# Chapter 2

# Provisions of the bill

2.1 The bill comprises ten parts. The main provision is contained in part 1 of the bill and attracted most attention. Part 7 and part 9 elicited some criticism while the remaining provisions drew little if any comment. Given the level of interest in the proposed amendment in part 1, the committee's main focus in this report is on that particular provision, which would remove the reporting requirement for food businesses under the ACL's product safety law. The committee also considers the two provisions that gave rise to a few concerns. They related to the ACCC's power to obtain information, documents and evidence and the cooling off period for unsolicited consumer agreements.

## Part 1—Removal of reporting requirements

2.2 In his second reading speech, the Minister for Small Business, the Hon Bruce Billson, made clear that the provisions of the bill were part of the government's commitment to 'cutting red tape'.[1]

2.3 Division 5 of the CCA deals with consumer goods, or product related services, associated with death or serious injury or illness. Under section 131, suppliers are required to report consumer goods associated with the death or serious injury or illness of any person. It makes clear that if a supplier, in trade or commerce, supplies consumer goods and becomes aware of 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. The supplier is obliged to make such a report if the supplier:

- considers that the death or serious injury or illness was caused, or may have been caused, by the use or foreseeable misuse of the consumer goods; or
- becomes aware that a person other than the supplier considers that the death or serious injury or illness was caused, or may have been caused, by the use or foreseeable misuse of the consumer goods.[2]

2.4 This notice must comply with certain conditions such as identify the consumer goods and include information about particular matters to the extent that the supplier was aware at the time the notice was given. The information required includes when, and in what quantities, the consumer goods were manufactured in Australia, supplied in Australia, imported into Australia or exported from Australia. The notice should also provide information on the circumstances in which the death or serious injury or illness occurred; the nature of any serious injury or illness suffered

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1 The Hon Bruce Bilson, House of Representative *Hansard*, 18 March 2015, p. 8.

2 Subsection 131(1), Schedule 2—the Australian Consumer Law, CC Act.

by any person; any action that the supplier has taken, or is intending to take, in relation to the consumer goods.[3]

2.5 It is worth noting that under the machinery of government convention, the ACCC receives the written notification from the supplier regarding the death or serious injury or illness linked to the supplier's consumer goods.[4]

2.6 The proposed amendment would remove consumer goods which are foods from the reporting requirement in subsection 131(1). The Explanatory Memorandum noted, however, that a death, serious injury or illness associated with a food product would still need to be reported to the ACCC if it were due to 'a use or reasonably foreseeable misuse of the packaging of the food rather than the food itself'. It explained:

> In this context, packaging has its ordinary meaning and does not include the accuracy or content of any labelling on the packaging. [Schedule 1, item 2, subsection 131(2) of Chapter 3 of Schedule 2][5]

2.7 The Explanatory Memorandum indicated that the ACCC and Australian food safety regulators considered that the current reporting requirement in section 131 'did not support the food regulation system, was duplicative and placed a disproportionate cost on industry'.[6]

2.8 Foods Standards Australia New Zealand (FSANZ), an independent statutory agency, supported removing the reporting requirement from the CCA. It made two pertinent points—firstly, the mandatory reports to the ACCC did 'not add value to existing reporting systems' and, secondly, the existing state and territories reporting requirements were adequate.[7]

2.9 The committee now considers the extent to which the current mandatory reporting obligations in section 131 add value to the food safety regulatory regime and whether they are necessary.

### *Mandatory reporting to the ACCC*

2.10 FSANZ explained the process following the supplier making the mandatory report to the ACCC as required under the current law. It explained that, where consent

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3 Subsection 131(5), Schedule 2—the Australian Consumer Law, CC Act.

4 Subsection 131(1), Schedule 2—the Australian Consumer Law, CC Act.

5 Explanatory Memorandum, paragraph s 1.7–1.9.

6 Explanatory Memorandum, paragraph 1.7.

7 Established by the *Food Standards Australia New Zealand Act 1991*, FSANZ is part of the Australian Government's Health portfolio. It is mainly responsible for developing and administering the Australia New Zealand Food Standards Code. FSANZ also plays a role in coordinating national food safety incidents and food recalls. FSANZ's role with food-related mandatory reports is limited to national monitoring and reporting.

from the supplier had been received, the ACCC refers food-related mandatory reports directly to the relevant state or territory food enforcement agency for possible action. Concurrently, FSANZ receives copies of the reports 'to identify any national issues/trends and to collate and report on mandatory reporting data at a national level'.[8]

### *Value of the reports*

2.11 In his second reading speech, the Minister for Small Business informed the Parliament that:

> Both the ACCC and Australian food safety regulators consider these reports to be of limited value in regulating the safety of food products. The reports received under the ACL have not led to improved food safety outcomes for consumers. On the other hand, food safety regulators consider that administering the reports received under the ACL takes up a significant amount of time and resources for regulators, which could be better spent in ensuring better outcomes for consumers. Food related reports make up nearly half of all reports to the ACCC under the ACL.[9]

2.12 Evidence before the committee generally supported the view the mandatory reports to the ACCC did not add value and imposed an unnecessary obligation on businesses. For example, in FSANZ's experience the reports to date have not provided an early alert for any national food incident or food safety issue.[10] According to FSANZ, since mandatory reporting commenced on 1 January 2011, it had received approximately 4,750 food-related mandatory reports, with around 100 being received each month.[11] It concluded:

> Since mandatory reporting commenced in 2011, there is no evidence that the reports have provided the state and territory enforcement agencies with information on food-related injuries, illnesses and death that they were not already aware of or would have been aware of via other sources. The reports have also not provided an early alert to a national food safety issue. The vast majority of reports are associated with alleged food poisoning that if investigated, would be very unlikely to be associated with the food being reported. Many reports also do not contain sufficient information to enable the relevant enforcement agency to undertake further investigations.[12]

2.13 The Australian National Retailers Association endorsed this finding noting further that the requirement to report an incident to the ACCC was 'unnecessarily duplicative'; created additional and unnecessary cost for industry; and had 'not

8 *Submission 1*, p. [1].

9 House of Representatives *Hansard*, 18 March 2015, pp. 8–9.

10 *Submission 1*, p. [1].

11 *Submission 1*, p. [1].

12 *Submission 1*, p. [2].

produced improved food safety outcomes'.[13] The Australian Food and Grocery Council (AFGC) concurred with this view. It stated:

> Food related reports make up nearly half of all reports to the ACCC under the ACL, and even the ACCC and Commonwealth, State and Territory food safety regulators consider these reports to be of limited value. The reports received under the ACL have not led to improved food safety outcomes for consumers. On the other hand, administering the reports received under the ACL takes up a significant amount of time and resources for regulators which could be better spent in ensuring better outcomes for consumers.[14]

2.14 In its view, the current mandatory reporting to the ACCC resulted in duplication. Furthermore, it requires:

> …duplicatary notifications from different agents in the supply chain based on mere allegations of harm, allowing time for only the most basic fact checking investigation by the manufacturer and usually well before any conclusions can be determined. The scheme is taking up regulatory and industry resources with no actual safety outcomes being delivered.[15]

2.15 In its words, the mandatory reporting to the ACCC was unnecessary and unproductive. Likewise, the Brewers Association supported this amendment to remove the reporting obligation to the ACCC, suggesting that the notification requirement 'imposes a significant burden, and in many instances, in an environment where the business is not aware of all details'.[16]

### *Adequacy of state and territories reporting framework*

2.16 Currently, state and territory public health laws require hospitals and medical practitioners to report food related illness, injuries or deaths. The Minister for Small Business explained:

> The types of illnesses required to be reported under these laws are set by state and territory regulators and target particular food related illnesses, which are of importance from a food safety perspective. Health and medical practitioners are the first-to-know network that activate the extensive state and territory public health laws and protocols that respond to food related illnesses, injuries or deaths.[17]

2.17 Most importantly, a number of submissions argued that the repeal of this provision would not comprise the overall integrity of the food safety regulatory

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13 *Submission 4*, p. [1].

14 *Submission 2*, p. [2].

15 *Submission 2*, p. [2].

16 *Submission 6*, [1].

17 House of Representatives *Hansard*, 18 March 2015, p. 8.

system. In this regard, the AFGC detailed the states and territories' arrangements for reporting food-borne illness:

> Currently, State and Territory public health laws require hospitals and medical practitioners to report food related illness, injuries or deaths, including serious illnesses or instances where there are multiple cases. These laws target food related illnesses which are of importance from a food safety perspective, and the requirement on health and medical practitioners to report them activates the extensive state and territory public health laws and protocols that respond to food related illnesses, including investigation and product recalls where appropriate.[18]

2.18 FSANZ detailed the numerous sources that provide information of injuries, illness and deaths associated with food to the relevant states and territories authorities. The information comes via:

- consumer complaints;
- notifications from general practitioners of suspected food poisoning, particularly when occurring in two or more related cases;
- notifications from laboratories of confirmed cases of foodborne diseases following clinical testing of persons suspected of having such diseases; and
- notifications from hospital emergency departments.[19]

2.19 Noting that state and territory agencies take the lead regarding reporting, investigating and taking action on foodborne illness, the AFGC also contended that mandatory reporting to the ACCC was unnecessary. It suggested that the measure to remove this mandatory reporting requirement was 'a deregulatory measure about resolving duplication between Commonwealth and State/Territory agencies, in favour of the State/Territory system that has been shown to be effective in protecting public safety'.[20] It explained further:

> While there are cost savings to industry that arise from the removal of the CCA requirement, the AFGC and the industry it represents would not seek to trade legitimate safety regulation for reduced costs, nor would it expect this Government or the Parliament to countenance such a trade. The food industry does not compromise where food safety regulation is concerned.[21]

2.20 Furthermore, the removal of this requirement would not affect the tools available to the government under the ACL to deal with products, including foods, which are considered to be unsafe. The AFGC gave the example:

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18 *Submission 2*, p. [1].

19 *Submission 1*, p. [2].

20 *Submission 2*, p. [1].

21 *Submission 2*, p. [1].

> …in addition to state and territory food safety and public health regulations, under the ACL the Commonwealth minister may issue a recall notice for consumer goods of a particular kind, including food products, where it appears to the minister that such goods will or may cause injury.[22]

2.21 The AFGC drew on recent cases to demonstrate the effectiveness of the system operating under the state and territories reporting regime. It cited the highly publicised cases in early 2015 relating to the alleged hepatitis A contamination of imported frozen berries and the Sydney scombroid fish incident. The AFGC argued that both were 'thoroughly investigated by the relevant state agencies who took decisive action'. Importantly, it suggested that:

> Neither case would have been notified to the ACCC under mandatory reporting because the relevant State agencies were already taking the necessary action to protect public health.[23]

2.22 The NSW Food Authority supported this view. It also contended that there was no evidence indicating that 'the mandatory reporting requirement had any beneficial effect on food product safety'. Further, the current mandatory reporting requirement under subsection 131 'tied up regulatory resources that could have been deployed more productively'.[24] Referring to the NSW regime, it noted that NSW had reliable and effective arrangements for reporting and investigating foodborne illness outbreaks, which operate in that state:

> …through close collaboration between the Authority and NSW Health, with environmental health staff of local Councils, and nationally with Food Standards Australia New Zealand.[25]

2.23 Consistent with FSANZ's findings, the NSW Food Authority reported:

> The [mandatory reporting] requirement typically resulted in 30 to 40 notifications per month in NSW. The Authority reviewed each of these notifications and in almost every instance found that the notification contained no information that required or justified further action. This is because most of the notifications relate to single-case foodborne illness attributed to food products with a national distribution but without sufficient evidence to establish that the product identified actually caused the alleged illness/injury. On the rare occasions where the Authority received more than one notification relating to the same or a similar product, the Authority's investigations have never confirmed an actual problem.[26]

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22 *Submission 2,* p. [3].

23 *Submission 2,* pp. [1–2].

24 *Submission 7,* p. 1.

25 *Submission 7,* p. 1.

26 *Submission 7,* p. 1.

2.24 The ACCC did not make a submission to the inquiry but in correspondence to the committee indicated that it endorsed the focus of the bill, which was to improve and clarify the administration of the CCA.[27]

2.25 CHOICE, a leading independent and member-funded consumer advocacy group in Australia, was concerned that the proposed removal of the reporting requirements would indeed weaken the reporting regime. It was concerned that it was 'difficult to confirm exactly what processes the ACCC reporting requirement duplicates'. From its perspective, the Australian Government had 'an obligation to demonstrate that alternative or existing processes are in place to require reporting of food products in the case of a serious injury, illness or death'.[28] CHOICE believed that if the bill proceeded there was 'the possibility that reporting of food-related deaths, injuries and illnesses as a result anaphylactic reactions may not occur'. It stated that based on its understanding 'there remains a gap with reporting of incidents related to anaphylaxis' and quoted the President of Allergy and Anaphylaxis Australia:

> … if this requirement is deregulated we have lost the ability to build on an existing platform to help capture information that would assist us with management of allergic disease in relation to food products…The gathering of information on potentially life threatening allergic reactions by the ACCC has meant we have a collection point for critical information.[29]

2.26 It is worth noting that in support of the proposed change, the AFGC used the case of a young man in Victoria who suffered a fatal anaphylaxis after consuming a coconut water drink that had an undeclared milk allergen as an ingredient. It elaborated:

> No-one involved in this young man's medical care told the importer or seller of the product about the incident and so it was never notified to the ACCC under the mandatory reporting requirements. Rather, the incident was investigated by the Victorian Department of Health and the product eventually recalled by the importer.[30]

2.27 In respect of the adequacy of the states and territories' reporting requirements, CHOICE indicated that it had been unable 'to clarify whether State and Territory-level reporting requirements are up-to-date and adequate'. Referring to state and territory legislation requiring food-borne infectious diseases to be reported to health authorities, CHOICE observed:

> These reporting requirements are not consistent between states but capture a large amount of food-borne diseases. OzFoodNet appears to be the central repository of data where government captures all information about food-borne disease incidents. However, it appears as though this website has not

27 Correspondence from the ACCC to the Senate Economics Committee, 10 April 2015.

28 *Submission 5*, p. [1].

29 *Submission 5*, p. [2].

30 *Submission 2*, p. [2].

> been updated since 2013, raising questions about the currency of the data and adequacy of current reporting.[31]

2.28 The committee notes CHOICE's concerns about the possible undermining of the reporting regime by removing the mandatory reporting obligations to the ACCC currently in force under section 131 of the CCA. Evidence indicates, however, that the reporting system operating in the states and territories is adequate and that the mandatory reporting to the ACCC both duplicates the work of the relevant state and territory agencies and also creates an added and unnecessary compliance burden on business.

## Part 9—Power to obtain information, documents and evidence

2.29 Section 155 of the CCA contains the ACCC's primary investigative power. Under section 155 of the CCA, the ACCC is empowered to compel individuals to appear before it to answer questions about a potential contravention, and to compel corporations and individuals to provide information and produce documents. It can exercise this power, if it has reason to believe that the person or corporation is capable of giving evidence, furnishing information or producing documents relating to a possible contravention of the CCA. It is not necessary for the ACCC to have reasonable grounds to believe that a contravention has occurred before exercising those powers.[32]

2.30 A recent review of Australia's competition policy, laws and institutions, which undertook a stocktake of the competition policy framework across the Australian economy referred to section 155. The review, known as the Harper review, noted that the section 155 powers have been:

> …a longstanding feature of Australia's competition law framework. Contraventions of competition laws, particularly cartel-type conduct, are often clandestine. Thus, it is thought necessary to give the competition regulator strong coercive powers to uncover such contraventions.[33]

2.31 Under this section, if the Commission, the Chairperson or a Deputy Chairperson has reason to believe that a person is capable of furnishing information, producing documents or giving evidence, the Commission may require the person to do so by notice in writing served on that person. Certain grounds apply where such a

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31 *Submission 5*, [1].

32 See explanation given by Professor Ian Harper, Peter Anderson, Su McCluskey Michael O'Bryan QC, *Competition Policy Review*, Final Report, March 2015, p. 418, http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report_online.pdf (accessed 23 April 2015). See section 155—Power to obtain information, documents and evidence, CCA.

33 Professor Ian Harper, Peter Anderson, Su McCluskey Michael O'Bryan QC, *Competition Policy Review*, Final Report, March 2015, p. 418, http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report_online.pdf (accessed 23 April 2015).

notice cannot be given such as self-incrimination. According to the Explanatory Memorandum, currently the ACCC may seek a fine of up to 20 penalty units or a term of imprisonment of up to 12 months for a failure to comply with such a notice.[34] The insertion of proposed subsection 155(8) is intended to further strengthen the ACCC's ability to obtain the necessary evidence to investigate properly allegations of a breach of the law.[35] New subsection 155(8) is clear on the requirements:

> If a person refuses or fails to comply with a notice under this section, a court may, on application by the Commission, make an order directing the person to comply with this notice.[36]

2.32 The Explanatory Memorandum suggests that this provision would improve the efficacy of this section by permitting the ACCC to seek such a court order. The Explanatory Memorandum, however, provides no further detail.

2.33 Two submissions objected to this provision. The Queensland Law Society argued that proposed subsection 155(8A) would not replicate the safeguard contained in subsection 155(5A) and that such a safeguard should be included. The safeguard in subsection 155(5A), among other things, exempts a person from the obligation to comply with a notice 'to the extent that the person is not capable of complying' with such a notice. The Society reasoned:

- as a matter of principle, given the inherently intrusive nature of section 155, its operation should be limited to the greatest extent possible without compromising its purpose;
- the subsection 155(5A) safeguard was introduced into the TPA (as the CCA then was) in 2001, and it has not compromised the policy objectives of section 155;
- under the proposed subsection 155(8A), recipients of s155 notices will be exposed to additional serious consequences for failing to comply with a section 155 notice (i.e. they will also be breaching a Court order), which underscores the importance of ensuring that the existing safeguard in subsection 155(5A) is extended to subsection 155(8A);
- extending the safeguard to subsection 155(8A) will neither lessen the ACCC's existing powers under section 155 nor compromise the purpose behind the proposed subsection 155(8A)—it will simply ensure that the new subsection 155(8A) is consistent with section 155 as it presently stands; and
- enacting subsection 155(8A) in its currently-proposed form would introduce a lacuna into the CCA, in that a Court, in seeking to enforce a section 155 notice, could make an order requiring the section 155 recipient to do things

34 Explanatory Memorandum, paragraph 1.45.

35 House of Representatives *Hansard*, 18 March 2015, p. 9.

36 Item 20, Competition and Consumer Amendment (Deregulatory and Other Measures) Bill 2015.

that the recipient could not have been required to do pursuant to the original section 155 notice itself.[37]

2.34 To ensure that a safeguard contained in subsection 155(5A) was replicated, the Queensland Law Society suggested the following amendment as italicised:

> If a person refuses or fails to comply with a notice under this section, a court may, on application by the Commission, make an order directing the person to comply with the notice *to the extent that the person is capable of doing so.*[38]

2.35 The Australian National Retailers Association also opposed proposed subsection 155(8A). It was concerned that the provision could:

- expose individuals to contempt sanctions in circumstances where production of information, documents and evidence is very difficult or costly.[39]

2.36 In this regard, the committee notes that the Harper review supported the enforcement regime under the CCA, which confers both public and private enforcement rights in respect of the competition law. The Harper review recognised that compulsory evidence-gathering powers under section 155 of the CCA bolstered the ACCC's ability to enforce the CCA.[40] It agreed with the ACCC's view that the current sanction for a corporation failing to comply with section 155 of the CCA was inadequate.

2.37 The Harper review went further to suggest that the ACCC should be able to use section 155 to investigate possible contraventions of court-enforceable undertakings accepted by the ACCC under section 87B of the CCA.[41]

2.38 The committee wrote to the Treasury and the ACCC regarding the concerns raised about proposed subsection 155(8A) by the two submitters

2.39 In its response, the Treasury informed the committee that the drafting of Part 9 of the bill was based on section 1303 of the Corporations Act 2001 (Cth). It noted that this provision provides the Federal Court with discretion to order compliance with a section 155 notice. It noted, however, that:

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37 *Submission 3*, pp. 1 and 2.

38 *Submission 3*, p. 2.

39 *Submission 4*, p. [2].

40 Professor Ian Harper, Peter Anderson, Su McCluskey Michael O'Bryan QC, *Competition Policy Review*, Final Report, March 2015, p. 71, http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report_online.pdf (accessed 23 April 2015).

41 Professor Ian Harper, Peter Anderson, Su McCluskey Michael O'Bryan QC, *Competition Policy Review*, Final Report, March 2015, p. 71, http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report_online.pdf (accessed 23 April 2015).

> In exercising its discretion, the Federal Court may consider any matter it considers relevant, including the difficulty or cost to a business of complying with a section 155 notice and whether the scope and timeframe of such a notice is reasonable.[42]

2.40 The Treasury explained that because proposed subsection 155(8A) provides a discretion to the Federal Court, it differs from subsection 155(5), which provides that a person must not refuse or fail to comply with a notice provided under section 155. According to the Treasury, subsection 155(5A) was 'inserted in the Treasury Legislation Amendment (Application of Criminal Code) Bill (No 2) 2001 (Cth) to provide that an offence does not occur to the extent that a person is not capable of complying with section 155(5)'. The Treasury concluded:

> An equivalent to subsection 155(5A) is not required with respect to proposed subsection 155(8A) as the Federal Court can consider the extent to which a person is not capable of complying with a notice under section 155 in exercising its discretion, where relevant.[43]

2.41 The ACCC similarly noted that the proposed section provides the Federal Court with discretion to order compliance with a section 155 notice. It explained:

> In the course of its consideration, the Federal Court is able to take into account any matters it considers relevant to its assessment. This can include the difficulty or cost to a business of complying with a notice issued under section 155, and whether the scope and timeframe of the notice is reasonable.[44]

2.42 In arguing that an equivalent to subsection 155(5A) was not required for 155(8A), the Treasury and the ACCC cited *Oswal v Burrup Holdings Ltd* as an example of the application of section 1303, where the Federal Court 'did not order the disclosure of all documents being sought by the applicant'. Furthermore, the ACCC informed the committee that before issuing every notice under section 155, the Chairman or Deputy Chair:

> …assesses the level of burden the notice is likely to impose. This assessment takes into consideration the timeframe for compliance and the scope of the notice including the difficulty of compiling the information or producing the documents the subject of the notice. The ACCC assists traders with compliance, as its main objective is to obtain the information, documents or evidence relating to a matter that may constitute a contravention of the CCA or Australian Consumer Law. The ACCC responds to representations from businesses by varying the scope and compliance date of notices, where appropriate.[45]

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42 The Treasury answer to written question on notice, see Appendix 2.

43 The Treasury answer to written question on notice, see Appendix 2.

44 The ACCC's answer to written question on notice, see Appendix 2.

45 The ACCC's answer to written question on notice, see appendix 2

2.43 Based on the evidence from the Treasury and the ACCC, the committee understands that, in respect of proposed subsection 155(8A), the Federal Court can exercise its discretion and consider the extent to which a person is not capable of complying with a notice.

*Costly litigation*

2.44 The Australian National Retailers Association raised another objection to this provision that would allow a court, on application by the Commission, to make an order directing a person to comply with a notice under section 155. It was concerned that the proposed subsection would 'increase the likelihood of costly litigation, particularly where the ACCC imposes an unreasonable scope and timeframe within the section 155 notice'.

2.45 It is worth noting that the Harper review accepted that compulsory evidence-gathering powers could impose a regulatory burden on recipients of compulsory notices and acknowledged concerns about the costs of compliance with section 155 notices issued by the ACCC. It suggested that the ACCC 'should accept a responsibility to frame section 155 notices in the narrowest form possible, consistent with the scope of the matter being investigated'.[46]

2.46 In their response to the committee's request for information, the Treasury and the ACCC rejected the proposition that proposed subsection would increase the likelihood of costly litigation. The Treasury indicated that proposed subsection 155(8A) would improve the 'efficacy of notices under section 155' without 'changing business' obligations under the law'. Likewise, the ACCC was of the view that the proposed amendment would not change business' obligations for compliance.[47]

## Part 7—Prohibition on supplies for 10 business days

2.47 The bill would repeal subsection 86(1), which sets down the period during which the supplier under an unsolicited consumer agreement must not supply the goods or service or accept or require payment in connection with the goods or service. It would substitute this repealed subsection with another provision intended to provide greater certainty by clarifying the rights and responsibilities of consumers and businesses that relate to the cooling-off period for unsolicited consumer agreements.[48]

2.48 Under the current provision, a supplier under an unsolicited consumer agreement must not supply unsolicited goods or services, or accept or require payment

46 Professor Ian Harper, Peter Anderson, Su McCluskey Michael O'Bryan QC, *Competition Policy Review*, Final Report, March 2015, p. 71, http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report_online.pdf (accessed 23 April 2015).

47 The Treasury and the ACCC's answer to written question on notice, see Appendix 2.

48 House of Representatives *Hansard*, 18 March 2015, p. 10.

under an unsolicited consumer agreement within a specified period. This timeframe covers a period of ten business days commencing on the first business day after such an agreement was made in person, or if it was made by telephone, commencing at the start of the business day after the consumer is given a copy of the agreement.

2.49 The Explanatory Memorandum reasoned that in its current form, the provision may 'inadvertently permit traders to supply unsolicited goods or services and accept or require payment after an unsolicited consumer agreement has been entered into, but before the ten business days commence (that is, on the day the contract is agreed)'.[49] According to the Explanatory Memorandum, the proposed amendment:

> …clarifies the responsibilities for traders and the rights of consumers regarding the supply and acceptance of payment for unsolicited goods or services and the commencement of the cooling-off period. In particular, it now makes it clear that traders are not permitted to supply unsolicited goods or services and accept or require payment under an unsolicited consumer agreement before the cooling-off period commences.[50]

2.50 The Queensland Law Society agreed with the proposition that the amendment to subsection of 86(1) rectified this particular problem but noted that it failed to correct other sections that rely on the cooling off period including sections 82, 85 and 179. It explained:

> The effect of section 82(3) (a) and (b) is to set the period when a consumer may terminate a contract. The effect of not also changing this section is that if a consumer terminates on the day the contract is entered into it is not technically part of the period when the consumer may terminate and therefore may be exploited by unscrupulous traders. Similarly, sections 85(3) and (6) place obligations on the consumer in relation to return and reasonable care of goods and supply of services that could have unforeseen consequences if they are brought into line with the new definition of termination period proposed by the clause 16 amendment. [51]

2.51 In the Society's view, if the replacement of subsection 86(1) were to go ahead, further amendments would be required 'to address the consequences for other parts of the Act which rely upon the cooling off period'.[52]

2.52 The committee wrote to the Treasury and the ACCC about the Queensland Law Society's concerns regarding proposed subsection 86(1) Both agreed that consequential amendments were required to sections 82, 85 and 179 'to ensure the definition of the cooling-off period is referred to consistently throughout the Australian Consumer Law.' The Treasury informed the committee that the government was in the process of finalising the amendments 'with a view to introducing them

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49 Explanatory Memorandum, paragraph 1.38.

50 Explanatory Memorandum paragraph 1.39.

51 *Submission 3*, p. 2.

52 *Submission 3*, p. 2.

when the legislation is debated in the House of Representatives'.[53] The ACCC also understood that, to rectify this oversight, the government intended to introduce amendments in the Committee-in-detail stage, following the Second Reading Debate in the House of Representatives.[54]

## Additional amendments

### *Part 2—Repeal of subsections 5(3), (4) and (5)*

2.53 Section 5 of the Act extends certain provisions of the legislation to cover conduct engaged in outside Australia by businesses incorporated or carrying on business in Australia and by Australian citizens and residents.[55] The bill would repeal subsections 5(3), (4) and (5) and in effect remove the requirement for litigants to seek the minister's agreement to bring an action for a breach of the CCA that has taken place overseas. In his second reading speech, the minister explained:

> This requirement was inserted into the act in 1986 due to concerns that the extraterritorial application of the act may impinge on the laws or policies of the country where the breach took place. This is not such a concern today.[56]

2.54 Submitters raised no objections to this provision.

### *Part 5—Confidentiality of notices*

2.55 The bill would amend section 132A of Schedule 2, Division 5—Consumer goods, or products related services, associated with death or serious injury or illness.

2.56 This section is concerned with confidentiality of notices under this Division. For example, a person must not disclose to any other person a notice or any part of, or information contained in, such a notice, unless the person who gave the notice has consented to the notice or relevant information not being treated as confidential.[57] The legislation lists exemptions. The bill would add another exemption under proposed subsection 132A(3) to the effect that the section would not apply:

> …if the disclosure is made by a member of the staff of the regulator, or an associate regulator, in the performance of his or her duties as such a member of staff, and is made because it is reasonably necessary to protect public safety, to:
>
> (a) any other agency within the meaning of the *Freedom of Information Act 1982*; or
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> (b) the Director of Public Prosecutions; or

53 The Treasury and the ACCC's answer to written question on notice, see Appendix 2.

54 The ACCC's answer to written question on notice, see Appendix 2.

55 Explanatory Memorandum, paragraph 1.13.

56 House of Representative *Hansard*, 18 March 2015, p. 9.

57 Section 132A, CCA.

(c) a State/Territory government body (within the meaning of section 155AAA of the Competition and Consumer Act); or

(d) a foreign government body (within the meaning of the Competition and Consumer Act).

2.57 According to the Explanatory Memorandum, this proposed amendment would improve the ACCC's ability to share notices it receives under this section with specified agencies 'where it is reasonably necessary to protect public safety'.[58] It states further:

> To the extent that a particular notice contains personal or confidential information, the disclosure of such notices to other agencies or bodies will still be required to comply with the law, including the *Privacy Act 1988* (Cth).[59]

2.58 Submitters made no reference to this proposed amendment.

### *Correcting irregularities and minor drafting errors*

2.59 The Minister for Small Business explained that this proposed legislation presented one of the first opportunities to amend the ACL since its inception.[60] A number of the provisions in the bill correct drafting errors or irregularities and are noted below.

2.60 Part 3 of the schedule is intended to correct an error in drafting regarding the jurisdiction of state and territory courts.[61] It extends the jurisdiction to hear pyramid selling and unsafe goods liability cases to state and territory courts. The Minister for Small Business explained that such cases were mistakenly excluded from the ACL when the act was passed in 2010. He noted this amendment:

> …expands access to justice for consumers in relation to these important provisions of the ACL by providing them with access to state and territory courts and low-cost tribunals, rather than only through the Federal Court.[62]

2.61 Part 4 of the Schedule removes a redundant requirement for the ACCC to maintain a register of certain records when they hold conferences for product safety bans.[63]

2.62 The bill would also correct a number of minor errors in the drafting of the ACL in parts 6 and 8. According to the Explanatory Memorandum, section 79 of the

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58 Explanatory Memorandum, paragraph 1.29.

59 Explanatory Memorandum, paragraph 1.29.

60 House of Representatives *Hansard*, 18 March 2015, p. 10.

61 Explanatory Memorandum paragraphs 1.17–1.18.

62 House of Representatives *Hansard*, 18 March 2015, p. 10.

63 House of Representatives *Hansard*, 18 March 2015, p. 9.

CCA as currently drafted 'mistakenly omits to remove the parallel application of the offence of conspiracy found in subsection 11.5 of the Criminal Code'.[64] The bill would amend this anomaly, meaning that if enacted the *Criminal Code Act 1995* would no longer apply to the offence of conspiracy where it overlaps with the CCA.[65]

2.63 Finally, proposed section 33 would implement Australia's obligations under the Paris Convention for the Protection of Industrial Property. According to the Minister for Small Business, 'it is appropriate that it applies to all persons as a Commonwealth law'. He did note that this proposed amendment would 'not change the substantive obligations of Australian traders—section 33 of the ACL already applies to the conduct of all persons as a law of the states and territories'.[66]

2.64 The committee understands that these provisions were simply part of a process to remedy minor drafting errors and to tidy up some identified anomalies of the current act and, given that they attracted no concern, the committee makes no further comment.

## Conclusion

2.65 The committee understands the heightened concern when legislation proposes to remove what is deemed to be a health and safety reporting obligation. In this instance, however, evidence before the committee indicated strongly that the current mandatory reporting requirements to the ACCC were unnecessary and added to the compliance burden on business. In other words, the reporting regimes of the states and territories were adequate: that the reporting obligations to the ACCC duplicated the work of the states and territories and did not add value. As the AFGC stated, 'The scheme is taking up regulatory and industry resources with no actual safety outcomes being delivered'.[67]

2.66 A few particular concerns were drawn to the committee's attention. In this regard, the committee notes the Treasury and the ACCC's explanation about proposed subsection 155(8A) not requiring an additional safeguard given that the Federal Court has the discretion to consider the extent to which a person is not capable of complying with a notice. Furthermore, the committee accepts the Treasury and the ACCC's assurances that new subsection 155(8A) would not change business obligations. As noted earlier, the bill also rectifies a number of minor irregularities and drafting errors in the current CLA.

2.67 Importantly, the committee notes the government's intention to propose consequential amendments to sections 82, 85 and 179 'to ensure the definition of the

64 Explanatory Memorandum, paragraph 1.34

65 See Explanatory Memorandum, p. 7.

66 House of Representatives *Hansard*, 18 March 2015, p. 10.

67 *Submission 2*, p. [2].

cooling-off period is referred to consistently throughout the Australian Consumer Law'.

2.68 Having considered the provisions of the bill and noting the government's intention to make some amendments, the committee cannot see any impediment to the passage of this proposed legislation.

**Recommendation**

**2.69 The committee recommends that the bill be passed**

**Senator Sean Edwards**
**Chair**