that:

> ...consideration could be given to the compilation of publication similar to the draft *Australian Consumer Law: A guide to unfair contract terms* at the appropriate time to assist the transition to the new consumer laws contained in (No 2) Bill.[19]

The bill

1.31 The bill consists of three parts. Firstly, general protections, for example, section 18 replicates the prohibition on misleading and deceptive conduct currently in section 52 of the TPA. The drafting is identical except that section 18 refers to 'persons' rather than 'corporations'.

1.32 The Trade Practices Committee of the Law Council of Australia argued in its submission that it:

> …believes that the broad application of section 52 of the TPA (retained as section 18 of the Bill), together with the existing heads of prohibition currently under section 53 of the TPA, are already sufficient in deterring misleading or deceptive conduct. The [Law Council Trade Practices] Committee submits that prescriptive provisions such as those under sections 29(1)(e), (f), (m) and (n) of the Bill are not required and are likely to increase complexity for both consumers and suppliers.[20]

1.33 Section 20 of the bill mirrors the current section 51AA of the TPA which states that a corporation must not, in trade or commerce, engage in conduct that is

17 Consumer Action Law Centre, *Submission 28,* p. 3.

18 Consumer Action Law Centre, *Submission 28,* p. 4.

19 Motor Trades Association of Queensland, *Submission 4*, p. 1.

20 Law Council of Australia, *Submission 18,* p. 11.

unconscionable within the meaning of the unwritten law, from time to time, of the states and territories'.[21]

1.34 Secondly, the bill introduces specific protections such as consumer guarantees and addresses some undesirable practices of unsolicited sellers, lay-by contract requirements and miscellaneous unfair practices. Finally, the bill introduces new remedies and enforcement mechanisms for regulators and consumers.

Conduct of the inquiry

1.35 The inquiry was advertised in both *The Australian* and on the Committee's website. The Committee also wrote to a range of stakeholders inviting written submissions by Friday 16 April 2010. The Committee received [47] submissions. Submitters included legal experts and academics, consumer advocates, retailers, manufacturers and suppliers of products and services captured by the consumer guarantee and product safety provisions, exempted from the guarantee or seeking an exemption, direct sellers and marketers and individual stakeholders. The details of the organisations and individuals who made those submissions are listed at Appendix 1.

1.36 The Committee held public hearings in Sydney, Melbourne and Canberra from 27 to 30 April 2010. A full list of witnesses is at Appendix 2.

1.37 The Committee thanks all those individuals and organisations who contributed to and participated in the inquiry process for their valuable input.

Structure of the report

1.38 In Chapter 2, this report discusses policy arguments in support and against 'harmonisation' of laws and the degree to which this public policy objective has been met with the bill. It will also discuss where future opportunities for consumer law reform lie with respect to harmonisation.

1.39 Chapter 3 examines the coverage of this bill and the modern notion of the Australian 'consumer'. In particular, it explores the case for small business and bodies corporate to be protected in their purchases of some goods by this bill. In doing so, it also considers whether all goods under a set monetary limit should be guaranteed under the bill. Chapter 3 also discusses where the line ought to be drawn in relation to

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21 'Unwritten law' refers to the law developed by the courts of common law and equity. The TPA refers to conduct that is 'unconscionable' in two different contexts. The first is section 51AA which is based on the concept of 'special disadvantage' in the common law of equity. The doctrine of special disadvantage protects individuals who, in seeking to make judgements in their best interests, are disabled by age, infirmity, mental illness or other characteristics. A contract that is formulated under this duress is known as a breach of 'procedural unconscionability'. The second context arises under sections 51AB (relating to consumer transactions) and 51AC (business transactions). These sections were intended to extend the equitable doctrine of unconscionable conduct to include contract terms and the progress of the contract. This is known as 'substantive unconscionability'.

exempting suppliers from liability where the consumers' use of goods or services is not the intended use of that good or service.

1.40 Chapter 4 discusses the new consumer guarantees scheme, which replaces the TPA and common law system of implied and statutory warranties. This chapter focuses on the guarantee under the bill that a good or service be fit for its intended purpose. Consequently, it debates the merits of claims for exemptions to the 'fitness for purpose' guarantee currently provided to telecommunications and utilities companies and a claim by representatives of architects and engineers that an industry-specific exemption from 'fitness for purpose' requirements should also apply to their work.

1.41 The bill introduces national regulation of unsolicited selling. Chapter 5 discusses the new restrictions with respect of various types of unsolicited sales: telemarketing, door-to-door, direct selling and any other selling which is characterised as 'store selling without the store'.[22] This chapter reflects evidence heard by the Committee about addressing the tactics of the most aggressive parts of the unsolicited sales companies and, conversely, the unintended implications in the bill for some business.

1.42 Chapter 6 considers the new 'incident-based' product safety regulation scheme, in particular the reporting obligations under the bill. The burden on regulators imposed by the new scheme is also discussed in this chapter.

1.43 Chapter 7 discusses the avenues for consumers to seek remedies under the new Australian Consumer Law. It also examines the regulators' powers under the bill.

1.44 Chapter 8 discusses some other, minor drafting amendments recommended by stakeholders.

The Committee's overall impression of the bill

1.45 The Committee believes the bill represents a substantial achievement in unifying many diverse pieces of consumer legislation. It also offers improved protection for consumers in a number of areas.

Recommendation 1

1.46 The Committee recommends that the Senate pass the bill, preferably adopting the other recommendations in the report.

22 Mr Anthony Greig, Chairman, Direct Selling Association of Australia Association, *Proof Committee Hansard*, 30 April 2010, p. 9.

Chapter 2

Harmonising Australia's consumer laws

2.1 In the Second Reading Speech of the bill, the Minister for Competition Policy and Consumer Affairs, the Hon. Dr Craig Emerson, stated that the 'complex array' of state and territory generic consumer laws 'must be rationalised'. The Minister argued that a single national consumer law is the best means of ensuring that the rights of Australian consumers are clear and consistent. A single consumer law also makes compliance simpler for Australian businesses.[1]

2.2 This chapter looks at the approach taken in the Australian Consumer Law (ACL) to harmonising Australia's various state and territory fair trading laws. It then considers stakeholders' general support for this initiative, and some concern that the national standard as set in the ACL has set the bar either too high or too low. The chapter necessarily pre-empts some of the discussion in later chapters concerning particular provisions of the ACL.

The Government's approach

2.3 Treasury explained to the committee that the bill will, for the first time, enable consumers to benefit from 'clear and consistent consumer rights'. It described the logic of the bill in the following terms:

> …[it] is based on the existing consumer protection and fair trading provisions in the *Trade Practices Act*, but it has been drafted so as to rationalise the way in which provisions are organised to make provisions clearer and easier to understand and include additions and amendments…[2]

2.4 Treasury responded somewhat tersely to the suggestion made by some witnesses that the bill adds to the complexity of Australia's consumer protection provisions. Mr Simon Writer told the committee:

> In terms of complexity, there are probably two points. One is that I find it curious that the argument of complexity is made when we are replacing provisions spread across 17 Commonwealth, state and territory acts and putting them into one piece of legislation which is set out, we would hope, in a fairly rational way.[3]

2.5 In terms of the bill's unsolicited consumer agreement provisions (see chapter 5), Treasury explained that the Government's intent was not to go beyond the

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1 The Hon. Dr Craig Emerson, *Second Reading Speech,* House of Representatives Hansard, 17 March 2010, p. 2718.

2 Dr Steven Kennedy, General Manager, Infrastructure, Competition and Consumer Division, Department of the Treasury, *Proof Committee Hansard,* 27 April 2010, p. 3.

3 Mr Simon Writer, Treasury, *Proof Committee Hansard,* 30 April 2010, p. 39.

provisions set in existing state and territory legislation. Rather, the Government's approach was to harmonise the state and territory approaches contained in the fair trading acts and in some cases in stand-alone acts in the states and territories.[4]

2.6 In terms of the bill's consumer guarantee provisions (see chapter 4), Treasury explained that the Government's purpose was to try and simplify the state laws and make them clear in terms of consumers' rights and remedies. The overarching objective is to consolidate these provisions 'so that consumers and businesses had a clear understanding of the standard of conduct that was required and, if there was a failure to adhere to that standard of conduct, the remedies were clearly expressed. Treasury noted that there is nothing in the bill's consumer guarantee provisions which is different from the existing law.[5]

The regulator's approach

2.7 The Australian Competition and Consumer Commission (ACCC) emphasised that consumer protection will be maximised where there is cooperation between jurisdictions and clear communication of the proposed changes in law to the public at large.[6] The ACCC explained:

> The beauty of our new regime is that we are dealing with one set of laws in an environment where there is enhanced cooperation and information sharing between agencies. So the choice a consumer has as to which agency they go to should not be reduced under this new regime. It will simply be that we are dealing with one set of common laws, with greater information sharing between the parties to allow us to work out who is best placed to assist a consumer or deal with a consumer issue. In some respects it is the same, but in other respects consumers will be much better placed.[7]

2.8 The ACCC told the Committee that it has been working for some time with the states and territories and with the Australian Securities and Investments Commission (ASIC) to identify how and in what form it can raise consumers' and businesses' awareness of the ACL. He added:

> We are particularly looking at identifying organisations such as business and industry associations and consumer groups as well as financial counsellor groups and others who we would characterise as intermediaries to make sure they have a good working understanding of the new framework so that they can assist consumers as and when they need to. We are also looking, particularly with respect to the consumer guarantee reforms, to identify the best way that we can help consumers understand

4 Mr Simon Writer, Treasury, *Proof Committee Hansard*, 30 April 2010, p. 34.

5 Mr Simon Writer, Treasury, *Proof Committee Hansard*, 30 April 2010, p. 39.

6 Mr Scott Gregson, Group General Manager, Enforcement Operations, ACCC, *Proof Committee Hansa*rd, 27 April 2010, p. 13.

7 Mr Scott Gregson, ACCC, *Proof Committee Hansard*, 27 April 2010, p. 18.

> their rights when it comes to what avenues of redress they have when things go wrong with the products or services they buy.[8]

Support for harmonising state and territory fair trading laws

2.9 The Committee notes that there is overwhelming support for the bill's objective of harmonising and rationalising the existing suite of state and territory consumer protection laws. There seems no support from practitioners for the theoretical idea of competitive federalism.

2.10 The following is a selection of quotes from submitters to this inquiry expressing support for a clear and consistent set of national consumer protection laws.

2.11 Ms Deborah Healey, an academic expert, told the Committee that in her experience, uniformity will decrease regulatory costs and the time taken by companies dealing with consumer goods nationally. She added:

> I think there is a lot of waste involved in complying with a variety of laws. I also think it will be easier for consumers because the law will be clarified, and I think there are a number of attempts to make it simpler, particularly in terms of the consumer guarantees.[9]

2.12 Mr Lynden Griggs, another academic expert, also welcomed the bill's effect of harmonising the range of state and territory consumer guarantees, product defects and remedial provisions. He told the Committee that in this regard, the bill is 'to be applauded and welcomed'.[10]

2.13 The consumer advocate CHOICE was glowing in its praise for the bill. Its submission noted that the ACL achieves the central objective of the reform process.[11] Mr Christopher Zinn of CHOICE elaborated on this support in evidence to the Committee:

> CHOICE believes that 2010 will be recorded as another watershed year in the development of consumer protection laws. This year sees the culmination of a long battle for uniform laws in which we have been involved.
>
> On uniformity, one of the key objectives of the current reform is to achieve a truly national consumer law. In our view, 'national' does not just mean

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8 Mr Nigel Ridgway, Group General Manager, Compliance, Research, Outreach and Product Safety, Australian Competition and Consumer Commission, *Proof Committee Hansard*, 27 April 2010, p. 13.

9 Ms Deborah Healey, Senior Lecturer, Faculty of Law, University of New South Wales, *Proof Committee Hansard*, 28 April 2010, p. 32.

10 Mr Lynden Griggs, Senior Lecturer, University of Tasmania Law School, *Proof Committee Hansard*, 29 April 2010, p. 10.

11 CHOICE, *Submission 20*, p. 5.

> the same regardless of which state is involved; it should mean the same nationally as well.[12]

2.14 CHOICE told the Committee that in terms of exemptions and exceptions, uniformity minimises competitive distortion within the economy, gives consumers confidence that the bill will be applied fairly and assists consumers to understand their rights.[13]

2.15 As a company that operates in all states and territories, Telstra supports a harmonised set of consumer laws and the policy direction of the ACL.[14] Similarly, Coles 'strongly supports' the introduction of the ACL on the basis that it will 'help reduce some of the multi-jurisdictional complexities we currently face and ultimately result in lower compliance costs for our business'.[15]

2.16 The Franchise Council put its support for the bill in the following terms:

> …we are supportive of the thrust of this legislation, without doubt. We definitely agree with the harmonisation approach, a national approach, rather than having state-by-state legislature. That suits us as a national operating sector.[16]

2.17 The Energy Retailers Association of Australia offered more qualified support for the bill's uniformity:

> We still want the national legislation. We certainly do not want the Australian consumer law to delay the National Energy Customer Framework. We accept that for our industry being an essential service there will always need to be some industry specific regulation, but it should be controlled. We recognise that in some areas it is duplicating generic regulation and in that case generic regulation should prevail. But certainly looking at things like disconnections and things unique to our industry, of course you need industry specific regulation.[17]

2.18 Harmonisation of the existing rules does not, of course, rule out further improvements in future, or extending some elements of harmonisation across national borders. For example, Associate Professor Luke Nottage believes some countries have introduced more expansive disclosure requirements in the context of ongoing product safety failures and would like to see similar measures taken here.[18]

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12 Mr Christopher Zinn, *Proof Committee Hansard*, 28 April 2010, p. 8.

13 Mr David Howarth, *Proof Committee Hansard*, 28 April 2010, p. 10.

14 Mr James Shaw, *Proof Committee Hansard*, 29 April 2010, p. 14.

15 Coles, *Submission 3*, p. 1.

16 Mr Steve Wright, *Proof Committee Hansard*, 29 April 2010, p. 51.

17 Mr Cameron O'Reilly, *Proof Committee Hansard*, 29 April 2010, p. 7.

18 Associate Professor Luke Nottage, *Proof Committee Hansard*, 28 April 2010, p. 2.

Views on the bar at which uniform laws are set

2.19 The Committee notes that beyond the broad support for a uniform national consumer law, opinions differed as to the appropriate level of standardised consumer protection.

Sector-specific exemptions

2.20 Treasury explained that under the intergovernmental agreement, the federal, state and territory governments have a commitment to examine sector-specific laws and amend or repeal those which duplicate or are inconsistent with the bill. An assessment is made of whether additional sector-specific protection is necessary for consumers or replicates existing protections in sector-specific contexts.[19]

2.21 CHOICE had no objection to higher standards in particular industries. However, it argued that:

> …if you allow private agreements and exemptions to undermine that uniformity in different areas then consumers are back to a worse position than we were, and we would say the same thing…we believe it should be uniform across the states, it should be uniform across sectors, and that is because consumers will understand the laws and be more confident about asserting their rights under the laws if they apply everywhere.[20]
>
> The introduction of sector-specific exemptions (and prospective exemptions under regulation) has the potential to introduce economic distortions and to compromise consumer understanding of and confidence in the consumer law. Only where there is a clear and compelling need for sector-specific rules should they be allowed to diverge from the generic law and even in these cases, the preferred approach is to make the minimum modifications necessary to avoid conflicts with the generic law (such as through remedies). Any special treatment should preserve the operation of the ACL to the maximum extent possible, not simply abrogate it.[21]

19 Mr Simon Writer, *Proof Committee Hansard*, 27 April 2010, p. 5.

20 Mr David Howarth, Legal Policy Officer, CHOICE, *Proof Committee Hansard*, 28 April 2010, p. 15.

21 CHOICE, *Submission 20*, p. 5.

Chapter 3

The definition of 'consumer' and the scope of the bill

The Australian Consumer Law and Trade Practices Act's definitions

3.1 Schedule 1, section 3(1) of the bill states that a person is taken to have acquired particular goods as a consumer if, and only if:

(a) the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption; or

(b) the goods consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads.

3.2 The explanatory memorandum (EM) notes that paragraph 3(1)(a) is an assessment based on the nature and usual purpose of the goods. In terms of paragraph 3(1)(b), the question of whether a vehicle or trailer is acquired as a consumer is determined 'with reference to the actual purpose for which the vehicle or trailer were acquired'.[1]

3.3 Section 3(2) states that subsection (1) does not apply if the person acquired the goods, or held himself or herself out as acquiring the goods:

(a) for the purpose of re-supply; or

(b) for the purpose of using them up or transforming them, in trade or commerce:

(i) in the course of a process of production or manufacture; or

(ii) in the course of repairing or treating other goods or fixtures on land.

Section 4B of the Trade Practices Act

3.4 Section 4B(1) of the *Trade Practices Act (1974)* (TPA) states that a person shall be taken to have acquired particular goods as a consumer if, and only if:

(i) the price of the goods did not exceed the prescribed amount [currently $40,000]; or

(ii) where that price exceeded the prescribed amount—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;

and the person did not acquire the goods, or hold himself or herself out as acquiring the goods, for the purpose of re-supply or for the purpose of using them up or transforming them, in trade or commerce, in the course of a

1 *Explanatory Memorandum*, p. 23.

> process of production or manufacture or of repairing or treating other goods or fixtures on land.

Comparison

3.5 'Consumer' in the bill is therefore defined in the same way as section 4B of the TPA, without the reference to the monetary threshold of $40 000. Treasury noted in its submission to the inquiry that the Commonwealth Consumer Affairs Advisory Council (CCAAC) had indicated in October 2009 that:

> …there is no meaningful distinction to be made between a person who pays $40,000 for goods or services and a person who pays $40,001. The focus of the definition should be on the class of person who makes the purchase, or on the kind of goods or services which are purchased.[2]

3.6 The Ministerial Council of Consumer Affairs accepted this recommendation.

Ordinarily acquired for personal, domestic or household use / consumption

3.7 Case law assists in defining the meaning of the phrase 'ordinarily acquired for personal, domestic or household use or consumption'. 'Ordinarily' means 'commonly' or 'regularly', not 'principally', 'exclusively' or 'predominantly'.[3]

Definitions of 'consumer' where section 3 does not apply

3.8 There are some uses of the word 'consumer' in the bill to which the definition in section 3 does not apply:

- the use of the term consumer in the unconscionable conduct provisions of Part 2–2;
- the definitions of consumer good in section 2 and consumer contract in section 23 (which use similar but not identical terms to the definition of consumer); and
- the definition of non-party consumer in section 2 of the bill.[4]

Criticism of multiple definitions of 'consumer'

3.9 Citing these exceptions to the section 3 definitions, the law firm Freehills criticised the bill for failing to unify the concept of consumer. It argued that the variations on the concept of 'consumer' 'will be confusing for consumers'. As Professor John Carter, a consultant to Freehills, stated:

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2 Treasury, *Submission 46*, p. 7.

3 Ray Steinwall, *Trade Practices Act 1974*, 2010 Edition, p. 94. The case of most relevance is Bunnings Group Ltd v Laminex Group Ltd (2006).

4 *Explanatory Memorandum*, p. 23.

> A consumer might well think that consumer goods are goods supplied to a consumer, but they are not. A consumer might well think that a consumer contract is a contact to which the consumer guarantees apply, but it is not. There is a definition of 'consumer' which is not followed through in the act.[5]

3.10 Freehills argued 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'.[6] Professor Bob Baxt feared that as a result:

> I think we are going to pay very dearly…because we are going to get courts coming down with different interpretations. Remember this is new legislation. The courts will be dealing with it for the first time. As with all legislation, there will be a lot of interpretations. They will disagree with each other. It is going to be years before we get clarity.[7]

Committee view

3.11 The Committee believes 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.

Concerns about the bill's definition of 'consumer' in section 3

3.12 The Committee received evidence from organisations including Freehills, the Law Council, CHOICE, the Motor Trades Association of Australia (MTAA) and the Consumer Action Law Centre that the definition of 'consumer' in the bill may reduce the level of consumer protection. Arguments were put that various categories of purchase would fall outside the bill's definition of 'consumer' including:

- goods that are not 'ordinarily acquired for personal use';
- small purchases that are not 'ordinarily acquired for personal use';
- goods purchased for the infirm and incapacitated that do not pass the 'ordinarily acquired' test;
- customers who use business technologies for personal use;
- a small business that purchases an identical product as a consumer but, unlike the consumer, will no longer be protected;
- goods that are not consumer goods but are used by consumers and pose potential harm to consumers; and

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5 Professor John Carter, *Proof Committee Hansard*, 29 April 2010, p. 38. See also Ms Deborah Healey, *Proof Committee Hansard*, 28 April 2010, p. 34.

6 Freehills, *Submission 35*, p.

7 Professor Bob Baxt, *Proof Committee Hansard*, 29 April 2010, p. 40.

- consumers who hire goods which are not 'ordinarily acquired for personal use'.

Goods that are not 'ordinarily acquired' for personal use

3.13 The Consumer Action Law Centre queried the effect of the removal of the TPA's monetary ceiling in section 3 of the bill. It argued that the bill's reliance on the threshold of goods 'ordinarily acquired for personal, domestic or household use or consumption' raises uncertainties that have not been publicly scrutinised. For example:

> …whether household consumers buying goods such as trade tools or commercial fridges for personal use will be adequately protected or whether sole traders using goods partly for business and partly for personal purposes will be protected.[8]

3.14 Freehills' submission also focussed on this dilemma. It noted that under current section 4B of the TPA, for purchases under $40 000 it is not relevant that the goods or services are of a kind ordinarily acquired for personal, domestic or household use or consumption. Under the TPA, however, if an air conditioning unit of a type ordinarily acquired for industrial use is acquired by a home owner for use in the home at a price of $41 000, the question of whether the goods are of a kind ordinarily acquired for personal, domestic or household use or consumption is crucial.[9]

3.15 Freehills claimed that this problem will not disappear under the bill. It gave the example of a person hiring a cement mixer to construct a driveway at his or her home. Under the bill, the person will not be regarded a 'consumer' unless the cement mixer can be categorised as goods of a kind ordinarily acquired for personal, domestic or household use or consumption. Freehills argued that the same is true if the person is a small business which acquires the goods for commercial use.[10]

Small purchases that fail the 'ordinarily acquired' test

3.16 Whereas small purchases (under $40 000) do not have to pass the 'ordinarily acquired' test under current law, they will under the bill. Freehills argued that in the absence of a monetary ceiling, a $100 acquisition which is not of a kind ordinarily acquired for personal, domestic or household use or consumption will not be an acquisition by a 'consumer'. Consumer protection will be denied.[11]

3.17 Mr Stephen Ridgeway of the Law Council's Trade Practices Committee foresaw similar difficulties. He told the Committee:

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8 Consumer Action Law Centre, *Submission 28,* p. 4.

9 Freehills, *Submission 35*, p. 4.

10 Freehills, *Submission 35*, p. 4.

11 Freehills, *Submission 35*,p. 4.

> If you are talking about small-value transactions, there is a risk that you complicate the provisions by introducing this need for an inquiry about what the purpose is when some businesses, particularly small businesses, might get the benefit of those provisions.[12]

Special circumstances

3.18 The Committee received evidence that removing the monetary threshold in the TPA may leave some vulnerable consumers without protection. The Law Council, for example, expressed concern that the definition of 'consumer' in section 3 of the bill excludes individuals who acquire goods for personal, household or domestic use if those goods are ordinarily acquired for other purposes. It gave three examples:

- a mobility impaired person who required a lift to be installed in their two storey home in order to provide access to the upper storey. In this case, the Council argued, the person would likely not be protected by the bill's consumer guarantees since the lift would ordinarily only be installed in commercial buildings;
- a person, unable to write or type, requiring voice recognition software to be installed on their home computer. If the software was developed for business use and is rarely used by individuals, the purchaser may be left without remedy if the software is defective; and
- if a company were to doorknock sufferers of a particular condition with equipment ordinarily supplied to hospitals, individuals who purchased the products would not have the benefit of a termination period under the proposed unsolicited consumer agreements regime because the products would fall outside the regime since they are not ordinarily acquired for personal, household or domestic use.[13]

Early movers

3.19 The Law Council also observed that early adopters of new technology may not receive protection under the definition of consumer in section 3. Innovations such as broadband internet were originally developed for business use before they were offered more widely to consumers.[14]

Small businesses as consumers

3.20 The Committee also heard evidence that the provision in section 3 of the bill will remove the current protection enjoyed by both big and small businesses for purchases under $40 000.

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12 Mr Stephen Ridgeway, *Proof Committee Hansard*, 28 April 2010, p. 46.

13 Law Council of Australia, *Submission 18*, p. 5. See also Mr Lynden Griggs, *Proof Committee Hansard*, 29 April 2010, p. 10.

14 Law Council of Australia, *Submission 18*, pp. 5–6.

3.21 The MTAA argued that the bill's definition of consumer may 'significantly weaken' the position of small business as consumers. It argued that the 'ordinarily acquired' test—relating to goods of *any* value—means that if a 'consumer' and a small business purchase an identical product, the 'consumer' is protected under the proposed warranties and guarantees law but the small business is not. The Association concluded that:

> …if a product is purchased in good faith, it should always come with the same warranty protection, regardless of who purchases it.[15]

3.22 Not all small business groups shared the MTAA's concern, however. The Australian Communications Consumer Action Network told the Committee that the definition of 'consumer' in the bill:

> …has not been a priority issue for us. I would be prepared to support that concern at a very broad level. Our organisation reads 'consumers' quite broadly. We have a specific agreement to advocate on behalf of small business customers as well as consumers using communications services for personal services.[16]

The dilemma for suppliers

3.23 The Committee recognises that the distinction between business and consumer purchases is not always clear and that, as a result, suppliers will be uncertain as to whether consumer protections should apply. Mr Lynden Griggs of the University of Tasmania illustrated the point with the following example:

> …[a] person who lives on a small acreage that might have some free-range chooks and buys an incubation machine, and it is not that authorities suggest that would not be for domestic or personal use, yet for the personal or small acreage that is not running a business it could be in that category. The danger is that when you remove the financial threshold you are then going to have the small business trader who buys their computer for that business perhaps being excluded from the protections when at the moment they would not be. The argument that suppliers could put up would be that they are not able to determine whether this is a business purchase or consumer purchase, which to me does not really stack up.[17]

'Consumer goods'

3.24 CHOICE argued in its submission that the product safety provisions of the bill should be extended to goods other than consumer goods. It noted that some goods, which have the potential to harm consumers, are not covered by the bill. CHOICE thereby argued that the product safety regime powers of the bill should not be restricted to 'consumer goods'. Some products, such as a drink vending machine, are

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15 Motor Trades Association of Australia, *Submission 24*, p. 2.

16 Ms Elissa Freeman, *Proof Committee Hansard*, 30 April 2010, p. 6.

17 Mr Lynden Griggs, *Proof Committee Hansard*, 29 April 2010, p. 13.

used by consumers to purchase a good. The machine, however, falls outside the section 2 definition of a 'consumer good'. [18]

3.25 CHOICE was also concerned that the definition of 'consumer goods' is weaker in the bill than in the TPA. It noted that while the bill's definition of 'consumer goods' is drafted similarly to the TPA's, it does not have a monetary threshold.[19]

Contracts for the supply of goods

3.26 Freehills observed that the sale of goods under the bill does not apply to contracts for the supply of goods by way of licence, hire or lease, or to contracts for the supply of services. Therefore, if a consumer hires goods which are not of a kind ordinarily acquired for personal, domestic or household use or consumption, the consumer will be relegated to the common law regarding implied terms of the contract. Under the TPA, assuming the contract price is less than $40 000 and the acquisition is not for the purpose of resupply, the conditions and warranties provisions in Part V Division 2 would apply.[20]

Bodies corporate

3.27 The Law Council argued that the definition of 'consumer' should be limited to consumers who are individuals and should not extend to bodies corporate. It considered that bodies corporate acquiring goods or services for business use do not need the protection afforded by the bill.[21] Freehills made the same argument:

> …the position of a small business supplying to a large corporation is that it must treat the large corporation as if it were a consumer such as people like you and I who buy goods for our own personal use. It can be a large corporation or a small corporation. Any corporation that acquires goods of a kind without being for resupply or that acquires services of that kind is treated as a consumer and has all the rights as an ordinary consumer. Consumer protection there seems to be a misnomer and the end result is to devalue the consumer protection regime because there is, in fact, no special regime for Australian consumers. All there is a concept of 'consumer' that serves to protect large corporations as much as individuals.[22]

3.28 In this context, Mr Alan Peckham, a partner at Freehills, observed the possibility of a small business supplying goods or services of a kind ordinarily supplied for personal, domestic or household purposes to an ASX100 company. In

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18 CHOICE, *Submission 20*, p. 11.

19 CHOICE, *Submission 20*, p. 11.

20 Freehills, *Submission 35*, p. 4.

21 Law Council of Australia, *Submission 18*, p. 3.

22 Professor John Carter, *Proof Committee Hansard*, 29 April 2010, pp 38–39.

this case, he noted, the large company gets the protection of the legislation and the small business supplier does not.[23]

Treasury's position

3.29 The Committee asked Treasury to explain the amendment in the bill to the definition of 'consumer'. It explained that the provision in section 3 is drafted in general terms 'so that cases can be dealt with on a case-by-case basis'. Treasury explained that the amendment is intended to remove an arbitrary monetary threshold and focus instead on the nature of the purpose:

> The only difference is that some goods which were of a value less than $40,000 might be taken out of the scope of this provision because they are not ordinarily used for personal, household or domestic purposes. I am perhaps a little perplexed as to why that might cause confusion given that it is a fairly minor change from what is there now. It is really designed to remove a fairly arbitrary threshold and focus the provisions on the types of purchases that consumers typically make, which is of goods which are ordinarily used for personal, household or domestic purposes.[24]

3.30 In its submission, Treasury argued that a key consideration in defining 'consumer' as it is in the bill is to avoid 'undue complexity'. It noted that:

> When a consumer returns a good to a supplier for a repair it is often not possible to conduct an inquiry into the nature of the person, the purpose of the acquisition or whether the goods are being returned on behalf of a body corporate. Any move to amend the definition of 'consumer' such that these inquiries are necessary would add to costs for business and limit the enforceability of consumer guarantees, reducing the scope of an important consumer protection. Similar considerations also apply to the other provisions of the ACL that rely on the definition of consumer, namely unsolicited consumer agreements, lay-by sales and the provision of itemised bills.[25]

Options to amend section 3 of the bill

3.31 The Committee is aware of three options (other than that proposed in the bill) to address concerns with the proposed definition of 'consumer' in section 3 of the bill.

The status quo

3.32 The first option is simply to retain the monetary ceiling in the TPA. The Committee asked Mr Michael Delaney of the MTAA if the best solution to his concerns with section 3 is to retain a financial limit rather than define 'consumer' by

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23 Mr Alan Peckham, *Proof Committee Hansard*, 29 April 2010, p. 3.

24 Mr Simon Writer, *Proof Committee Hansard*, 30 April 2010, p. 33.

25 Treasury, *Submission 46*, p. 7.

what the goods are intended to be used for. He responded: 'it has worked pretty well for 35 years, so we would prefer the status quo, unless there are better policy instruments'.[26]

The 'purpose' test

3.33 The second option is to focus solely on the actual use of the good or service. Freehills told the Committee that there is 'a good working definition [of consumer] in the unfair terms regime' which should be the definition for purposes of consumer guarantees.[27] That definition states:

> A consumer contract is a contract for:
>
> a supply of goods or services; or
>
> a sale or grant of an interest in land;
>
> to an individual whose acquisition of the goods, services or interest is *wholly or predominantly for personal, domestic or household use or consumption*.[28]

3.34 Another way to achieve the purpose test would be to remove the word 'ordinarily' from section 3. Mr Lynden Griggs, a legal academic, elaborated:

> The simplest answer may be to remove the word 'ordinarily'. The way the cases have interpreted personal, domestic, household use has generally been an urban-centric approach. I think country purchasers, even though they may be personal or domestic in a country sense, because they are not ordinarily acquired by people in a metropolitan or suburban area they have been ruled outside the consumer protection guarantees.[29]

3.35 However, the Consumer Action Law Centre cautioned that a definition of 'consumer' focussing solely on the use of the good:

> …would be a further narrowing…[I]t comes linked to a reverse onus of proof in terms of the standard form contracts issue and certainly the purpose of the contract. We know from our work in the credit space, for example, that one reason we would strongly oppose a definition that simply focused on the use rather than a concept of 'ordinarily used' is because it begs for avoidance behaviour. What we would start to see happen in consumer contracts generally, as we have seen in a number of consumer credit contracts, is a little box that says, 'Tick. I am using this product for business

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26 Mr Michael Delaney, *Proof Committee Hansard*, 30 April 2010, p. 21.

27 Professor John Carter, *Proof Committee Hansard*, 29 April 2010, pp 40–41.

28 Trade Practices Amendment (Australian Consumer Law) Bill (No. 1) 2010, p. 6. Emphasis added.

29 Mr Lynden Griggs, *Proof Committee Hansard*, 29 April 2010, p. 11.

> purposes.' All of a sudden the consumer has excluded themselves from the range of protections that is available under the act.[30]

3.36 The purpose test could also be achieved by adopting a definition analogous to the definition of 'consumer good' in the bill. This refers to goods that are intended to be used, or are of a kind likely to be used, for personal, domestic or household use or consumption. The Law Council explained that some products may be 'likely to be used' by individuals with a particular need or medical condition without being 'ordinarily used' by consumers generally.[31] This approach would seem to accord with Treasury's approach of dealing with scope of coverage issues on a case-by-case basis.

The Law Council's proposal

3.37 The third option is to allow consumer protection for goods not ordinarily acquired for personal use in cases where the supplier is 'subjectively aware of this purpose'. It would remain at the discretion of the supplier to decline to sell the product to the prospective consumer.[32] This approach would seem to accord with Treasury's approach of considering the purpose of the purchase on a case-by-case basis.

3.38 The Law Council of Australia proposed a definition of 'consumer' based on a case-by case assessment of the nature and purpose of a good. It produced the following matrix in its submission to demonstrate how a monetary threshold could be maintained using a dual test of the nature and the purpose of the good or service.[33]

Table 3.1: A hybrid test

Ordinary nature and purpose of goods	Purpose of acquisition	Above or below monetary threshold	Whether acquirer is a 'consumer'
Personal	Personal	Above or below	Yes
Personal	Business	Above	No
Personal	Business	Below	Yes
Business	Personal	Above	No
Business	Personal	Below	Yes
Business	Business	Above or below	No

Source: Law Council of Australia, *Submission 18*, p. 7.

3.39 Ms Jacqueline Downes, representing the Law Council, told the Committee that the purpose of the purchase would need to be made known to the supplier. She elaborated:

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30 Ms Catriona Lowe, *Proof Committee Hansard*, 29 April 2010, pp 48–49.

31 Law Council of Australia, *Submission 18*, p. 6.

32 Law Council of Australia, *Submission 18*, p. 6.

33 Law Council of Australia, *Submission 18*, p. 7.

> For example, this would be where the supplier is aware that a good that may ordinarily be a business good is actually being supplied to a consumer who is acquiring it for a personal reason. So it is objectively made known to the supplier of the good. We submit that in that case, if the supplier of the good does not believe that the good is suitable for that personal purpose, they could have the option not to in fact supply the good. This would apply on a case-by-case basis, where the supplier of the good is aware that the good—which may otherwise be of a kind for business—is being used for personal reasons. If they continue to be aware of that purpose and are determined to still supply that good to the consumer, then our submission is that it would be appropriate for the consumer to be protected by the provisions of the act, in particular the consumer guarantees. Conversely, if a good that is ordinarily used for domestic purposes is supplied to a large business customer or a corporation, or for a business purpose, then they should not be afforded the protection that is provided to consumers under the act.[34]

3.40 Mr Griggs suggested that suppliers could be given more clarity if all transactions were made consumer transactions, but allowing business the opportunity to contract out of the guarantees. He explained:

> The person may well say, 'If you're a business purchaser I can provide this at a lower cost to you if you are willing to contract out of the guarantees or the consumer protections being offered.' From my direction, I would be looking to bring more transactions into the frame rather than less. Off the top of my head, I am struggling to come up with the arguments that business could put forward to actually have a tighter or narrower definition of 'consumer'.[35]

Comparison of the options

3.41 The strengths and drawbacks of these three alternative approaches are compared in Table 3.2.

Committee view

3.42 On balance, the Committee believes that the bill's definition of consumer is appropriate. It has long been recognised that the monetary threshold is arbitrary and contentious. It is anomalous that a business should have the same protection as an individual consumer if they buy goods for less than $40 000 regardless of whether the goods are 'of a kind ordinarily acquired for personal, domestic or household use or consumption'. The key must be the *nature* of the good.

3.43 The Committee agrees with Treasury that it would be overly complex and time consuming to conduct an inquiry into the nature of the person and the purpose of

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34 Ms Jacqueline Downes, *Proof Committee Hansard*, 28 April 2010, p. 42.

35 Mr Lynden Griggs, *Proof Committee Hansard*, 29 April 2010, p. 13.

the acquisition. The range of options canvassed illustrates clearly the complexity of the problem of definition. The nature of the good or service is the simplest determinant of a 'consumer'.

Table 3.2

	Current law (monetary threshold and nature test)	**The Law Council's proposal (monetary threshold, nature test and purpose test)**	**The purpose test (remove 'ordinarily', no monetary threshold)**	**The bill's proposal (nature test, no monetary threshold)**
Strengths	Covers small business consumers and 'special circumstances'	Covers small business consumers and 'special circumstances' Covers consumers making small & large purchases if the 'nature' test is not passed	Threshold is arbitrary Covers 'special circumstances' Covers consumers making small & large purchases if the 'nature' test is not passed Does not cover small and big business purchases	Threshold is arbitrary Nature of person and purpose of acquisition tests are complex
Drawbacks	Small and big business consumers should not be covered Threshold is arbitrary	Difficulty of determining for what purpose the purchaser will use good Ticking 'business' use means consumers may forego protections Threshold is arbitrary	Difficulty of determining for what purpose the purchaser will use good Ticking 'business' use means consumers will forego protections	Does not cover 'special circumstances' Does not cover consumers making small & large purchases if the 'nature' test is not passed Does not cover 'early movers'

Chapter 4

Consumer Guarantees

4.1 Under current legislation, consumers rely on implied conditions and warranties in consumer contracts to protect them with respect to the title and quality of goods they purchase.

4.2 Evidence presented by Treasury in support of this bill suggests Australian consumers' awareness of their rights under the implied warranties regime is very low - only 29 per cent, compared to 67 per cent in a similar survey in New Zealand.[1] The complexity of the implied warranties regime, which requires a consumer have some knowledge of contract law, may contribute to Australian consumers being less likely to assert their rights at the point of sale or pursue breaches of implied warranties.

The New Zealand model of consumer guarantees

4.3 Treasury describes the object of the bill's provisions on consumer guarantees as increasing consumer awareness and simplifying the rights to which consumers are entitled.

4.4 The new consumer guarantees regime is a single national law which will replace the various implied statutory conditions and warranties provisions in the TPA and in a large number of state and territory laws. It is designed to express in plain language consumers' current rights. It also sets out, for the first time, the remedies that consumers have where a guarantee is breached and does not require consumers to rely on unstated common law remedies.[2]

4.5 The bill introduces guarantees to consumers for the first time in Australia.[3] The jurisprudence from New Zealand courts is relevant to these new provisions in the Australian context.[4]

Consumer guarantees for goods

4.6 The bill would give consumers a guarantee to title, undisturbed possession and ensure goods are supplied unencumbered.[5] Significantly, this bill introduces a statutory basis upon which to seek remedy where the goods are not of an 'acceptable quality'. Currently, consumers have an implied warranty that goods are of

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1 Treasury, *Submission 46*, pp. 21-22.

2 Treasury, *Submission 46*, p. 22.

3 *Explanatory memorandum*, p. 177

4 *Explanatory memorandum*, p. 178

5 Sections 51 to 54.

'merchantable quality', which has a common law meaning that has been developed through high volumes of litigation. 'Acceptable quality' now has a clear meaning under the bill, which reads:

> (a) fit for all the purposes for which goods of that kind are commonly supplied; and
>
> (b) acceptable in appearance and finish; and
>
> (c) free from defects; and
>
> (d) safe; and
>
> (e) durable.[6]

4.7 An exemption from the guarantee of acceptable quality of goods is available only in exceptional circumstances, where the goods are used abnormally, such as a mobile phone dropped into a full bathtub or a television broken by an object hitting the screen.[7]

4.8 Legal experts, including the Law Council of Australia, were supportive of the introduction of the 'acceptable' threshold for product quality:

> The adoption of the New Zealand formulation for 'acceptable quality' rather than 'merchantable quality' is to be much applauded. You have disagreement amongst lawyers as to what 'merchantable quality' means and 'acceptable quality' is a better definition.[8]

4.9 In relation to the delivery of goods, consumers have a guarantee that goods will correspond with the description, or where relevant a demonstration model, and that requisite spare parts are available when repair is necessary.[9]

4.10 The Committee heard evidence from consumer advocates that there is much confusion on the part of consumers about what rights they enjoy under statutory warranties and what they pay for with additional manufacturers or extended warranty schemes.[10] Section 59 states:

> ...there is a guarantee that the manufacturer of the goods will comply with any express warranty given or made by the manufacturer in relation to the goods.

4.11 While this may provide some relief, consumer advocates also argued that without adequate information that is easily understood, the change in drafting would be ineffectual:

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6 Section 54(2).

7 *Explanatory memorandum*, p. 187.

8 Mr Lynden Griggs, *Submission 7;* p.2; Mr Stephen Ridgeway, Law Council of Australia, *Proof Committee Hansard,* 28 April 2010, p. 48.

9 Sections 56 to 58.

10 Choice, *Submission 20,* p. 6.

> ...warranties continue to raise serious problems. For many consumers, paying for an extended warranty on a large purchase seems to make good sense because it offers peace of mind but in many cases that sense of security is an illusion. It is based on a danger that does not exist because the statutory implied warranties offer as good or better protection. Nevertheless, under the old system of contract based remedies, consumers may have seen some value in paying to avoid the hassle of trying to enforce these warranties. With the move to consumer guarantees, CHOICE calls on the Senate to ensure that consumers receive adequate information about their rights before entering into extended warranties. This should be done through a compulsory disclosure at the time the extended warranty is offered so that consumers can judge for themselves whether the warranty offers any additional protection and, if so, whether it is worth the price.[11]

4.12 The intent of section 59 of the bill is that consumers are not paying for a warranty they already enjoy under the statutory protections, but can continue to purchase other benefits, including warranties conferring rights which exceed the statutory minimum. The Committee is concerned that there is some confusion on the part of consumers about the difference between various types of warranties. To counter this confusion, the Committee considers that it would be useful for the regulator to introduce positive disclosure obligations at the 'point of sale' for retailers to provide information to consumers, detailing the rights available under each type of warranties available and the relative value of purchasing additional warranties.

4.13 There are other provisions in the bill (such as prohibitions of misleading conduct and unfair contract terms) which may prevent some warranties being sold where they do not extend consumers' rights. The evidence suggests that informing consumers so they may exercise greater choice between warranties may better address the issue. One way may be to use new 'display notices' powers of the Minister and the regulator.

Display notices

4.14 It is proposed by the Commonwealth Consumer Affairs Advisory Council (CCAAC) that Australian shop owners be encouraged to participate in a voluntary scheme to provide a notice of consumer rights to consumers. If this fails to enhance awareness of consumers of their rights under the bill, the relevant Minister is to determine that the notice must be displayed in all shops nationally. The Minister is also able to prescribe the content of any notice mandated for suppliers of goods and services.[12] Completing a transaction without the required notice displayed can result in a maximum penalty of $30,000 for a company; and $6000 for an individual.[13]

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11 Mr Christopher Zinn, Director, Communications and Campaigns, CHOICE, *Proof Committee Hansard*, 28 April 2010, p. 7.

12 Section 66.

13 Section 133F.

4.15 This will be more effective if consumers can readily comprehend the benefits they would received from buying an additional warranty.

Recommendation 2

4.16 The Committee recommends 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.

Consumer guarantees for services

4.17 The bill provides guarantees for consumers where services are not rendered with due care and skill or not provided within a reasonable time.[14]

4.18 The bill replaces an implied warranty in the TPA with a guarantee that the supply of services, and products resulting from services, are 'fit for a particular purpose'.

Recommendation 3

4.19 The Committee notes the low rate of Australian consumers' awareness, compared with that of New Zealand consumers, of their statutory rights when purchasing goods and services, particularly in relation to warranties. The Committee recommends the Government introduce a programme to educate Australian consumers about their statutory rights in relation to express warranties and other consumer guarantees. The programme should particularly aim to educate consumers about the guarantee that goods must be of "acceptable quality", which may offer protection above that included in manufacturers or extended warranty contracts.

4.20 Section 61 has proven to be a controversial inclusion in the regime of consumer guarantees, as the scope for liability for suppliers under this provision is very wide. The section reads:

> 61 Guarantees as to fitness for a particular purpose etc.
>
> (1) If:
>
> (a) a person (the ***supplier***) supplies, in trade or commerce, services to a consumer; and
>
> (b) the consumer, expressly or by implication, makes known to the supplier any particular purpose for which the services are being acquired by the consumer;
>
> there is a guarantee that the services, and any product resulting from the services, will be reasonably fit for that purpose.
>
> (2) If:

14 Sections 60 and 62.

(a) a person (the ***supplier***) supplies, in trade or commerce, services to a consumer; and

(b) the consumer makes known, expressly or by implication, to:

(i) the supplier; or

(ii) a person by whom any prior negotiations or arrangements in relation to the acquisition of the services were conducted or made;

the result that the consumer wishes the services to achieve;

there is a guarantee that the services, and any product resulting from the services, will be of such a nature, and quality, state or condition, that they might reasonably be expected to achieve that result.

(3) This section does not apply if the circumstances show that the consumer did not rely on, or that it was unreasonable for the consumer to rely on, the skill or judgment of the supplier.

4.21 The inclusion of this guarantee in the bill means a number of industries, some currently exempt under the TPA, will experience a change to their exposure to liability. A number of stakeholders provided evidence to the Committee of the implications of a universal 'fitness for purpose' guarantee and the merits of exempting industries from this section. A discussion of exemptions is contained later in this chapter.

4.22 Service providers cannot avoid the obligations guaranteed to consumers in this bill by contracting out of them. Section 64 also prevents suppliers from displacing consumer guarantees by specifying that some other law, such as the jurisdiction where the supplier is based, applies to the contract instead. Telstra submitted that:

> …suppliers be able to nominate where customers must direct their notice of intention to terminate a contract for beach of a consumer guarantee, provided that the nominated contact be readily available to consumers;[15]

4.23 Telstra's recommendation appears to limit consumers' ability to access a remedy. This would be invalid, given the scope of section 64 of the bill, which stipulates that any such term of a contract would be void where it 'purports to exclude, restrict or modify the consumer guarantees or a consumers' ability to seek remedy under the guarantees'.

Support for reforms

4.24 Most submissions and witnesses were supportive of the changes relating to consumer guarantees. Mr Lynden Griggs, a Lecturer in Law, commented that the changes:

> ... mooted in Part 3-2 represent a considerable improvement on the current regime.[16]

15 Telstra, *Submission 11*, p. 3.

4.25 The consumer organisation, CHOICE believe the bill achieves its aim:

> …we are delighted to see that the bill moves away from some of the musty legalese that infected the existing regime of implied warranties and conditions. A rose by any other name may smell as sweet, but a name for a consumer guarantee that means nothing to the average consumer effectively just stinks. We are pleased that the Office of Parliamentary Counsel has taken the opportunity to simplify the consumer guarantees...[17]

4.26 The Committee heard evidence from a significant number of witnesses who suggested that the change in wording, and explicit definitions on the face of the bill, would provide the foundation for better informed consumers in Australia and, where matched with the requirements for points of sale to display notices of consumer rights, consumer awareness may rise to levels seen in New Zealand.[18]

4.27 To assist business to prepare for the regulatory and other changes involved in the consumer guarantees scheme, Telstra submitted that:

> …the ACCC and consumer regulators should issue national guidance in relation to the new consumer guarantees to ensure regulators, consumers and businesses have a consistent understanding of the new rights and responsibilities created under this regime.[19]

4.28 Given the size and scope of this bill and the changes its implementation will involve, the Committee agrees with this suggestion and other suggestions by stakeholders which will improve the awareness of business and consumers of the rights and responsibilities under the scheme.

Recommendation 4

4.29 The ACCC and consumer regulators should issue national guidance in relation to the new consumer guarantees to ensure regulators, consumers and businesses have a consistent understanding of their new rights and responsibilities.

Remedies for breaches of consumer guarantees

4.30 The bill enables consumers to take action against a supplier of goods if:

(a) goods are supplied in trade or commerce; and

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16 Mr Lynden Griggs, *Submission 7,* p. 2.

17 Mr Christopher Zinn, *Proof Committee Hansard,* 28 April 2010, p. 8.

18 Mr Lynden Griggs, *Submission 7;* p. 2; see also Dr Stephen Corones, 'Consumer Guarantees in Australia: Putting an End to the Blame Game', *Queensland University of Technology Law Journal* (2009) 9(2) 137; Treasury, *Submission 46;* Law Council of Australia, *Submission 18,* p. 7; CHOICE, *Submission 20*, p. 3.

19 Telstra, *Submission 11,* p. 16.

(b) there is a breach of any of the guarantees that relate to goods.[20]

4.31 The bill entitles consumers to a refund, replacement or repairs from the supplier if the standards required under the guarantee are not met. The remedy is based on the specific guarantee with which the supplier has not complied.

4.32 The type and severity of penalties depends on the severity of the breach of a consumer guarantee. A major failure is taken to have occurred where:

(a) A reasonable consumer would not have acquired the goods if he or she knew about the nature and extent of the problem;

(b) the goods depart significantly from their description or a sample of the item;

(c) goods cannot be remedied to make them fit for purpose within a reasonable time; or

(d) the goods are unsafe.

4.33 Where there is a major failure to comply with a guarantee, the consumer may reject goods and choose between a refund and replacement goods. The same guarantees apply to the replaced goods as applied to the goods originally supplied.

4.34 For a lesser failure the usual remedy will be for a consumer to require the supplier to address the problem. This remedy must be made available within a reasonable time, which will vary according to the nature of the goods provided.

4.35 While submissions and evidence received by the Committee were generally supportive of the inclusion of the remedies available to consumers for a suppliers' breach of a guarantee, a number cautioned that the:

> ... distinction that is drawn between major and minor repairs may well add a layer of complexity that is not warranted.[21]

4.36 Telstra also recommended in its submission that:

> …there be greater clarity of new and unfamiliar terms (such as “major failure”).[22]

4.37 Mr Lynden Griggs suggested best practice standards may have been more helpful to consumers than a 'major' and 'minor' distinction. Mr Griggs submitted that

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20 Section 258.

21 Mr Lynden Griggs, *Submission 7;* p.2; Telstra, *Submission 11*, p. 15.

22 Telstra, *Submission 11*, p. 3.

'lemon laws',[23] as introduced in the United States provide specific guides to consumers on how to differentiate between major and minor failures in products.[24]

4.38 While the Committee agrees with the CCAAC finding that lemon laws are not necessary in Australia at this stage due to the heavy burden they place on suppliers – in particular motor vehicle manufacturers - the Committee agrees with Mr Griggs' recommendation that the ACCC:

> …monitor and undertake a detailed analysis (after...two years) of the effectiveness of the major/minor distinction in remedial relief...[25]

4.39 This would allow consideration of a more interventionist approach if the proposed approach is not proving effective. The Committee recognises, however, that a period of consumer education is required before consumers would make use of the measure and therefore a trend might not be observable within two years.

Recommendation 5

4.40 The Committee recommends that an appropriate agency monitor and, as soon as practicable after 1 July 2013, provide a comprehensive report on:

(a) the application of the distinction in Part 5-4 of the bill between major and minor failure based on consumer behaviour (with a view to ascertain whether improved definitions are required or amendments are warranted); and

(b) consumers' behavioural awareness of consumer guarantees and use of remedial relief.

Exemptions to consumer guarantees

Committee view

4.41 The Committee accepts the policy intent implicit in the consumer guarantee scheme: that the national economy derives efficiencies from consumers with a robust

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23 "In the US, all states have 'lemon laws', which give consumers the right to get their money back or a new replacement car if they buy a 'lemon'. There, a car qualifies as a lemon if the same defect can't be repaired in a certain number of attempts, and/or if the car has spent a certain amount of time in the workshop over a 12–24-month period while still under warranty. The problems must be due to a manufacturing fault rather than a design fault present in all models of a batch (which would be covered by a model recall) or a fault of the dealer." CHOICE, *Your rights when you buy a used car*, Online article, accessed 12 May 2010, http://www.choice.com.au/Reviews-and-Tests/Travel-and-Transport/Cars/Buying/Car-lemon-laws/Page/Car%20lemon%20laws.aspx. (last updated 6 May 2006).

24 Mr Lynden Griggs, *Submission 7*, p. 2.

25 Mr Lynden Griggs, *Submission 7*, p. 2.

knowledge and pursuit of their rights based on a nationally consistent standard for business conduct.

4.42 Similarly, the Committee accepts the policy intent of the guarantee embodied in section 61, giving specific protection to consumers that 'services, and any product resulting from the services, will be reasonably fit for that purpose'. Consequentially, each 'carve out' or exemption from a guarantee diminishes the economic efficiencies produced by a nationally consistent, all-industry law and undermines both the consumer confidence and business certainty objectives of the bill.

4.43 The Committee agrees with a general recommendation expressed by CHOICE in its submission that:

> …the Australian Consumer Law should be applied as minimum, uniform standard across both states and industries. Any existing exemptions or exceptions under the *Trade Practices Act 1974* should be subject to debate before being adopted in the new law.[26]

4.44 Any industry seeking an exemption should bear the onus for demonstrating the public good derived from their exclusion, and should demonstrate why a service or product that is not *reasonably* fit for a particular purpose ought to be outside the scope of liability.

4.45 As a general proposition, the Committee finds that the threshold for applying such an exemption ought to be that:

- the nature of the service provided is so vulnerable to third parties or other elements who may affect supply of that service or product so as to alter either the nature of the product, or prevent the service provider from managing the expectations of the consumer; or
- the 'purpose' of the product cannot be ascertained through competent due diligence, consultation and professional advice by the supplier to the consumer; or
- the service or product supplied is so unique in its nature that it cannot conceivably have a purpose that is reasonably understood.

4.46 Three specific sectors seeking exemptions - electricity and gas suppliers; telecommunications suppliers; and architects and engineers – are discussed.

Electricity and gas supplies exemption from 'fitness for purpose' guarantee

4.47 Section 65 of the bill provides an exception from the guarantee that the service supplied be fit for a particular purpose for the suppliers of gas, electricity and telecommunications in certain instances.

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26 *Submission 20,* p. 2.

4.48 Energex submitted that the electricity supply in Australia is unique, warranting an exemption:

> Given the unique nature of electricity and manner in which it is supplied, in the event of a failure, it is difficult to determine the cause of the failure. In many cases, the failure is due to circumstances beyond the reasonable control of the distributor. Electricity specific laws at national and state level make adequate provision for consumer protection.[27]

4.49 With respect to telecommunications and other utilities, Treasury stated 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.[28]

4.50 Energex asks for further protection under the proposed regulations, recommending that the bill be amended to 'make it clear' that consumer guarantee provisions do not apply to the supply or connection of electricity services.[29] In their submission, Energex stated that introduction of the bill will:

> …result in overlapping and potentially conflicting legislative regimes leading to unnecessary regulatory compliance burden.[30]

4.51 The Energy Retailers Association of Australia disagrees with the view put by Energex and in supporting the national regulation of electricity markets, recommends a corollary rescinding of state based regulation:

> As most retailers operate in more than one retail market, the ERAA sees the use of generic consumer laws as being preferable to the implementation of state based regulations that differ across jurisdictions.[31]
>
> As noted in previous submissions relating to the ACL, the ERAA remains concerned that there appears to have been little consultation with the officers working on the NECF [National Energy Customer Framework] in the framing of the ACL. While the Explanatory Memorandum makes

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27 Energex, *Submission 8,* p. 2; electricity specific laws referred in Submission 8 include the *Electricity Act 1994* (Qld) and Electricity Regulations 2006; *Electrical Safety Act 2002* (Qld) and Regulations; National Electricity Law; Queensland Electricity Industry Code; and National Electricity Rules.

28 Treasury, *Submission 46,* p. 24.

29 Energex, *Submission 8,* p. 2.

30 Energex, *Submission 8,* p. 2.

31 Energy Retailers Association of Australia, *Submission 9,* p. 4.

> reference to the NECF process, there appears to be little evidence as to how the ACL will align with the NECF.[32]

Committee view

4.52 The Committee notes that 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.

Telecommunications suppliers exemption from 'fitness for purpose' guarantee

4.53 Australian Communications Consumer Action Network (ACCAN) provided five reasons that the consumers they represent disagreed with the policy of exemptions:

> 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, exemptions such as these have proved notoriously difficult to reverse.[33]

4.54 Consumer advocates, CHOICE, agreed with the arguments and policy position of ACCAN.[34]

4.55 The *Telecommunications (Consumer Protection and Service Standards) Act 1999 (Cth)* (CPSS Act) provides for consumer protection in respect of telecommunication services. Part 5 of the CPSS Act provides for a Customer Service

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32 Energy Retailers Association of Australia, *Submission 9,* p. 4.

33 Ms Elissa Freeman, Director, Policy and Campaigns, Australian Communications Consumer Action Network, *Proof Committee Hansard,* 30 April 2010, p. 2.

34 Mr David Howarth, Legal Policy Officer, CHOICE, *Proof Committee Hansard,* 28 April 2010, p. 9.

Guarantee in respect of the supply of telecommunication services. To provide an efficient mechanism for dealing with mass claims, the CPSS Act allows for the Australian Communication and Media Authority specifying a scale of damages for contravention of service standards. For example, a payment of $14.52 is specified for each of the first five days of delay in effecting a repair to a residential telephone service, followed by $48.40 for each subsequent day. This approach allows consumers to avoid the cost and inconvenience of court proceedings to recover amounts lost as a result of the failure of a telephone service.

Committee view

4.56 The Committee recommends caution in applying exemptions to telecommunications services, in particular telephone services, to remote areas and other types of connection problems in the ordinary course of business. Also, the Committee finds that products (such as handsets) used in conjunction with connection services should continue to be covered under the guarantee and that no regulation made under section 65 should limit any of the consumer guarantees relating to goods sold by telecommunications suppliers.

Architects and Engineers exemption from 'fitness for purpose' guarantee

Background to the exemption

4.57 Subsection 74(2) of the TPA currently provides consumers with an implied fitness for purpose warranty. In 1986 an amendment was made to this section giving engineers and architects a specific exemption from liability under this provision.

4.58 Treasury noted in its submission to the inquiry following the public hearings, that:

> …this exemption was included by the government in 1986 in order to secure passage of the *Trade Practices Revision Bill 1986* through the Senate.[35]

4.59 In 1986, Senator Janine Haines of the Australian Democrats gave one particular reason that consumers who engaged architects and engineers not be able to seek remedy under this provision.

> The issue with regard to architects and engineers is we believe that they fall into a special category as far as their relationship to their client is concerned; that is that, while they come up with designs, specifications and so on in accordance with whatever a particular client wishes, in the implementation of those specifications, designs, contracts and so on a fairly significant third party intervenes.[36]

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35 Treasury, *Submission 46*, p. 22, citing, The Hon. Mr L. F. Bowen, Attorney-General, *House of Representatives Hansard*, 2 May 1986, p. 269.

36 Senator Janine Haines, *Senate Hansard*, 30 April 1986, p. 2053 cited by Consult Australia, *Submission 14*, p. 6.

Reform proposed in the bill

4.60 Section 61 of the bill does not contain the exemption from its parent provision in the TPA. Where a consumer, in negotiations to purchase the service or product, has expressed a desire for a particular result section 61 provides a guarantee that the services or product will be of such a 'nature, and quality, state or condition, that they might reasonably be expected to achieve that result'.

4.61 The section does not apply where it was unreasonable for the consumer to rely on the skill or judgment of the supplier, or the consumer chose not to rely upon their skill or judgment.

4.62 The explanatory memorandum gives an example of the intended operation of the provision:

> ...the installation of lighting that will allow a room to be used as a home office. If the electrician installs lighting that is too dull to allow reading of documents and books in that room, the guarantee as to fitness for a particular purpose has not been complied with.[37]

4.63 This use of a building services example demonstrates a deliberate policy decision taken by the Government to allow consumers to seek remedies from those providing professional services for the construction of a consumer's home.

The merits of an exemption in a consumer guarantees scheme

4.64 Engineering and architecture peak bodies[38] have asked the Committee to recommend the exemption previously included be reintroduced into the bill and provided a number of reasons in support of this recommendation.

4.65 Consult Australia, representing consulting companies that provide professional services to the built and natural environment, argued:

> ...If this exemption is removed it will create substantial adverse consequences for engineering and architectural professionals and businesses providing such services in Australia.[39]

4.66 The Australian Institute of Architects also argued that there is no reason to regulate their industry:

> There is no evidence that an additional head of liability is necessary or that it addresses a systemic failure in the recourse consumers presently have for loss attributed to architects, through negligence, misleading and deceptive conduct under s.52 or s.51A of the TPA, and/or contractual claims.[40]

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37 *Explanatory memorandum,* p. 192.

38 Consult Australia, *Submission 14*; Australian Institute of Architects, *Submission 16.*

39 *Submission 14,* p. 3.

40 Australian Institute of Architects, *Submission 16,* p. 3.

4.67 This claim is difficult to assess as given the exemption there was no way for dissatisfied customers to take action. Removing the exemption is the only way to test the extent of customers who would like to take action.

4.68 Treasury argue that the starting point for considering exemptions to guarantees which protect consumers ought to be whether such an exemption is of public benefit, not whether there is a proven case for its removal from a previous bill.

4.69 Treasury referred to the recommendation made by the Commonwealth Consumer Affairs Advisory Council (CCAAC), which had consulted with professional architecture and engineering bodies:

> CCAAC considered this issue and determined that the exemption should be removed. CCAAC noted that the same factors that apply to architects and engineers apply to many other service industries. CCAAC recommended that the exemption be removed '...in the interests of simplicity, uniformity and fairness.' It should also be noted that there is no exemption for architects and engineers in relation to consumer guarantees in New Zealand's *Consumer Guarantees Act*, which has been in place since 1993.[41]

4.70 Consult Australia argued in favour of maintaining the exemption, firstly, because consumers are adequately protected by other provisions in the current TPA (and proposed consumer guarantees) which form part of the bill, including the law of negligence and contractual terms and conditions.

4.71 Treasury agreed that these protections exist under the TPA, but submitted that the new drafting under the bill gives better protection by being easier for consumers to access and understand:

> A significant benefit of the consumer guarantee is that it is written on the face of the law. As such, a statutory guarantee is more accessible to consumers compared to actions for negligence, which usually requires the services of a lawyer to understand. This is a different protection to the common law notion of negligence, which provides consumers with protection when services are provided in a way which does not meet the standard of care required. The consumer guarantee is directed to ensuring that the services are provided in accordance with the purpose expressed by the consumer. A particular service might be provided in a way that is not negligence but may, nevertheless, fail to achieve the purpose that a consumer made known to a supplier.[42]

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41 Treasury, *Submission 46*, pp 22-23. Treasury also cited: National Education and Information Taskforce, *National Baseline Study on Warranties and Refunds*, October 2009, p. 20; New Zealand Ministry of Consumer Affairs, *National Consumer Survey* 2009, A Colmar Brunton Report, pp. 3 and 5; See, for example, the New Zealand Ministry of Consumer Affairs website, http://www.consumeraffairs.govt.nz/consumerinfo/cga/.

42 Treasury, *Submission 46*, p. 22.

4.72 Treasury also rejected the notion that these protections are adequate for consumers who engage an architect or an engineer for what is often the biggest investment of their lives.

4.73 Treasury also argue that professional services which have subject elements are provided by a range of professionals who have always been liable under the TPA:

> The argument has been made to the Committee that architectural services are substantially different to any other services due to their sometimes creative or prototypical nature. The existing law has applied to every other occupation in Australia for 24 years and many other occupations also involve elements of a creative or prototypical nature. For example, portrait artists, interior and exterior designers, landscape gardeners, cosmetic surgeons and event planners, along with the tradespeople they may work with, are all subject to the requirements of fitness for purpose currently provided in the TPA.[43]

4.74 Engineering and architecture industry representatives also submitted that building and construction projects involve (sometimes multiple) third parties to deliver the final product experienced by the consumer. They argued that this creates a number of difficulties in relation to guaranteeing the work of other parties, and a higher level of risk, leading to higher insurance costs.

4.75 The Australian Institute of Architects argued that the service provided by architects and engineers is 'unlike the provision of many professional services' because it 'almost always results in a physical product – a home'.[44]

4.76 It was also suggested by peak bodies that building projects change in scope over the course of a build, which peak bodies suggest is a significant driver of cost, partly due to litigation as a result. They argue that a guarantee as to the 'fitness for purpose' may allow a consumer to change their mind as to the 'purpose' of the design, or the time and cost constraints imposed on the professional even though these factors affect the service provided.[45]

4.77 Consult Australia stated in their submission:

> Exposing engineers and architects to fitness for purpose warranties will only inflate the wastage further, driving competition out of the industry as many businesses will not survive in such circumstances. Removal for the exemption will particularly impact small businesses working in the residential sector because of increased risk, costs and disputation. [46]

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43 Treasury, *Submission 46,* pp. 22-23.

44 Australian Institute of Architects, *Submission 16,* p. 6.

45 Consult Australia, *Submission 14,* p. 5.

46 Consult Australia, *Submission 14,* p. 5.

4.78 They further argued that these changes could have a wider effect on housing affordability if the cost of professional services increases is compounded by reduced competition in the small business sector.

4.79 The New Zealand *Consumer Guarantees Act 1993* specifically excludes agreements between suppliers and consumer that acquire services for the purposes of a business. Consult Australia notes that this explicit exemption has not been carried across into the bill.[47] Such transactions, however, would be excluded on the basis that under section 3 a person is taken to have acquired particulars if the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption. Under subsection 3(2) subsection (1) does not apply if the goods are used in trade or commerce. This has the same effect as the New Zealand exemption.

> Consult Australia believes that there is no robust policy basis for removal of the exemption. Thirty three submissions were made to the CCAAC inquiry. Consult Australia understands that no objections were raised in the consultation process to the exemption for architects or engineers and that only Consult Australia (then ACEA and the Australian Institute of Architects) made mention of the exemption in subsection 74(2). Consult Australia also understands that further analysis into the effects of removal of the exemption has not been conducted.[48]

4.80 The Institute of Architects conceded that other professional services are captured by the guarantee under section 61:

> Many of the arguments we will put for continuance of the exemption could equally be made for bringing other professional services providers within the exemption of the current s,74(2), or removing s.74(2) of the TPA and by inference s.61 of the Bill altogether.[49]

4.81 Ms Deborah Healey, an academic and consumer protection expert, responded to questions on whether the work of engineers or architects was too complex to be captured by the bill:

> ... these people are professionals and this is their job. They are significantly more trained than a person selling a toaster. It is something they are trained for. But, in any event, if an architect has done a reasonable job it does not necessarily have to satisfy all the whims of the customer. It is a matter of striking a balance. There are any number of things that are incredibly complex. If we sought to exclude all complex things from the ambit of this, we would just have toasters left![50]

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47 *Submission 14*, p. 4.

48 Consult Australia, *Submission 14*, p. 5.

49 Australian Institute of Architects, *Submission 16*, p. 5.

50 Ms Deborah Healey, *Proof Committee Hansard*, p. 35.

4.82 Treasury responded to a question from the Committee in relation to the architects' and engineers' concerns:

> The purpose of the guarantee is to set out in fairly clear language on the face of the statute what the required standard of business conduct is, so that services provided are fit for the purpose that was disclosed or are clearly implied from the interaction between the two parties. In that sense, if it encourages businesses to make much clearer the basis on which they are providing their service or the basis on which they might provide advice, that can only be a good thing. I do not think we accept the proposition that it is somehow a more nebulous concept than the law of negligence for a consumer. Few consumers would really have an appreciation of what the law of negligence is, given that it is a common law concept which has been developed over the past 90-odd years by the courts and given that this obligation applies to other professions, to other trades and to other businesses in relation to the services they provide, some of which are fairly clearly analogous to the sorts of situations that architects and engineers find themselves in.[51]

4.83 Treasury disagreed with Consult Australia, that architects and engineers may be held liable for work, product or conduct of other third parties, such as builders, as the guarantee applied to the services of the architect or engineers:

> …later failures by a builder, plumber or carpenter, would give rise to liability of the builder or other party, not the architect or engineer. This has not created the sorts of problems, as claimed by representatives of architects and engineers, for other occupations in a similar position.[52]

4.84 Treasury likened the position of architects and engineers to other creative professionals and industries, such as an interior designer, landscape gardener, labourers or a fabricator, and argued that each provider is liable for their service, but:

> ...not the contractually unrelated services of another party. Further, section 267 of the ACL provides explicitly that action is not possible against a supplier of services if an act, default, omission or representation is made by any person other than the supplier or an agent or employee of the supplier.[53]

4.85 Treasury also commented that the merits of the 1986 amendment, when the statutory warranty was a new legislative concept and concerns about increased costs to consumers as a result of the warranty were untested, are no longer valid:

> ...the practical application of the statutory warranty has shown that such concerns have not been borne out with respect to all other occupational groups. Every other occupational grouping has been subject to fitness for

51 Mr Simon Writer, Treasury, *Proof Committee Hansard,* 30 April 2010, p. 40.

52 Treasury, *Submission 46,* p. 23.

53 Treasury, *Submission 46,* pp. 22-23.

> purpose warranties since 1986, without the effects that are claimed for architects and engineers.[54]

4.86 The provision has been read very broadly by the professional representatives, as relating to a large proportion of the work that architects and engineers do. Treasury sought to limit the exposure of liability, stating:

> The guarantee only applies to services provided directly to consumers, not projects where a consumer contracts only with a developer for a whole package and the developer uses an architect or engineer, nor commercial projects involving business parties. Accordingly, the provision is targeted at providing protection for consumers who acquire services from engineers or architects.[55]

Committee view

4.87 The Committee does not find that the nature of the services rendered by engineers and architects, or the resulting product – their design concept - can be sufficiently distinguished from the professional advice, due diligence, project management and client communication duties of other professionals, such as plastic surgeons, interior designers, landscape gardeners or lawyers.

4.88 The Committee considers that the product received by the consumer from architects and engineers is a design concept rather than the building itself, which limits their exposure to liability for the purpose of the design, rather than interpretation or installation of the final construct. The designer of a product which is considered to have achieved a result of a kind *reasonably* required by the client would not be liable.

54 Treasury, *Submission 46,* p. 23.

55 Treasury, *Submission 46,* p. 23.

Chapter 5

Unsolicited selling

5.1 This chapter examines the Australian Consumer Law's (ACL) unsolicited consumer agreement provisions. There are four key issues:

- the definition of 'unsolicited consumer agreements' and concerns that this definition is too narrow to protect vulnerable consumers from 'solicited' door-to-door selling;
- the restriction on the hours during which an unsolicited consumer agreement can be negotiated;
- the proposed 10 business day cooling off period; and
- the prohibition of supplies to the consumer during the cooling off period.

Context of the provisions

5.2 Schedule 1, Division 2 of the bill relates to unsolicited consumer agreements. Sections 69–72 gives means of terms; sections 73–77 establish various negotiating provisions; sections 78–81 relate to requirements for unsolicited consumer agreements; sections 82–88 refer to terminating the agreements; and sections 89–95 are miscellaneous provisions. With reference to the provisions for negotiating an unsolicited consumer agreement, Treasury explained:

> The unsolicited selling regime seeks to achieve a balance between the interests of consumers—particularly those of vulnerable consumers who are often targeted through aggressive selling techniques such as high pressure sales —and those of businesses. Various published studies indicate that the potential for abuse in this area is considerable. The unsolicited selling provisions, including those provisions identified above, have been developed so as to balance an appropriate level of consumer protection with business compliance costs and also avoid the potential for loopholes to be exploited.[1]

The definition of unsolicited consumer agreements

5.3 Schedule 1, section 2 of the bill defines unsolicited goods as goods sent to a person without any request made by the person or on his or her behalf. Section 69 states:

> (1) An agreement is an unsolicited consumer agreement if:
>
> (a) it is for the supply, in trade or commerce, of goods or services to a consumer; and

1 Treasury, *Submission 46*, p. 26.

(b) it is made as a result of negotiations between a dealer and the consumer:

(i) in each other's presence at a place other than the business or trade premises of the supplier of the goods or services; or

(ii) by telephone;

whether or not they are the only negotiations that precede the making of the agreement; and

(c) the consumer did not invite the dealer to come to that place, or to make a telephone call, for the purposes of entering into negotiations relating to the supply of those goods or services (whether or not the consumer made such an invitation in relation to a different supply); and

(d) the total price paid or payable by the consumer under the agreement:

(i) is not ascertainable at the time the agreement is made; or

(ii) if it is ascertainable at that time—is more than $100 or such other amount prescribed by the regulations.

(2) An invitation merely to quote a price for a supply is not taken, for the purposes of subsection (1)(c), to be an invitation to enter into negotiations for a supply.

(3) An agreement is also an unsolicited consumer agreement if it is an agreement of a kind that the regulations provide are unsolicited consumer agreements.

(4) However, despite subsections (1) and (3), an agreement is not an unsolicited consumer agreement if it is an agreement of a kind that the regulations provide are not unsolicited consumer agreements.

Concern with the definition of 'unsolicited consumer agreements'

5.4 Some submitters expressed concern that the narrow definition of 'unsolicited selling' would fail to protect vulnerable consumers adequately.

5.5 The Consumer Action Law Centre contrasted the bill's provisions on unsolicited selling with the terms of the Victorian *Fair Trading Act 1999*. The Victorian legislation does not distinguish between unsolicited and solicited in-home sales, but focuses solely on the context in which the interaction is occurring. The Centre noted in its submission that many in-home sales are 'solicited' by the purchaser, 'who has usually been approached from a supermarket booth, or has provided their details in a competition, and then been 'followed up' by the supplier for the purpose of arranging a time to visit'.[2]

5.6 The Centre argued in its submission that the dichotomy between 'unsolicited' and 'solicited' in-home selling is false and that both techniques share common attributes. These include:

2 Consumer Action Law Centre, *Submission 28*, p. 13.

- that consumers cannot walk away from the situation;
- that traders use moral pressure to try to create an obligation for reciprocity;
- that the relationship between the trader and the consumer is not ongoing so the consumer has to make a decision quickly (i.e. they cannot simply leave the shop, and come back later), and;
- that in-home traders commonly play on the scarcity principle to encourage the sale—i.e. the goods are not available elsewhere.[3]

5.7 The Centre also cited research from Dr Paul Harrison of Deakin University which showed that in terms of a consumer's vulnerability to the marketing techniques of in-home traders, the disadvantage can be exacerbated if the visit is 'solicited'. The research showed that consumers may be more susceptible to high pressure sales techniques when the consumer has extended an invitation for the sales person to visit, than when they knock on the door unannounced.[4]

5.8 Legal Aid Queensland (LAQ) put a similar argument. It told the Committee of its concern that where traders are able to secure solicited agreements, vulnerable consumers will not be protected by the unsolicited selling provisions of the bill. LAQ's Mr Paul Holmes noted that door-to-door traders are able to avoid the provisions of the Queensland *Fair Trading Act 1989* which are similar to the terms of the bill. He gave the following recent examples:

> …a consumer receives a notification that they have won a dinner invitation featuring a guest presenter on the latest research on sleep deprivation. This led to the consumer signing a contract for a $6,000 financed bed. Secondly, a survey was sent from a child's school, encouraging the parent to undertake an independent assessment of the child's literacy or numeracy. This led to a maths software contract being signed. There was a free cookbook offer at a stand in a shopping centre, which led to a financed cookware contract in the region of $5,000. Perhaps most appalling, there was an approach made to a child at a shopping centre while the mother was putting her weekly shopping through the checkout. The man approached the child who had walked 10 metres further away and then waited for the parent to approach him. Then he engaged her in discussion about the child's proficiency at numeracy…three phone calls later, she finally gives an invitation for the maths software salesman to attend the home to sell her the product.[5]

5.9 LAQ's concern, therefore, is that the bill's focus on the supply of goods where there is no invitation into the consumer's home means there is no protection from traders who solicit invitations into the home. In LAQ's opinion, there is no difference

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3 Consumer Action Law Centre, *Submission 28,* p. 14.

4 Consumer Action Law Centre, *Submission 28,* p. 13.

5 Mr Paul Holmes, Consumer Protection Unit, Legal Aid Queensland, *Proof Committee Hansard,* 28 April 2010, p. 18.

between the pressure felt by vulnerable consumers from an unsolicited invitation into the home by a door-to-door trader and the high-pressure sales tactics of a trader when the invitation is obtained.[6]

5.10 Treasury attempted to allay these concerns. It argued in its submission that the unsolicited selling provisions will regulate the making of unanticipated offers to supply goods and services to a consumer and the agreements arising from these offers, regardless of whether the initial invitation by the consumer was for another purpose, or relates to the supply of a related or unrelated product or service.[7]

Options for reform

5.11 Both Legal Aid Queensland and the Consumer Action Law Centre recommended amending the bill to define the term 'unsolicited'. Specifically, they support using section 69(3) of the bill[8] to insert a regulation currently being considered in the draft regulations of the *National Credit Consumer Protection Act 2010*:

> The exemption [to be licensed] does not apply to a person if the supplying of goods or services to the consumer is the result of unsolicited contact with the consumer.
>
> ...unsolicited contact includes circumstances in which:
>
> (a) a consumer is contacted in relation to the supply of goods or services after providing his or her name or contact details to a person, and:
>
> (i) the consumer did not provide his or her name or contact details for the predominant purpose of being contacted in relation to the supply of those goods or services; or
>
> (ii) the consumer is not contacted within a reasonable period after making an inquiry in relation to the provision of those goods or services; or
>
> (b) a consumer is contacted, in relation to the supply of goods or services, on or from business premises that are not physically separate from premises regularly used by consumers for purposes other than being contacted in relation to the provision of those goods or services.[9]

5.12 In addition, the Consumer Action Law Centre recommended inserting a third category—(c)—to cover circumstances in which it is the consumer who calls the dealer in response to a 'missed call' (from the dealer) on their telephone. It reasoned:

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6 Mr Paul Holmes, Legal Aid Queensland, *Proof Committee Hansard*, 28 April 2010, p. 19.

7 Treasury, *Submission 46*, p. 27.

8 Section 69(3) states:

> An agreement is also an unsolicited consumer agreement if it is an agreement of a kind that the regulations provide are unsolicited consumer agreements.

9 Consumer Action Law Centre, *Submission 28*, pp. 14; Mr Paul Holmes, Legal Aid Queensland, *Proof Committee Hansard*, 28 April 2010, p. 19.

> …it would be unreasonable if a consumer unknowingly responding to a missed call that represented a unsolicited marketing contact and then entering into an agreement for the supply of goods or services was not entitled to the same level of protection as if they answered the initial unsolicited marketing call.[10]

5.13 Legal Aid Queensland suggested a provision in the bill whereby all contracts which are negotiated away from a supplier's business premises are subject to the door-to-door provisions. It noted that this type of protection is currently offered in statute in the United Kingdom.[11]

5.14 It would seem that this type of general provision is consistent with the Government's intent in drafting the unsolicited consumer agreement provisions. Treasury informed the Committee that:

> The legislation is designed to deal essentially with transactions which take place outside of a retail environment. Traditionally this has been conceived of in terms of door-to-door sales, which has historically been a way in which direct sales have been made. That is obviously less common, and there are more sophisticated and different approaches taken to these issues. The fundamental policy issue that is being addressed, though, is that the concern is around the kind of vulnerability that exists because of a change in the situation that a consumer finds themselves in. We all know that when we go into a shop we are receptive to the retail experience and to potentially being sold something. When we are at home, or in a social situation—and a party plan is perhaps a good example of that, where there are personal relationships involved, and perhaps social obligations at play in addition to the retail context—a different approach to regulation may be required. For that reason this applies in relation to unlisted sales context.[12]

Committee view

5.15 The Committee believes it is important that the bill addresses those areas of unsolicited consumer agreements where dealers have, in effect, sought to solicit a consumer agreement with a view to by-passing the consumer protections. It is concerned that this type of practice is currently occurring. Accordingly, the Committee supports inserting provisions into the bill which define the meaning of 'unsolicited consumer agreement' based on the proposed draft regulation of the *National Credit Consumer Protection Act 2010* (see paragraph 5.11). In the Committee's view, these safeguards are too important to be left to regulation.

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10 Consumer Action Law Centre, *Submission 28*, p. 15.

11 Mr Paul Holmes, *Proof Committee Hansard*, 28 April 2010, p. 19.

12 Mr Simon Writer, *Proof Committee Hansard*, 30 April 2010, p. 34.

Recommendation 6

5.16 The Committee recommends that the bill defines an 'unsolicited consumer agreement' as to include circumstances in which consumers are contacted (and contact dealers) through indirect means. This should include circumstances:

- **where a consumer is contacted in relation to the supply of goods or services after providing his or her name or contact details to a person, and the predominant purpose for providing those details was not to supply those goods or services; and**
- **where a consumer contacts a dealer in response to a 'missed call'.**

Permitted hours for negotiating an unsolicited consumer agreement

5.17 Section 73(1) of the bill sets out the hours during which a dealer must not call on (as opposed to telephoning) a person for the purpose of negotiating an unsolicited consumer agreement. These are:

(a) at any time on a Sunday or a public holiday; or

(b) before 9 am on any other day; or

(c) after 6 pm on any other day (or after 5 pm if the other day is a Saturday).

5.18 Currently, a dealer is able to call on a person up until 8 pm on a weekday: the bill will prohibit this activity.

Concerns with the restriction on field sale hours

5.19 The Energy Retailers Association of Australia expressed concern at the bill's proposal to restrict the hours of unsolicited selling activity. Their executive director emphasised the importance and the effectiveness of door-to-door selling in the energy retail industry:

> The reason that door-to-door is therefore important in terms of offering that choice is that for a lot of consumers if a better deal is provided to them and the switching process is quite convenient—as it is by signing a contract at the door—they will often access better deals and lower prices.… The Australian Energy Markets Commission for instance reviewed the market here in Victoria, the most competitive in the world and certainly the most competitive in Australia in terms of customer switching as my graphs show, and they used the term ‘energy purchasing, the low-involvement decision’. People are passive. If nothing is done the default option prevails. But if a better deal is offered to them and it is made easy for them to switch, they

> do. And the easiest way to help them switch is through door-to-door sales. That is why that has been the chosen means.[13]

5.20 The Association also noted that in Victoria around 20 to 25 per cent of the market is held by companies that did not exist four or five years ago. Of these companies, around 55 per cent of their customers were acquired by door-to-door sales:

> The newer you are to the market the lower your brand recognition and sometimes the smaller the company you are. How do you build consumer awareness? How do you get customers? Door-to-door is the most important means because if people do not know who you are they are not necessarily going to approach you or be attracted to any advertising or direct mail.[14]

5.21 Given the importance of door-to-door techniques in shaping consumer decisions, the Association expressed concern at the bill's restriction on unsolicited selling hours, and argued that 'some flexibility' in the application of those hours might be appropriate. For example:

> Perhaps there would be situations where for instance there may be a door-knocking occur at 5.30 pm and the person at home may say, 'I am actually not the account signatory.' Of course we are supposed to deal with the person who holds the account because if you are not the account holder you cannot transfer supplier. They may say, 'Can you come back when my husband—or wife—is home at 7.30 pm.' If that can be allowed I think that is important to the dynamic of competition and door-to-door in our industry. We hope there is some discretion in the application of that while recognising the intent is to ensure that door-to-door is not a hassle to people and is occurring at very inconvenient times, or times that are very unwelcome on the part of the vast majority of the community.…[15]

5.22 Salmat, Aegis and CPM voiced their opposition to section 73 of the bill on the same grounds. Salmat pointed out that in every jurisdiction bar Queensland, field sales are permitted up to 8 pm on a weekday:

> These hours accommodate the requirements of busy families where both parents work and would not make it home before 6 pm. As I indicated earlier, the benefit of field sales in terms of choice and competition is clear. Busy working families should at least be given the opportunity to agree to hear from a sales representative if they want to or indeed to say no if they are not interested. There is no doubt that this change to consumer law in Australia will have a significant impact on the viability of this sales channel and in our opinion will achieve little additional benefit to consumers.[16]

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13 Mr Cameron O'Reilly, *Proof Committee Hansard*, 29 April 2010, pp 2 and 5.

14 Mr Cameron O'Reilly, *Proof Committee Hansard*, 29 April 2010, p. 5.

15 Mr Cameron O'Reilly, *Proof Committee Hansard*, 29 April 2010, p. 4.

16 Mr Joshua Faulks, *Proof Committee Hansard*, 29 April 2010, p. 23. See also, Mr Garry Smith, *Proof Committee Hansard*, 29 April 2010, p. 25.

5.23 Salmat noted that field sales is 'an industry that sort of mobilises itself in the field from typically 4 pm through to 8 pm'[17] and claimed that the bill effectively cuts out 50 per cent of the industry's operating time. The potential consequence of this cut was put to the Committee by CPM Australia:

> If we were to lose that opportunity to engage with consumers between 6 pm and 8 pm what that might do is actually inflate our costs so that we would have to pass that higher cost on to our clients. We fear that may increase the cost offered to the consumer which therefore may become uncompetitive by nature.[18]

5.24 The Direct Selling Association of Australia forecast more dire consequences from the unsolicited selling provisions:

> The proposed unsolicited selling provisions will destroy the business models operated by DSAA members. The lives of many Australians involved with the industry will be adversely affected and there will inevitably be unemployment consequences. The effect of the proposals will be to deny consumers choice.[19]

Committee view

5.25 The Committee believes the restriction in the permitted hours for negotiating an unsolicited consumer agreement is justified. It considers the field sales industry's fears of higher product prices and industry unemployment are an insufficient counterargument to the householders' interests in relation to safety and freedom from nuisance.

Section 73(2)

5.26 Section 73(2) of the bill states:

> Subsection (1) does not apply if the dealer calls on the person in accordance with consent that:
>
> (a) was given by the person to the dealer or a person acting on the dealer's behalf; and
>
> (b) was not given in the presence of the dealer or a person acting on the dealer's behalf.

5.27 Salmat was also critical of this section of the bill, arguing that consumers should be able to give voluntary consent to a sales representative to come back at a more convenient time. If the permitted calling hours are further reduced the ability to give voluntary consent to call at another time becomes even more crucial:

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17 Mr Gary Smith, *Proof Committee Hansard*, 29 April 2010, p. 26.

18 Mr Gingkai Tan, *Proof Committee Hansard*, 29 April 2010, p. 26.

19 Direct Selling Association of Australia, *Submission 17*, p. 1.

> It seems ridiculous that if a consumer says, 'I am interested but can you come back later?', that the sales representative will have to reply, 'I am sorry, but you cannot give me that consent face to face. I will have to go away and call you at another time.' The unintended consequence of this provision is that the consumer is inconvenienced by having to receive another call and the sales representatives and the industry are subjected to a further unnecessary compliance cost. We would argue strongly that section 73(2) should be deleted and replaced with a provision that permits the consumer to give consent face to face during the permitted calling hours.[20]

Committee view

5.28 Treasury's view is that section 73(2) of the bill is needed to reduce the incentives for traders to use unfair conduct, such as coercion and harassment, to avoid the permitted calling hours provisions.[21] The Committee agrees that the provision is necessary and appropriate.

Cooling off periods

5.29 Currently, state and territory jurisdictions provide cooling off periods for unsolicited consumer agreements of 10 days or 5 clear business days.[22] Section 82 of the bill changes the cooling off period to 10 business days. This timeframe is known as the termination period during which the consumer has the opportunity to reverse his/her decision, cancel the contract and legally withdraw from it.

5.30 Treasury explained to the Committee the rationale for a cooling off period for unsolicited consumer agreements:

> …we are talking about something that is not a conventional retail transaction and there are pressures which consumers may face in those transactions which suggest the need for a cooling-off period. For that reason, in situations where goods might be provided there is then an additional obligation in that you already have the goods. To go back to, for example, your friend who has hosted this party and say, 'Actually, I don't want them; I want you to take them back and deal with that inconvenience,' may be an issue. The point of a cooling-off period is to provide a genuine hiatus to enable a person to rethink the transaction in the light of day and to make a more reasoned assessment of whether or not they actually want to make that purchase. There are a very wide range of products which are sold here and the committee has heard about those, some of which are quite expensive and some of which have linked credit arrangements and can be quite expensive for people to deal with, particularly when they do not

20 Mr Joshua Faulks, *Proof Committee Hansard*, 29 April 2010, p. 24.

21 Treasury, *Submission 46*, p. 26.

22 The only jurisdiction with a cooling off period of 5 clear business days is NSW (*Fair Trading Act 1987 (NSW)* s 40E(1)).

> understand the full implications at the time at which the product is sold to them.[23]

5.31 However, various submitters expressed concern at the logistics of the bill's cooling off provisions. Telstra told the committee of its concern that the 10 business day cooling off period is overly complex. It argued that the provision requires staff and customers to take into account public holidays and bank holidays in the different states. Telstra also noted that call centre staff are often in a different state to the customer in question. To illustrate the dilemma, it provided the following table.

Table 5.1: Variation in cooling off periods

Date on which unsolicited consumer agreement is made	Expiry of termination period	Effective length of termination period
Thursday 1 April 2010	19 April 2010	18 days
Thursday 8 April 2010	22 April 2010	14 days
Thursday 15 April 2010	30 April 2010	15 days

Source: Telstra, *Submission 11*, p. 6.

5.32 Telstra told the Committee that a provision of 10 days is much easier for both consumers and staff to apply, and it still gives the consumers 'a lot of time' to make an informed decision.[24] However, under further questioning, Telstra told the Committee that:

> If the decision is 10 working days then we will work our way through it. There is no issue. The point that we made was that on the consumer side the complexity between 10 clear days and 10 business days is not always there, so in terms of informing our consumers, if we can make it easier at any step in the whole process, then we would like to do that.[25]

5.33 The Consumer Action Law Centre gave a markedly different view on the 'cooling off' issue. It argued that cooling periods are 'usually limited in the protection they can offer'. It noted that consumers are often reticent to admit a mistake so soon after their initial decision. Instead of a cooling off period, the Centre proposed an 'opt in' process requiring the consumer to confirm a contract within, for example, 2–3 days of signing the contract:[26]

> …with the opt-in process, if the consumer genuinely wants the goods, it is a very small thing for them to pick up the phone and say, 'Yes. I confirm I'd like that new energy contract,' or 'Yes, I confirm I would like that maths

23 Mr Simon Writer, *Proof Committee Hansard*, 30 April 2010, p. 34.

24 Ms Jennifer Crichton, *Proof Committee Hansard*, 29 April 2010, p. 14.

25 Mr James Shaw, Director of Government Relations, Telstra, *Proof Committee Hansard*, 29 April 2010, p. 20.

26 Consumer Action Law Centre, *Submission 28*, p. 16.

> software,' and then away you go, contract formed. It also provides the capacity for the consumer just to not make the call if they do not want the goods, though they may have agreed at the time for all of the sorts of reasons that are outlined in our report. We would see that as the best approach to this issue.[27]

Committee view

5.34 The Committee sees some merit in the idea of an 'opt-in' process to confirm an unsolicited consumer agreement. It would empower the consumer and would be in the supplier's interests to make the consumer aware of the opt-in process. In the Committee's view, however, this option may be too cumbersome. If the consumer is not able to contact the supplier within the timeframe, the agreement would lapse. An opt-in clause may result in more inconvenience for consumers than a cooling off period. It may also result in dealers prompting the consumer—by phone, e-mail or text—to contact the dealer to confirm the sale.

5.35 The Committee believes the Government's intent in proposing a 10 business day cooling off period is to lengthen the current period in most state laws of 10 days. This gives more protection to consumers to consider whether they want to renege on an unsolicited agreement. The Committee does not consider that the bill's timeframe of 'business' days should cause any significant confusion or logistical complexity. States' public holidays can, and must, be taken into account in determining the cooling off period. (Alternatively, the cooling off period could be specified as 14 days.)

Section 86—prohibition of supplies during termination period

5.36 Under section 86 of the bill, if the agreement is an unsolicited consumer agreement a supplier is unable to supply goods to the consumer for at least ten clear business days after the purchase.

5.37 The Direct Selling Association of Australia claimed that the unsolicited consumer agreement provisions generally, and section 86 in particular, will 'destroy or irreparably harm businesses'.[28] It argued that the prohibitions on supply and payment within the cooling off period will mean larger businesses will not be able to sustain their business models and smaller businesses will be denied the cash flow needed to establish and grow profitable businesses.[29] Their executive director gave the following example to illustrate his objection to section 86 of the bill:

> One of our members, for example, in the cosmetics field is competing very actively with retail. They have managed now to get their logistics to the point where they can fill an order the same day. So someone makes an

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27 Ms Catriona Lowe, Consumer Action Law Centre, *Proof Committee Hansard*, 29 April 2010, p. 47. See also their *Submission 28*, p. 16.

28 Mr Tony Greig, *Proof Committee Hansard*, 30 April 2010, p. 9.

29 Direct Selling Association of Australia, *Submission 17*, p. 10.

> order one day and the cosmetics are supplied that day. Under this legislation they will be precluded from matching the competitive demands of retail by not being able to supply their product for at least 14 days and potentially 17 days…It is just competitive nonsense, in our view.[30]

5.38 The Committee asked whether the bill could be improved if the prohibition on supply remained but the consumer could choose to waive that protection and take receipt of the goods or services. He responded, 'No doubt it would'.[31]

5.39 Telstra also argued that customers should be able to receive their goods or services prior to the end of the termination period, if they so wish. It noted that many customers will want or need to receive their goods or services as soon as possible. Telstra gave the example of the customer agreeing during an outbound telemarketing call to recontract an existing service for another term. Under section 86, it argued, the service would then have to be suspended until the termination period expires.[32]

5.40 Salmat, Aegis and CPM put the same argument in opposition to section 86:

> Section 86 of the bill is relevant for many goods and services but may have the unintended consequence of inconveniencing some consumers. A good example of this is a consumer who chooses to purchase a newspaper subscription but may not want to wait two weeks for it to appear in their letterbox. We recommend that section 86 of the bill be amended to enable a consumer to consent to receive goods and services within the 10 business days cooling-off period whilst maintaining the consumer protections of the cooling-off period.[33]

5.41 The Consumer Action Law Centre recognised that consumers would probably expect to be able to receive the goods or services from an unsolicited consumer agreement before the termination period.[34]

Committee view

5.42 The Committee agrees that in certain cases—such as the supply of an electricity or landline telephone service—the consumer will want the service as soon as possible. However, it believes that most of these sales will be solicited agreements, where the consumer is in need of the service and contacts the supplier. In other cases such as cosmetics or cookware or other goods supplied by direct sellers it is possible that the exemption for purchases of under $100 may apply. As this limit is a regulation the Minister may approve a higher limit if it can be shown that customers and

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30 Mr John Holloway, *Proof Committee Hansard,* 30 April 2010, p. 11.

31 Mr John Holloway, *Proof Committee Hansard*, 30 April 2010, p. 13.

32 Telstra, *Submission 11*, p. 6.

33 Mr Joshua Faulks, *Proof Committee Hansard,* 29 April 2010, p. 24.

34 Ms Nicole Rich, *Proof Committee Hansard*, 29 April 2010, p. 47.

legitimate direct sellers would be unduly disadvantaged by this provision given the average value of such purchases.

Recommendation 7

5.43 The Committee recommends that the Minister review the $100 exemption limit after consultation with direct sellers, other direct marketers and other interested parties.

Chapter 6

Product Safety

6.1 The 2006 *Review of the Australian Consumer Product Safety System* by the Productivity Commission[1] proposed a requirement for suppliers to report products associated with death or serious injury,[2] which was further supported by the Commission's consumer policy report in 2008.[3] The bill implements these recommendations and will mean that for the first time Australia will have a nationally consistent scheme for product safety reporting and product recalls.

A national product safety system

6.2 Part 3-3 of the bill introduces a national consumer product safety regime for consumer goods and product related services, which replaces existing state and territory legislation on industry-specific products and compulsory recalls.

6.3 Division 1 outlines the way in which safety standards are to be determined and published by the relevant Commonwealth Minister. Division 2 provides for circumstances in which goods will be banned under the bill and the responsibilities of suppliers where a ban is affected by the Minister. Division 3 determines the circumstances in which the Commonwealth Minister may institute compulsory recalls of consumer goods and the notification requirements for suppliers where they initiate a voluntary recall of their product. Division 4 stipulates the contents of warning notices which may be published by the Minister.

6.4 Division 5, which proved the most contentious, introduces a new reporting regime which requires all suppliers – including manufacturers, importers, wholesalers and retailers of products – to provide written notice to the Minister 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.[4] This 'incident-based' reporting regime is both pre-emptive: suppliers of products 'of a kind' associated with death, injury or serious illness are bound by the requirement; and responsive to incidents as they occur.

6.5 A guide to the Australian Consumer Law described the work being done by regulators to implement the changes the bill involves, and changes to coordination across the group of regulatory agencies:

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1 Productivity Commission 2006, *Review of the Australian Consumer Product Safety System*, Research Report, Canberra. Recommendation 9.3, p. 211.

2 Freehills, *Submission 35*, p. 15

3 Productivity Commission 2008, *Review of the Australia's Consumer Policy Framework* (April 2008). Research Report, Canberra. Recommendation 8.2, p. 70.

4 Part 3-3, Division 5, section 13.

> The ACCC, ASIC and the State and Territory fair trading offices are negotiating a Memorandum of Understanding (MOU). The MOU will set out the administrative and enforcement relationships and protocols between the agencies, including in relation to product safety.[5]

Incident reporting

6.6 Sections 131 and 132 of the bill frame a new duty on suppliers to report incidents which may be associated with their products or product-related services. This is the first time Australia will operate a national 'incident reporting' regime. Section 131(1) of the bill states that:

> (1) If:
>
> (a) a person (the ***supplier***), in trade or commerce, supplies consumer goods of a particular kind; and
>
> (b) the supplier becomes aware that consumer goods of that kind have been associated with the death or serious injury or illness of any person;
>
> the supplier must, within 2 days of becoming so aware, give the Commonwealth Minister a written notice that complies with subsection (5).

6.7 Associate Professor Luke Nottage cautioned that reporting duties must be supported by adequate information systems within government to ensure consumers benefit from the policy:

> You have to have good information flows for the regulators to be able to do all those other things set out in the *Trade Practices Act* and now in the new bill, such as giving warnings to the public, imposing product bans for unsafe products and developing mandatory product and information standards. We also have to have good information flows for an effective product liability system, which is another mechanism that, through private action by injured individuals or sometimes businesses, encourages manufacturers and others to supply safe goods.[6]

6.8 On 15 April 2010, Consumer Affairs Minister Dr Craig Emerson launched a new clearing house government website, www.productsafety.gov.au, for the publication of information garnered through product safety information collected voluntarily or under duties provisions in the bill.[7] The website will be administered by the ACCC and will be the main vehicle for information to be conveyed to the public. Associate Professor Nottage's comments draw attention to the need for state and territory authorities to work closely with the ACCC to ensure reporting is timely,

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5 Treasury, *The Australian Consumer Law: A guide to provisions*, April 2010, p. 27.

6 Associate Professor Luke Nottage, *Proof Committee Hansard*, 28 April 2010, p. 2.

7 The Hon Dr Craig Emerson MP, 'New Push to Strengthen Consumer Safety', *Media Release*, 15 April 2010. http://minister.innovation.gov.au/Emerson/Pages/NEWPUSHTOSTRENGTHENCONSUMERSAFETY.aspx (accessed 21 April 2010)

accurate (including synthesising multiple reports of the same products or incidents) and based on verifiable information rather than competitive malice.

International comparisons – incident versus hazard reporting

6.9 Associate Professor Nottage recommended to the Committee that Australia use the opportunity of a national product safety system to introduce world's best practice. Professor Nottage said:

> …the Bill's draft provisions still do not meet contemporary best practice among major economies world-wide. This reflects a broader "design defect" in Australia's consumer law reform process, which has focused overwhelmingly on re-harmonising consumer protection nation-wide to reflect best practice among its states and territories. As well as broader parochialism, that focus (and the lengthy delays) suggests the decline of the consumer voice in Australian policy-making over the last decade, in contrast to most countries worldwide. The deficiencies in the Bill's provisions will leave problems not only for Australian consumers but also for consumers and suppliers of Australian products abroad, as overseas suppliers are increasingly subject to stricter accident disclosure standards yet unable to draw on as much information that Australian exporters will need to provide to their home country's regulatory authorities.[8]

Committee view

6.10 The Committee's view is that this bill is the first step towards enabling Australia to meet world's best practice standards in a range of consumer protection measures, including product safety, over the longer term. While international comparisons are helpful benchmarks for future bills, the Committee believes that synthesising the current array of laws nationally provides substantial benefit upon which future product safety reform can be based.

Claims that the reporting requirements are too broad

6.11 The Committee received a significant number of submissions critical of the drafting of section 131, particular with respect to term 'goods of that kind' and 'associated with'. Stakeholders claimed this created too broad a scope for consumer goods which would need to be reported to the regulator.

"Associated with"

6.12 Freehills expressed concern at the use of the phrase 'associated with', on the basis that it is not a phrase which has a given legal meaning, in the same way as

8 Associate Professor Luke Nottage, *Submission 26*, p. 2.

'caused by', or 'resulting from'. The various public consultation reports[9] have recommended a strengthened reporting system where suppliers are obliged to report occasions of products causing harm within the industry, without having to establish fault prior to doing so. While a number of policy research reports have used the term 'associated with' in making the recommendation to strengthen the reporting regime, none have discussed the effect of the term on legislative drafting. Freehills submitted that:

> None of the reports has examined the meaning of the term. By way of contrast, the Productivity Commission's 2006 report noted (at 224) that a 'further way this reporting requirement may impose a cost on business is through the uncertainty associated with determining what constitutes a "serious injury"'…The meaning of the phrase 'associated with' is imprecise. The term does not have a commonly understood meaning in the context of product safety.[10]

6.13 Industry groups were also concerned that the wording causes ambiguity, despite attracting pecuniary penalties for breach. The toy maker and importer, Hasbro Australian Ltd submitted:

> Hasbro is concerned that the proposed connection between the product and the serious injury or death – that there merely be an "association" between them – is too broad. Hasbro submits the focus of any reporting regime should be products, not incidents; specifically the focus should be on defects in products which present risks of serious injury or death...The proposed "association" test…would significantly increase the enforcement burden of government to review a large number of incident-based notifications...Hasbro considers the obligation to report should be triggered by information that a product *caused* the incident, rather than merely being *associated* with the incident.[11]

6.14 Freehills claim that a problem created by the drafting of the provision is that a duty to report now appears to exist:

> ...even if there is no suggestion or possibility that the goods caused or contributed to (in a legal sense) the death or serious injury or illness.[12]

6.15 There are exceptions to the duty imposed by section 131 (1) contained in subsection 2 of the provision. Subsection 131(2) states that subsection (1) does not apply if:

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9 Productivity Commission 2006, *Review of the Australian Consumer Product Safety System,* Research Report, Canberra. Recommendation 9.3, p. 211; Productivity Commission 2008, *Review of the Australia's Consumer Policy Framework* (April 2008). Research Report, Canberra. Recommendation 8.2, p. 70; Ministerial Council on Consumer Affairs', Report, *Review of the Australian Consumer Product Safety System,* August 2004, Canberra, p. 8.

10 Freehills, *Submission 35,* p. 16.

11 Hasbro Australia Ltd, *Submission 6,* p. 5.

12 Freehills, *Submission 35,* p. 15.

(a) it is clear that the consumer goods supplied were not associated with the death or serious injury or illness; or

(b) it is very unlikely that the consumer goods supplied were associated with the death or serious injury or illness; or

(c) the supplier is required to notify the death or serious injury or illness in accordance with a law of the Commonwealth, a State or a Territory that is a law specified in the regulations; or

(d) the supplier is required to notify the death or serious injury or illness in accordance with an industry code of practice that:

(i) applies to the supplier; and

(ii) is specified in the regulations.

6.16 Hasbro submitted, however, that the exceptions are unworkable, claiming:

> ...that sub-sections (2)(a) and (b), when read with sub-section (1), are confusing and contradictory.[13]
>
> In relation to sub-section (2)(b), the proposed exception where an association is "very unlikely" seems to contradict the explanation in the RIS that the time frame for reporting only commences once the supplier becomes aware that one of its products is associated with the serious injury or death, and the time frame for verifying this is excluded. The terminology "very unlikely" is also vague and likely to cause confusion.[14]

Products already covered by comprehensive reporting regulations

6.17 Peak bodies representing car manufacturers and the automotive industry were also critical of the duties created by sections 131 and 132 for reasons of duplication.[15] They proposed an industry-specific amendment to the wording of section 131(2)(c), which would preclude the car manufacturing industry from the obligations under section 131 where an accident and its cause have already been reported under state and territory regulations. They recommended to the Committee that the proposed scheme would see reports of all incidents involving motor vehicles flood the regulators, undermining the public interest benefit derived from incident reporting.

6.18 The Federal Chamber of Automatic Industries submitted:

> ...in relation to motor vehicles, a substantial Federal and State framework already exists which can readily provide the information sought by the Provisions – in a significantly more comprehensive manner than could be achieved by requiring suppliers of motor vehicles to report under proposed new sections 131 and 132. This framework includes comprehensive safety

13 Hasbro Australia Ltd, *Submission 6*, p. 5.

14 Hasbro Australia Ltd, *Submission 6*, p. 6.

15 Motor Trades Association of Australia, *Submission 24*, pp 3-4; Federal Chamber of Automotive Industries, *Submission 29*.

> related legislation and controls, together with incident reporting mechanisms, which provide for a comprehensive and effective means by which to collect the required information, in a manner which meets (and likely exceeds) the requirements and objectives of the Provisions.[16]

Goods supplied 'of a particular kind'

6.19 Freehills claims the drafting of sections 131 and 132 is inconsistent as to whether the supplier must declare goods or services supplied by the supplier, or of a kind supplied:

> In our view, the reporting requirement should apply if goods of the kind supplied, or goods to which services of the kind supplied relate, may have caused or contributed to a death or serious injury or illness.[17]

6.20 Hasbro regards this as raising an unintended consequence. According to Hasbro, the bill places on suppliers an obligation to report consumer goods 'of a particular kind', including those supplied by competitors, if they have an association with an incident causing death, serious illness or injury:

> …the reporting requirement will not be a "self-reporting" requirement, it will also be a requirement to report other suppliers' products. This would have two undesirable consequences:
>
> (a) the volume of reports required to be made would increase enormously. All suppliers of all products of that particular kind would have to report; and
>
> (b) it would create opportunities for inappropriate competitive conduct, with Competitor A reporting Competitor B's product…
>
> Hasbro suggests that this drafting issue should be remedied by adding words such as "*supplied by it*" or "*which is supplied*" after the words "*of that kind*" in proposed sub-section 131(1)(b). [18]

6.21 Treasury disputes Hasbro's interpretation:

> Senator BUSHBY—…So the interpretation, which some of the submitters have suggested, which actually could apply or require competitors of a similar good to report is not actually the case?
>
> Mr Writer—That is not my reading of that provision.[19]

6.22 Hasbro also refer to the Productivity Commission's acknowledgement that confidentiality is important until an investigation into the risk posed by an unacceptable product be confirmed:

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16 Federal Chamber of Automotive Industries, *Submission 29*, p. 2.

17 Freehills, *Submission 35*, p. 17.

18 Hasbro Australia Ltd, *Submission 6* ,p. 3.

19 Mr Simon Writer, Treasury, *Proof Committee Hansard*, 30 April 2010, pp 38-39.

> Hasbro submits that there should not be a publicly available register of incidents reported under section 131(1), and that reported information should not be publicly available. The appropriate balance of interests is for the public to be informed of product safety issues once government has investigated a reported incident and determined that action is warranted.[20]

Two days reporting deadline when suppliers 'become aware'

6.23 The Committee heard that suppliers often discover complaints or learn of incidents allegedly involving their product, or a similar product, via the media. They argue that in this instance it is difficult to ascertain sufficient details to sustain a report to the Minister as required under section 131 of the bill. They foresee that the likely outcome will be suppliers 'over-reporting' incidents or complaints to the Minister to avoid becoming the public of criminal sanctions. Hasbro cites a similar problem with complaints received from consumers.[21]

6.24 Hasbro submits that wording of the proposed legislation should be amended to make it clear that the 2 day time limit does not include the time it takes for suppliers to verify the incident.[22]

6.25 Hasbro's reference to 'verification' seems to overstating its obligations. The *Explanatory Memorandum* says:

> There is no additional requirement for a supplier to have to substantiate information it has become aware of prior to making a report.[23]

Multiple reporting of incidents

6.26 Hasbro submitted to the Committee that the provision may lead to over-reporting and an inundation of the regulatory agencies, due to the pecuniary penalties involve for failure to report:

> The Explanatory Memorandum makes it clear that all participants in the supply chain of a consumer good which has been associated with a death, serious injury or illness will be required to comply with the reporting requirement upon becoming aware of the incident. This includes retailers, dealers, distributors, repairers, importers, manufacturers and/or exporters of the consumer good in question.[24]

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20 Hasbro Australia Ltd, *Submission 6,* p. 6.

21 Hasbro Australia Ltd, *Submission 6*,p. 4.

22 Hasbro Australia Ltd, *Submission 6,* pp 4-5.

23 *Explanatory Memorandum*, 10.179.

24 Hasbro Australia Ltd, *Submission 6*, p. 3.

> …not only the manufacturer of the good involved in the incident, but all other suppliers in the supply chain, would have to report the same incident.[25]

Committee view

6.27 The Committee notes the Productivity Commission report which stated that a tightly defined mandatory reporting requirement should limit business compliance costs and was likely to be a cost effective way of enhancing the ability of regulators to identify the most hazardous products early. The Committee has some sympathy with the automotive industries and other similarly highly regulated industries but notes that making exceptions causes complexity and its own ambiguity in the legislation. For example, modified new vehicles would not be adequately covered and nor would others not complying with Australian Standards. The Productivity Commission also acknowledged the uncertainty of the potential benefits and costs in this new measure, and recommended a three year review period.

6.28 The Committee finds that the new 'awareness' requirement is a deliberate policy decision to provide early warning of trends of incidents caused by unsafe goods. It is intended to alert customers to products which may be problematic at the first sign of a defect or unsafe outcome. The new provision does not require suppliers to pre-empt incidents, merely to notify the Minister where a report is made prior to establishing all of the technical details involved in the incident. The Minister, via the considerations set out in section 122 of the bill, is still responsible for making a decision, based on the information available from incidents reports, as to whether to issue a warning notice or a compulsory product safety recall. Voluntary recalls by the supplier simply require that supplier to provide written notice to the Minister no later than two days after the recall notice is published.[26]

6.29 The Committee is sympathetic to the need to balance protection of consumers and avoidance of overwhelming both suppliers and regulators with unproductive paperwork. Suggestions to reduce the reporting burden by, for example, replacing 'associated with' by 'caused by', however, could well raise more problems by putting an onus on the reporter to verify or investigate the incident before reporting.

Recommendation 8

6.30 The Committee recommends 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.

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25 Hasbro Australia Ltd, *Submission 6*, p.3.

26 Sections 122 to 128.

Requirements related to illness

6.31 Part 3-3, Division 5 of the bill invokes the reporting duties under section 131 where the product is "associated with the death or serious injury or ***illness of any person***". The explanatory memorandum to the bill defines 'death or serious injury or illness of any person', to mean:

> An acute physical injury or illness requiring medical or surgical treatment by or under the supervision of a qualified doctor or nurse...the injury or illness in question must be acute in nature arising through sudden onset rather than after gradual development over time. The injury or illness must also be serious rather than minor in nature. Lastly, the injury or illness must be a ***disease,*** which is defined to include an ailment, disorder or morbid condition which arises through sudden onset or gradual development.[27]

6.32 Freehills submitted it is unclear what 'illnesses' are intended to be caught by the definition as presently drafted.[28] In particular, it is unclear whether definition limits the reporting duties of suppliers in instances where a toxin causes an illness. Such afflictions are not always apparent through 'sudden onset', or may manifest as a 'disease', which is specifically excluded from the definition, although the term itself is not defined.[29]

Committee view

6.33 There was concern by the Committee that a 2 day timeframe does not always enable suppliers to report toxicity reactions or illnesses which develop over the medium-long term, for example, asbestosis. The Treasury confirmed that diseases such as asbestosis would have coverage under the reporting regime, because of the past-tense wording of the provision "have been associated" and the 2 day rule is only activated once the supplier *becomes aware* of the association between the product and the 'serious illness'.[30]

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27 *Explanatory memorandum,* p.267, [10.164] – [10.165]

28 Freehills, *Submission 35,* p. 17.

29 Freehills, *Submission 35,* p. 17.

30 Mr Simon Writer, Treasury, *Proof Committee Hansard,* 30 April 2010. p.

Chapter 7

Enforcement and dispute resolution

7.1 This chapter examines the Australian Consumer Law's (ACL) enforcement and dispute resolution provisions. The bill introduces a suite of national enforcement powers for consumer law enforcement agencies to administer the ACL. There will also be national penalties for breaches of the ACL.

Enforcement

7.2 Under the provisions of the bill, a regulator:

- may accept (under section 218) a court-enforceable undertaking in connection with conduct regulated by the bill. If a person becomes aware they may have breached the ACL, they will be able to offer an undertaking to a regulator that they will not engage in the conduct again;
- can issue a notice to a business requesting information relevant to substantiating claims made in the marketplace. When a regulator becomes aware of a representation that may appear to contravene the ACL, it can require a person to provide information which could support the claim; or
- may issue a public warning notice (section 223) to inform the public about the conduct which may be detrimental.[1]

Enforcement agencies

7.3 Treasury notes in its guide to the legislation that the following federal, state and territory consumer agencies will jointly administer and enforce the ACL:

- the Australian Competition and Consumer Commission;
- the Australian Securities and Investments Commission (ASIC);
- NSW Fair Trading;
- Consumer Affairs Victoria;
- Queensland Office of Fair Trading;
- Western Australian Department of Commerce—Consumer Protection;
- South Australian Office of Consumer and Business Affairs;
- Consumer Affairs and Fair Trading Tasmania;
- ACT Office of Regulatory Services; and
- Northern Territory Consumer Affairs.[2]

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1 Treasury, *The Consumer Law: A Guide to the provisions*, April 2010, pp 39–41.

7.4 The Australian Competition and Consumer Commission (ACCC) emphasised in its evidence to the Committee that the bill's additional enforcement tools and remedies, combined with the 'increased scope and enthusiasm for cooperation amongst agencies' will enhance consumer protection.[3]

7.5 In terms of information sharing between the regulatory agencies, the ACCC explained:

> …there will be enhanced lines of communication between agencies. Practically speaking we still have that capacity now to have discussions with our co-regulators around the country, and we share information and track down who is behind a particular scheme. But one of the beauties of this reform process is that it is through having consistent laws encouraging greater cooperation and coordination between agencies. I am sure that will lead to better enforcement.[4]

7.6 The ACCC also referred to the importance of some flexibility in both the regulator to which consumers can complain and where the complaint is subsequently handled:

> There will be situations where a complaint is made directly to the ACCC, and reasonably so from the consumer's point of view, but that matter is already being investigated by one of the state agencies. In that circumstance, we want to make sure that we can pass the complaint that was made to us, in as transparent a way as we can, to the agency already looking into a similar matter or investigating a particular trader.[5]
>
> While at times it may sound desirable to have black and white lines about which matters will be handled by each agency, I suggest it is not in the consumer's interest to have such black and white lines. There will be matters of common interest between agencies and I think the best outcome for consumers is to allow that information to the agencies, have an environment where it is shared and discussed, and we collectively work out the best way to get consumer redress.[6]

7.7 The Consumer Action Law Centre explained that the ACCC's role in the enforcement of the ACL is not as a complaints handling organisation. Rather:

> They will take consumer complaints for the purposes of building a picture of conduct in the marketplace that might, and hopefully will, support their enforcement work in this area, but they are not a body, unlike existing state and territory fair trading offices, which will take on a portion of those

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2 Treasury, *Australian Consumer Law: an introduction*, Consultation paper, Canberra, 2010, p. 18.

3 Mr Scott Gregson, *Proof Committee Hansard*, 27 April 2010, p. 13.

4 Mr Scott Gregson, *Proof Committee Hansard*, 27 April 2010, p. 14.

5 Mr Bruce Cooper, *Proof Committee Hansard*, 27 April 2010, p. 19.

6 Mr Scott Gregson, *Proof Committee Hansard*, 27 April 2010, p. 19.

> complaints and resolve them for consumers, separate perhaps entirely to any enforcement action that they may take. That is simply not a role that the ACCC has. It is not a failing on their part that they do not do it; it is just not their job.[7]

Submitters' views on the bill's enforcement provisions

7.8 Several submitters commented on the bill's enforcement requirements. CHOICE told the Committee it supported the introduction of the bill's new remedies and powers for the ACCC and ASIC. It argued that the bill's substantiation notices correctly place the onus of proof on those making the representations. CHOICE also supported the new infringement and warning notice powers for the ACCC. It did note, however, some concern that these powers may become an option in difficult cases, adding, 'we would be concerned if there were parking tickets being issued when full court action was more appropriate'.[8]

7.9 Professor Bob Baxt, representing Freehills, claimed the legislation was likely to build unfair expectations on the regulator:

> When legislation is enacted such as last year with the cartel legislation there was an immediate expectation that the Commission would the very next day start prosecuting people criminally. It is very unfair to expect regulators to be able to suddenly find cases to bring to court and the same thing is happening in relation to this legislation. There will be pressure on the Commission to do something. Why aren't you doing something? We have had this legislation in force now for a month; why haven't you already started issuing infringement notices, et cetera? I think that is such a difficult concept for people out there to understand how difficult it is for the regulators to get on top of this legislation to understand it and train the people, get the resources and apply it. We really do need to be patient and we need to have a sensible approach to what is overall very useful and important legislation.[9]

7.10 Coles identified the use of infringement notices for allegations of misleading conduct (section 13A) as an area of potential difficulty. It argued that:

> …the imposition of infringement notices involving a financial penalty where the regulator has *"reasonable grounds to believe"* that a representation is misleading is inconsistent with the Commonwealth Guide to *Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* which states that infringement notice schemes should only apply to strict or absolute liability offences that "...carry physical elements on which

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7 Ms Catriona Lowe, Co-Director, Consumer Action Law Centre *Proof Committee Hansard*, 29 April 2010, p. 45.

8 Mr David Howarth, *Proof Committee Hansard*, 28 April 2010, pp 10–11.

9 Professor Bob Baxt, *Proof Committee Hansard*, 29 April 2010, p. 38.

> an enforcement officer can make a reliable assessment of guilt or innocence".[10]
>
> ...it remains Coles' view that such notices are inappropriate where the alleged contravening conduct requires an assessment that might be quite subjective.[11]

7.11 CHOICE agreed with the broad proposition that infringement notices are appropriate for breaches of industry codes:

> Industry codes provide a useful means to introduce a measure of industry participation in the regulatory process and often involve a degree of detail that exceeds that in the law itself. Breaches of the provisions of codes are often at the less serious end of contraventions. These characteristics make infringement notices a workable and appropriate enforcement option and CHOICE supports a power to allow the ACCC or ASIC to issue infringement notices for suspected breaches of codes.[12]

The need for consumer education and a proactive regulator

7.12 The Consumer Action Law Centre argued the need for a combination of education and enforcement on the part of the regulator to ensure that consumers know their rights of redress under the bill. Their co-director told the Committee that in the area of consumer guarantees:

> …we think that the provisions there will hopefully go some way to making those rights better understood by both parties because there is certainly an issue around consumer and trader awareness of rights. Obviously putting these things into law will not achieve that. There will need to be promotion and education campaigns for consumers around their rights if that is to occur.[13]

7.13 The Centre also emphasised the need for the ACCC to take enforcement action and address 'widespread non-compliance' in terms of consumers' rights. It argued that the bill does not tackle this issue and that the consumer guarantee provisions continue to rely largely on individual consumers taking individual legal action if a supplier fails to comply with their obligations. The Centre noted that consumers do not generally initiate legal actions over small-value disputes, which means that improvements in systemic practices are not encouraged. Even where an individual consumer successfully enforces their contractual rights, this does not

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10 Coles Supermarkets Pty Ltd, *Submission 3*, p. 2.

11 Coles Supermarkets Pty Ltd, *Submission 3*, p. 2.

12 Choice, *Submission 20*, p. 12.

13 Ms Catriona Lowe, *Proof Committee Hansard*, 29 April 2010, p. 45.

benefit other affected consumers or provide any incentive to traders to change their overall practices.[14]

7.14 The Centre recommended to the Commonwealth Consumer Affairs Advisory Council that:

- the regulators undertake a more active and strategic approach to enforcing traders' guarantee obligations including through better use of the prohibitions on misleading conduct and misrepresentations; and
- the guarantee rights, which the bill provides are enforceable by consumers as individual rights, also be stated to be conduct obligations so that the regulators can undertake enforcement action in relation to breaches of guarantee obligations as they might for other breaches of the Australian Consumer Law.[15]

Alternative and low cost dispute resolution

7.15 Many of the remedies available under the proposed bill are through low cost dispute resolution fora such as small claims tribunals.

7.16 Section 277 of the bill enables the regulator to commence an action on behalf of one or more persons on matters relating to consumer guarantees (Part 5-4). CHOICE argued that the bill provides increased scope for alternative dispute resolution mechanisms to assist consumers by avoiding costs of litigation. It identified an area of particular interest as the ACCC's representative actions under section 277.[16]

7.17 Other submitters emphasised the need for greater consumer access to low cost dispute resolution mechanisms. Professor Justin Malbon advocated:

> …greater accessibility for consumers to make complaints and consider the idea of an industry funded dispute resolution scheme that is truly independent so the consumers can get easy redress where they are being sold a dud product or a product that has lots of problems. Because they tend to be relatively low income purchasers dispute resolution is one of the major problems in this area.[17]

7.18 Professor Malbon suggested that the Committee could consider a model for consumer redress in guarantee disputes along the lines of the financial ombudsman's service, and other similar industry funded dispute settlement schemes.[18]

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14 Consumer Action Law Centre, *Submission 28*, pp. 25–26.

15 Consumer Action Law Centre, *Submission 28*, pp. 25–26. Ms Catriona Lowe, *Proof Committee Hansard*, 29 April 2010, p. 45.

16 Mr David Howarth, *Proof Committee Hansard*, 28 April 2010, p. 10.

17 Professor Justin Malbon, *Proof Committee Hansard*, 29 April 2010, p. 32.

18 Professor Justin Malbon, *Proof Committee Hansard*, 29 April 2010, p. 32.

7.19 Mr Lynden Griggs from the University of Tasmania emphasised that:

> …the biggest practical barrier to effective consumer protection is accessibility to alternative dispute resolution options. The proposed legislation does little to improve this. Improvements to the substantive law will do little if access to justice is not improved. The Parliament is encouraged to undertake the research necessary to develop national models of access that will serve and support the improvements made by the substantive law. Something akin to the Victorian Civil and Administrative Tribunal working at the national level may well be worth exploring.[19]

7.20 Mr Griggs elaborated on the need to improve low cost alternative dispute resolution mechanisms:

> It is a matter of encouraging, explaining and putting in place the processes within those small claims tribunals that say to the consumer that you can access this without the assistance of a legal professional and it is not something that will be tied down in legal requirements or the rules of evidence. It is a question of empowering the consumer to be able to access that. There is no doubt that these proposed changes will assist greatly. If we had a national tribunal system of some sort, even if it were attached or connected somehow with the Federal Magistrates Court, that would go a long way to allowing the empowerment of the consumer to act on their own behalf.[20]

7.21 Treasury explained that its approach to dispute resolution mechanisms in the bill was to harmonise what is already in place at the state and territory level, rather than expand the range of options:

> Certainly the scope of this reform was to harmonise existing laws and create a single national consumer law. There are obviously issues around access to justice and dispute resolution mechanisms which are being addressed through other processes, including at the national level through a process that the Attorney-General is leading at present. We have designed this law to deal with the situation as it is now in the states and territories and at the Commonwealth level. It is intended, obviously within the constraints that are provided for by the rules about which forum you can access on which sort of dispute, that people should and can do that.[21]

Onus of proof

7.22 In its submission to this inquiry, Treasury noted ten instances in the bill where there is a reversal of the onus of proof. Of these, five replace existing reversals in the TPA and five are new. The new reversals of proof reflect the inclusion of new areas of consumer law at the Commonwealth level as part of the bill. The new reversals are:

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19 Mr Lynden Griggs, *Submission 7,* p. 2.

20 Mr Lynden Griggs, *Proof Committee Hansard*, 29 April 2010, p. 11.

21 Mr Simon Writer, Treasury, *Proof Committee Hansard,* 30 April 2010, p. 42.

(a) section 24(4) relating to unfair contract terms. There is a rebuttable presumption that an unfair term is not reasonably necessary to protect the legitimate interests of the party who would be disadvantaged by the application or reliance on that term, unless that party can prove otherwise;

(b) section 27(1), introduced in the first bill, relates to where a contract is alleged to be a standard form contract. The onus will then be on the supplier to prove that it is not;

(c) sections 29(2) relates to false or misleading representations (testimonials). The section includes a requirement for respondents to provide evidence in court that testimonials are not false or misleading. The accused person does not have to disprove the alleged breach but must put evidence to the contrary before the court.

(d) section 151(2) is similar to section 29(2); and

(e) section 70 provides that where a contract is alleged to be an unsolicited consumer agreement, then the onus will be on the supplier to prove that it is not.[22]

Concern at the bill's changes to the onus of proof

7.23 Professor Bob Baxt, representing Freehills, cautioned that these changes will create a burden on the defendant who 'in many cases…is going to be the small person, the consumer or the small business'. He added:

> We believe that this can lead to significant accidental non-compliance which will be costly and time consuming to rectify. We would urge the government to slow down the process so that this legislation when it is put into effect can work more effectively.[23]

7.24 Ms Jacqueline Downes, representing the Law Council of Australia, told the Committee that the reversal of the onus of proof should only be used where there is sufficient empirical justification and should not apply for the purposes of criminal prosecution:

> …the bill provides that where an agreement is asserted to be an unsolicited consumer agreement, it is presumed to be an unsolicited consumer agreement unless proved otherwise. The committee does not consider this reversal necessary as it should not be unduly difficult for the consumer to establish that a particular agreement fulfils the elements of an unsolicited consumer agreement. Even more concerning, the evidential burden regarding testimonials has been reversed for criminal prosecutions. The committee does not support the reversal of the evidentiary burden in relation to the proposed subsection 151(2). Although the imposition of an

22 Treasury, *Submission 46*, p. 10.

23 Professor Bob Baxt, *Proof Committee Hansard*, 29 April 2010, p. 37.

> evidentiary burden stops short of an actual reversal of onus, the finding of a criminal contravention is a very serious matter and should require all elements of the offence to be proved against the accused.[24]

7.25 Mr Stephen Ridgeway, of the Law Council's Trade Practices Committee, noted that there are some circumstances in which it is proper either to reverse the onus of proof or to create an evidentiary presumption. However, in cases where the matter is being prosecuted by the consumer, Mr Ridgeway argued that the consumer probably has the best evidence and recollection of the circumstances:

> If there has been oral contact between the consumer and the business at some prior time, with the breadth of the way the bill is drafted to refer to any prior negotiations or contact—which is drafted in a very broad way for the purposes of inducing the contract or even for the purposes of promoting the product— the bill potentially proposes a very significant burden on business to keep very extensive records. The consumer in the circumstances for the transaction will probably have a pretty good recollection of what happened. Salespeople, who deal with any number of consumers in a day or over time, may not have the same recollection.[25]

7.26 Mr Ridgeway told the Committee that the reversal of the onus of proof could have 'a very significant burden' on business, particularly in the case of criminal prosecution. In these cases, he argued, the consumer is likely to be in a position to be able to establish and get past that evidentiary burden with reasonable ease. Businesses, on the other hand, face developing potentially elaborate systems of record keeping for the most minor of transactions which risks imposing costs on business which will be passed through to consumers. Mr Ridgeway concluded that while the Law Council has no quarrel with the introduction of the substantive amendment itself:

> Procedurally…[it] is not satisfied that there is sufficient evidentiary difficulty that warrants what traditionally in our law and in English law is regarded as a fairly dramatic change in process.[26]

Committee view

7.27 The Committee notes various concerns with the enforcement powers and remedies under the legislation and how these will be administered in practice. There is the need to educate consumers about their consumer rights and promote avenues for low cost dispute resolution. There are related concerns that the regulator must take a proactive approach to enforce traders' guarantee obligations through better use of the prohibitions on misleading conduct and misrepresentations. There are also fears that the bill will impose an unnecessary account keeping burden on businesses by reversing the onus of proof.

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24 Ms Jacqueline Downes, *Proof Committee Hansard*, 28 April 2010, p. 42.

25 Mr Stephen Ridgeway, *Proof Committee Hansard*, 28 April 2010, p. 44.

26 Mr Stephen Ridgeway, *Proof Committee Hansard*, 28 April 2010, p. 44.

7.28 The Committee believes it is important that the ACCC publicises the provisions of the ACL to make consumers aware of their rights, and the fact that these rights will now be consistent across the states and territories. It is also important that the ACCC takes a proactive approach to enforcing the consumer guarantee obligations.

7.29 In the Committee's view, the government has taken the correct approach in harmonising the dispute resolution mechanisms that are currently available across Australian jurisdictions. There are separate processes examining alternative dispute resolution mechanisms for consumers.

7.30 In terms of the reversal of the onus of proof, the Committee argues that this has only been done where it is impossible or unreasonable to expect a regulator to meet the conventional standard of proof. In the case of solicited contracts, it is not unreasonable to expect that the supplier has evidence of the contact, rather than the consumer.

Chapter 8

Minor drafting issues

8.1 The chapter identifies some places where Treasury could clarify some of the definitions and address matters raised about drafting. In the interests of clarity this should be done using existing legal meanings.

Consumer guarantees

8.2 Dr Stephen Corones asked whether 'due care' in section 60 of the bill means 'reasonable care', or imposes a new, more 'stringent standard'.[1]

8.3 Mr Lynden Griggs argues that the drafting of the provisions covering auction sales does not reflect the intent:

> A further matter to be raised is the drafting associated with auction sales. These are excluded from the operation of ss 54-59. Sale by auction is defined as follows (s 2): '**sale by auction,** in relation to the supply of goods by a person, means a sale by auction that is conducted by an agent of the person, (whether that person acts in person or by electronic means).' It is clear from the explanatory memorandum that the intent is that the guarantees do not apply where an auctioneer acts as an agent for a person to sell goods. 'They do apply to sales made by businesses on the internet by way of an online 'auction' websites when the website operate does not act as an agent for the seller.' Today, there is no doubt that guarantees should apply to online auctions...[2]

"Grown in" Australia provisions

8.4 Section 255 provides that where "country of origin" claims are made consistent with the rules in the provision, they do not amount to misleading or deceptive conduct under section 218 of the bill. CHOICE submitted that they support the approach of requiring "grown in…" claims to also satisfy other tests in the table to ACL s. 255(1) ("made in…" or "product of…") and to avoid the protection for the

> "grown in…" claim where the supplier makes multiple origin claims. However, the drafting in ACL s. 255 is almost incomprehensibly complex, involving a circular (and negative) crossreference between sub-sections (1) and (2). We would encourage the Committee to request alternative drafting.[3]

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1 Dr Stephen Corones, *Submission 44*, p. 1.

2 Mr Lynden Griggs, *Submission 7*, p. 3; refers to *Explanatory memorandum*, p. 184.

3 CHOICE, *Submission 20*, p. 6.

Product Safety

8.5 The Law Council of Australia highlighted the ambiguity of the term 'reasonable foreseeable use (including misuse)' that has been incorporated into the threshold tests in relation to product safety. This definition allows the Minister to, for example, impose an interim or permanent ban for consumer goods; but it also relates to product related services. The Law Council is concerned that:

> …it is not clear on the face of the legislation what is meant by "reasonably foreseeable use" and, in particular, "misuse". The Explanatory Memorandum to the Bill states that "reasonably foreseeable use" may include use of the good for its primary, normal or intended purpose, *for its unintended purpose*, or misuse of the good. This implies that the legislature intends for the concept of "reasonably foreseeable use" to capture not only unintended misuse by a user (for example, due to some design defect), but also any deliberate use of a good in an unintended manner...The [Trade Practices] Committee [of the Law Council] believes that the concept of "reasonably foreseeable use" should be clarified to exclude instances where harm will likely occur only due to deliberate use of a product, and where that use is not the intended purpose of the good.[4]

8.6 Associate Professor Luke Nottage drew the Committee's attention to an apparent drafting error in sections 140 and 141:

> There appears to be a major drafting error in the Product Liability provisions in ss 140-1, which the legislative history (including April 2009 "Guide to Provisions just published) intend to be a restatement of TPA Part VA:
>
> > These private compensation provisions apply if a product's "safety defect" (now defined in s9 of the Bill – cf present TPA s75AC) causes harm to other goods
> >
> > (i) "of a kind ordinarily acquired for personal, domestic or household use or consumption" AND
> >
> > (ii) (ii) the person harmed (actually or planned to have) "used or consumed" such damaged goods for such use or consumption. In other words, liability only follows if both an objective AND subjective test are satisfied.
> >
> > By contrast, current TPA ss 75AF and 75AG allow claims for loss to other goods if they fulfil only (i) the objective test (as eg in the EU, which was the template for this Part VA of the TPA).
> >
> > And TPA Part V Div 2A (see s74A(2)(a) and s74D(1)) requires the unsafe goods to be "consumer goods" satisfying such an objective test, but then claims can be made for consequential damage to all other goods (even not ordinarily for personal use).

4 Law Council of Australia, *Submission 18*, p. 12.

> To maintain consumer protection we should retain our alignment with the EU (and other Asia-Pacific jurisdictions that have also followed it) by redrafting as in (b). Or, if the legislative intention is really to narrow the scope for product liability claims (already very few in Australia, especially after 2002 tort reforms), then this provides further justification to expand the scope for product safety duties as suggested here and in my original Submission.[5]

8.7 Mr David Howarth from CHOICE agreed with Associate Professor Nottage's recommendation in a statement to the Committee.[6]

Other drafting corrections

8.8 The Scrutiny of Bills Committee has examined the legislation. It noted the following three errors in the explanatory memorandum:

(i) chapter 16: reference in the chapter to Part 5-2 should be to Part 5-3

(ii) Schedule 2, item 133E: this section about self incrimination is discussed in the EM at paragraph 19.47, but there is no cross reference to the item number; and

(iii) Schedule 2, item 137F: the EM at pages 389 and 390 mistakenly refer to section 137K instead of 137F.

Recommendation 9

8.9 The Committee notes the claim of drafting errors. The Committee does not believe that these issues are of sufficient magnitude to delay passage of the bill. Notwithstanding this, the Committee recommends that the Minister seek further advice and rectifies any drafting errors where warranted.

Senator Annette Hurley
Chair

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5 Associate Professor Luke Nottage, *Submission 26 (Supplementary Submission),* pp. 1-2; see also *Proof Committee Hansard,* 28 April 2010, pp. 3 and 7.

6 CHOICE, *Proof Committee Hansard,* 28 April 2010, p. 11.

Additional comments by Coalition senators

Introduction

While the Coalition broadly supports the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010, there are a number of areas of particular concern to the Coalition, which are outlined below.

Definition of consumer and consumer good

The definition of consumer within section 3 of the Trade Practices Act (Australian Consumer Law) Bill (No. 2) 2010, as well as the definition of consumer goods were controversial issues across many submissions.

Of initial concern is that there is no class of consumer that deals with small business. This is of grave concern, particularly given that small business is the largest employer of people in Australia.

There has previously been a small business application for the definition of consumer, as discussed in the hearings:

> Traditionally, there has been that small business application for the definition of 'consumer' in existing section 4B for goods purchased under a particular value, regardless of their nature. That has now been excluded.[1]

There is also concern about the fact that some consumers would make small purchases that would not fit within the definition currently proposed. This was brought up in both submissions and evidence before the committee.

> 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. Although such persons would not be protected under the Bill, they are arguably among the most vulnerable groups in society, required to spend relatively substantial sums on products that meet their unique needs and are thereby most in need of protection. 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. Similarly, a person unable to write or type may require voice recognition software to be installed on their home computer in order to study or access the internet

1 Ms Deborah Healey, Senior Lecturer, Faculty of Law, University of New South Wales, *proof Committee Hansard*, 28 April 2010, p. 34

> without assistance. If the software was developed for business use and is rarely used by individuals, the purchaser may be left without remedy if the software is defective.[2]
>
> Further, it would be possible for unscrupulous businesses to take advantage of this lacuna in the Bill by targeting vulnerable groups with products developed for uses other than personal, domestic or household use. For example, if a company were to doorknock sufferers of a particular condition with equipment ordinarily supplied to hospitals, individuals who purchased the products would not have the benefit of a termination period under the proposed unsolicited consumer agreements regime because the products would fall outside the regime since they are not ordinarily acquired for personal, household or domestic use.[3]
>
> By removing the financial threshold there is the possibility that someone may purchase an item which would not ordinarily be acquired for personal, domestic or household use. Perhaps an example could be someone suffering from emphysema who has to get oxygen cylinders of some sort, or for medical equipment that may be supplied normally through the hospital system which would not ordinarily be acquired for personal, domestic or household use.[4]

It was argued by Treasury that the amendment merely removed the arbitrary monetary threshold of $40,000 which applied with respect to all goods.[5] Given the number of examples given over the course of this inquiry, it is extraordinary that Treasury decided to take the approach of a case-by-case basis.

> We could go through many examples and attempt to split hairs. The provision is drafted in general terms so that cases can be dealt with on a case-by-case basis and the actual situation can be dealt with. I cannot say whether a particular kind of cement mixer might or might not be a good ordinarily of a kind et cetera, but the provision is designed to deal with consumer purchases of those sorts of goods.[6]

The main concern of the Coalition is that small business has not been accounted for within the definition of consumer.

Recommendation 1:

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2 Law Council of Australia, *Submission 18*, p. 5.

3 Law Council of Australia, *Submission 18*, p. 5.

4 Mr Lynden Griggs, *Proof Committee Hansard*, 29 April 2010, p. 10.

5 Mr Simon Writer, Manager, Infrastructure, Competition Policy Framework Unit, Competition and Consumer Division, Department of the Treasury, *Proof Committee Hansard*, 30 April 2010, p. 32.

6 Mr Simon Writer, Manager, Infrastructure, Competition Policy Framework Unit, Competition and Consumer Division, Department of the Treasury, *Proof Committee Hansard*, 30 April 2010, p. 33.

The Coalition recommends that the definition of consumer should allow for a class of consumers that would encompass small businesses

Similarly, the Coalition has concerns about the definition of consumer goods, as some goods purchased by small business would fit within the definitions of consumer goods and others would not under the current definitions in section 3 of the bill. Consequently, the Coalition believes that a consumer good could be defined as follows and makes a recommendation on this basis.

Recommendation 2:

The Coalition recommends that the definition of a consumer good should be as such:

***consumer goods* are goods where:**

(a) The goods are of a kind ordinarily acquired for personal, domestic or household use; or

(b) The goods consisted of a vehicle or trailer acquired principally in the transport of goods on public roads; or

(c) The price of the goods did not exceed the prescribed amount.

This would include the new definitions and allow the status quo to continue applying to goods under $40,000 (including for business).

Consumer guarantees

The Coalition support Recommendation 2 at paragraph 4.16 in the Chair's report. The requirement for plain English would ensure that consumers are better informed about the issues associated with extended warranties. A number of submissions pointed out that there was confusion over what rights consumers had under statutory warranties and what they pay for with additional manufacturers' warranties or extended warranty schemes.[7]

An additional concern was that consumers did not have enough information to make an informed decision, hence the Coalition's support for Recommendation 3 at paragraph 4.19. It was noted that the change in drafting would be ineffectual without an appropriate information campaign

> ...warranties continue to raise serious problems. For many consumers, paying for an extended warranty on a large purchase seems to make good sense because it offers peace of mind but in many cases that sense of security is an illusion. It is based on a danger that does not exist because the statutory implied warranties offer as good or better protection. Nevertheless, under the old system of contract based remedies, consumers

7 Choice, *Submission 20*, p. 6.

> may have seen some value in paying to avoid the hassle of trying to enforce these warranties. With the move to consumer guarantees, *Choice* calls on the Senate to ensure that consumers receive adequate information about their rights before entering into extended warranties. This should be done through a compulsory disclosure at the time the extended warranty is offered so that consumers can judge for themselves whether the warranty offers any additional protection and, if so, whether it is worth the price.[8]

It is important to note that there was general support for the reforms proposed under Part 3-2 of the Bill.[9] The Coalition supports the increase in education for consumers, particularly given the New Zealand model discussed by a number of submissions and witnesses.[10]

The Coalition supports Recommendation 4, as it is important for all parties to a transaction to have a consistent understanding of their rights and responsibilities under the new Bill.

On a similar note, the Coalition supports Recommendation 5.

Architects and Engineers exemption from 'fitness for purpose' guarantee

There was some concern about the exemption of architects and engineers from the 'fitness for purpose' guarantee.

This amendment was made in 1986 to section 74(2) and reads as follows:

> Where a corporation supplies services (other than services of a professional nature provided by a qualified architect or engineer) to a consumer in the course of a business and the consumer, expressly or by implication, makes known to the corporation any particular purpose for which the services are required or the result that he or she desires the services to achieve, there is an implied warranty that the services supplied under the contract for the supply of the services and any materials supplied in connexion with those services will be reasonably fit for that purpose or are of such a nature and quality that they might reasonably be expected to achieve that result, except where the circumstances show that the consumer does not rely, or that it is unreasonable for him or her to rely, on the corporation's skill or judgment.[11]

Senator Janine Haines of the Australian Democrats gave a particular reason

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8 Mr Christopher Zinn, Director, Communications and Campaigns, Choice, *Proof Committee Hansard,* 28 April 2010, p. 7.

9 Mr Lynden Griggs, *Submission 7*, p. 2.

10 Mr Lynden Griggs, *Submission 7;* p.2; see also Dr Stephen Corones, 'Consumer Guarantees in Australia: Putting an End to the Blame Game', *Queensland University of Technology Law Journal* (2009) 9(2) 137; Treasury, *Submission 46;* Law Council of Australia, *Submission 18,* p. 7; Choice, *Submission 20*, p. 3.

11 *Trade Practices Act 1974* (Cth), section 74(2)

> The issue with regard to architects and engineers is we believe that they fall into a special category as far as their relationship to their client is concerned; that is that, while they come up with designs, specifications and so on in accordance with whatever a particular client wishes, in the implementation of those specifications, designs, contracts and so on a fairly significant third party intervenes.[12]

The main concern was the application of the 'fitness for purpose' guarantee. Consult Australia put forth an example of how this could result in unscrupulous conduct by consumers.

> …the really big difference here is that most consumers of engineering and architectural services do not have the skill-set required to understand fully what they are signing off on. Once again I give the example of the family home. The drawings that you get from the engineer or architect can be explained to you. However, your brief could have been, 'I want a room to be light and airy,' for example, and the engineer says, 'Once you take into account your council considerations and your total floor space and your budget in terms of how big this house can be, we have given you this room that is three by four with this many windows' or whatever might be the case. In the engineer's or architect's mind that might equate to 'light and airy' for that room. However, your definition of light and airy and my definition of light and airy may be two completely different things. This is where the ambiguity arises.[13]

Similarly, the Australian Institute of Architects expressed concern about the removal of the exemption as well.

> The Institute strongly objects to the inclusion of architects and engineers as service suppliers subject to the proposed statutory guarantee to consumers of fitness for purpose. The statutory guarantee would then apply to consumers who engage an architect for their house, but not to those who will on-sell their home as a developer.[14]
>
> There is no evidence that an additional head of liability is necessary or that it addresses a systemic failure in the recourse consumers presently have for loss attributed to architects, through negligence, misleading and deceptive conduct under s.52 or s.51A of the TPA, and/or contractual claims.[15]
>
> No substantiated reasons appear to have been advanced for the removal by s.61 of the Australian Consumer Law Bill No. 2, of the exemption contained in the existing equivalent Trade Practices Act (TPA) section 74(2).[16]

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12 Senator Janine Haines, *Senate Hansard*, 30 April 1986, p. 2053.

13 Ms Megan Motto, Chief Executive Officer, Consult Australia, *Proof Committee Hansard*, 28 April 2010, p. 26.

14 Australian Institute of Architects, *Submission 16*, p. 3.

15 Australian Institute of Architects, *Submission 16*, p. 3.

16 Australian Institute of Architects, *Submission 16*, p. 3.

Concerns were raised by Coalition Senators as to the possibility of game playing by clients who might seek to avoid final repayments.

> It is incredibly common. As I said, the litigiousness in our market is incredibly common, unfortunately. Clients will often seek to avoid making final payments of professional fees by deeming something to be unacceptable in the end product, and rather than holding up just the fees for the particular party involved they will hold up all fees. Particularly this is the case when an engineer or architect also works as a project manager on site for a home. They will hold up the final architectural or engineering payments because the cornices on a particular room have not been finished to their liking or a tile is cracked in the bathroom and has not been replaced or whatnot. These are, once again, faults of tradespeople. It is not something that is within the jurisdiction or ambit of the engineer or architect.[17]

It is the position of the Coalition that the exemption for architects and engineers should remain, as their role as designers rather than suppliers puts them in a unique position. Despite the comments in the Chair's Report in paragraphs 4.87 and 4.88, the Coalition Senators believe that given the litigious nature of the Australian market, there is justification for maintaining this exemption.

Recommendation 3:

The Coalition recommends that the exemption at section 74(2) of the current Trade Practices Act 1974 be included in the *Trade Practices Act (Australian Consumer Law) Bill (No. 2) 2010*.

Unsolicited Selling

The Coalition believes that there should be more strict definitions for "unsolicited consumer agreements" to allow for the circumstances listed in Recommendation 6.

Likewise, Recommendation 7 is supported by the Coalition. This is an area that requires further work and consultation.

Product Safety Reporting

Firstly, the Coalition supports Recommendation 8 at paragraph 6.30, as it is important that all the relevant provisions relating to product safety are reviewed to ensure that there is no unnecessary red tape, an appropriate level of confidentiality and any amendments to definitions.

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17 Ms Megan Motto, Chief Executive Officer, Consult Australia, *Proof Committee Hansard*, 28 April 2010, p. 27.

Broadness of reporting requirements

There was considerable debate about the form that any reporting should take. One method of reporting is product hazard reporting (also known as risk reporting), rather than the incident reporting system that is currently in place.

> The test for association between a product and an injury is not defined and has not been tested in law. The ATA would prefer the more usual test of causation, i.e. a product may be associated with an injury but not the cause of it, e.g. a consumer has a heart attack while riding a bike. Suppliers should only be required to report goods where it has been established that the injury was caused by the good. There is sufficient case law surrounding causation to provide a clear understanding as to whether an injury was caused by the good.[18]
>
> Hasbro submits the focus of any reporting regime should be *products*, not *incidents*; specifically the focus should be on defects in products which present risks of serious injury or death.
>
> The proposed "association" test in Part 3-3, Division 5 would significantly increase the enforcement burden of government to review a large number of incident-based notifications, of which Hasbro considers a significant proportion will not relate to genuine health and safety concerns arising from issues with the product. As Hasbro indicated in its Draft RIS submission, each year thousands of bicyclists in Australia are treated in hospital emergency rooms for injuries sustained in cycling accidents.2 Yet, to enhance the safety of bicycles, the focus should be on those accidents where there is evidence of a product defect (e.g. faulty brakes or sub-standard design or construction), rather than accidents caused by a myriad of other factors. Incident-based notifications would not meaningfully advance efforts to identify products that present an unreasonable risk and could divert both the supplier's and government's attention and resources away from those issues that merit serious consideration.[19]

This was reflected in some of the testimony from Hasbro.

> Where we are coming from is we wholeheartedly agree with the objectives of the mandatory reporting requirement, which is to have earlier access to information about product risks and to get that information from the place where government has said it can be most reliably obtained, which is from business, from the suppliers. However, under the current proposal, which is a proposal that all incidents, all accidents, be reported, the focus of the information which is being sought is the accident; it is not the risk with the product. The concern we see is that there is some valuable information which will be reported and that is the information about the product risk but there is an enormous amount of extra information which is going to be reported for these reasons. Firstly, there will be reports about known risks. Products have risks. We have just heard from the motor vehicles people and

18 Australian Toy Association, *Submission 42*, p. 1.

19 Hasbro Australia Limited¸ *Submission 6*, paragraphs 6.2 – 6.4, p. 5.

> we know that there are going to be accidents associated with motor vehicles, but unless the report relates to a defect with the product, it is not of assistance, and unless it is a new defect, it is not of assistance.[20]

The Coalition believes that product hazard reporting is the best method to take. This means that the incidents are reported quickly and efficiently, without excessive amounts of red tape.

Recommendation 4a:

The Coalition recommends the following as the text for Section 131:

1. If:

(a) a person (the supplier), in trade or commerce, supplies consumer goods; and

(b) the supplier becomes aware of information which reasonably supports the conclusion that those consumer goods:

(i) fail to comply with an applicable safety standard, information standard, interim ban or permanent ban;

(ii) contain a defect which could create a substantial product hazard; or

(iii) create an unreasonable risk of death or serious injury or illness to any person,

the supplier must, within 2 days of becoming aware of that information, give the Commonwealth Minister a written notice that complies with subsection (4).

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

2. Subsection (1) does not apply if the supplier has actual knowledge that the Commonwealth Minister has been adequately informed of such:

(a) failure to comply with an applicable safety standard, information standard, interim ban or permanent ban;

(b) defect which could create a substantial product hazard; or

(c) unreasonable risk of death or serious injury or illness to any person.

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20 Mr David McCredie, Hasbro Australia Limited, *Proof Committee Hansard*, 30 April 2010, p. 24.

3. Without limiting subsection (1), the ways in which the supplier may become aware of information as mentioned in subsection (1)(b) include receiving the information from any of the following:

(a) a consumer;

(b) a person who re-supplies the consumer goods;

(c) a repairer or insurer of the goods;

(d) an industry organisation or consumer organisation.

4. The notice must:

(a) identify the consumer goods; and

(b) include information about the following matters to the extent that it is known by the supplier at the time the notice is given:

(i) when, and in what quantities, the consumer goods were manufactured in Australia, supplied in Australia, imported into Australia or exported from Australia;

(ii) the nature of any failure to comply with an applicable safety standard, information standard, interim ban or permanent ban;

(iii) the nature of any defect which could create a substantial product hazard;

(iv) the nature of any unreasonable risk of death or serious injury or illness to any person;

(v) if the substantial product hazard may have caused any death or serious injury or illness, the circumstances in which that death or serious injury or illness occurred, and, in the case of a serious injury or illness, the nature of that serious injury or illness;

(vi) any action that the supplier has taken, or is intending to take, in relation to the consumer goods.

5. The giving of the notice under subsection (1):

(a) is not to be taken for any purpose to be an admission by the supplier of any liability in relation to:

(i) the consumer goods; or

(ii) the death or serious injury or illness of any person; and

(b) may not be used as the basis for any criminal prosecution.

Recommendation 4b:

The Coalition recommends the following be inserted into section 3

serious injury or illness **means an acute physical injury or illness that requires medical or surgical treatment by, or under the supervision of, a medical practitioner or a nurse (whether or not in a hospital, clinic or similar place), but does not include:**

> **(a) an ailment, disorder, defect or morbid condition (whether of sudden onset or gradual development); or**
>
> **(b) the recurrence, or aggravation, of such an ailment, disorder, defect or morbid condition.**

substantial product hazard **means a product defect which (because of the pattern of defect, the number of defective products distributed in trade or commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public.**

An additional issue was raised about the privacy associated with the reports being sent to the Minister. There was concern in a number of submissions about the confidentiality of the report:

> The 2006 Productivity Commission Report acknowledged the need to guarantee that reported information would be kept confidential, at least until further investigation concluded that the product did in fact pose an unacceptable safety risk. The Bill makes no provision for this and in fact the Bill does not deal at all with the disclosure or use of information provided to government through the mandatory reporting requirement.[21]
>
> Hasbro recognises that governments should be able to make use of information received in order to protect consumers from unsafe products, particularly where there is an immediate risk of harm. However much of the reported information would be confidential business information and, because reporting is to be required in such a short time frame, much would be unverified. Information released about unverified incidents may be misinterpreted by the public or the media, may give rise to false alarms and may cause serious reputational damage to businesses, even if it is later determined that the product was not at fault. These are not justifiable consequences of the reform.[22]

This is a valid concern, as the information received in those reports could include proprietary information and create unnecessary media problems for the company concerned. There is also the risk that the competitor products of any consumer good that is reported could receive negative publicity as well.

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21 Australian Toy Association, *Submission 42*, p. 2.

22 Hasbro Australia Limited, *Submission 6*, paragraph 8.3, p. 6.

Recommendation 4c:

The Coalition recommends the insertion of the following subsections within Section 131:

- **(6) The Minister must keep notices given under Subsection (1), and any communications with suppliers relating to the information contained in such notices, confidential and must not disclose any information contained in such notices to any person other than:**
    - **(a) another responsible Minister**
    - **(b) a regulator**
- **(7) A responsible Minister or regulator who receives information contained in a notice given under subsection (1) must keep that information confidential**
- **(8) Subsections (6) and (7) do not apply in relation to the disclosure of information if the supplier who gave that information to the Minister consents to its disclosure.**

Products already covered by comprehensive reporting regulations

It was submitted by the Motor Trade Association of Australia and the Federal Chamber of Automotive Industries that the duties created under sections 131 and 132 would duplicate existing provisions within the Act.[23] The argument was predicated on the justification that they already need to report under numerous state and territory regulations. They proposed that a specific industry-specific amendment should be included in the wording of section 131(2) (c) as an accident and its cause needs to be reported under the relevant state and territory regulations.

The Coalition suggests that an amendment could be made to section 131(2) to allow for the Minister to determine that a specific industry could be made exempt of the duties under sections 131 and 132, provided that those specific industries already have substantial reporting requirements.

Recommendation 5:

The Coalition recommends

- **The insertion of a subsection within Section 131(2):**
    - **If the supplier is in a kind of industry that has been exempted by the Minister**

23 Motor Trades Association of Australia, *Submission 24*, pp 3-4; Federal Chamber of Automotive Industries, *Submission 29*.

- **In determining the kind of industry to be exempted, the Minister must give regard to any currently existing Federal and State reporting framework and regulations**

Goods supplied 'of a particular kind"

There was concern about the requirement to report on goods supplied 'of a particular kind'. There is potential for an unintended consequence, where goods of a particular kind could include goods sold by competitors. It was put forward in submissions that

> …the reporting requirement will not be a "self-reporting" requirement, it would also be a requirement to report other suppliers' products. This would have two undesirable consequences:
>
> (a) The volume of reports required to be made would increase enormously.[24]

Treasury argues that suppliers will not be required to report on competitor products.

> Senator BUSHBY—…So the interpretation, which some of the submitters have suggested, which actually could apply or require competitors of a similar good to report is not actually the case?
>
> Mr Writer—That is not my reading of that provision.[25]

It is the Coalition's submission that if it is the intention of the bill not to require the reporting of competitors' products, then the bill needs to make this explicit.

Recommendation 6:

The Coalition recommends that a subsection of Section 131 be included:

- **If the supplier is not the supplier of those particular consumer goods associated with death, serious injury or illness**

Two day reporting deadline when suppliers 'become aware"

This is a provision that needs to be properly examined under Recommendation 8 at paragraph 6.30.

Multiple reporting of incidents

There was general concern about the issue of multiple reporting of incidents. The Coalition believes that this needs to be addressed in a way that does not unnecessarily increase the amount of red tape already experienced by businesses. It is important that this area receives further investigation to ensure that the onus of reporting does not wind up falling onto one point in the supply chain.

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24 Hasbro Australia, *Submission 6*, p. 3.

25 Mr Simon Writer, Treasury, *Proof Committee Hansard*, 30 April 2010, pp 38-39.

Recommendation 7:

The Coalition recommends that the Department and the Minister seek further advice as to how to minimise the resource-heavy impact of multiple reporting, with a view to reducing red tape.

Enforcement and dispute resolution

The reversal of the onus of proof was a major concern in several submissions.

> We believe that this can lead to significant accidental non-compliance which will be costly and time consuming to rectify. We would urge the government to slow down the process so that this legislation when it is put into effect can work more effectively.[26]

> …the bill provides that where an agreement is asserted to be an unsolicited consumer agreement, it is presumed to be an unsolicited consumer agreement unless proved otherwise. The committee does not consider this reversal necessary as it should not be unduly difficult for the consumer to establish that a particular agreement fulfils the elements of an unsolicited consumer agreement. Even more concerning, the evidential burden regarding testimonials has been reversed for criminal prosecutions. The committee does not support the reversal of the evidentiary burden in relation to the proposed subsection 151(2). Although the imposition of an evidentiary burden stops short of an actual reversal of onus, the finding of a criminal contravention is a very serious matter and should require all elements of the offence to be proved against the accused.[27]

While evidence was given that there are some situations where the reversal of the onus of proof is appropriate,[28] it was accepted that when the consumer is prosecuting the matter, the consumer is in the position of power by having the best evidence and recollection of the circumstances.[29]

Lack of consultation and Drafting issues

A number of submissions highlighted the lack of consultation compared to *Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010* (Cth), also known as ACL 1 Act.

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26 Professor Bob Baxt, Partner, Freehills, *Proof Committee Hansard*, 29 April 2010, p. 37.

27 Ms Jacqueline Downes, Partner, Allens Arthur Robinson and Trade Practices Committee, Business Law Section, Law Council of Australia, *Proof Committee Hansard*, 28 April 2010, p. 42.

28 Mr Stephen Ridgeway, Deputy Chairman, Trade Practices Committee, Business Law Section, Law Council of Australia, *Proof Committee Hansard*, 28 April 2010, p. 44

29 Mr Stephen Ridgeway, Deputy Chairman, Trade Practices Committee, Business Law Section, Law Council of Australia, *Proof Committee Hansard*, 28 April 2010, p. 44

> As a preliminary matter we not that, in contrast with the ACL 1 Act, regardless of one's views on the content of the current Bill, in our view the provisions have not been subject to appropriate public consultation.[30]

Similarly, some submissions pointed out that the relevant professional and industry bodies were not consulted.

> We were also puzzled as to why there has been no consultation on this proposal with the relevant professional and industry bodies, other than through the review of implied terms by the Commonwealth Consumer Affairs Advisory Council, which did not initially raise the issue of removal of the exemption. There appears to be no market failure to justify taking such an approach, and no evidence that it will improve consumer protection.[31]

> DSAA makes the point that reference to regulating unsolicited selling in material released as recently as November 2009 (the draft Regulation Impact Statement) had not defined the impact of the proposals on business and that the RIS process would have benefited enormously had business been able to respond to what is now proposed in the unsolicited selling provisions. DSAA submits it is grossly unfair that the implications of these proposals for genuine direct selling activity must be examined and determined by 21 May 2010 and against the broader coverage of the ACL. This submission records our present analysis but further issues are likely to emerge as its effect is considered by members.[32]

This was reflected in the evidence given before the committee in the four hearings held, where a number of witnesses told the committee about the lack of consultation.

> Our concern is that, in the original review paper in March 2009, no indication was made that this exemption was actually going to be something that was looked at. So our understanding is that, of the 30-odd submissions that were made at the time, other than the submission by Consult Australia and the Institute of architects, none made any reference whatsoever to that particular exemption. So there was no complaint against the exemption from any other groups in the original submissions. Despite that, a decision had been taken in the final report to remove the exemption. However, no further consultation has happened with the parties that may have been affected by that particular provision. And there are not that many of those parties in Australia. There are only really four major bodies that represent engineers and architects in Australia. So it would not have been a difficult task to consult with those four bodies.[33]

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30 Consumer Action Law Centre, *Submission 28,* p. 3.

31 Engineers Australia, *Submission 34*, p. 2.

32 Direct Selling Association of Australia, *Submission 17*, p. 9.

33 Ms Megan Motto, Chief Executive Officer, Consult Australia, *Proof Committee Hansard*, 28 April 2010, p. 24.

> One broader point about that is that because there has not been an exposure draft consultation process with the bill there has been no opportunity for Telstra or stakeholders like us to engage in the real details of the provisions. That is a real shame, which means that you, as senators, are going to have to grapple with all of those little details that you would not normally want to.[34]
>
> Under the COAG agreements there was meant to be April to June exposure draft consultation process, and instead this bill was drafted and introduced into the parliament in March. It probably would have taken three months.[35]
>
> In fairness to its members, the DSAA records its disappointment at the lack of adequate consultation on the unsolicited selling provisions. Its only opportunity to comment on this threat to the direct selling industry has been a 10-day turnaround period for submissions on generalised commentary on proposals in the draft regulation impact statement last November and, within DSAA constraints, literally days to analyse almost 400 pages of proposed law and 700 pages of explanatory memorandum.[36]
>
> MTAA is also disappointed with the level of consultation undertaken by the government in relation to these changes. The government appears to have adopted the report of the Commonwealth Consumer Affairs Advisory Council without any discussion with business of the impact of the views contained in that council's report.[37]

The level of consultation, or lack thereof, particularly with professional and industry bodies, is of considerable concern to the Coalition. This has lead to some poorly drafted legislation as pointed out in the submissions and suggested before Committee hearings.

The Chair's report highlighted a number of potential drafting errors but expresses concerns at Recommendation 9. This recommendation leads the Coalition to believe that this is part of the continued legacy of the Rudd Government of rushing legislation into Parliament without proper drafting as a result of poor consultation.

Recommendation 8:

The Committee recommends that Treasury investigate the claimed drafting errors reported in Chapter 8 of this report and the failure of the Government to consult with stakeholders in the manner prescribed by COAG's implementation plan.

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34 Ms Catriona Lowe, Co-Chief Executive Officer, Consumer Action Law Centre, *Proof Committee Hansard*, 29 April 2010, p. 47.

35 Ms Nicole Rich, Director, Policy and Campaigns, Consumer Action Law Centre, *Proof Committee Hansard*, 29 April 2010, p. 48.

36 Mr Anthony Greig, Chairman, Direct Selling Association of Australia, *Proof Committee Hansard*, 30 April 2010, p. 9.

37 Mr Michael Delaney, Executive Director, Motor Trades Association of Australia, *Proof Committee Hansard*, 30 April, 2010, p. 16.

Conclusion

The Coalition believes that there is merit in a universal consumer law bill, and is looking forward to working with the Minister in discussing the recommendations in this report with a view to dealing with the concerns raised by both the Chair and the Coalition.

Senator Alan Eggleston **Senator David Bushby**

Deputy Chair

APPENDIX 1

Submissions Received

Submission Number	Submitter
1	Queensland Consumers Association
2	Sensis Pty Ltd
3	Coles Supermarkets Australia Pty Ltd
4	Motor Trades Association of Queensland
5	Real Estate Institute of Western Australia
6	Hasbro Australia Ltd
7	Mr Lynden Griggs
8	Energex
9	Energy Retailers Association of Australia
10	Queensland Newsagents Federation & NSW and ACT Newsagents Association
11	Telstra
12	Legal Aid Queensland
13	Salmat, Aegis Direct and CPM • Supplementary Submission
14	Consult Australia
15	Consumer Credit Legal Service Western Australia
16	Australian Institute of Architects
17	Direct Selling Association of Australia
18	Law Council of Australia
19	NARGA • Supplementary Submission
20	Choice
21	Motor Trades Association of Australia
22	Australian Direct Marketing Association
23	AUSTAR United Communications Ltd
24	Pharmacy Guild of Australia
25	Ms Madeleine Kingston
26	Associate Professor Dr Luke Nottage • Supplementary Submission
27	Council of Small Business of Australia
28	Consumer Action Law Centre
29	Federal Chamber of Automotive Industries
30	Australian Privacy Foundation and Privacy International
31	Australian Made Campaign Ltd
32	National Retail Association
33	Australian Communications Consumer Action Network
34	Engineers Australia

35 Freehills
- Supplementary Submission

36 Consumer Utilities Advocacy Centre
37 Australian Finance Conference
38 WACOSS
39 Engineers Australia
40 Dr Jeannie Paterson
41 Franchise Council of Australia
42 Australian Toy Association
43 Mr Robert Downey
44 Professor Stephen Corones
45 Australian National Retailers Association
46 Treasury
47 Mr Kevin McMahon

Additional Information Received

- Received from Dr Jeannie Paterson on 30 April 2010; answers to Questions on Notice taken at a public hearing in Melbourne on 29 April 2010.
- Received from the ACCAN on 7 May 2010; answers to Questions on Notice taken at a public hearing in Canberra on 30 April 2010.
- Received from Mr James Shaw on 13 May 2010; answers to Questions on Notice taken at a public hearing in Melbourne on 29 April 2010.
- Received from the CHOICE on 14 May 2010; answers to Questions on Notice taken at a public hearing in Sydney on 28 April 2010.

TABLED DOCUMENTS

Melbourne, 29 April 2010

- Document tabled by Salmat, AEGIS & CPM: "Field Sales Industry: Minimum accepted standards"
- Document tabled by the Energy Retailers Association: "Opening Statement"

Canberra, 30 April 2010

- Document tabled by the Australian Communications Consumer Action Network: "Informed Consent: Research Report"

APPENDIX 2

Public Hearings and Witnesses

CANBERRA, TUESDAY 27 APRIL 2010

BARTON, Mr Richard Bruce, General Counsel and Company Secretary,
Australian Institute of Architects

BOXALL, Dr Peter, AO, Commissioner,
Australian Securities and Investments Commission

COOPER, Mr Bruce, General Manager, Information, Research and Analysis,
Australian Competition and Consumer Commission

GREGSON, Mr Scott, Group General Manager, Enforcement Operations,
Australian Competition and Consumer Commission

KENNEDY, Dr Steven, General Manager, Infrastructure, Competition and Consumer Division, Department of the Treasury

KIRK, Mr Greg, Senior Executive Leader, Credit Taskforce/Deposit Takers and Insurers, Australian Securities and Investments Commission

MAGENNIS, Mr Darren, Policy Analyst,
Department of the Treasury

McCARTHY, Ms Clare, Senior Policy and Education Officer,
Australian Securities and Investments Commission

PARKEN, Mr David John, Chief Executive Officer,
Australian Institute of Architects

RIDGWAY, Mr Nigel, Group General Manager, Compliance, Research, Outreach and Product Safety, Australian Competition and Consumer Commission

TOWNSEND, Ms Catherine, Member,
Australian Institute of Architects

WINCKLER, Mr Simon, Policy Analyst, Consumer Policy Framework Unit, Infrastructure, Competition and Consumer Division, Department of the Treasury

WRITER, Mr Simon, Manager, Consumer Policy Framework Unit, Infrastructure, Competition and Consumer Division, Department of the Treasury

SYDNEY, WEDNESDAY 28 APRIL 2010

DOWNES, Ms Jacqueline, Partner, Allens Arthur Robinson; and Trade Practices Committee, Business Law Section, Law Council of Australia

HEALEY, Ms Deborah Jane, Senior Lecturer, Faculty of Law,
University of New South Wales

HENRICK, Mr Kenneth Michael, Chief Executive Officer,
National Association of Retail Grocers of Australia

HOLMES, Mr Paul Richard John, Senior Solicitor and Consumer Advocate,
Consumer Protection Unit, Legal Aid Queensland

HOWARTH, Mr David Nixon, Legal Policy Officer,
Choice

MOTTO, Ms Megan, Chief Executive Officer,
Consult Australia

NOTTAGE, Associate Professor Luke, Co-Director, Australian Network for Japanese Law, Law School, University of Sydney

RIDGEWAY, Mr Stephen, Deputy Chairman, Trade Practices Committee, Business Law Section, Law Council of Australia

UHR, Ms Catherine, Senior Solicitor and Consumer Advocate, Consumer Protection Unit, Legal Aid Queensland

van RIJSWIJK, Mr Gerard, Senior Policy Adviser,
National Association of Retail Grocers of Australia

ZINN, Mr Christopher, Director, Communications and Campaigns,
Choice

MELBOURNE, THURSDAY 29 APRIL 2010

BAXT, Professor Robert, Partner,
Freehills

CARTER, Professor John William, Consultant,
Freehills

CRICHTON, Ms Jennifer, General Counsel, Telstra Consumer,
Telstra Corporation Ltd

CRUMMY, Mr Paul James, General Manager,
Aegis Direct

FAULKS, Mr Joshua, Head of External Affairs,
Salmat Ltd

GRIGGS, Mr Lynden,
Private capacity

LOWE, Ms Catriona, Co-Chief Executive Officer,
Consumer Action Law Centre

MALBON, Professor Justin,
Private capacity

O'REILLY, Mr Cameron Myles, Executive Director,
Energy Retailers Association of Australia

PATTERSON, Dr Jeannie,
Private capacity

PECKHAM, Mr Alan, Partner,
Freehills

RICH, Ms Nicole, Director, Policy and Campaigns,
Consumer Action Law Centre

ROHAN, Ms Melinda, Director, Corporate and Regulatory Affairs,
Australian Direct Marketing Association

SHAW, Mr James, Director, Government Relations,
Telstra Corporation Ltd

SMITH, Mr Gary, Head of Strategic Solutions,
Salmat Ltd

TAN, Mr Gingkai, Director, Direct Sales,
CPM Australia

WRIGHT, Mr Steve, Executive Director,
Franchise Council of Australia

YOUNGER, Mrs Rochelle Amanda, Legal Counsel,
Sensis Pty Ltd

CANBERRA, FRIDAY 30 APRIL 2010

DELANEY, Mr Michael, Executive Director,
Motor Trades Association of Australia

DUCKWORTH, Mr Colin, Senior Policy Officer,
Motor Trades Association of Australia

FREEMAN, Ms Elissa, Director, Policy and Campaigns,
Australian Communications Consumer Action Network

GREIG, Mr Anthony, Chairman,
Direct Selling Association of Australia

HOLLOWAY, Mr John William Andrew, Executive Director,
Direct Selling Association of Australia

MAGENNIS, Mr Darren, Policy Analyst, Infrastructure, Competition Policy Framework Unit, Competition and Consumer Division, Department of the Treasury

McCREDIE, Mr David Cameron,
Hasbro Australia Ltd

PAINE, Mr Bruce, Principal Adviser, Infrastructure, Competition and Consumer Division, Department of the Treasury

PEATTIE, Mr David, Managing Director, Australia and New Zealand,
Hasbro Australia Ltd

SCANLAN, Ms Sue, Deputy Executive Director,
Motor Trades Association of Australia

SPIER, Mr Hank, Consultant,
Motor Trades Association of Australia

WRITER, Mr Simon, Manager, Infrastructure, Competition Policy Framework Unit, Competition and Consumer Division, Department of the Treasury