

INTERGOVERNMENTAL AGREEMENT FOR THE AUSTRALIAN CONSUMER LAW

Council of
Australian
Governments

An agreement between

- the Commonwealth of Australia and
- the States and Territories, being:
 - ◆ The State of New South Wales
 - ◆ The State of Victoria
 - ◆ The State of Queensland
 - ◆ The State of Western Australia
 - ◆ The State of South Australia
 - ◆ The State of Tasmania
 - ◆ The Australian Capital Territory
 - ◆ The Northern Territory of Australia

Intergovernmental Agreement for the Australian Consumer Law

PRELIMINARIES

This Intergovernmental Agreement is created to give effect to the Implementation Plan which is a schedule to the National Partnership (NP) Agreement to Deliver a Seamless National Economy. The NP is established under the Intergovernmental Agreement on Federal Financial Relations and should be read in conjunction with that Agreement and its subsidiary schedules.

RECITALS

- A. The Council of Australian Governments met in Perth on 2 October 2008 and agreed to a new national consumer policy framework to enhance consumer protection, reduce regulatory complexity for businesses and encourage the development of a seamless national economy. This agreement built on the Council of Australian Governments' 3 July 2008 agreement to implement a new national product safety regulatory system.
- B. The new national consumer policy framework draws on the recommendations of the Productivity Commission's 2008 *Review of Australia's Consumer Policy Framework*, and:
- 1) the agreed model for detailed proposals for Australia's product safety regulatory arrangements, agreed by the Ministerial Council on Consumer Affairs on 23 May 2008; and
 - 2) the detailed proposals agreed by the Ministerial Council on Consumer Affairs on 15 August 2008.
- C. The objective of the new national consumer policy framework is to improve consumer wellbeing through consumer empowerment and protection, to foster effective competition and to enable the confident participation of consumers in markets in which both consumers and suppliers trade fairly.
- D. This objective is supported by six operational objectives:
- 1) to ensure that consumers are sufficiently well-informed to benefit from and stimulate effective competition;
 - 2) to ensure that goods and services are safe and fit for the purposes for which they were sold;
 - 3) to prevent practices that are unfair;
 - 4) to meet the needs of those consumers who are most vulnerable or are at the greatest disadvantage;

Intergovernmental Agreement for the Australian Consumer Law

- 5) to provide accessible and timely redress where consumer detriment has occurred; and
 - 6) to promote proportionate, risk-based enforcement.
- E. The new national consumer policy framework consists of the following key elements:
- 1) a national consumer protection law based on the existing consumer protection provisions of the Trade Practices Act and also including:-
 - a) provisions regulating unfair contract terms,
 - b) new enforcement and redress powers, and
 - c) new provisions based on best practice in State and Territory consumer protection laws;
 - 2) a new national product safety regulatory and enforcement regime; and
 - 3) improved enforcement cooperation and information sharing arrangements between Commonwealth, State and Territory Agencies.
- F. The legislative elements of the national consumer policy framework will be implemented by way of an Australian Consumer Law, to be enacted by the Commonwealth and applied by State and Territory legislation, in accordance with the Implementation Plan for the *National Partnership Agreement to Deliver a Seamless National Economy*, as amended from time to time.

DEFINITIONS AND INTERPRETATION

- 'ACCC' means the Australian Competition and Consumer Commission;
- 'ASIC' means the Australian Securities and Investments Commission;
- 'Australian Consumer Law' means the text contained in the relevant Schedule of the Trade Practices Act and any legislative instruments made pursuant to the Australian Consumer Law;
- 'COAG' means the Council of Australian Governments;
- 'Commonwealth Minister' means the Commonwealth Minister responsible for consumer affairs;
- 'MCCA' means the Ministerial Council on Consumer Affairs;
- 'minor or inconsequential amendments' means typographical, drafting or other changes that do not affect the substantive operation of the Australian Consumer Law or the attainment of its purposes;
- 'Party' means a party to this Agreement;
- 'State and Territory Ministers' means the State and Territory Ministers responsible for consumer affairs;
- 'States' means the States of New South Wales, Victoria, Queensland, Western Australia, South Australia and Tasmania;

- 'State and Territory Agency' means the agency or agencies designated in the relevant State or Territory Application Act, or regulations made pursuant to that Act, as the agency responsible for the enforcement and administration of the Australian Consumer Law;
- 'Territories' means the Australian Capital Territory and the Northern Territory of Australia;
- 'TPA Consumer Protection Provisions' means the following provisions of the Trade Practices Act:
 - a) the provisions in Part IVA;
 - b) the provisions in Part V;
 - c) the provisions in Part VA;
 - d) the provisions in Part VC;
 - e) relevant provisions in Part VI; and
 - f) other relevant provisions elsewhere in that Act relating to definitions and enforcement.
- 'Trade Practices Act' means the *Trade Practices Act 1974* (Cth).

OPERATION OF THE AGREEMENT

1. This Agreement commences on 2 July 2009 subject to the following:
 - 1.1. clauses 8 to 19 of this Agreement will come into operation on 1 January 2011, or such later date as is set out in the Implementation Plan for the *National Partnership Agreement to Deliver a Seamless National Economy*, as amended from time to time; and
 - 1.2. prior to clauses 8 to 19 coming into operation as per clause 1.1, the Australian Consumer Law will be developed by the agreement of all the Parties.
2. This Agreement may be amended only by the unanimous agreement of all the Parties.

IMPLEMENTATION

The Legislative Scheme

3. The Australian Consumer Law will be implemented by way of a legislative scheme that will involve the following elements:
 - 3.1. the Commonwealth will introduce into the Australian Parliament a Bill or Bills to:-
 - 3.1.1. enact the text of the Australian Consumer Law as a Schedule to the Trade Practices Act,
 - 3.1.2. amend relevant provisions of the Trade Practices Act to ensure that they are consistent with the Australian Consumer Law, and

Intergovernmental Agreement for the Australian Consumer Law

- 3.1.3. enact changes to the investor protection provisions of the *Australian Securities and Investments Commission Act 2001* and, to the extent necessary, the *Corporations Act 2001*, to ensure that they are consistent with the Australian Consumer Law; and
 - 3.2. each State and Territory government will introduce into its Parliament a Bill or Bills to enact application Acts no later than 31 December 2010, or such later date as is set out in the Implementation Plan for the *National Partnership Agreement to Deliver a Seamless National Economy*, as amended from time to time, which will apply the Australian Consumer Law (as embodied in the relevant Schedule to the Trade Practices Act and as amended from time to time) in its jurisdiction and each Party, including the Commonwealth, will use best endeavours to have its Parliament repeal, amend or modify any legislation that is inconsistent with or alters the effect of the Australian Consumer Law. The Parties agree that MCCA will develop a process for Parties to review legislation to identify any inconsistencies with the Australian Consumer Law. The process will include providing guidelines on the meaning of 'inconsistent with or alters the effect of' the Australian Consumer Law and reporting to COAG.
4. Where modifications are made to the Australian Consumer Law, similar modifications will be made to the TPA Consumer Protection Provisions.
5. Except as agreed by the Parties, a Party will not submit a Bill to its legislature which would be inconsistent with or alter the effect of the Australian Consumer Law.

The Contents of the Australian Consumer Law

6. As at the end of 2010, or such later date as is set out in the Implementation Plan for the *National Partnership Agreement to Deliver a Seamless National Economy*, as amended from time to time, the text of the Australian Consumer Law will include:
 - 6.1. provisions based on the TPA Consumer Protection Provisions, including new or amended provisions based on best practice in State and Territory consumer protection laws;
 - 6.2. provisions regulating unfair contract terms;
 - 6.3. provisions containing enforcement powers and redress options;
 - 6.4. provisions establishing a new national regime for product safety; and
 - 6.5. legislative instruments made pursuant to the Australian Consumer Law.
7. For the purposes of clause 6.1, new or amended provisions based on best practice in State and Territory consumer protection laws will be agreed by the Parties by 31 December 2009.

ALTERATION OF THE AUSTRALIAN CONSUMER LAW

Consultation

8. Any Party may submit to the Commonwealth a valid proposal to amend the Australian Consumer Law. In doing so, the submitting Party shall provide a copy of that proposal to all other Parties.
9. A valid proposal shall:

- 9.1. include a description of the problem to be addressed by the proposal;
 - 9.2. include a description of the key features of the legislative provisions by which it is proposed to address that problem;
 - 9.3. include a discussion of alternative methods of addressing the problem, including non-regulatory methods; and
 - 9.4. provide supporting material that, so far as practical, complies with the Commonwealth's best practice regulation requirements, including by provision of a draft Regulation Impact Statement, if required.
10. The Commonwealth will commence consultation with all Parties within four weeks from the date of receiving a valid proposal.
 11. The Commonwealth will also consult with all Parties on any amendments it proposes to make to the Australian Consumer Law. Any such amendment must meet the requirements of the valid proposal outlined in clause 9.
 12. To commence consultation, the Commonwealth Minister will write to the State and Territory Ministers notifying them of the proposed amendment. All Parties, including the Commonwealth, will have three months from the date of the Commonwealth Minister's written notification within which they are required to consider and respond to the proposal in writing.
 13. The Commonwealth does not need to consult with the Parties before making minor or inconsequential amendments to the Australian Consumer Law, but must give the Parties sufficient notice of its intention to make such amendments.
 14. Where the Commonwealth has notified the Parties of its intention to make minor or inconsequential amendments in accordance with clause 13 and four Parties advise the Commonwealth Minister in writing within 21 days that they believe the proposed amendments are not minor or inconsequential, then the Commonwealth Minister must submit the proposed amendments to a vote of the Parties in accordance with the procedure set out in clauses 15 to 19 of this Agreement.

Voting

15. At the end of the consultation period outlined in clause 12, or following the notification by four Parties that proposed amendments are not minor or inconsequential outlined in clause 14, the Commonwealth Minister will call a vote on the proposed amendment by sending a written notice to the State and Territory Ministers.
16. Parties will have 35 days from the date of the Commonwealth Minister sending the notice to vote.
17. If a Party does not vote, or does not abstain, by the end of the 35-day voting period, that Party will be taken to have voted in favour of the proposed amendment.
18. The only circumstance in which a Party may abstain from the vote is if a Party is in caretaker mode at any time during the 35-day voting period.
19. The Commonwealth will not introduce a Bill into the Commonwealth Parliament to amend the Australian Consumer Law unless the proposed amendment is supported by:
 - 19.1. the Commonwealth; and

Intergovernmental Agreement for the Australian Consumer Law

- 19.2. four other Parties (including at least three States).

ADMINISTRATION AND ENFORCEMENT

20. Enforcement and administration of the Australian Consumer Law will be shared between the ACCC, ASIC and State and Territory Agencies.
21. The ACCC, ASIC and State and Territory Agencies will formalise Memoranda of Understanding for the purposes of the enforcement and administration of the Australian Consumer Law.
22. The Memoranda of Understanding shall include arrangements for communication, cooperation and coordination between the ACCC, ASIC and State and Territory Agencies, including, but not limited to:
 - 22.1. enforcing the Australian Consumer Law, including the exchange of information and intelligence;
 - 22.2. informing the general public and educating consumers and business about the Australian Consumer Law;
 - 22.3. monitoring of compliance with the Australian Consumer Law, including market surveillance;
 - 22.4. ongoing reporting and review of the enforcement and administration of the Australian Consumer Law, including arrangements for the ACCC, ASIC and State and Territory Agencies to report to MCCA; and
 - 22.5. protocols for complaint handling and investigation.
23. Enforcement and administration arrangements will be reviewed by COAG within seven years of the commencement of the Australian Consumer Law.
24. The ACCC, ASIC and State and Territory Agencies will develop and publish common national guidance for businesses and consumers on the application, enforcement and administration of the new unfair contract term provisions of the Australian Consumer Law.
25. With a view to facilitating cooperation and consistency in enforcement approaches nationally, the ACCC, ASIC and State and Territory Agencies will develop guidance for businesses and consumers in relation to the application, enforcement and administration of the Australian Consumer Law, including on:
 - 25.1. a decision to take action seeking a civil pecuniary penalty; and
 - 25.2. a decision to publish a public warning notice.
26. Subject to the Commonwealth's agreement, any Party may confer its powers in relation to the enforcement and administration of the Australian Consumer Law on the Commonwealth.
27. Sufficient notice must be given to the Commonwealth of a Party's intention to confer its administration and enforcement functions on the Commonwealth.

PRODUCT SAFETY

Interim Product Bans and Mandatory Safety Standards

28. States and Territories will retain the power to develop and implement interim product bans within their respective jurisdictions.
29. Commonwealth interim product bans and mandatory safety standards will apply in each State and Territory automatically. However, State and Territory interim bans do not apply outside the relevant State or Territory.
30. A Party that imposes an interim product ban will endeavour to notify MCCA before implementing the ban or at the latest, concurrently with implementing the ban.
31. No Party will introduce an interim product ban without at least prima facie evidence of the need for an interim ban.
32. All interim product bans will apply for 60 days. In exceptional circumstances, this period may be extended for 30 days and then for a further 30 days at the discretion of the Commonwealth Minister.

Permanent Product Bans and Mandatory Safety Standards

33. Only the Commonwealth Minister may make, amend or revoke permanent bans and mandatory safety standards.
34. If the Commonwealth Minister decides to make, amend or revoke a permanent ban or a mandatory safety standard, the Minister will, as soon as practical, inform the Parties of the decision to do so.
35. The ACCC may submit a recommendation to make, amend or revoke a permanent ban or a mandatory safety standard to the Commonwealth Minister.
36. Before submitting such a recommendation, the ACCC will undertake any required regulatory impact analysis and consultation, including consultation with State and Territory Agencies.
37. Any Party may refer a proposal to the ACCC for the making, amending or revoking of a permanent ban or a mandatory safety standard. A proposal must be accompanied by supporting information, including a hazard risk assessment and market details.
38. Based on its own assessment, and having regard to consultation with State and Territory Agencies, the ACCC will decide whether to submit a recommendation to the Commonwealth Minister for a permanent ban or a mandatory safety standard of the sort proposed by a Party. The Minister will, as soon as practical, inform all Parties of its decision.

Recalls

39. Only the Commonwealth may require a supplier to conduct a mandatory recall where it is likely that the recall would affect three or more States or Territories.
40. Any Party may require a supplier to conduct a mandatory recall where the recall is likely to affect no more than two States or Territories.

Intergovernmental Agreement for the Australian Consumer Law

41. A Party that requires a supplier to undertake a mandatory recall will endeavour to notify MCCA before requesting the recall to be undertaken, or at the latest, concurrently with requesting that the recall is undertaken.
42. In cases where the supplier of a good is unable to be contacted, the Commonwealth Minister may order the ACCC to undertake a recall of goods. The Commonwealth Minister will inform all Parties of its intention to require the ACCC to conduct a recall.

Enforcement of Bans, Mandatory Standards and Recalls

43. The Parties will share responsibility for enforcement and administration of the product safety components of the Australian Consumer Law, including hazard identification, interim product bans, permanent bans, mandatory standards and recalls.
44. The Memoranda of Understanding referred to in clause 21 will cover the enforcement and administration of the product safety components of the Australian Consumer Law.
45. Any Party, with the agreement of the Commonwealth, may confer its powers in relation to the enforcement and administration of product safety on the Commonwealth.
46. Sufficient notice must be given to the Commonwealth of a Party's intention to confer its administration and enforcement functions in relation to product safety on the Commonwealth.

RESEARCH AND ADVOCACY

47. The Parties recognise the importance of evidence-based policy supported by robust research and effective stakeholder advocacy. To this end, the Commonwealth will work with the States and Territories to develop further the effectiveness of consumer representation and consumer policy research nationally.

RELATIONS WITH NEW ZEALAND

48. The Parties will review in due course with New Zealand the potential benefits, consistent with the objectives of the Australia/New Zealand Closer Economic Relations Trade Agreement, of participation by New Zealand in the Memoranda of Understanding referred to in clause 21, for the purpose of providing for improved communication, cooperation and coordination between the administration and enforcement of consumer law in Australia and New Zealand.

WITHDRAWAL AND CESSATION

49. A Party may withdraw from this Agreement by sending written notice to all other Parties. The withdrawal will become effective six months after the notice was sent.
50. If a Party withdraws from this Agreement, this Agreement will continue in force with respect to the remaining Parties.

REVIEW

51. After this Agreement has operated for seven years, the Parties will review the Agreement's operation and terms.

The Parties have confirmed their commitment to this agreement as follows:

Signed for and on behalf of the Commonwealth of Australia by

The Honourable Kevin Rudd MP
Prime Minister of the Commonwealth of Australia
2 July 2009

Signed for and on behalf of the State of New South Wales by

The Honourable Nathan Rees MP
Premier of the State of New South Wales
2 July 2009

Signed for and on behalf of the State of Queensland by

The Honourable Anna Bligh MP
Premier of the State of Queensland
2 July 2009

Signed for and on behalf of the State of South Australia by

The Honourable Mike Rann MP
Premier of the State of South Australia
2 July 2009

Signed for and on behalf of the Australian Capital Territory by

Jon Stanhope MLA
Chief Minister of the Australian Capital Territory
2 July 2009

Signed for and on behalf of the State of Victoria by

The Honourable John Brumby MP
Premier of the State of Victoria
2 July 2009

Signed for and on behalf of the State of Western Australia by

The Honourable Colin Barnett MP
Premier of the State of Western Australia
2 July 2009

Signed for and on behalf of the State of Tasmania by

The Honourable David Bartlett MP
Premier of the State of Tasmania
2 July 2009

Signed for and on behalf of the Northern Territory by

The Honourable Paul Henderson MLA
Chief Minister of the Northern Territory of Australia
2 July 2009