

CONSUMER LAW

INTRODUCTION

After a long period in the doldrums which has seen Australia's consumer protection laws lag behind those of comparable Organisation for Economic Co-operation and Development countries, the winds of change are finally blowing again. It is timely, therefore, to produce a special issue of the *QUT Law and Justice Journal* devoted to some of the changes that are occurring.¹

The catalyst for the reforms was the 2008 report of the Productivity Commission (PC), *Review of Australia's Consumer Policy Framework*.² As part of its terms of reference the PC was to report on 'ways to improve the consumer policy framework so as to assist and empower consumers ... to meet current and future challenges'³. The PC was also required to report on 'any barriers to, and ways to improve, the harmonisation and coordination of consumer policy and its development and administration across jurisdictions in Australia, including ways to institutional arrangements and to avoid duplications of effort'.⁴

The PC commissioned a report to ascertain the nature and extent of any differences between the existing Commonwealth, State and Territory legislation governing consumer protection.⁵

The report considered first the Commonwealth consumer protection regime contained in part V of *Trade Practices Act 1974* (Cth) (TPA) and other Commonwealth legislation, namely the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act).

Having considered the material differences between the Commonwealth legislation, the report compared the TPA (the template legislation) with the equivalent provisions of the State and Territory Fair Trading legislation (eight separate pieces of State and Territory legislation), including the enforcement powers of the State and Territory regulators.

¹ For a history of consumer law reform in Australia see S Hally-Burton et al, 'Harnessing the Demand Side: Australian Consumer Policy' (2008) 4 *Economic Roundup* 91, available at: <<http://www.treasury.gov.au/contentitem.asp?NavId=&ContentID=1451>> at 22 February 2010.

² Productivity Commission, *Review of Australia's Consumer Policy Framework, Final Report* (2008).

³ Ibid vol 1, vii.

⁴ Ibid.

⁵ S Corones and S Christensen, *Comparison of Generic Consumer Protection Legislation* (2007), report prepared for Productivity Commission, Faculty of Law, Queensland University of Technology, available at <<http://www.pc.gov.au/projects/inquiry/consumer/consultancyreports/consumerprotectionlegislation>> at 22 February 2010.

The report also considered the material differences between the statutory implied terms regime in pt V div 2 of the TPA, and the State and Territory Sale of Goods Acts (another eight separate pieces of legislation). Finally, the report considered other State legislation dealing with unfair or unjust terms (a further two separate pieces of legislation).

The overall conclusion of the report was that a myriad of Commonwealth, State and Territory consumer laws, had developed over time with many small variations, even in regard to the definition of ‘consumer’ and that rather than moving towards uniformity and simplicity, they were moving towards greater complexity and disharmony. The Consumer Protection regime that had emerged since the passing of the TPA in 1974, created a nightmare for traders in terms of compliance costs, and confusion for consumers as to their rights and remedies.

The PC recommended that a single national generic consumer law (to be called the ‘Australian Consumer Law’) be implemented and that the existing consumer protection provisions of the TPA should form the basis for the new law. When it takes effect, the Australian Consumer Law will constitute a single, national law for fair trading and consumer protection, which will apply equally in all Australian jurisdictions.

The Australian Consumer Law will comprise:

- the ‘TPA Consumer Protection Provisions’;⁶
- a new national unfair contract terms law;
- a new national product safety regulatory system;
- reforms drawing on best practices in State and Territory laws; and
- a new national consumer guarantees law.

It will be implemented in two stages. The first stage of reforms is contained in the Trade Practices Amendment (Australian Consumer Law) Bill 2009 which was introduced into the Australian Parliament by the Minister for Competition Policy and Consumer Affairs, the Hon Dr Craig Emerson MP on 24 June 2009.

The Bill comprises the unfair contract terms provisions, and provides new civil pecuniary penalties, enforcement powers and consumer redress options for breaches of the TPA or the ASIC Act. The Senate Standing Committee on Economics Legislation reported on the Bill on 7 September 2009 and recommended that the Bill be passed.⁷

⁶ The ‘TPA Consumer Protection Provisions’ are defined in the *Intergovernmental Agreement for the Australian Consumer Law* signed on 2 July 2009 to mean the provisions in pt IVA; the provisions in pt V; the provisions in pt VA; the provisions in pt VC; relevant provisions in pt VI; and other relevant provisions elsewhere in the TPA relating to definition and enforcement. Available at: *Intergovernmental Agreement for the Australian Consumer Law* (2009) Council of Australian Governments <http://www.coag.gov.au/coag_meeting_outcomes/2009-07-02/docs/IGA_australian_consumer_law.pdf> at 22 February 2010.

⁷ The report of the Senate Economics Committee is available at: *Trade Practices Amendment (Australian Consumer Law) Bill 2009* (2009) Parliament of Australia, Senate <http://www.aph.gov.au/senate/committee/economics_ctte/tpa_consumer_law_09/index.htm> at 22 February 2010.

A second Bill and explanatory memorandum containing changes drawing on best practice in the States and Territories,⁸ and the consumer guarantees reforms will be introduced in the autumn session of Parliament with its passage expected by June 2010.

By the end of 2010, the States and Territories will have passed application legislation giving effect to the template Australian Consumer Law in the TPA, which will allow it to become effective on 1 January 2011.

The *Intergovernmental Agreement for the Australian Consumer Law* signed on 2 July 2009, regulates the way in which future changes can be made to the template Australian Consumer Law to avoid slipping back into disharmony. Any party may submit to the Commonwealth a valid proposal to amend the Australian Consumer Law.⁹ After a period of consultation provided for in cl 12, the Commonwealth Minister will call a vote on the proposed amendment. Clause 19 provides that the Commonwealth will not amend the Australian Consumer Law unless the proposed amendment is supported by the Commonwealth plus four jurisdictions, three of which must be States.

Enforcement and administration of the Australian Consumer Law will be shared between the Australian Competition and Consumer Commission, ASIC and State and Territory agencies pursuant to agreed Memoranda of Understanding.¹⁰

The issues are complex and the solutions are equally complex. They rely on numerous actions on a variety of levels to make the proposed legislative changes meaningful. However, the PC estimated that the adoption of a single, national law for fair trading and consumer protection applying equally in all Australian jurisdictions, will generate a net benefit to the community of between \$1.5 billion and \$4.5 billion each year, making it a very worthwhile policy initiative to pursue.¹¹

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⁸ The Ministerial Council on Consumer Affairs (MCCA) held in Perth on 4 December 2009, considered and agreed on 14 specific proposals to enhance the effectiveness of the Australian Consumer Law. These include unsolicited sales practices, and other forms of direct selling which do not take place in a retail context, lay-by sales transactions, demanding payment for unsolicited advertising, and clarifications to the provisions on pyramid selling. The MCCA Joint Communique is available at: Consumer.gov.au Official Site of the Ministerial Council on Consumer Affairs (2009) <http://www.consumer.gov.au/html/download/MCCA_Meetings/Meeting_22_4_Dec_09.pdf> at 22 February 2010.

⁹ *Intergovernmental Agreement for the Australian Consumer Law*, above n 5, cl 8.

¹⁰ *Ibid* cls 20 and 21.

¹¹ Productivity Commission, above n 2, 353.