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By email

Dear Committee Members

## Highlighting the differences between the Australia Consumer Law and the Trade Practices Act

### Background

During Freehills' attendance at the Public Hearing before the Economics Legislation Committee on Thursday, 29 April 2010, there was discussion of the differences between the ACL (in particular the consumer guarantee provisions) and the provisions of the TPA which they would replace.

The Committee expressed its understanding that the relevant provisions of the Bill will have the same substantive effect as the TPA provisions, but have been re-enacted to achieve two goals:

- simplification of language; and
- adoption of best practice in the State and Territory fair trading legislation.

That is the position broadly expressed in the Explanatory Memorandum. See, eg para 6.6 and Chapters 23 and 25. In particular, Chapter 25 ('Regulatory Impact Statement: The Australian Consumer Law — A national consumer guarantees law') includes the statement (*italics supplied*):

25.8 The RIS discusses the impact of implementing the CCAAC recommendations, including the costs and benefits of moving from a system of implied conditions and warranties to statutory consumer guarantees. Given that *the proposal does not involve a change in the substantive rights and obligations of businesses or consumers*, the only cost is transitional in nature. On the other hand, the benefits of reduced complexity and uncertainty will be enduring, as will be the reduced costs of compliance for businesses, particularly those businesses that trade in more than one State or Territory of Australia.

### Significant change

However, as we submitted at the Public Hearing, this is not correct. There is without doubt a '*change in the substantive rights and obligations of businesses or consumers*'. It is, moreover, a **significant change**. If nothing is done to correct the matter, the enactment of the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 (**Bill**) will be based on a misunderstanding – a misunderstanding which has been conveyed to Parliament – of the legal effect of the Bill. Since we have put the Committee on notice of that misunderstanding, we thought it appropriate to provide a further written statement.

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The substantive differences which cannot be accounted for on the basis of the provisions of the State and Territory fair trading legislation include the following:

- (1) Removal of the mandatory obligations currently imposed on suppliers of goods which are not of a kind ordinarily acquired for personal, domestic or household use or consumption;
- (2) Removal of the mandatory obligations currently imposed on suppliers of services which are not of a kind ordinarily acquired for personal, domestic or household use or consumption;
- (3) Introduction of the ability of the Minister to exempt the most basic supplies to consumers (of gas, electricity and telecommunications) from the ACL;
- (4) Removal of direct restrictions on the use of limitation clauses in relation to the supply of goods which are not of a kind ordinarily acquired for personal, domestic or household use or consumption;
- (5) Removal of direct restrictions on the use of limitation clauses in relation to the supply of services which are not of a kind ordinarily acquired for personal, domestic or household use or consumption;
- (6) Introduction of a 'major failure' criterion where at present any non-compliance with an implied (statutory) condition confers a right to terminate the contract;
- (7) Introduction of a restriction of consumer rights to repair (rather than replacement) of goods;
- (8) Removal of specific exemptions from mandatory obligations in the supply of services by a qualified architect or engineer;
- (9) Introduction of a right to have goods repaired;
- (10) Deeming express warranties etc to be statutory guarantees;
- (11) Removal of a supplier's right to limit liability for breach of express warranties;
- (12) A fundamental substantive change to criterion for damages assessment in relation to express warranties;
- (13) Deeming a pre-contractual statement to be an express warranty;
- (14) Removal of supplier's right to limit contractual liability for a pre-contractual statement deemed to be an express warranty;
- (15) A fundamental substantive change to criterion for damages assessment in relation to any pre-contractual statement deemed to be an express warranty;
- (16) Introduction of a statutory prohibition on a false or misleading representation concerning a requirement to pay for a contractual right; and
- (17) Introduction of criminal penalties for a false or misleading representation concerning a requirement to pay for a contractual right.

The list is by no means exhaustive.

### **Commercial context**

These differences apply both in the genuine consumer context (where goods and services are acquired for personal use) and the commercial context (where goods and services are acquired for business purposes).

From the perspective of suppliers of goods and services, the impact can be expressed in two broad propositions:

- The imposition of a mandatory liability regime which is **indeterminate, unquantified, unlimited and uncosted**, in place of the current liability regime which is limited by damages rules which have been in place for in excess of 150 years;

- The imposition of a regulatory regime under which provisions in **each and every contract currently in use** in relation to the supply of goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption will become invalid overnight on 1 January 2011.

Bearing in mind the initial and continuing compliance costs, the overall cost to business is likely to be billions of dollars. Although **much of that cost will arise from the removal of freedom of contract for commercial suppliers to commercial consumers**, those costs will either be passed on to consumers or the businesses subjected to the costs will go out of business. In sum, rather than reducing costs to consumers, costs will be increased and consumer choice will be narrowed.

### **Competition issues**

A competitive market is one which has as one of its primary functions the role of allocating resources. Competition is a mechanism for the discovery of market information and the enforcement of those decisions, allowing the firms to discover what kinds of goods and services consumers want and the manner that they can be delivered in the cheapest possible manner. An essential element of competition is that prices and incentives are not distorted and costs are allocated to those who can most effectively bear them. This is why 'efficiency' is an important element of a competitive environment. The indicia of greater competition is that firms cannot charge more or give less. Lower output and higher prices is the result of uncompetitive behaviour. Thus, something that causes an incentive to 'produce less, or charge more' (equivalents in economics) is anticompetitive in nature.

The risk is that the ACL will allocate costs to parties who are not necessarily:

- the party who imposed the costs; or
- the least cost bearer.

There appears to have been no investigation of whether the outcome of the legislation will be more or less output in the relevant market. In this case there is good reason to think it will result in less output, because it is imposing direct costs on producers that were not previously imposed.

There has been no investigation of these fundamental questions. There has been no attempt to quantify the (social) costs of the ACL. That is both unprincipled and contrary to the 'guiding principle' in National Competition Policy (clause 5(1) Competition Principles Agreement) and the principles of good regulation, now acknowledged globally, that there should be a cost benefit analysis of any such regulation.

This demonstrates why the assertion that this is 'best practice' is misleading. Something is only 'best' practice when measured against an objective metric. It is not 'best' to simply maximise one factor (consumer rights) without determining that that is what is to be maximised. And that is particularly the case where those who benefit most are corporate 'consumers'. A market distortion occurs in giving one set of corporate consumers (those who acquire goods or services of a kind etc) a windfall benefit over other corporate buyers – even though they may operate in the same market as competitors.

### **Comparison of ACL and TPA**

Set out below are tables which compare the current regime with the proposed ACL. We have included an indication of the impact of replacement of the current definition of 'consumer' with that which is used in the unfair terms provisions (something we suggested in our Submission on the Bill). What the tables do not show is that a very significant proportion of the costs would be eliminated by the adoption of that definition.

**Position of consumers who acquire goods or services for personal use where the goods or services are not of a kind ordinarily acquired for personal, domestic or household use or consumption**

Aspect	TPA	Fair Trading Legislation	ACL	Impact of ACL on TPA Consumer Rights	Comparative Impact of ACL on: (1) Price to Consumer (2) Supplier Compliance costs	Comparative Impact of Adoption of Unfair Terms Definition of Consumer Contract on: (1) Consumer; (2) Supplier
<i>Mandatory obligations – Supply of goods</i>	Yes – up to \$40,000	Yes, where applicable	No	Reduction	(1) Nil (2) Negligible	(1) Consumer rights increased (2) Negligible cost
<i>Mandatory obligations – Supply of services</i>	Yes – up to \$40,000	Yes, where applicable	No	Reduction	(1) Nil (2) Negligible	(1) Consumer rights increased (2) Negligible cost
<i>Ability to limit liability for Mandatory obligations</i>	Only if reasonable	Same as TPA	No direct restriction	Reduction	(1) Nil (2) Negligible	(1) Consumer rights increased (2) Nil cost

**Position of consumers who acquire goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption for personal use**

Aspect	TPA	Fair Trading Legislation	ACL	Impact of ACL on TPA Consumer Rights	Comparative Impact of ACL on: (1) Price to Consumer (2) Supplier Compliance costs	Comparative Impact of Adoption of Unfair Terms Definition of Consumer Contract on: (1) Consumer; (2) Supplier
<i>Mandatory obligations for the supply of gas, electricity and telecommunications</i>	Yes	Yes	Depends on Minister	Reduction	(1) Unknown (2) Unknown	(1) Irrelevant (2) Irrelevant
<i>Right to reject goods</i>	Yes, with immaterial exceptions	Same as TPA	In general, only if failure major	Reduction	(1) Nil (2) Negligible	(1) Neutral (2) Neutral
<i>Damages for mandatory obligations</i>	No – common law	Same as TPA	Yes – ACL criterion	Increase	(1) Increase (2) Increase – Significant	(1) Neutral (2) Neutral
<i>Express warranties in relation to goods</i>	No	No	Yes	Substantial Increase; But Suppliers may decline to give warranties	(1) Increase (2) Increase – Significant	(1) Neutral (2) Neutral

<i>Ability to limit liability for Express Warranties</i>	Yes	Yes	No	Substantial Increase; But Suppliers may decline to give warranties	(1) Increase (2) Increase – Significant	(1) Neutral (2) Neutral
<i>Damages for Express Warranties</i>	No – common law	Same as TPA	Yes – ACL criterion	Increase; But Suppliers may decline to give warranties	(1) Increase (2) Increase – Significant	(1) Neutral (2) Neutral
<i>Pre-contract statements as express warranties in relation to goods</i>	No	No	Yes	Slight increase – protection in section 18 <sup>2</sup> already applies; But Suppliers may restrict information	(1) Increase (2) Increase – Significant	(1) Neutral (2) Neutral
<i>Ability to limit liability for Pre-contract statements</i>	Yes – subject to section 52	Same as TPA	No	Substantial Increase; But Suppliers may restrict information	(1) Increase (2) Increase – Significant	(1) Neutral (2) Neutral
<i>Damages for Pre-contract statements</i>	Yes – ss 82, 87	Same as TPA	Yes – ACL criterion	Slight increase – protection in section 18 <sup>2</sup> already applies; But Suppliers may restrict information	(1) Increase (2) Increase – Significant	(1) Neutral (2) Neutral
<i>Liability for conduct in contravention of section 29(n)<sup>1</sup></i>	No	No	Yes	Slight increase – protection in section 18 <sup>2</sup> already applies	(1) Possibly slight increase (2) Some Increase; but significant further risks eg default in borrowing and continuous disclosure requirements	(1) Neutral (2) Neutral

## Footnotes from table

### 1. Section 29(n) provides:

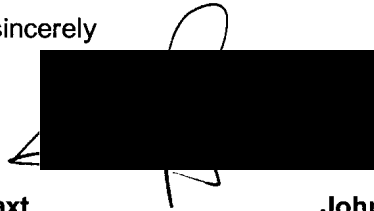
A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:

- (n) make a false or misleading representation concerning a requirement to pay for a contractual right that:
- (i) is wholly or partly equivalent to any condition, warranty, guarantee, right or remedy (including a guarantee under Division 1 of Part 3-2); and
- (ii) a person has under a law of the Commonwealth, a State or a Territory (other than an unwritten law).

### 2. Section 18 provides:

- (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
- (2) Nothing in Part 3-1 (which is about unfair practices) limits by implication subsection (1).

Yours sincerely

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