

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S273 of 2010

BETWEEN:

INSIGHT VACATIONS PTY LTD t/as

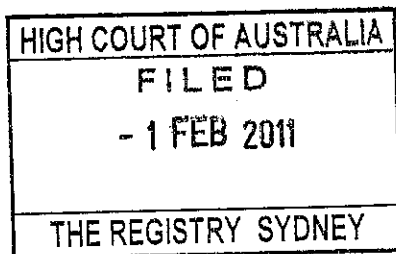
INSIGHT VACATIONS

Appellant

and

STEPHANIE YOUNG

Respondent



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APPELLANT'S SUBMISSIONS

PART I - PUBLICATION

1. The appellant certifies that this document is in a form suitable for publication on the Internet.

20 **PART II - ISSUES**

2. Whether section 74(2A) of the *Trade Practices Act, 1974 (Cth)* picks up and applies a State law that authorises the inclusion of a contractual provision which limits or precludes liability for breach of the warranty implied into a contract by section 74(1).
3. Whether the contractual exclusion authorised by section 5N of the *Civil Liability Act, 2002 (NSW)* in the present case excludes the Appellant's liability to the Respondent.

Date of document:	31 January 2011	
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PART III – s.78B JUDICIARY ACT 1903 (CTH)

4. The appellant has considered whether any notice should be given to Attorneys General in compliance with section 78B of the *Judiciary Act 1903 (Cth)*. The appellant has given notice to the Attorneys General pursuant to section 78B.

PART IV – CITATION OF JUDGMENTS BELOW

5. Primary Court: *Stephanie Young v Insight Vacations Pty Limited* [2009] NSWDC 122; (2009) 8 DCLR(NSW) 369 (Rolfe DCJ, 4 June 2009).
6. Intermediate Court: *Insight Vacations Pty Limited v Stephanie Young* [2010] NSWCA 137; (2010) 241 FLR 125; (2010) 268 ALR 570 (Spigelman CJ, Basten JA and Sackville AJA, 11 June 2010).

PART V – RELEVANT FACTS

7. In February 2005, the Respondent purchased from the Appellant a European tour package {AB 187.20}.
8. The proper law of the contract is New South Wales {AB 121.45}.
9. Section 74(1) of the *Trade Practices Act, 1974 (Cth)* (“TPA”) implied into the contract a warranty that the services provided by the Appellant to the Respondent *will be rendered with due care and skill* {AB 163.53}.
10. The tour commenced in October 2005 in London {AB 187.28}.
11. On 14 October 2005, the Respondent was travelling by motorcoach from Prague to Budapest {AB 162.26}.
12. Whilst seated on the motorcoach, the Respondent was not wearing the seatbelt fitted to her seat on the motorcoach.{AB 114.23}
13. As the motorcoach was being driven along a motorway, the Respondent stood up to take a highlighter pen from an overhead compartment. The driver of the motorcoach braked suddenly, causing the Respondent to fall backwards and suffer personal injury {AB 162.28-.35}.
14. The injury suffered by the Respondent was caused by a breach (by the driver) of the warranty implied by section 74(1) {AB 166.16}.
15. There was an express term (clause 4) in the contract providing that:

Where the passenger occupies a motorcoach seat fitted with a safety belt, neither the Operators nor their agents or co-operating organisations will be liable for any injury, illness or death or for any damages or claims whatsoever arising from any accident or incident, if the safety belt is not being worn at the time of such accident or incident {AB 165.52}

16. The ‘tour package’, including the supply of transportation by motorcoach between Prague and Budapest, was not the supply of “recreational services” within the meaning of s68B TPA {AB 169.41} but it was the supply of “recreation services” by

the Appellant within the meaning of section 5N of the *Civil Liability Act, 2002 (NSW)* (“CLA”) {AB 181.50-313.50; AB 191.30-.33}.

PART VI – ARGUMENT

(a) Section 74(2A)

17. The central issue is whether section 5N CLA falls within the scope of section 74(2A) TPA.

18. If section 5N does come within the scope of section 74(2A), then:

- 10
- a. there is no inconsistency between section 74(1) and section 5N so as to attract section 109 of the *Constitution*;
 - b. as the ‘no liability’ clause is a term of a contract of a type within the scope of section 5N, the ‘no liability’ clause is also within the scope of section 74(2A) and thus is consistent with section 74(1);
 - c. section 68(1) TPA does not make the ‘no liability’ clause void, because that clause is not “inconsistent with” section 74(1), within the meaning of section 68(2);
 - d. there is no inconsistency between section 68(1) and section 5N so as to attract section 109 of the *Constitution*, again because of section 68(2); and
 - e. in these proceedings, as the District Court of New South Wales was exercising federal jurisdiction within sections 76(ii) and 77(iii) of the *Constitution* pursuant to section 39(2) of the *Judiciary Act, 1903 (Cth)*, section 5N is a “surrogate” Commonwealth law by virtue of section 79 of the *Judiciary Act, 1903 (Cth)*.
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19. The competing views concerning the scope of section 74(2A) are identified by Basten JA at [96] {AB 191.50} and Sackville AJA at [151] {AB 211.12}, namely, whether that scope is limited to a State or Territory statute which operates directly, by its own terms, to limit or preclude liability or whether the scope extends to a State or Territory statute which operates indirectly, by authorising the inclusion of a contractual provision that limits or precludes liability. Basten JA observed [96] that it is possible for section 74(2A) to be read either way {AB191.50}.

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20. The majority held that, because section 5N does not itself *provide for* a limitation or preclusion of liability, section 5N is not picked up by section 74(2A), with the result that section 68 operates to render void the ‘no liability’ clause: Basten JA at [102]-[104] {AB 194.10-188.22}; Sackville AJA at [151]-[153] {AB 211.12-.61}.

21. The majority in the Court of Appeal emphasised that section 74(2A) was introduced as a response to a decision of this Court¹ concerning inconsistency between section 74(1) and a State statute which directly limited liability under a contract incorporating the warranty implied by that section. Basten JA at [98] said that section 74(2A) “was intended to avoid that consequence” {AB 192.58}.

¹ *Wallis v Downard-Pickford (North Queensland) Pty Ltd* [1994] HCA 17; (1994) 179 CLR 388

22. However, in each of the Consideration in Detail Speech {**AB 177.48**}, the Supplementary Explanatory Memorandum {**AB 178.38**} and the Second Reading speech (Senate Hansard 21 June 2004 p24398) in relation to section 74(2A) it was said that *“These amendments will seek to ensure that state and territory reforms of the law of contract are not undermined”* (emphasis added). That indicates a broader legislative intention than to only avoid the consequence of a decision that a State or Territory statute which directly limited liability under a contract was invalid because of inconsistency with section 74(1).
- 10 23. The appellant submits that the ordinary meaning of the words of section 74(2A) pick up section 5N and that the view expressed by the majority of the New South Wales Court of Appeal requires reading down the ordinary and natural meaning of the words of section 74(2A) in order to give effect to a perceived legislative purpose which is not reflected either in the language of the section or in the parliamentary debates. Contrary to the observation made by Basten JA at [105] {**AB 195.39**}, it is not a question of extending the operation of section 74(2A) by judicial fiat but of whether there is a proper basis for reading down the natural meaning of the words of section 74(2A).
- 20 24. Sections 68, 74(1) and 74(2A) read together demonstrate a legislative intention to preclude private agreements which limit or exclude the implication and application of the statutory warranty in section 74(1), *except* where State or Territory law otherwise provides. The apparent purpose is to permit a State or Territory to regulate consumer transactions in a manner which detracts from the operation of section 74(1). The means by which that is achieved is not expressly limited to only the method identified by the majority of the Court of Appeal. To the contrary, the exception is stated in broad terms. Consistently with section 68B, the means of doing so may include, at least in part, the operation of a private contract.
25. Spigelman CJ, correctly observed at [34] {**AB 172.56**} that:
- 30 *Section 74(1) inserts a term into a contract. Section 5N provides statutory protection for a term of a contract that excludes a term of the very kind inserted by section 74(1). Both sections 74(2A) and 5N(1) have effect upon breach of the same kind of provision. Neither case involves the direct application of a statute.*
26. Section 5N expressly authorises a particular type of term in a particular type of contract.
27. The particular type of term is one which “may exclude, restrict or modify any liability” to which Division 5 of Part 1A of the *Civil Liability Act* applies.
28. The particular type of contract is one “for the supply of recreation services”.
29. Accordingly, section 5N is a statute which “applies to limit or preclude liability for the breach...” within the ordinary meaning of those words in section 74(2A). (Section 5N is also a statute which “applies to...recovery of that liability”).
- 40 30. The view taken by the majority in the Court of Appeal requires that additional words such as “directly” or “by its own terms” be read into section 74(2A) after “applies”, so as to limit “applies” to mean “provides for directly”, instead of meaning “brings to bear”, including by way of a provision in a contract. The latter meaning is within the natural and ordinary meaning of “applies” unless it is read down.

31. The majority also erred by reading the words “the law of the State or Territory applies...” in section 74(2A) as meaning only “a statutory provision of the State or Territory applies...”: Basten JA at [96] {AB 191.60}, [102] {194.10}.
32. The words “the law” in section 74(2A) mean the whole of the statutory provisions and non-statutory contractual principles applying in a State or Territory which, taken together, may operate *to limit or preclude liability ... and recovery of that liability*.
33. That is consistent with the legislative intention that *reforms to the law of contract are not undermined*.
- 10 34. The linguistic “mismatch” between 74(2A) and 5N referred to by Basten JA at [95] {AB 191.41} only arises if the narrow construction of section 74(2A) is adopted. If the construction contended for above is accepted, then there is no “mismatch”.
35. Similarly, the reasoning of Basten JA at [103]-[104] {AB 194.28-195.22}, to the effect that the legislature would have been expected to expressly reverse the operation of section 68(1) as part of the drafting of section 74(2A), depends on his erroneous view of the scope of section 74(2A). That is because section 68(2) provides that section 68(1) does not apply unless the term of the contract is inconsistent with another provision of that Division. If a contractual provision is within the scope of section 74(2A), because it is authorised by a State or Territory law which is within the scope of section 74(2A), then there is no inconsistency
20 between the contractual provision and section 74(1).
36. In this case, if section 5N is within the scope of section 74(2A), then a contractual provision within the scope of section 5N is consistent with section 74(1). That is because, notwithstanding that section 74(1) implies a warranty of due care and skill into the tour package contract, section 74(2A) then authorises a contractual provision which has been authorised by State law and which limits or precludes liability for breach and recovery of that liability. That is the effect of section 5N. Accordingly, no question of either direct or indirect constitutional invalidity arises in relation to section 5N in respect to either section 74(1) or section 68(1).

30 (b) **The contractual exclusion**

37. Spigelman CJ correctly found at [70]-[72] {AB 184.20-.56}² that the intent of clause 4 was to ensure that the tourists wore the seat belt at all appropriate times, specifically whilst the bus was in motion and that, accordingly, the clause did not apply only to the period when the tourist was actually sitting down.

PART VII – STATUTES

38. The applicable provisions of the *Commonwealth Constitution; Judiciary Act, 1903 (Cth); Trade Practices Act, 1974 (Cth)* and *Civil Liability Act, 2002 (NSW)* are attached as an annexure.

PART VIII – ORDERS SOUGHT

- 40 (i) Appeal allowed.

² Sackville AJA agreeing on this issue {AB 206.30}, Basten JA not deciding {AB 195.61}

- (ii) Set aside Orders 3 and 4 made by the New South Wales Court of Appeal on 11 June 2010.
- (iii) Allow the appeal by the Appellant to the New South Wales Court of Appeal.
- (iv) Set aside the verdict and judgment for the Respondent in the New South Wales District Court.
- (v) Verdict and judgment for the Appellant.
- (vi) Appellant to pay the Respondent's costs of this Appeal.

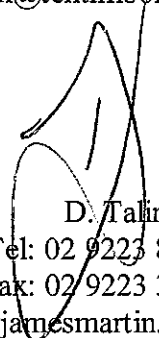
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ANNEXURE TO APPELLANT'S SUBMISSIONS - STATUTES

PART A

1 COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - Section 109

Inconsistency of laws

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

10 Currency – the above provision is still in force, in that form, at the date of making the attached submissions.

PART B

2 JUDICIARY ACT 1903 - Section 39

Federal jurisdiction of State Courts in other matters

(1) *The jurisdiction of the High Court, so far as it is not exclusive of the jurisdiction of any Court of a State by virtue of section 38, shall be exclusive of the jurisdiction of the several Courts of the States, except as provided in this section.*

10 (2) *The several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter, or otherwise, be invested with federal jurisdiction, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it, except as provided in section 38, and subject to the following conditions and restrictions:*

(a) *A decision of a Court of a State, whether in original or in appellate jurisdiction, shall not be subject to appeal to Her Majesty in Council, whether by special leave or otherwise.*

Special leave to appeal from decisions of State Courts though State law prohibits appeal

20 (c) *The High Court may grant special leave to appeal to the High Court from any decision of any Court or Judge of a State notwithstanding that the law of the State may prohibit any appeal from such Court or Judge.*

3 JUDICIARY ACT 1903 - Section 79

State or Territory laws to govern where applicable

(1) *The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.*

30 (2) *A provision of this Act does not prevent a law of a State or Territory covered by subsection (3) from binding a court under this section in connection with a suit relating to the recovery of an amount paid in connection with a tax that a law of a State or Territory invalidly purported to impose.*

(3) *This subsection covers a law of a State or Territory that would be applicable to the suit if it did not involve federal jurisdiction, including, for example, a law doing any of the following:*

(a) *limiting the period for bringing the suit to recover the amount;*

(b) *requiring prior notice to be given to the person against whom the suit is brought;*

(c) *barring the suit on the grounds that the person bringing the suit has charged someone else for the amount.*

(4) *For the purposes of subsection (2), some examples of an amount paid in connection with a tax are as follows:*

(a) *an amount paid as the tax;*

(b) *an amount of penalty for failure to pay the tax on time;*

(c) *an amount of penalty for failure to pay enough of the tax;*

10 (d) *an amount that is paid to a taxpayer by a customer of the taxpayer and is directly referable to the taxpayer's liability to the tax in connection with the taxpayer's dealings with the customer.*

4 JUDICIARY ACT 1903 - Section 80

Common law to govern

20 *So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.*

Currency – the above provisions are still in force, in that form, at the date of making the attached submissions.

PART C

5A TRADE PRACTICES ACT 1974 (Cth)- Section 68

68 Application of provisions not to be excluded or modified

(1) Any term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) that purports to exclude, restrict or modify or has the effect of excluding, restricting or modifying:

- 10 (a) *the application of all or any of the provisions of this Division;*
- (b) *the exercise of a right conferred by such a provision;*
- (c) *any liability of the corporation for breach of a condition or warranty implied by such a provision; or*
- (d) *the application of section 75A;*

is void.

(2) A term of a contract shall not be taken to exclude, restrict or modify the application of a provision of this Division or the application of section 75A unless the term does so expressly or is inconsistent with that provision or section.

- 20 Currency – the above provision has been repealed by the *Trade Practices Amendment (Australian Consumer Law) Act (No.2) 2010* Schedule 5 Clause 49 (copy attached) and replaced by the same Act with the provision which follows at 5B immediately below. Pursuant to Schedule 7, item 7 of that Act the *Trade Practices Act 1974* as in force continues to apply to proceedings commenced but not concluded.

5B COMPETITION AND CONSUMER ACT 2010 - SCHEDULE 2

The Australian Consumer Law - Section 64

Subdivision C -- Guarantees not to be excluded etc. by contract

64 Guarantees not to be excluded etc. by contract

- 30 (1) *A term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) is void to the extent that the term purports to exclude, restrict or modify, or has the effect of excluding, restricting or modifying:*

- (a) *the application of all or any of the provisions of this Division; or*

(b) *the exercise of a right conferred by such a provision; or*

(c) *any liability of a person for a failure to comply with a guarantee that applies under this Division to a supply of goods or services.*

(2) *A term of a contract is not taken, for the purposes of this section, to exclude, restrict or modify the application of a provision of this Division unless the term does so expressly or is inconsistent with the provision.*

6A TRADE PRACTICES ACT 1974 (Cth)- Section 68B

68B *Limitation of liability in relation to supply of recreational services*

10 (1) *A term of a contract for the supply by a corporation of recreational services is not void under section 68 by reason only that the term excludes, restricts or modifies, or has the effect of excluding, restricting or modifying:*

(a) *the application of section 74 to the supply of the recreational services under the contract; or*

(b) *the exercise of a right conferred by section 74 in relation to the supply of the recreational services under the contract; or*

(c) *any liability of the corporation for a breach of a warranty implied by section 74 in relation to the supply of the recreational services under the contract;*

so long as:

20 (d) *the exclusion, restriction or modification is limited to liability for death or personal injury; and*

(e) *the contract was entered into after the commencement of this section.*

(2) *In this section:*

disease includes any physical or mental ailment, disorder, defect or morbid condition, whether of sudden onset or gradual development and whether of genetic or other origin.

injury means any physical or mental injury.

personal injury means:

(a) *an injury of an individual (including the aggravation, acceleration or recurrence of an injury of the individual); or*

30 (b) *the contraction, aggravation, acceleration, or recurrence of a disease of an individual; or*

(a) a sporting activity or a similar leisure time pursuit; or

(b) any other activity that:

and (i) involves a significant degree of physical exertion or physical risk;

(ii) is undertaken for the purposes of recreation, enjoyment or leisure.

(3) This section does not apply unless the exclusion, restriction or modification is limited to liability for:

(a) death; or

10 (b) a physical or mental injury of an individual (including the aggravation, acceleration or recurrence of such an injury of the individual); or

(c) the contraction, aggravation or acceleration of a disease of an individual; or

(d) the coming into existence, the aggravation, acceleration or recurrence of any other condition, circumstance, occurrence, activity, form of behaviour, course of conduct or state of affairs in relation to an individual:

(i) that is or may be harmful or disadvantageous to the individual or community; or

(ii) that may result in harm or disadvantage to the individual or community.

20 (4) This section does not apply if the exclusion, restriction or modification would apply to significant personal injury suffered by a person that is caused by the reckless conduct of the supplier of the recreational services.

(5) The supplier's conduct is **reckless conduct** if the supplier:

(a) is aware, or should reasonably have been aware, of a significant risk that the conduct could result in personal injury to another person; and

(b) engages in the conduct despite the risk and without adequate justification.

7A TRADE PRACTICES ACT 1974 (Cth)- Section 74

74 Warranties in relation to the supply of services

30 (1) In every contract for the supply by a corporation in the course of a business of services to a consumer there is an implied warranty that the services will be rendered with

due care and skill and that any materials supplied in connexion with those services will be reasonably fit for the purpose for which they are supplied.

10 (2) *Where a corporation supplies services (other than services of a professional nature provided by a qualified architect or engineer) to a consumer in the course of a business and the consumer, expressly or by implication, makes known to the corporation any particular purpose for which the services are required or the result that he or she desires the services to achieve, there is an implied warranty that the services supplied under the contract for the supply of the services and any materials supplied in connexion with those services will be reasonably fit for that purpose or are of such a nature and quality that they might reasonably be expected to achieve that result, except where the*
10 *circumstances show that the consumer does not rely, or that it is unreasonable for him or her to rely, on the corporation's skill or judgment.*

(2A) *If:*

(a) *there is a breach of an implied warranty that exists because of this section in a contract made after the commencement of this subsection; and*

(b) *the law of a State or Territory is the proper law of the contract;*

the law of the State or Territory applies to limit or preclude liability for the breach, and recovery of that liability (if any), in the same way as it applies to limit or preclude liability, and recovery of a liability, for breach of another term of the contract.

20 (3) *A reference in this section to services does not include a reference to services that are, or are to be, provided, granted or conferred under:*

(a) *a contract for or in relation to the transportation or storage of goods for the purposes of a business, trade, profession or occupation carried on or engaged in by the person for whom the goods are transported or stored; or*

(b) *a contract of insurance.*

30 Currency— the above provision has been repealed by the *Trade Practices Amendment (Australian Consumer Law) Act (No.2) 2010* Schedule 5 Clause 49 (copy attached) and replaced by the same Act with the provision which follows at 7B, 7C and 7D immediately below. Pursuant to Schedule 7, item 7 of that Act the *Trade Practices Act 1974* as in force continues to apply to proceedings commenced but not concluded.

7B COMPETITION AND CONSUMER ACT 2010 - SCHEDULE 2

The Australian Consumer Law - Section 60

Subdivision B -- Guarantees relating to the supply of services

60 *Guarantee as to due care and skill*

If a person supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with due care and skill.

7C COMPETITION AND CONSUMER ACT 2010 - SCHEDULE 2

The Australian Consumer Law - Section 275

275 *Limitation of liability etc.*

If:

(a) there is a failure to comply with a guarantee that applies to a supply of services under Subdivision B of Division 1 of Part 3-2; and

(b) the law of a State or a Territory is the proper law of the contract;

10 *that law applies to limit or preclude liability for the failure, and recovery of that liability (if any), in the same way as it applies to limit or preclude liability, and recovery of any liability, for a breach of a term of the contract for the supply of the services.*

7D COMPETITION AND CONSUMER ACT 2010 - SCHEDULE 2

The Australian Consumer Law - Section 67

67 *Conflict of laws*

If:

(a) the proper law of a contract for the supply of goods or services to a consumer would be the law of any part of Australia but for a term of the contract that provides otherwise; or

20 *(b) a contract for the supply of goods or services to a consumer contains a term that purports to substitute, or has the effect of substituting, the following provisions for all or any of the provisions of this Division:*

(i) the provisions of the law of a country other than Australia;

(ii) the provisions of the law of a State or a Territory;

the provisions of this Division apply in relation to the supply under the contract despite that term.

8A TRADE PRACTICES ACT 1974 (Cth)- Section 75

75 Saving of other laws and remedies

(1) *Except as provided by subsection (2), this Part is not intended to exclude or limit the concurrent operation of any law of a State or Territory.*

(2) *Where an act or omission of a person is both an offence against section 79 and an offence under the law of a State or Territory and that person is convicted of either of those offences, he or she is not liable to be convicted of the other of those offences.*

10 (3) *Except as expressly provided by this Part, nothing in this Part shall be taken to limit, restrict or otherwise affect any right or remedy a person would have had if this Part had not been enacted.*

Currency – the above provision has been repealed by the *Trade Practices Amendment (Australian Consumer Law) Act (No.2) 2010* Schedule 5 Clause 49 (copy attached) and replaced by the same Act with the provision which follows at 8B immediately below. Pursuant to Schedule 7, item 7 of that Act the *Trade Practices Act 1974* as in force continues to apply to proceedings commenced but not concluded.

8B COMPETITION AND CONSUMER ACT 2010 - Section 131C

Saving of other laws and remedies

20 (1) *This Part is not intended to exclude or limit the concurrent operation of any law, whether written or unwritten, of a State or a Territory.*

(2) *Section 73 of the Australian Consumer Law does not operate in a State or a Territory to the extent necessary to ensure that no inconsistency arises between:*

(a) *that section; and*

(b) *a provision of a law of the State or Territory that would, but for this subsection, be inconsistent with that section.*

(3) *Despite subsection (1):*

(a) *if an act or omission of a person is both:*

(i) *an offence against this Part or the Australian Consumer Law; and*

(ii) *an offence against a law of a State or a Territory; and*

30 (b) *the person is convicted of either of those offences;*

he or she is not liable to be convicted of the other of those offences.

(4) Except as expressly provided by this Part or the Australian Consumer Law, nothing in this Part or the Australian Consumer Law is taken to limit, restrict or otherwise affect any right or remedy a person would have had if this Part and the Australian Consumer Law had not been enacted.

PART D

9 CIVIL LIABILITY ACT 2002 - Section 5N

Waiver of contractual duty of care for recreational activities

5N Waiver of contractual duty of care for recreational activities

10 (1) *Despite any other written or unwritten law, a term of a contract for the supply of recreation services may exclude, restrict or modify any liability to which this Division applies that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill.*

(2) *Nothing in the written law of New South Wales renders such a term of a contract void or unenforceable or authorises any court to refuse to enforce the term, to declare the term void or to vary the term.*

(3) *A term of a contract for the supply of recreation services that is to the effect that a person to whom recreation services are supplied under the contract engages in any recreational activity concerned at his or her own risk operates to exclude any liability to which this Division applies that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill.*

20 (4) *In this section, "recreation services" means services supplied to a person for the purposes of, in connection with or incidental to the pursuit by the person of any recreational activity.*

(5) *This section applies in respect of a contract for the supply of services entered into before or after the commencement of this section but does not apply in respect of a breach of warranty that occurred before that commencement.*

(6) *This section does not apply if it is established (on the balance of probabilities) that the harm concerned resulted from a contravention of a provision of a written law of the State or Commonwealth that establishes specific practices or procedures for the protection of personal safety.*

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10 CIVIL LIABILITY ACT 2002 - Section 5K

Definitions

5K Definitions

In this Division:

"dangerous recreational activity" means a recreational activity that involves a significant risk of physical harm.

"obvious risk" has the same meaning as it has in Division 4.

"recreational activity" includes:

- 40 (a) *any sport (whether or not the sport is an organised activity), and*
(b) *any pursuit or activity engaged in for enjoyment, relaxation or leisure, and*
(c) *any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure.*

Currency – the above provisions are still in force, in that form, at the date of making the attached submissions.



**Trade Practices Amendment (Australian
Consumer Law) Act (No. 2) 2010**

No. 103, 2010

***An Act to amend the *Trade Practices Act 1974* and
the *Australian Securities and Investments
Commission Act 2001*, and for other purposes***

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)



Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010

No. 103, 2010

An Act to amend the *Trade Practices Act 1974* and the *Australian Securities and Investments Commission Act 2001*, and for other purposes

[Assented to 13 July 2010]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010*.

Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010 No. 103, 2010

1

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	13 July 2010
2. Schedules 1 to 5	The later of: (a) the start of 1 January 2011; and (b) immediately after the commencement of Schedule 1 to the <i>Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010</i> . However, the provision(s) do not commence at all if the event mentioned in paragraph (b) does not occur.	1 January 2011
3. Schedule 6, items 1 to 46	At the same time as the provision(s) covered by table item 2.	1 January 2011
4. Schedule 6, item 47	The later of: (a) the same time as the provision(s) covered by table item 2; and (b) immediately after the commencement of Schedule 1 to the <i>Broadcasting Legislation Amendment (Digital Television) Act 2010</i> . However, the provision(s) do not commence at all if the event mentioned in paragraph (b) does not occur.	1 January 2011
5. Schedule 6, items 48 to 141	At the same time as the provision(s) covered by table item 2.	1 January 2011

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
6. Schedule 6, item 142	The later of: (a) the same time as the provision(s) covered by table item 2; and (b) immediately after the commencement of section 3 of the <i>Trans-Tasman Proceedings Act 2010</i> . However, the provision(s) do not commence at all if the event mentioned in paragraph (b) does not occur.	
7. Schedule 6, items 143 to 191	At the same time as the provision(s) covered by table item 2.	1 January 2011
8. Schedule 7	At the same time as the provision(s) covered by table item 2.	1 January 2011

Note: This table relates only to the provisions of this Act as originally passed by both Houses of the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

- (2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—The Australian Consumer Law

Trade Practices Act 1974

1 Schedule 2

Repeal the Schedule, substitute:

Schedule 2—The Australian Consumer Law

Note: See Part XI.

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- 1 Application of this Schedule
- 2 Definitions
- 3 Meaning of consumer
- 4 Misleading representations with respect to future matters
- 5 When donations are treated as supplies or acquisitions
- 6 Related bodies corporate
- 7 Meaning of manufacturer
- 8 Goods affixed to land or premises
- 9 Meaning of safety defect in relation to goods
- 10 Asserting a right to payment
- 11 References to acquisition, supply and re-supply
- 12 Application of Schedule in relation to leases and licences of land and buildings
- 13 Loss or damage to include injury
- 14 Meaning of continuing credit contract
- 15 Contraventions of this Schedule
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- 17 References to provisions in this Schedule

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- 19 Application of this Part to information providers

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- 33 Misleading conduct as to the nature etc. of goods
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- 35 Bait advertising
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- 58 Guarantee as to repairs and spare parts
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- 60 Guarantee as to due care and skill
- 61 Guarantees as to fitness for a particular purpose etc.
- 62 Guarantee as to reasonable time for supply
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- 64 Guarantees not to be excluded etc. by contract

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157 Bait advertising
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160 Application of provisions of this Division to information providers

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- 161 Unsolicited cards etc.
162 Assertion of right to payment for unsolicited goods or services
163 Assertion of right to payment for unauthorised entries or advertisements

Division 3—Pyramid schemes

- 164 Participation in pyramid schemes

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- 165 Multiple pricing
166 Single price to be specified in certain circumstances

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- 167 Referral selling
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- 170 Permitted hours for negotiating an unsolicited consumer agreement
171 Disclosing purpose and identity
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173 Informing person of termination period etc.

Subdivision B—Requirements for unsolicited consumer agreements etc.

- 174 Requirement to give document to the consumer
- 175 Requirements for all unsolicited consumer agreements etc.
- 176 Additional requirements for unsolicited consumer agreements not negotiated by telephone
- 177 Requirements for amendments of unsolicited consumer agreements

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- 178 Obligations of suppliers on termination
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- 182 Certain provisions of unsolicited consumer agreements void
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- 184 Application of this Division to persons to whom rights of consumers and suppliers are assigned etc.
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- 188 Lay-by agreements must be in writing etc.
- 189 Termination charges
- 190 Termination of lay-by agreements by suppliers
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- 196 Requirement to nominate a safety standard

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- 199 Compliance with recall orders
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- 202 Suppliers to report consumer goods etc. associated with the death or serious injury or illness of any person

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- 203 Supplying etc. goods that do not comply with information standards
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259 Action against suppliers of goods

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265 Termination of contracts for the supply of services that are connected with rejected goods

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- 274 Indemnification of suppliers by manufacturers
- 275 Limitation of liability etc.
- 276 This Part not to be excluded etc. by contract
- 277 Representative actions by the regulator

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- 287 Liability of suppliers and credit providers relating to non-linked credit contracts

Chapter 1—Introduction

1 Application of this Schedule

This Schedule applies to the extent provided by:

- (a) Part XI of the Competition and Consumer Act; or
- (b) an application law.

- (2) If:
- (a) a person supplies, in trade or commerce, goods to a consumer; and
 - (b) the supply does not occur by way of sale by auction;
- there is a guarantee that the supplier will comply with any express warranty given or made by the supplier in relation to the goods.

Subdivision B—Guarantees relating to the supply of services

60 Guarantee as to due care and skill

If a person supplies, in trade or commerce, services to a consumer, there is a guarantee that the services will be rendered with due care and skill.

61 Guarantees as to fitness for a particular purpose etc.

- (1) If:
- (a) a person (the *supplier*) supplies, in trade or commerce, services to a consumer; and
 - (b) the consumer, expressly or by implication, makes known to the supplier any particular purpose for which the services are being acquired by the consumer;
- there is a guarantee that the services, and any product resulting from the services, will be reasonably fit for that purpose.
- (2) If:
- (a) a person (the *supplier*) supplies, in trade or commerce, services to a consumer; and
 - (b) the consumer makes known, expressly or by implication, to:
 - (i) the supplier; or
 - (ii) a person by whom any prior negotiations or arrangements in relation to the acquisition of the services were conducted or made;the result that the consumer wishes the services to achieve;
- there is a guarantee that the services, and any product resulting from the services, will be of such a nature, and quality, state or condition, that they might reasonably be expected to achieve that result.

- (3) This section does not apply if the circumstances show that the consumer did not rely on, or that it was unreasonable for the consumer to rely on, the skill or judgment of the supplier.
- (4) This section does not apply to a supply of services of a professional nature by a qualified architect or engineer.

62 Guarantee as to reasonable time for supply

If:

- (a) a person (the *supplier*) supplies, in trade or commerce, services to a consumer; and
- (b) the time within which the services are to be supplied:
 - (i) is not fixed by the contract for the supply of the services; or
 - (ii) is not to be determined in a manner agreed to by the consumer and supplier;

there is a guarantee that the services will be supplied within a reasonable time.

63 Services to which this Subdivision does not apply

This Subdivision does not apply to services that are, or are to be, supplied under:

- (a) a contract for or in relation to the transportation or storage of goods for the purposes of a business, trade, profession or occupation carried on or engaged in by the person for whom the goods are transported or stored; or
- (b) a contract of insurance.

Subdivision C—Guarantees not to be excluded etc. by contract

64 Guarantees not to be excluded etc. by contract

- (1) A term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) is void to the extent that the term purports to exclude, restrict or modify, or has the effect of excluding, restricting or modifying:
 - (a) the application of all or any of the provisions of this Division;or

- (b) the exercise of a right conferred by such a provision; or
 - (c) any liability of a person for a failure to comply with a guarantee that applies under this Division to a supply of goods or services.
- (2) A term of a contract is not taken, for the purposes of this section, to exclude, restrict or modify the application of a provision of this Division unless the term does so expressly or is inconsistent with the provision.

64A Limitation of liability for failures to comply with guarantees

- (1) A term of a contract for the supply by a person of goods other than goods of a kind ordinarily acquired for personal, domestic or household use or consumption is not void under section 64 merely because the term limits the person's liability for failure to comply with a guarantee (other than a guarantee under section 51, 52 or 53) to one or more of the following:
- (a) the replacement of the goods or the supply of equivalent goods;
 - (b) the repair of the goods;
 - (c) the payment of the cost of replacing the goods or of acquiring equivalent goods;
 - (d) the payment of the cost of having the goods repaired.
- (2) A term of a contract for the supply by a person of services other than services of a kind ordinarily acquired for personal, domestic or household use or consumption is not void under section 64 merely because the term limits the person's liability for failure to comply with a guarantee to:
- (a) the supplying of the services again; or
 - (b) the payment of the cost of having the services supplied again.
- (3) This section does not apply in relation to a term of a contract if the person to whom the goods or services were supplied establishes that it is not fair or reasonable for the person who supplied the goods or services to rely on that term of the contract.
- (4) In determining for the purposes of subsection (3) whether or not reliance on a term of a contract is fair or reasonable, a court is to have regard to all the circumstances of the case, and in particular to the following matters:
-

- (2) A supplier who makes a supply to a consumer to which a guarantee applies under this Division, and to which such a determination relates, must ensure that a notice that meets those requirements is, in accordance with the determination:
- (a) if the consumer takes delivery of the goods or services at the supplier's premises—displayed at those premises; or
 - (b) otherwise—drawn to the consumer's attention before the consumer agrees to the supply of the goods.

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

- (3) Without limiting subsection (1), a determination under that subsection may do all or any of the following:
- (a) require the notice to include specified information about the application of all or any of the provisions of this Division and Part 5-4;
 - (b) specify where the notice must be displayed;
 - (c) specify how the notice must be drawn to the attention of consumers;
 - (d) specify requirements as to the form of the notice.

67 Conflict of laws

If:

- (a) the proper law of a contract for the supply of goods or services to a consumer would be the law of any part of Australia but for a term of the contract that provides otherwise; or
- (b) a contract for the supply of goods or services to a consumer contains a term that purports to substitute, or has the effect of substituting, the following provisions for all or any of the provisions of this Division:
 - (i) the provisions of the law of a country other than Australia;
 - (ii) the provisions of the law of a State or a Territory;the provisions of this Division apply in relation to the supply under the contract despite that term.

- (a) the day, or the first day, as the case may be, on which the supplier made a payment with respect to, or otherwise discharged in whole or in part, the liability of the supplier to the consumer;
- (b) the day on which a proceeding was commenced by the consumer against the supplier with respect to that liability or, if more than one such proceeding was commenced, the day on which the first such proceeding was commenced.

275 Limitation of liability etc.

If:

- (a) there is a failure to comply with a guarantee that applies to a supply of services under Subdivision B of Division 1 of Part 3-2; and
- (b) the law of a State or a Territory is the proper law of the contract;

that law applies to limit or preclude liability for the failure, and recovery of that liability (if any), in the same way as it applies to limit or preclude liability, and recovery of any liability, for a breach of a term of the contract for the supply of the services.

276 This Part not to be excluded etc. by contract

- (1) A term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) is void to the extent that the term purports to exclude, restrict or modify, or has the effect of excluding, restricting or modifying:
 - (a) the application of all or any of the provisions of this Part; or
 - (b) the exercise of a right conferred by such a provision; or
 - (c) any liability of a person in relation to a failure to comply with a guarantee that applies under Division 1 of Part 3-2 to a supply of goods or services.
- (2) A term of a contract is not taken, for the purposes of this section, to exclude, restrict or modify the application of a provision of this Part unless the term does so expressly or is inconsistent with the provision.
- (3) This section does not apply to a term of a contract that is a term referred to in section 276A(4).

Schedule 2—Application of the Australian Consumer Law

Trade Practices Act 1974

1 Part XI

Repeal the Part, substitute:

Part XI—Application of the Australian Consumer Law as a law of the Commonwealth

Division 1—Preliminary

130 Definitions

In this Part:

associate: a person (the *first person*) is an associate of another person if:

- (a) the first person holds money or other property on behalf of the other person; or
- (b) if the other person is a body corporate—the first person is a wholly-owned subsidiary (within the meaning of the *Corporations Act 2001*) of the other person.

Australian Consumer Law means Schedule 2 as applied under Subdivision A of Division 2 of this Part.

Chairperson has the same meaning as in subsection 4(1).

corporation has the same meaning as in subsection 4(1).

disclosure notice: see subsection 133D(3).

embargo notice: see subsection 135S(1).

embargo period for an embargo notice means the period specified in the embargo notice under paragraph 135S(3)(c) or (d).

enforcement order: see paragraph 139D(1)(b).

- (d) sections 39 and 161 of Schedule 2 do not apply to:
 - (i) a credit card that is part of, or that provides access to, a credit facility that is a financial product; or
 - (ii) a debit card that allows access to an account that is a financial product.

131B Division does not apply to interim bans imposed by State or Territory Ministers

Despite section 131, this Division does not apply to an interim ban that is not imposed by the Commonwealth Minister.

131C Saving of other laws and remedies

- (1) This Part is not intended to exclude or limit the concurrent operation of any law, whether written or unwritten, of a State or a Territory.
- (2) Section 73 of the Australian Consumer Law does not operate in a State or a Territory to the extent necessary to ensure that no inconsistency arises between:
 - (a) that section; and
 - (b) a provision of a law of the State or Territory that would, but for this subsection, be inconsistent with that section.
- (3) Despite subsection (1):
 - (a) if an act or omission of a person is both:
 - (i) an offence against this Part or the Australian Consumer Law; and
 - (ii) an offence against a law of a State or a Territory; and
 - (b) the person is convicted of either of those offences; he or she is not liable to be convicted of the other of those offences.
- (4) Except as expressly provided by this Part or the Australian Consumer Law, nothing in this Part or the Australian Consumer Law is taken to limit, restrict or otherwise affect any right or remedy a person would have had if this Part and the Australian Consumer Law had not been enacted.

- (2) If the Commission intervenes in a proceeding, the Commission is taken to be a party to the proceeding and has all the rights, duties and liabilities of such a party.

139A Terms excluding consumer guarantees from supplies of recreational services

- (1) A term of a contract for the supply of recreational services to a consumer by a person is not void under section 64 of the Australian Consumer Law only because the term excludes, restricts or modifies, or has the effect of excluding, restricting or modifying:
- (a) the application of all or any of the provisions of Subdivision B of Division 1 of Part 3-2 of the Australian Consumer Law; or
 - (b) the exercise of a right conferred by such a provision; or
 - (c) any liability of the person for a failure to comply with a guarantee that applies under that Subdivision to the supply.
- (2) *Recreational services* are services that consist of participation in:
- (a) a sporting activity or a similar leisure time pursuit; or
 - (b) any other activity that:
 - (i) involves a significant degree of physical exertion or physical risk; and
 - (ii) is undertaken for the purposes of recreation, enjoyment or leisure.
- (3) This section does not apply unless the exclusion, restriction or modification is limited to liability for:
- (a) death; or
 - (b) a physical or mental injury of an individual (including the aggravation, acceleration or recurrence of such an injury of the individual); or
 - (c) the contraction, aggravation or acceleration of a disease of an individual; or
 - (d) the coming into existence, the aggravation, acceleration or recurrence of any other condition, circumstance, occurrence, activity, form of behaviour, course of conduct or state of affairs in relation to an individual:
 - (i) that is or may be harmful or disadvantageous to the individual or community; or
-

- (ii) that may result in harm or disadvantage to the individual or community.
- (4) This section does not apply if the exclusion, restriction or modification would apply to significant personal injury suffered by a person that is caused by the reckless conduct of the supplier of the recreational services.
- (5) The supplier's conduct is *reckless conduct* if the supplier:
 - (a) is aware, or should reasonably have been aware, of a significant risk that the conduct could result in personal injury to another person; and
 - (b) engages in the conduct despite the risk and without adequate justification.

139B Conduct of directors, employees or agents of bodies corporate

- (1) If, in a proceeding under this Part or the Australian Consumer Law in respect of conduct that is engaged in by a body corporate and to which this Part or the Australian Consumer Law applies, it is necessary to establish the state of mind of the body corporate, it is sufficient to show:
 - (a) that a director, employee or agent of the body corporate engaged in that conduct within the scope of the actual or apparent authority of the director, employee or agent; and
 - (b) that the director, employee or agent had that state of mind.
- (2) Any conduct engaged in on behalf of a body corporate:
 - (a) by a director, employee or agent of the body corporate within the scope of the actual or apparent authority of the director, employee or agent; or
 - (b) by any other person:
 - (i) at the direction of a director, employee or agent of the body corporate; or
 - (ii) with the consent or agreement (whether express or implied) of such a director, employee or agent;if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent;is taken, for the purposes of this Part or the Australian Consumer Law, to have been engaged in also by the body corporate.

Schedule 5—Other amendments of the Trade Practices Act 1974

1 Title

Omit “certain Trade Practices”, substitute “competition, fair trading and consumer protection, and for other purposes”.

2 Section 1

Omit “*Trade Practices Act 1974*”, substitute “*Competition and Consumer Act 2010*”.

Note: This item amends the short title of the Act. If another amendment of the Act is described by reference to the Act’s previous short title, that other amendment has effect after the commencement of this item as an amendment of the Act under its amended short title (see section 10 of the *Acts Interpretation Act 1901*).

3 Subsection 4(1) (definition of *Australian Consumer Law*)

Repeal the definition, substitute:

Australian Consumer Law means Schedule 2 as applied under Subdivision A of Division 2 of Part XI.

4 Subsection 4(1) (definition of *commencing date*)

Repeal the definition.

5 Subsection 4(1) (definition of *consumer contract*)

Repeal the definition.

6 Subsection 4(1) (definition of *enforcement proceeding*)

Repeal the definition.

6A Subsection 4(1) (definition of *Family Court Judge*)

Repeal the definition.

7 Subsection 4(1) (definition of *financial product*)

Repeal the definition.

8 Subsection 4(1) (definition of *financial service*)

Repeal the definition.

9 Subsection 4(1) (definition of *infringement notice*)

Repeal the definition.

10 Subsection 4(1) (definition of *infringement notice compliance period*)

Repeal the definition.

11 Subsection 4(1) (definition of *infringement notice provision*)

Repeal the definition.

12 Subsection 4(1) (definition of *non-party consumer*)

Repeal the definition.

13 Subsection 4(1) (definition of *personal injury*)

Repeal the definition, substitute:

personal injury includes:

- (a) pre-natal injury; or
- (b) impairment of a person's physical or mental condition; or
- (c) disease;

but does not include an impairment of a person's mental condition unless the impairment consists of a recognised psychiatric illness.

14 Subsection 4(1) (definition of *provision*) (the definition inserted by item 4 of Schedule 1 to the *Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010*)

Repeal the definition.

15 Subsection 4(1) (definition of *rely on*)

Repeal the definition.

16 Subsection 4(1) (definition of *substantiation notice*)

Repeal the definition.

17 Subsection 4(1) (definition of *substantiation notice compliance period*)

Repeal the definition.

18 Subsection 4(1)

Insert:

this Act includes Schedule 2 to the extent that it is applied under Subdivision A of Division 2 of Part XI.

19 Subsection 4(1) (definition of *unfair*)

Repeal the definition.

20 Subsection 4(1) (definition of *unsolicited goods*)

Repeal the definition.

21 Subsection 4(1) (definition of *unsolicited services*)

Repeal the definition.

22 Section 4KA

Repeal the section, substitute:

4KA Definitions etc. that do not apply in Part XI or Schedule 2

Despite any other provision of this Act, sections 4 to 4K do not affect the meaning of any expression used in Part XI or Schedule 2, unless a contrary intention appears.

23 Sections 4KB and 4KC

Repeal the sections.

24 Section 4L

Omit “section 87, 87AAA or 87A”, substitute “section 51ADB or 87”.

25 Paragraphs 5(1)(b) to (ea)

Repeal the paragraphs, substitute:

(b) Part XI;

(c) the Australian Consumer Law (other than Part 5-3);

26 Paragraph 5(1)(f)

Omit “, (c), (e) or (ea)”, substitute “or (c)”.

27 Subsection 5(3)

After “section 82”, insert “, or under section 236 of the Australian Consumer Law,”.

28 Subsection 5(4)

After “or (1A)”, insert “, or under subsection 237(1) or 238(1) of the Australian Consumer Law,”.

29 Paragraph 6(2)(a)

Omit “45DB, 55 or 75AZH”, substitute “45DB, or section 33 or 155 of the Australian Consumer Law,”.

30 Paragraph 6(2)(b)

Repeal the paragraph, substitute:

(b) the following provisions:

- (i) sections 44ZZRF, 44ZZRG, 44ZZRJ, 44ZZRK, 45, 45B, 45D to 45EB (other than section 45DB), 46 and 46A;
 - (ii) Part VIII;
 - (iii) sections 31 and 43, Division 3 of Part 3-1, and sections 50, 153, 163, 164 and 168, of the Australian Consumer Law;
were, by express provision, confined in their operation to engaging in conduct to the extent to which the conduct takes place in the course of or in relation to:
 - (iv) trade or commerce between Australia and places outside Australia; or
 - (v) trade or commerce among the States; or
 - (vi) trade or commerce within a Territory, between a State and a Territory or between 2 Territories; or
 - (vii) the supply of goods or services to the Commonwealth or an authority or instrumentality of the Commonwealth;
- and

31 Paragraph 6(2)(c)

Omit “Division 2 of Part V”, substitute “Division 1 of Part 3-2 of the Australian Consumer Law”

32 Paragraph 6(2)(c)

Omit “Division 2A of that Part or in Part VA to the supply of goods”, substitute “Part 3-5 or 5-4 of the Australian Consumer Law to the supply of goods or services”.

33 Paragraph 6(2)(c)

Omit “or the supply of goods”, substitute “or the supply of goods or services”.

34 Paragraph 6(2)(ca)

Omit “Part 2”, substitute “Part 2-3”.

35 Paragraph 6(2)(h)

After “or 151AJ”, insert “or in section 229 of the Australian Consumer Law,”.

36 Subsection 6(3)

Omit “Part IVA, of Divisions 1, 1A and 1AA of Part V and of Divisions 2 and 3 of Part VC”, substitute “Parts 2-1, 2-2, 3-1 (other than Division 3), 3-3, 3-4, 4-1 (other than Division 3), 4-3, 4-4 and 5-3 of the Australian Consumer Law”.

37 Paragraph 6(3)(a)

Omit “sections 55 and 75AZH”, substitute “sections 33 and 155 of the Australian Consumer Law”.

38 Paragraph 6(3)(b)

Omit “those provisions”, substitute “the provisions of Part XI”.

39 Subsection 6(3A)

Omit “Part 2”, substitute “Part 2-3”.

40 Subsection 6(4)

Omit “Part IVA and of Division 1 (other than sections 53A and 55) and Divisions 1AAA and 1AA of Part V and of Division 2 of Part VC (other than sections 75AZD, 75AZH and 75AZO)”, substitute “Parts 2-2, 3-1 (other than sections 30 and 33), Part 4-1 (other than sections 152, 155 and 164) and 5-3 of the Australian Consumer Law”.

41 Subsection 6(5)

Omit “section 73”, substitute “sections 279, 282 and 283 of the Australian Consumer Law”.

42 Subsection 6(5)

Omit “that section has”, substitute “those sections have”.

43 Subsection 6(5)

Omit “paragraph 73(6)(a)”, substitute “paragraphs 279(3)(a), 282(2)(a) and 283(5)(a) of the Australian Consumer Law”.

44 Subsection 6(5)

Omit “the supplier had”, substitute “the supplier has”.

45 Subsection 6(6)

Repeal the subsection.

46 Section 6AA

Omit “, VC”.

47 Subsection 26(1)

Repeal the subsection, substitute:

- (1) The Commission may, by resolution, delegate:
- (a) any of its functions and powers under or in relation to Parts VI and XI and the Australian Consumer Law; and
 - (b) any of its powers under Part XII that relate to those Parts or the Australian Consumer Law;
- to a staff member of the Australian Securities and Investments Commission within the meaning of section 5 of the *Australian Securities and Investments Commission Act 2001*.

Note: The heading to section 26 is altered by omitting “in relation to unconscionable conduct and consumer protection” and substituting “of certain functions and powers”.

48 Paragraph 29(1A)(b)

Omit “section 65J, 65K, 65M or 65N”, substitute “Division 3 of Part XI”.

49 Parts IVA, V, VA and VC

Repeal the Parts.

Schedule 7—Transitional matters

1 Definitions

In this Schedule:

Australian Consumer Law has the same meaning as in Part XI of the *Competition and Consumer Act 2010* as substituted by Schedule 2 to this Act.

Commonwealth Minister has the same meaning as in the Australian Consumer Law.

2 Declarations of goods to be unsafe goods

A notice under subsection 65C(5) of the *Trade Practices Act 1974* that was in force immediately before the commencement of this item continues in force after that commencement as if:

- (a) it were an interim ban imposed under section 109 of the Australian Consumer Law by the Commonwealth Minister; and
- (b) it starts on the day of that commencement.

3 Permanent bans

A notice under subsection 65C(7) of the *Trade Practices Act 1974* that was in force immediately before the commencement of this item continues in force after that commencement as if it were a permanent ban imposed under section 114 of the Australian Consumer Law.

4 Prescribed consumer product safety standards

A prescribed consumer product safety standard under section 65C of the *Trade Practices Act 1974* that was in force immediately before the commencement of this item continues in force after that commencement as if it were a safety standard made under section 104 of the Australian Consumer Law.

5 Prescribed consumer product information standards

A prescribed consumer product information standard under section 65D of the *Trade Practices Act 1974* that was in force immediately before the commencement of this item continues in force after that commencement as if it were an information standard made under section 134 of the Australian Consumer Law.

6 Acts or omissions that occurred before commencement

- (1) The *Trade Practices Act 1974* as in force immediately before the commencement of this item continues to apply, after that commencement, in relation to acts or omissions that occurred before that commencement.
- (2) Without limiting subitem (1), action may be taken, under or in relation to Part VC or VI of that Act as so in force, in relation to those acts or omissions.

7 Proceedings already commenced

- (1) The *Trade Practices Act 1974* as in force immediately before the commencement of this item continues to apply to or in relation to any proceedings, under or in relation to that Act, that were commenced, but not concluded, before that commencement.
- (2) However, to the extent that any such proceeding are proceedings for an injunction under section 80 of that Act as so in force, the proceedings are taken, after that commencement, to be proceedings for an injunction under section 232 of the Australian Consumer Law.

8 Unfair contract terms

- (1) Part 2-3 of the Australian Consumer Law applies to a contract entered into on or after the commencement of this item.
- (2) That Part does not apply to a contract entered into before that commencement. However:
 - (a) if the contract is renewed on or after that commencement—that Part applies to the contract as renewed, on and from the day (the *renewal day*) on which the renewal takes effect, in relation to conduct that occurs on or after the renewal day; or
 - (b) if a term of the contract is varied on or after that commencement, and paragraph (a) has not already applied in relation to the contract—that Part applies to the term as varied, on and from the day (the *variation day*) on which the variation takes effect, in relation to conduct that occurs on or after the variation day.
- (3) If paragraph (2)(b) applies to a term of a contract, subsection 23(2) and section 27 of the Australian Consumer Law apply to the contract.

- (4) Despite paragraphs (2)(a) and (b) and subitem (3), that Part does not apply to a contract, or a term of a contract, to the extent that the operation of that Part would result in an acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution) from a person otherwise than on just terms (within the meaning of that paragraph of the Constitution).

9 Requests for itemised bills

Section 101 of the Australian Consumer Law does not apply in relation to a supply of services to the extent that the services were supplied before the commencement of this item.

10 Pecuniary penalties—having regard to previous findings

The reference in paragraph 224(2)(c) of the Australian Consumer Law to proceedings under Chapter 4 or Part 5-2 of Schedule 2 includes a reference to proceedings, commenced before the commencement of this item, under or in relation to:

- (a) Part VC or VI of the *Trade Practices Act 1974*; or
- (b) equivalent provisions of a law of a State or a Territory.

11 Regulations relating to professional standards laws

Regulations made for the purposes of section 87AB of the *Trade Practices Act 1974* that were in force immediately before the commencement of this item have effect, after the commencement of this item, as if they had been made for the purposes of section 137 of that Act as amended by this Act.

12 General power for regulations to deal with transitional matters

The Governor-General may make regulations prescribing matters of a transitional, application or saving nature in relation to the amendments and repeals made by the Schedules to this Act.

*[Minister's second reading speech made in—
House of Representatives on 17 March 2010
Senate on 24 June 2010]*

(74/10)

396 *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010* No.
103, 2010