

December 2010

## Trade Practices Update: New Consumer Laws commencing 1 January 2011

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### Overview

Under the Australian Consumer Law Reforms, the *Trade Practices Act 1974*, is being replaced by the *Competition and Consumer Act 2010* and comes into effect on **1 January 2011**. Businesses must review and update their trade practices compliance procedures and manuals, exiting contracts, warranties/guarantees to ensure compliance with the new regime.

The *Competition and Consumer Act* replaces a range of existing national, State and Territory trade practices and fair trading laws, to ensure that Australian consumers have the same protections and expectations about business conduct Australia-wide. Equally, Australian businesses now have the same obligations and responsibilities, wherever they operate in Australia. [\[1\]](#)

The new legislation involves a substantial restructure and renumber of the former *Trade Practices Act 1974* and introduces various new provisions. In reviewing compliance systems, businesses should note the following key areas, which are substantially changed by the *Competition and Consumer Act*:

- Consumer guarantees;
- Specific types of unfair business practices;
- Specific sales practices (unsolicited consumer agreements, lay-by agreements); and
- Product safety.

The *Competition and Consumer Act* also incorporates the provisions regulating unfair terms in consumer contracts, which came into affect on **1 July 2010**, under the first stage of amendments. For a detailed analysis of the unfair contract terms provisions, which are now in operation, please see Stephens Lawyers' June 2010 Update: [Unfair Contract Provisions in force July 1 2010, as more amendments pass Parliament](#).

In November 2010, the Government also released the *Competition and Consumer Regulations*. [\[2\]](#) These regulations relate largely to unsolicited consumer agreements, and will be implemented in 3 stages: 1 January 2011, 1 July 2011 and 1 January 2012.

These reforms are also being implemented in stages by each State and Territory. All States and Territories have introduced legislation into parliament which will enable the Commonwealth, State and Territory consumer agencies to jointly administer and enforce the new consumer laws under the *Competition and Consumer Act*.

### Key Areas of Impact for Businesses

## Consumer Guarantees

It is common practice for manufacturers and suppliers to provide express warranties to consumers in respect of goods or services supplied by them. In addition, manufacturers and suppliers are required to comply with statutory warranties and conditions, including warranties as to title, fitness for purpose, merchantable quality, which are implied into consumer contracts by the *Trade Practices Act*, the State Fair Trading Acts and Goods Acts. The implied statutory warranties and conditions regime has been replaced by a comprehensive new framework of statutory guarantees under the *Competition and Consumer Act*.

### Statutory Guarantees: Goods & Services

The new statutory guarantee provisions apply to goods and services supplied to consumers, by a manufacturer or supplier. A person is taken to be a 'consumer' under the legislation where:

- The goods or services cost up to \$40,000; or
- The goods or services cost more than \$40,000, but are of a kind ordinarily acquired for personal, domestic or household use or consumption; or
- The goods consist of a vehicle or trailer acquired for use principally in the transport of goods on public roads. [\[3\]](#)

The *Competition and Consumer Act*, imposes statutory guarantees in relation to **goods**, as to the following:

- Guarantee as to title; [\[4\]](#)
- Guarantee as to undisturbed possession (provided there are no limitations on the title disclosed to the consumer); [\[5\]](#)
- Guarantee as to undisclosed securities, charges or encumbrances; [\[6\]](#)
- Guarantee that goods are of an acceptable quality; [\[7\]](#)
- Guarantee that goods are reasonably fit for any disclosed purpose; [\[8\]](#)
- Guarantee that goods match their description; [\[9\]](#)
- Guarantee that goods match a sample or demonstration model; [\[10\]](#) and
- Guarantee that spare parts and repair facilities are reasonably available for a reasonable period after goods are supplied. [\[11\]](#) An exemption applies where manufacturers give reasonable notice, in writing, to a consumer that repair facilities or parts would not be available for a specified period. [\[12\]](#)

Further, if a manufacturer or supplier provides an express warranty to consumers when supplying goods, the *Competition and Consumer Act* imposes on the manufacturer or supplier, a statutory guarantee that they will comply with the express warranty provided in respect of their products or services. [\[13\]](#)

The *Competition and Consumer Act*, imposes statutory guarantees in relation to the supply of **services**, as to the following:

- Guarantee as to due care and skill; [\[14\]](#)
- Guarantee that services are reasonably fit for a particular purpose; [\[15\]](#)
- Guarantee that services will achieve the desired result; [\[16\]](#) and
- Guarantee as to reasonable time of supply. [\[17\]](#)

The guarantees for the supply of services do not apply to contracts for the transportation or storage of goods, or insurance contracts. [\[18\]](#)

Further, the *Competition and Consumer Act* also provides that the statutory guarantees cannot be excluded, restricted or modified by contract. A contractual term excluding, restricting or modifying a guarantee will be void. [\[19\]](#) However, manufacturers or suppliers can limit their liability for failure to comply with statutory guarantees (other than guarantees as to title, undisturbed possession and undisclosed securities, charges and encumbrances), in limited circumstances. [\[20\]](#)

## Consequences for failure to comply

Wide remedies are available to consumers against both suppliers and manufacturers of goods or services, for failure to comply with a statutory guarantee, including the ability to recover damages for reasonably foreseeable loss or damage suffered. [\[21\]](#)

Where the failure to comply with the guarantee is not major, the consumer can require the supplier to remedy the failure within a reasonable time, [\[22\]](#) or bring an action against the supplier for costs incurred by the consumer in having the failure remedied, if the supplier fails to do so. [\[23\]](#) Remedies provided by the supplier may include repairing or replacing the goods, or offering a refund. [\[24\]](#) Where the failure to comply with the guarantee is a major failure, the consumer can notify the supplier that they reject the goods or terminate the service contract, [\[25\]](#) or recover compensation for any reduction in the value of the goods/services.

Further, if a manufacturer's or supplier's contracts and product and service warranties do not comply with the *Competition and Consumer Act*, they expose themselves to risks of prosecution or legal proceedings by the ACCC or the State regulator for false or misleading representations relating to the consumer's rights. [\[26\]](#)

## Competition and Consumer Regulations

### Repair Notices

From 1 July 2011, repair notices relating to consumer goods will need to comply with various new requirements under the *Competition and Consumer Regulations*, such as the need to include the following statement in notices where the repairer offers refurbished goods or uses refurbished parts: "*Goods presented for repair may be replaced by refurbished goods of the same type rather than being repaired. Refurbished parts may be used to repair the goods*". [\[27\]](#)

### Warranties against defects

From 1 January 2012, manufacturer's and supplier's express warranties against defects in goods or services to which the warranty relates, offered to consumers must meet the requirements specified under the *Competition and Consumer Regulations*, including documenting:

- What the person who gives the warranty must do so that the warranty may be honoured;
- What the consumer must do to entitle them to claim the warranty;
- The contact details of the person giving the warranty;
- The period of the warranty;
- The procedures for the consumer making the warranty claim;
- Who must bear the expense of claiming the warranty;
- That the express warranty is in addition to other rights and remedies of the consumer under law.

The Regulations also prescribe the text which must be included on all warranty cards.

## Specific Types of Unfair Business Practices

The *Competition and Consumer Act* includes a substantial legislative re-structure and re-ordering of the existing consumer protection provisions of Parts IVA and V the *Trade Practices Act* relating to unfair business practices, including misleading or deceptive conduct, [\[28\]](#) unconscionable conduct, [\[29\]](#) false or misleading representations, [\[30\]](#) information standards [\[31\]](#) and country of origin representations. [\[32\]](#)

### False or Misleading Representations

The Act also provides additional protection to consumers and businesses against unfair business practices. Section 29 of the *Competition and Consumer Act*, which replaces section 53 of the *Trade Practices Act*, includes new prohibitions against false or misleading representations in connection with the supply, possible supply, or promotion of goods or services, concerning:

- testimonials (or purported testimonials) by persons; [\[33\]](#) or
- a requirement to pay for a contractual right that is wholly or partly equivalent to any condition, warranty, guarantee, right or remedy. [\[34\]](#)

Companies and businesses who promote their goods or services using testimonials of customers, celebrities or sporting identities, will have to ensure that the testimonial used in their promotional and advertising material, complies with the section 29 of the *Competition and Consumer Act*.

### Multiple Pricing

The *Competition and Consumer Act* also includes a new, specific provision on multiple pricing. Under section 47, if multiple prices are displayed at the same time for goods being sold, those goods must not be sold for more than the lowest of those prices. However, businesses will still have a right to withdraw the goods from sale, and correct pricing errors if they occur. [\[35\]](#)

### Penalties

Under the *Competition and Consumer Act*, any person, business or corporation who makes false or misleading representations in breach of section 29 of the Act, or contravenes the multiple pricing provisions contained in section 47, exposes themselves to criminal penalties of up to \$1,100,000 for corporations or \$220,000 for individuals. [\[36\]](#)

## Specific Sales Practices

The *Competition and Consumer Act* also targets specific sales practices, such as unsolicited supplies, unsolicited consumer agreements, lay-by agreements, proof of transaction and itemised bills, referral selling, pyramid schemes, harassment and coercion. The new provisions are intended to operate in conjunction with the Telemarketing Industry Standard, the *Do Not Call Register Act 2006* (Cth) and the National Energy Customer Framework.

A significant change in this area, relates to unsolicited selling; the new provisions are intended to replace existing State and Territory laws on door-to-door sales, and other sales which do not take place in a retail context. The new legislation regulates:

- Supplier obligations about the way in which consumers are approached;
- Supplier disclosure obligations regarding the making of contracts;
- Consumer rights - including a 10-day cooling-off right, and the right to terminate a contract after the 10-day cooling-off period in certain circumstances; and
- Supplier obligations about post-contractual behaviour. [\[37\]](#)

Under the new scheme it is unlawful to request payment for unsolicited goods/services or unauthorised entries/advertisements, or to send unsolicited credit or debit cards. Further, a business/person must not issue an invoice that states an amount to be paid for unsolicited goods/services unless:

- They reasonably believe they have a right to be paid; or
- The invoice contains a prominent warning, that "*This is not a bill. You are not required to pay any money*". [\[38\]](#)

The *Competition and Consumer Regulations*, contain various exemptions to unsolicited consumer agreements, including business contracts, emergency repair contracts and renewable agreements. [\[39\]](#)

## Product Safety

The *Competition and Consumer Act* introduces a national product safety regime, [\[40\]](#) to replace existing Commonwealth, State and Territory product safety regulations. The new regime aims at simplifying the product safety system, to assist suppliers in understanding how to comply with the law. These changes are relevant to businesses who supply:

- Consumer goods: goods intended, or are likely to be used, for personal domestic or household use or consumption; and/or
- Product-related services: services relating to the installation, maintenance, repair, cleaning, assembly or delivery of consumer goods. [\[41\]](#)

Key changes under the new laws relate to:

- Mandatory safety/information standards and permanent bans: only the Commonwealth Minister may impose permanent bans or prescribe safety standards;
- Mandatory reporting requirements: new requirements for when a supplier must notify the Commonwealth Minister if consumer goods or product-related services caused or may have caused a death, serious injury or illness; [\[42\]](#)
- Voluntary recalls: a person/business undertaking a voluntary recall of a consumer good must notify the Commonwealth Minister; [\[43\]](#)
- Public Safety Warnings: Commonwealth, State or Territory Ministers can issue warnings where a good/product-related service is under investigation for safety; [\[44\]](#) the ACCC and State Fair Trading Offices can also issue warning notices when they suspect on reasonable grounds, that there has been a contravention of the consumer protection provisions, where someone is likely to suffer harm or where it is in the public interest to do so. [\[45\]](#)

State and Territory Ministers will retain the ability to issue interim bans and to conduct product recalls.

## Implications for Businesses

The replacement of the existing *Trade Practices Act* and other State consumer laws with the new *Competition and Consumer Act*, which will commence on 1 January 2011, will require businesses and/or organisations involved in

the supply of goods or services to review and update their existing agreements, disclosure documents, advertising and marketing material, product and service warranties and product information, and trade practices compliance procedures and manuals, to ensure compliance with the new Act, or risk substantial penalties. The regulator, the ACCC, has wide investigative powers relating to compliance with the new *Competition and Consumer Act*, including new powers to compel corporations subject to industry codes, such as the franchising industry, to provide information to the ACCC. [46]

Stephens Lawyers & Consultants have a high level of expertise in trade practices and consumer law compliance.

**Our** lawyers represent leading companies in both litigious and commercial matters. Please contact us for assistance in reviewing your consumer contracts to ensure compliance with the new consumer protection regime.

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[1] 'The Australian Consumer Law: A Guide to Provisions', *Department of Treasury*, November 2010, available at: [http://www.consumerlaw.gov.au/content/the\\_acl/downloads/ACL\\_guide\\_to\\_provisions\\_November\\_2010.pdf](http://www.consumerlaw.gov.au/content/the_acl/downloads/ACL_guide_to_provisions_November_2010.pdf)

[2] Set out in the [Trade Practices \(Australian Consumer Law\) Amendment Regulations 2010 \(No. 1\)](#).

[3] *Competition and Consumer Act 2010* section 3.

[4] *Competition and Consumer Act 2010* section 51.

[5] *Competition and Consumer Act 2010* section 52.

[6] *Competition and Consumer Act 2010* section 53.

[7] *Competition and Consumer Act 2010* section 54.

[8] *Competition and Consumer Act 2010* section 55.

[9] *Competition and Consumer Act 2010* section 56.

[10] *Competition and Consumer Act 2010* section 57.

[11] *Competition and Consumer Act 2010* section 58(1).

[12] *Competition and Consumer Act 2010* section 58(2).

[13] *Competition and Consumer Act 2010* section 59.

[14] *Competition and Consumer Act 2010* section 60.

[15] *Competition and Consumer Act 2010* section 61(1).

[16] *Competition and Consumer Act 2010* section 61(2).

[17] *Competition and Consumer Act 2010* section 62.

[18] *Competition and Consumer Act 2010* section 63.

[19] *Competition and Consumer Act 2010* section 64.

[20] *Competition and Consumer Act 2010* section 64A.

[21] *Competition and Consumer Act 2010* sections 259(4), 267(4), 271, 272.

[22] *Competition and Consumer Act 2010* sections 259(2)(a), 267(2)(a).

[23] *Competition and Consumer Act 2010* sections 259(2)(b), 267(2)(b).

[24] *Competition and Consumer Act 2010* section 261.

[25] *Competition and Consumer Act 2010* sections 259(3), 267(3).

[26] *Competition and Consumer Act 2010* sections 18 and 29 (equivalent to sections 52 and 53 *Trade Practices Act*).

[27] *Competition and Consumer Regulations 2010*, Explanatory Statement, Schedule 2, Item 1. Available at: <http://www.comlaw.gov.au/comlaw/Legislation/LegislativeInstrument1.nsf/all/whatsnew/733DF6FC5026BB02CA2577DB0079E483?OpenDocument&VIEWCAT=attachment&COUNT=999&START=1> .

[28] *Competition and Consumer Act 2010* section 18.

[29] *Competition and Consumer Act 2010* sections 20-22.

[30] *Competition and Consumer Act 2010* section 29.

[31] *Competition and Consumer Act 2010* Pt 3-4.

[32] *Competition and Consumer Act 2010*, Pt 5-3.

[33] *Competition and Consumer Act 2010* section 29(1)(e), 29(1)(f).

[34] *Competition and Consumer Act 2010* section 29(1)(n).

[35] Explanatory Memorandum, Consumer Law Bill (No 2) 2010.

[36] *Competition and Consumer Act 2010* Part 4-1.

[37] *Competition and Consumer Act 2010* Pt 3-2.

[38] 'Sales Practices: A guide for Businesses and Legal Practitioners', *the Treasury*, November 2010, available at: [http://www.consumerlaw.gov.au/content/the\\_acl/downloads/sales\\_guide\\_final.pdf](http://www.consumerlaw.gov.au/content/the_acl/downloads/sales_guide_final.pdf)

[39] *Trade Practices (Australian Consumer Law) Amendment Regulations*

2010 (No. 1) available at:

<http://www.comlaw.gov.au/comlaw/Legislation/LegislativeInstrument1.nsf/all/whatsnew/733DF6FC5026BB02CA2577DB0079E483?OpenDocument>.

The *Competition and Consumer Regulations* include various transitional provisions relating to the unsolicited consumer agreement provisions; these allow suppliers to comply with pre-reform laws until:

- 30 June 2011 regarding the regulations that prescribe that certain information must be given to consumers, or that information must be given in a certain way; [39] and
- 1 December 2011, regarding the regulations that prohibit accepting payment and supply during a cooling-off period.

[40] *Competition and Consumer Act 2010* Pt 3-3.

[41] 'Product Safety: A guide for Businesses and Legal Practitioners', *the Treasury*, November 2010, available at: [http://www.consumerlaw.gov.au/content/the\\_acl/downloads/product\\_guide.pdf](http://www.consumerlaw.gov.au/content/the_acl/downloads/product_guide.pdf)

[42] *Competition and Consumer Act 2010* sections 131-132A. To notify the minister, suppliers should complete the online mandatory reporting form on the Product Safety Australia website: [www.productsafety.gov.au](http://www.productsafety.gov.au).

[43] *Competition and Consumer Act 2010* sections 128 and 201.

[44] *Competition and Consumer Act 2010* section 129.

[\[45\]](#) *Competition and Consumer Act 2010* section 223.

[\[46\]](#) *Competition and Consumer Act 2010* Part IVB (Industry Codes) Division 5.