

Agreement in Principle

Ms VIRGINIA JUDGE (Strathfield—Minister for Fair Trading, Minister for the Arts) [1.00 p.m.]: I move:

That this bill be now agreed to in principle.

It is my great pleasure to introduce the Fair Trading Amendment (Australian Consumer Law) Bill 2010, the final step in giving effect to far-reaching reforms of consumer protection legislation in this State and throughout Australia. Last session this Parliament passed legislation to regulate unfair contract terms in standard form consumer contracts. When those provisions commenced on 1 July 2010, in concert with Commonwealth and Victorian laws, phase one of the national reform process was complete. Successful passage of this bill will conclude phase two.

On 1 January 2011, the new consumer policy framework envisaged by the Council of Australian Governments will be in place. This has been described as the most significant overhaul of consumer law in a generation. The last serious attempt to introduce uniform laws and reduce the level of complexity, duplication and fragmentation was in the mid 1980s, when State and Territory governments agreed to mirror the consumer protection provisions in part V of the Trade Practices Act 1974 by introducing fair trading Acts. Unfortunately, there was no mechanism in place to ensure that uniformity was maintained. During the intervening years governments of all political persuasions faced new consumer protection and fair trading issues, and communities demanded action to minimise detriment particularly for disadvantaged and vulnerable consumers.

A federal system of government can benefit from innovation in different jurisdictions to find solutions to problems, leading to better public policy and service delivery. The problem is that regulatory innovation can lead to divergence in legislation. It was against this background that the Productivity Commission held an inquiry into Australia's consumer policy framework during 2007. By the time the commission was finalising its report, the Council of Australian Governments had agreed to an ambitious regulatory reform agenda, including an enhanced national consumer policy framework. The Ministerial Council on Consumer Affairs had the task of developing a new national approach to consumer policy, based on the recommendations in the Productivity Commission's report of May 2008. In their communiqué of 23 May 2008, Ministers noted that the reforms would serve to overcome inefficiencies resulting from the division of responsibilities between Australian governments so as to deliver better outcomes for consumers and lower costs for businesses, and to more speedily tackle practices that harm consumers.

In August 2008, the Ministers agreed to a series of proposals for far-reaching consumer policy reform. In summary, the reforms involved: a single national consumer law based on the consumer-protection provisions of the Trade Practices Act, with amendments reflecting best practice in State and Territory fair trading legislation; the Commonwealth as lead legislator, with States and Territories applying the national law as part of their own laws; and enforcement of the national generic consumer law shared between the Australian Competition and Consumer Commission and the State and Territory offices of Fair Trading. In October 2008, the Council of Australian Governments agreed to this new consumer policy framework.

The Australian Consumer Law replaces approximately 20 Commonwealth, State and Territory statutes, including parts of the New South Wales Fair Trading Act. For the first time, all Australian businesses and consumers will have the same rights and obligations concerning the supply of goods and services. The national consumer policy objective, agreed by the Ministerial Council on Consumer Affairs in May 2008, is as follows:

To improve consumer wellbeing through consumer empowerment and protection, fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers trade fairly.

On 2 July 2009 the Council of Australian Governments signed the Intergovernmental Agreement for the Australian Consumer Law. The intergovernmental agreement governs the development, administration and enforcement of the Australian Consumer Law. Importantly, it also governs future amendment of the law, so that uniformity can be maintained.

The Australian Consumer Law scheme is an applied law scheme. Legislation is enacted by the Commonwealth and applied, as in force from time to time, by other participating jurisdictions as a law of those jurisdictions. The relevant Commonwealth legislation is the Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010. Under the amendments the Trade Practices Act becomes the Consumer and Competition Act 2010 and the Australian Consumer Law is schedule 2 to the Competition and Consumer Act. All States and Territories are passing application laws—the only exception to this is Western Australia. It has been Western Australian Government practice to adopt a different mechanism so that the Western Australian Parliament has the opportunity to consider any changes to national legislative schemes before they are made. This is the case with the Australian Consumer Law. Unlike some other applied law schemes, the States and Territories have, and will maintain, an active role in the development of consumer policy and the enforcement of consumer laws. This is of particular significance to New South Wales. It is vital that New South Wales—Australia's most populous State

with the largest economy—is able to influence the decision-making process when national action is contemplated.

As far as changes to the law are concerned, the intergovernmental agreement provides that any jurisdiction may submit a proposal to the Commonwealth, supported by best practice regulation documentation similar to that required in New South Wales. Any Commonwealth proposal must be similarly justified. There is a three-month consultation period, after which a vote is held. Although consensus is the preferred outcome, in the end no amendments can be introduced to the Commonwealth Parliament unless they are supported by the Commonwealth plus four other jurisdictions, including at least three States.

Before I speak in more detail about the provisions of the bill, I acknowledge the legacy that has made New South Wales the pre-eminent lawmaker for consumer protection and fair trading in Australia. Some would say that Victoria has the honour of passing the first specific consumer-protection legislation in this country, but in 1969 it was New South Wales that introduced the comprehensive Consumer Protection Act: a statute that served as the model for corresponding legislation in other States and territories, including Victoria. The Consumer Protection Act operated successfully for nearly 20 years, supplemented by industry-specific regulation and innovative laws such as the Contracts Review Act and the former Consumer Claims Tribunals Act. The Fair Trading Act was enacted in 1987 in response to the agreement to mirror the consumer-protection provisions of the Trade Practices Act. At the time it was described—in words that have a familiar ring—as a groundbreaking piece of legislation and the most comprehensive overhaul of consumer law in New South Wales since 1969.

This bill amends the Fair Trading Act 1987 to apply the Australian Consumer Law as a law of New South Wales. I can assure members that the Fair Trading Act will not disappear. Although the core provisions of the Act are now replicated in the Australian Consumer Law, we will retain those provisions that are required for the exercise of Fair Trading's other administrative and regulatory functions. The Fair Trading Act gives our State agency power to advise and educate consumers; take action for remedying infringements of or for securing compliance with all legislation administered by the Minister for Fair Trading; receive, investigate and refer complaints; and examine and research laws and matters affecting consumers.

Staff will continue to carry out these functions with respect to both the Australian Consumer Law and industry specific laws, such as those that regulate motor dealers and real estate agents. Investigators require powers to enter premises, undertake search and seizure under warrant and obtain information, documents and evidence. The Fair Trading Act powers will be retained. Consumers in New South Wales have long benefited from the legal assistance provisions in the Fair Trading Act. Subject to the approval of the Minister, such assistance may be granted to a consumer involved in legal proceedings arising out of the supply of goods or services or an interest in land. Applications must meet the threshold consideration that it is in the general interests of consumers or a class of consumers for assistance to be granted.

The Fair Trading Act will continue to provide for the establishment of the Products Safety Committee and other advisory councils. The Australian Consumer Law is generic regulation, whereas industry-specific regulation targets particular sectors. It is likely to be the preferred option when effective enforcement of generic regulation has not achieved the policy objectives, such as, the modification of trader behaviour or protection of consumers from financial loss. The Fair Trading Act will continue the specific regulation of employment placement services, funeral goods and services, and the relationship between motor vehicle insurers and repairers.

A most important part of the Fair Trading Act deals with enforcement and remedies. Although many of these provisions are replicated in the Australian Consumer Law, there are others that are particular to New South Wales and have been retained. These include the director general's power to suspend licences and the prohibition on publishing a statement that is intended to promote the supply of goods and services and makes reference to the Minister or Fair Trading officials without their consent. Also retained is the broad power to make public warning statements about unsatisfactory goods or services or unfair business practices and those who supply or engage in them.

I turn now to the provisions of the bill. Schedule 1 amends the Fair Trading Act 1987 to apply the Australian Consumer Law as a law of New South Wales and provide for the administration and enforcement of the Australian Consumer Law in New South Wales. Schedule 1 also makes consequential amendments to the Fair Trading Act. It repeals the provisions that are superseded by the enactment of the Australian Consumer Law and clarifies the interaction of existing enforcement and remedy provisions with those in the Australian Consumer Law. Existing provisions are amended to promote harmonisation and national consistency in the administration of consumer protection and fair trading laws. The bill amends section 4 to make it clear which of the definitions in the Australian Consumer Law are also to apply to the Fair Trading Act.

Section 5, which defines "consumer", is repealed in favour of the definition in the Australian Consumer Law. The definition in the Australian Consumer Law is the same as that in the Trade Practices Act. Essentially, a consumer is someone who buys goods or services that would normally be for personal, domestic or household use, any type of goods or services costing up to \$40,000, or a vehicle or trailer used mainly to transport goods on public roads. Under the Australian Consumer Law, the provisions dealing with consumer guarantees, unsolicited consumer agreements, lay-by sales, proof of transactions and itemised bills all rely on the definition

of "consumer". The Fair Trading Act uses "consumer" in a generic sense. For example, one of the functions of the director general is to make general information available to consumers about matters affecting the interests of consumers. Adoption of the Australian Consumer Law definition will have little practical impact in New South Wales.

The bill amends section 9 to extend the functions of the director general to accommodate the role played by agencies in cooperative legislative schemes, such as, the joint administration and enforcement of the Australian Consumer Law. To facilitate cooperative enforcement activity, section 9A is amended to make it clear that information exchanged with other regulators can include reports, recommendations, opinions, assessments and operational plans. The bill repeals division 3A of part 2, which deals with the substantiation of claims and representations. Substitute provisions in the Australian Consumer Law provide New South Wales Fair Trading with a similar investigative tool. The bill amends the existing powers of investigators to match the enhanced suite of product safety market surveillance and enforcement powers at the Commonwealth level.

The national product safety reforms that are an integral part of the Australian Consumer Law require the Australian Competition and Consumer Commission to take a stronger role in the day-to-day administration and enforcement of the law. The existing powers in New South Wales are strengthened with respect to unsafe consumer goods and product-related services. The bill defines "unsafe consumer goods" as consumer goods that will or may cause injury to any person or a foreseeable use, or misuse, which will or may cause injury to any person, and "unsafe product-related services" as product-related services of a particular kind supplied in trade or commerce, a result of the supply of which is that any consumer goods will or may cause injury to any person or a reasonably foreseeable use, including misuse, of any consumer goods will or may cause injury to any person.

The bill amends section 19A to permit an investigator to apply for the issue of a search warrant on the grounds that unsafe consumer goods or product-related services are being supplied from premises. The investigator will be able to seize the goods or the equipment used to supply the services. New section 23D provides that if seizure is not practical, the investigator may issue an embargo notice to prevent their supply. New section 23B enables the director general to make an application to a court to authorise an investigator to enter and search premises for consumer goods that are in a person's possession for the purposes of trade or commerce and that do not comply with safety standards, or have been permanently banned or recalled, or are unsafe. The court may make an order for the destruction or other disposal of any such goods.

The bill inserts a new part 3, the Australian Consumer Law, into the Fair Trading Act. Part 3 applies the Australian Consumer Law text as it is in force from time to time as a law of New South Wales. It is to be referred to as the Australian Consumer Law (New South Wales). The existing administration and enforcement powers in the Fair Trading Act will apply and may be utilised for the Australian Consumer Law (New South Wales), unless otherwise provided. Part 3 confirms that the Director General of the Department of Services, Administration and Technology will be the regulator for the purposes of the enforcement and administration of the Australian Consumer Law in New South Wales. Part 3 also sets out the jurisdiction of the New South Wales courts and the Consumer, Trader and Tenancy Tribunal with respect to the Australian Consumer Law. The Australian Consumer Law text consists of schedule 2 to the Competition and Consumer Act and the regulations under section 139A of that Act. Part 3 provides that modifications to the Australian Consumer text by the Commonwealth may be excluded by New South Wales proclamation from having operation in New South Wales.

The provisions of the principal Act that apply the Australian Consumer Law as a law of New South Wales, and the Australian Consumer Law, bind the Crown in right of New South Wales and of every other Australian jurisdiction, but only to the extent that the Crown carries on a business. The Australian Consumer Law applied by other jurisdictions binds the Crown in right of New South Wales to the extent that it carries on a business. Part 3 provides that the Crown in any capacity is not liable to a pecuniary penalty or to be prosecuted for an offence under the provisions of the principal Act that apply the Australian Consumer Law as a law of New South Wales, or the Australian Consumer Law. A person is not liable to be punished for an offence against the Australian Consumer Law of another jurisdiction and the Australian Consumer Law (New South Wales) or to pay pecuniary penalties in respect of the same conduct.

The Australian Consumer Law comprises five chapters. Chapter 1 includes definitions and interpretive provisions about consumer law concepts. Chapter 2 contains general protections that create standards of business conduct in the market. In particular, misleading, deceptive or unconscionable conduct is prohibited and unfair terms in consumer contracts are regulated. Chapter 3 deals with specific protections in five categories: unfair practices, consumer transactions, safety of consumer goods and product-related services, information standards, and liability of manufacturers for goods with safety defects. Unfair practices include false or misleading representations, unsolicited supplies, pyramid schemes, referral selling and harassment or coercion. New South Wales provisions on false billing and dual pricing—now called multiple pricing—have been adopted. The section on consumer transactions deals with the new consumer guarantees and the harmonised national provisions regulating unsolicited consumer agreements and lay-by sales.

New to this State are best practice provisions from Victoria that require consumers to be given proof of transactions and an itemised bill, if requested, following the supply of services. Chapter 4 contains criminal offences relating to certain matters in Chapter 3 and provides for a number of defences. Chapter 5 sets out

enforcement powers and remedies relating to consumer law. These include enforceable undertakings, substantiation notices, public warning notices, pecuniary penalties, injunctions, actions for damages, compensation orders for injured persons and non-party consumers, non-punitive orders, adverse publicity orders and disqualification orders. Most are already available in New South Wales, but pecuniary penalties, orders for non-party consumers, non-punitive orders and disqualification orders are welcome additions to the compliance and redress options for Australian Consumer Law contraventions. Chapter 5 also provides a defence to allegations that claims about the country of origin of goods are false, misleading or deceptive, details the remedies available under the new consumer guarantees and provides for the liability of suppliers and credit providers.

The bill inserts a new part 4 dealing with New South Wales consumer safety and information requirements. Under the Australian Consumer Law, State Ministers retain the power to introduce interim bans or recall unsafe consumer goods and product-related services, while the Commonwealth Minister has sole power to introduce mandatory safety standards and permanent bans following consultation with all jurisdictions. The bill amends the role and functions of the Products Safety Committee to align them with the Minister's powers under the Australian Consumer Law. The bill repeals those provisions that relate to safety standards, banning and recall orders that are made redundant by the Australian Consumer Law. The bill repeals part 4, which deals with product information, dual pricing, direct commerce, conditions and warranties in consumer transactions and actions against manufacturers and importers of goods. The Australian Consumer Law contains substitute provisions that maintain and in some cases enhance the New South Wales provisions. For example, mandatory information standards can now be prescribed for services as well as goods, although only by the Commonwealth Minister after consultation with the States and Territories.

Implied conditions and warranties in contracts are replaced by statutory consumer guarantees—a comprehensive set of rights and remedies for defective goods and services. They draw on the New Zealand Consumer Guarantees Act 1993, which adopts a clearer approach to the law and to the remedies consumers have. The statutory guarantees are much the same as the implied conditions and warranties, although the law simplifies the language and replaces the poorly understood concept of merchantable quality with a new guarantee of acceptable quality. Acceptable quality means fit for all the purposes for which goods of that kind are commonly supplied, acceptable in appearance and finish, free from defects, safe and durable.

The bill omits part 5, fair trading; part 5B, lay-by sales; and part 5D, pyramid selling, which are largely replicated in chapter 3 of the Australian Consumer Law. Although they are not included in the Australian Consumer Law, the bill repeals section 51A, which prohibits mock auctions, and part 5A, which regulates trading stamp schemes. Specific regulation of these practices dates from the 1970s and is now regarded as inoperative. The general prohibition on misleading and deceptive conduct is considered sufficient protection. The bill omits part 5G, which deals with unfair contract terms. Part 5G is replicated in part 2.3 of the Australian Consumer Law. The bill inserts a new part 6 that addresses enforcement and remedies. Part 6 makes a distinction between Australian Consumer Law contraventions and local contraventions, that is, breaches of the remaining provisions of the Fair Trading Act. The old part 6 contained provisions dealing with enforceable undertakings, injunctions, actions for damages, compensation orders and adverse publicity orders. These are repealed because substitute provisions are in the Australian Consumer Law.

Also repealed, because they are included in the Australian Consumer Law, are certain provisions dealing with defences and the disposal of proceedings for offences. Part 6 makes it clear that these Australian Consumer Law provisions apply to both Australian Consumer Law contraventions and local contraventions. The old part 6 also contained enforcement and remedy provisions that apply only in New South Wales and are not adopted in the Australian Consumer Law. The bill rewrites these provisions and makes it clear that, where appropriate, they apply to Australian Consumer Law contraventions and/or local contraventions. For example, new section 64 replaces existing section 62 (2A), which provides for the imposition of a penalty of imprisonment for a term not exceeding three years for a second or subsequent offence against certain provisions of the Australian Consumer Law.

Another example is new section 71, which replaces existing section 64B and enables the director general or, with leave, a party to a standard form consumer contract to apply to the Supreme Court for a declaration that a term in a contract of that kind is unfair. New section 67 replaces existing section 64 and enables a penalty notice to be served on a person in relation to an Australian Consumer Law or local offence. The bill inserts a new part 7 to establish a New South Wales Consumer Law Fund. The equivalent law in Victoria also provides for such a fund, into which will be paid civil pecuniary penalties awarded under the Australian Consumer Law. When ordered by a court the fund will also be able to receive and distribute payments to redress loss or damage suffered by a class of persons who have not taken proceedings and are known as non-party consumers. They would be entitled to redress if the loss or damage resulted from a contravention of the Australian Consumer Law.

Currently, the director general must identify and obtain the consent of consumers when making an application for compensation orders. When contravening conduct affects a large number of consumers, this requirement is both impractical and has the potential to exclude consumers who have not yet come forward with legitimate claims. Although the director general will be able to apply for orders for non-party consumers under the Australian

Consumer Law, the Australian Consumer Law does not address the question of where any monetary compensation so ordered is to be held while non-party consumers make a claim. The experience of NSW Fair Trading suggests that the establishment of a permanent fund will ensure good process and governance and will reduce administrative complexity.

Part 7 provides that money is to be paid out of the fund in accordance with the relevant court orders and may be paid out of the fund for other specified purposes, including special purpose grants for improving consumer wellbeing, consumer protection or fair trading. New section 88A deals with the relationship of the Australian Consumer Law and the provisions of other Acts. Section 88A (1) maintains the status quo with respect to contracts for recreation services under section 5N of the Civil Liability Act 2002. Section 88A (2) provides that section 101 of the Australian Consumer Law does not apply to a bill within the meaning of part 3.2 of the Legal Profession Act 2004.

The remaining provisions of schedule 1 contain consequential savings and transitional amendments. Schedule 2 amends the Fair Trading Regulation 2007 as a consequence of the enactment of the proposed legislation and, in particular, repeals certain prescribed product safety standards and product information standards that will be covered by the national scheme. By virtue of the savings provisions in schedule 1 the product information standards on fibre content labelling for textile products and petrol price boards will continue to operate in New South Wales.

This bill fulfils our commitment to participate in the introduction of a new Australian Consumer Law. The successful development of the Australian Consumer Law reflects the hard work and cooperation of many people—Commonwealth, State and Territory colleagues on the Ministerial Council on Consumer Affairs, the officials of all the jurisdictions involved and consumer and business stakeholders. Thanks are due to them all. I commend the bill.