

## ***Competition and Consumer Laws in Australia***

**Effective from 1 January 2011, the new *Competition and Consumer Act 2010* has come into operation. It completely replaces the old *Trade Practices Act 1974*.**

### **A Introduction**

The *Competition and Consumer Act 2010* contains rules against anti-competitive conduct within Australia, and also contains consumer protection rules which businesses must abide by in their dealings with consumers.

The *Competition and Consumer Act 2010* has given the Australian Competition and Consumer Commission (“ACCC”) new powers. These include:

- the power to issue **substantiation notices** requiring businesses to substantiate claims they make about their products or services
- the power to issue **public warning notices** where it has reasonable grounds for believing that a contravention of certain consumer protection provisions of the Act has occurred and that consumers have suffered, or are likely to suffer, detriment as a result
- the power to issue **infringement notices** where it has reasonable grounds for believing that a contravention of certain provisions of the Act has occurred, imposing a financial penalty of \$66,000.00 for listed corporations, \$6,600.00 for other corporations and \$1,320.00 for individuals
- a new **investigation power** which will allow it to audit corporations that are required to keep, generate or publish information or documents under an applicable industry code (including the Franchising Code).

The *Competition and Consumer Act 2010* has introduced **civil pecuniary (financial) penalties** ranging from \$5,000.00 to \$1.1 million for corporations, and from \$1,000.00 to \$220,000.00 for individuals, who breach the unconscionable conduct and certain consumer protection provisions. A *civil pecuniary penalty* may be imposed by a Court if it has found that a breach of the Australian Consumer Law has occurred on the civil standard of proof, that is, on the balance of probabilities, not beyond reasonable doubt.

The *Competition and Consumer Act 2010* also gives businesses a right of private action if they have been adversely affected by any conduct that may breach the Act.

The courts can now also, on application by the ACCC, make an order disqualifying a person from managing corporations for a given period if the court is satisfied that the person has contravened or attempted to contravene the law and that the disqualification is justified.

The *Competition and Consumer Act 2010* contains the **Australian Consumer Law** which creates a single, national consumer law for Australia. It applies to all businesses regardless of their size or business structure. The Australian Consumer Law is enforced by the Australian Competition and Consumer Commission (“ACCC”), the state and territory Fair Trading agencies and, where it applies to financial services, the Australian Securities and Investments Commission (“ASIC”).

The Australian Consumer Law provides a range of general and specific remedies to consumers and others for contraventions of the *consumer guarantees* including rights to damages, injunctions, compensation, repairs or replacement of goods or services. Damages which may be recovered may include consequential losses, such as loss of value or loss of profit, if the losses are reasonably foreseeable, in relation to some contraventions.

### **B Some specific rules**

#### **Misleading or deceptive conduct**

The most litigated provision of Section 52 of the old *Trade Practices Act 1974* relating to misleading representations is now contained in Section 18 (1) of Schedule 2 of *Competition and Consumer Act 2010*, which provides: A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Businesses must not make false or misleading representations about specific characteristics or aspects of a goods or service – for example, sponsorship, price or place of origin – or about the consumer guarantees.

A business also has a right to take action against a competitor if the business has suffered a loss because the competitor has engaged in conduct that may breach the Act.

### Consumer guarantees

The Act includes a set of twelve consumer guarantees which apply to all goods and services purchased (where the price or cost does not exceed **\$40,000.00**) by consumers from 1 January 2011.

The consumer guarantees provide that all goods must be of acceptable quality, be fit for any disclosed purpose and match any description, sample or demonstration model shown. Repair facilities and spare parts must be reasonably available for a reasonable time, and any express warranty made by a supplier or manufacturer must be complied with. Goods must come with clear title and without any undisclosed securities or charges attached to them. Consumers also have a right to undisturbed possession of the goods. Services must be delivered with due care and skill, be fit for any disclosed purpose and, if the contract for services doesn't set a time frame, be completed within a reasonable time.

### Unfair contract terms

The *Competition and Consumer Act 2010* creates a **national unfair contract terms regime** which applies to *standard form consumer contracts* and enables a court to find that a term of such a contract is unfair, and so void. This law applies to contracts in all forms, whether written or oral, and made by all means, including online, over the phone or face to face. It should be noted that the contract itself remains binding on the parties to the extent that it can operate without the unfair term.

The unfair contract terms provisions provide a three-pronged test of unfairness. A term is unfair if:

1. it would cause a significant imbalance in the rights of the parties to the contract; and
2. it is not reasonably necessary to protect the legitimate interests of the party it advantages; and
3. it would cause detriment if applied or relied upon.

When deciding whether a term is unfair, the court must also consider the transparency of the term within the contract, and the contract as a whole. The law applies to contracts that are entered into on or after 1 July 2010 and to the terms of existing contracts that are renewed or changed on or after 1 July 2010.

The list of *unfair practices* in Part 3-1 of Schedule 2 is long and includes *false or misleading representations*, or *misleading conduct*, in relation to goods and services, sales of land, employment, offering rebates, gifts and prizes, bait advertising, accepting payments without an intention to supply, pyramid selling and other matters.

### Sales practices

The *Competition and Consumer Act 2010* prohibits specific unfair practices in trade or commerce. It addresses areas including:

- unsolicited supply of goods and services, including unsolicited credit cards and debit cards
- unsolicited consumer agreements – rules applying to door-to-door selling, telephone sales and other forms of direct selling which do not take place in a retail environment, including specific supplier obligations about the way in which consumers are approached, disclosure obligations and consumer rights in relation to termination
- pyramid schemes – rules prohibiting a person from participating or persuading others to participate in a pyramid scheme. Such schemes usually entail two payments: a participation payment to join; and a promised recruitment payment for when a member recruits others, which may be a financial or non-financial benefit another consumer.
- component pricing – rules relating to pricing practices to ensure that the total price is always presented where possible
- proof of transaction – a rule that suppliers must provide proof of transaction (such as a GST tax invoice or a cash register receipt) to consumers for goods or services valued at \$75.00 or more
- itemised bills – a rule that customers can request, and are entitled to receive, an itemised bill for services setting out how the price was calculated, the number of labour hours and the hourly rate, and a list of the materials used, including the amounts charged for them.

### Immunity

The ACCC can allow anti-competitive conduct in some circumstances. The ACCC is able to grant legal immunity for conduct that would otherwise breach the Act. In particular, the ACCC may grant immunity to small businesses to collectively negotiate terms and conditions (including price) with suppliers if this is in the public interest.

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