

## Changes to the legislative trade practices regime

*The Competition and Consumer Act 2010*

On 1 January 2011, the *Trade Practices Act 1974* (Cth) became the *Competition and Consumer Act 2010* (Cth). The changes to the Act went far beyond its title. A detailed review and analysis of the changes is beyond the scope of this article. Rather, the aim of this article is to provide a brief overview of the new statutory regime, and to provide readers with guidance as to where to locate key former provisions of the Trade Practices Act in the new Act.

### Overview of the changes

The changes to the legislative trade practices regime were brought about in two phases. First, the *Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010* was assented to on 14 April 2010, with all provisions commencing by 1 July 2010. The major development introduced by this Act was the introduction of a national legislative scheme relating to unfair terms in standard-form consumer contracts. Secondly, the *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* was assented to on 13 July 2010. Most provisions of that Act commenced on 1 January 2011. Major changes brought by that Act include the following:

- the introduction of a national product safety law, which ensures the national application of permanent product bans and mandatory safety standards apply nationally (although states and territories retain recall and temporary ban measures);
- amendments to the old s 51A of the Trade Practices Act, now s 4 of the Australian Consumer Law (located in Schedule 2 to the Act) (ACL), to reverse the effect of some past decisions in relation to the section;
- amendments to the old s 52 of the Trade Practices Act, now s 18 of the ACL, so that the prohibition on misleading and deceptive conduct applies not only to corporations but to persons generally;
- the introduction of a national legislative scheme for statutory consumer guarantees to replace conditions and warranties that are implied into consumer transactions by the former Trade Practices Act and corresponding state and territory legislation;

- the inclusion of a single set of enforcement powers, penalties, remedies and redress provisions applicable to breaches, which applies nationally; and
- the provision of increased powers for the ACCC and other Commonwealth agencies and increased surveillance enforcement powers in the product market.

The Australian Consumer Law will only apply to transactions taking place from 1 January 2011. The previous national, state and territory legislation continues to apply to transactions taking place prior to that date.

### Changes to the structure of the Competition and Consumer Act

The structure of the Competition and Consumer Act is substantially similar to that of the Trade Practices Act, except that the former Part V of the Trade Practices Act (relating to consumer protection) is no longer located in the body of the Act, and instead forms part of the ACL, located at schedule 2 to the Act. The old Part VA (liability of manufacturers and importers of defective goods) and Part VC (offences) are also no longer in the text of the Act, but are now located in Parts 3–5 and Chapter 4 of Schedule 2 to the Act.

The key provisions in Part VI (Enforcement and Remedies) of the Trade Practices Act, such as s 80 (injunctions), s 85 (defences), s 86 (jurisdiction of courts), and s 87 (other orders) remain in the new Act, with some amendments. However, the old defences provision under s 85 has now been amended such that the section now provides only for the defence of acting honestly and reasonably in relation to conduct in contravention of Part IV. The former defences set out in s 85 relating to conduct in contravention of Part V are now contained in Chapter 5 of Schedule 2, for example, the publisher's defence, formerly located at s 85(3) of the Act is now at clause 251 of Schedule 2.

Rather unhelpfully, this means that practitioners must learn the new section numbers of the old Part V

provisions, yet cumbersome numbering of sections in respect of other parts of the Act remains, for example, s 44ZZOA.

### **The Australian Consumer Law**

The ACL is split into five chapters.

Chapter One is introductory and sets out various definitions, including the definition of consumer (clause 3). The former s 51A (misleading representations with respect to future matters) is now clause 4 of the Schedule. It still includes the rebuttable presumption that a person is taken not to have had reasonable grounds for making a representation with respect to any future matter unless evidence has been adduced to the contrary, but it has now been amended to provide that the presumption does not mean that merely because a person adduces evidence to the contrary, the person has been taken to have reasonable grounds for making it. The section also specifies that the provision does not have the effect of placing an onus upon any person to prove that the person who made the representation had reasonable grounds for making it.

Chapter Two sets out general protections in relation to misleading or deceptive conduct (part 2-1), unconscionable conduct (part 2-2) and unfair contract terms (part 2-3). This chapter includes the former section 52 (misleading or deceptive conduct), which is now found at clause 18 of Schedule 2. The only changes to the section include the substitution of the word 'person' for 'corporation', and the word 'must' for 'shall'. 'Person' is defined in the Act to include a partnership. Section 19 sets out the application of the section to information providers.

The unfair contract terms provisions (contained at clauses 23 to 28 of Schedule 2) provide that a term of a standard form consumer contract is void if the term is unfair. The meanings of 'consumer contract' and 'unfair' are set out, along with examples of terms of consumer contracts which 'may be unfair' in clause 25. Clause 27 sets out factors the court must take into account in determining whether a contract is a 'standard form contract'.

Chapter Three sets out specific protections in respect

of unfair practices (part 3-1), consumer transactions (part 3-2, which deals with consumer guarantees and unsolicited consumer agreements), safety of consumer goods and product related services (part 3-3) information standards (part 3-4) and liability of manufacturers for goods with safety defects (part 3-5).

The former ss 53 (false or misleading representations in relation to the supply of goods or services), 53A (false or misleading representations in relation to land) and 53B (false or misleading representations in relation to employment) are now found at clauses 29, 30 and 31 in part 3-1 with significant expansions.

Chapter Four sets out offences relating to unfair practices (part 4-1), consumer transactions (part 4-2), safety of consumer goods and product-related services (part 4-3), information standards (part 4-4), substantiation notices (part 4-5), defences to the offences (part 4-6), and miscellaneous provisions (part 4-7).

Chapter Five relates to enforcement and remedies, and includes provisions relating to defences to conduct in breach of Part 2-1 and 2-2 or Chapter 3 (formerly found in s 85 of the Trade Practices Act).

For further information about the ACL, please see the ACCC website at [www.accc.gov.au](http://www.accc.gov.au) and in particular, the 'Australian Consumer Law – Ready Reckoner' quick-reference guide.

**By Victoria Brigden**