Fair Trading (Australian Consumer Law) Amendment Bill 2010

Explanatory Notes

General Outline

Australian Consumer Law amendments

The principal purpose of the Fair Trading (Australian Consumer Law) Amendment Bill 2010 is to apply the Australian Consumer Law (ACL), comprising schedule 2 of the Commonwealth *Competition and Consumer Act 2010* (CCA), as law in Queensland.

Security Providers Act 1993 amendments

The Bill will also amend the *Security Providers Act 1993* (SP Act) by inserting provisions which require mandatory fingerprinting of security providers, and adding terrorism offences to the list of disqualifying offences for holding a security provider licence.

Policy Objectives

Australian Consumer Law amendments

The Bill will give effect, in Queensland, to part of the Council of Australian Governments (COAG) agreed reforms to Australia's consumer policy framework whereby all jurisdictions have agreed to adopt the ACL as a single instrument of generic consumer protection legislation. These reforms, largely based on the Productivity Commission's Review of Australia's Consumer Policy Framework, will provide, to the extent possible, a nationally consistent, and enhanced, consumer law for all Australians.

Security Providers Act 1993 amendments

Further, the Bill will also implement part of a COAG agreement to deliver nationally consistent regulation of the private security industry. Mandatory fingerprinting is one of two remaining elements of Stage One of a three-stage reform process. The additional disqualifying offence of

terrorism offences brings national consistency to the list of disqualifying offences for security provider licensing across Australia.

Reasons for the Bill

Australian Consumer Law amendments

As agreed among jurisdictions, through the Intergovernmental Agreement for the Australian Consumer Law (IGA), the text of the ACL is created as schedule 2 to the *Trade Practices Act 1974* (TPA) by the collective effects of two Commonwealth Acts, the *Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010*, and the *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010*. The Acts in combination also provide a Part (XI) to apply the ACL as a law of the Commonwealth, provide a Part (XIAA) to facilitate application of the ACL by States and Territories, and rename the TPA as the *Competition and Consumer Act 2010* (CCA).

The ACL as a law of the Commonwealth is restricted in application to the constitutional competence of the Commonwealth which is principally the conduct of corporations and the conduct of interstate trade or commerce.

The text of the ACL consists of:

(a) Schedule 2 of the CCA.

(b) The remaining provisions of the CCA (with some exceptions), so far as they relate to Schedule 2.

(c) Regulations under the CCA so far as they relate to (a) or (b).

The elements at (b) and (c) are to be modified to fit with Schedule 2, particularly to cover natural persons where reference is made to corporations. The applied ACL refers to the ACL text, applying as a law of a participating jurisdiction, either with or without modifications.

The Bill does not provide for attachment of the ACL text to the *Fair Trading Act 1989* (FTA). This is to ensure that there is a single point of reference for the ACL text, that being Schedule 2 of the CCA. Attachment of the ACL text to the FTA may lead to confusion as the ACL text in the CCA will be amended by the Commonwealth from time to time in accordance with procedures agreed under the IGA, and any such amendments would not necessarily be reflected in ACL text attached to the FTA.

As the ACL applied as a law of Queensland, referred to as the ACL (Queensland), is intended to replace many of Queensland's existing generic consumer protection provisions, this application Bill repeals the consumer protection provisions of the FTA where there are substantively similar provisions in the ACL text.

Under the application law, Queensland will administer and enforce the ACL as a law of Queensland. The Bill amends the machinery, administrative and enforcement provisions existing in the FTA to allow administration and enforcement of the ACL (Queensland). Similarly, machinery, administrative and enforcement provisions in the ACL will be extended to be used for consumer protection provisions remaining in the FTA. This is to increase uniformity of administration and enforcement of the ACL (Queensland) and FTA with the Commonwealth and other jurisdictions.

The ACL provides a new framework for product safety for consumer goods and product related services. Under the ACL, consumer goods are defined as goods that are intended, or are of a kind likely to be used, for personal, domestic or household purposes. This includes goods which are a subject of a recall and have become fixtures since being supplied. A product related service is a service for or relating to: (a) the installation of consumer goods of a particular kind; or (b) the maintenance, repair or cleaning of consumer goods of a particular kind; or (c) the assembly of consumer goods of a particular kind; or (d) the delivery of consumer goods of a particular kind; and without (a) to (d), includes any other service that relates to the supply of consumer goods of that kind.

Queensland's current product safety framework covers both goods and services. While the ACL product safety regime will replace Queensland's current product safety framework in relation to consumer goods and product related services, as defined in the ACL text, Queensland's current product safety framework extends beyond consumer goods and product related services to include services. The ACL and FTA have a similar broad definition of services however the ACL product safety regime does not cover services in general. The Bill allows an ongoing role for Queensland under the FTA, specifically in relation to the safety of services beyond that of the ACL (Queensland) product safety regime.

The Bill also removes the statutory establishment of the Office of Fair Trading within the FTA. This gives effect to a recommendation of the 2007 Service Development and Performance Commission Review into the (former) Department of Tourism, Fair Trading and Wine Industry

Development, and the 2009 Independent Review of Government Boards, Committees and Statutory Authorities.

Security Providers Act 1993 amendments

The security industry has been infiltrated by organised crime gangs, as evidenced through investigations recently completed by the Australian Crime Commission and the New South Wales Independent Commission Against Corruption. In recognition of this fact, and with a view to improving national consistency, at the COAG meeting on 3 July 2008, COAG agreed to adopt a nationally consistent approach to the regulation of the private security industry. This will focus initially on the guarding sector of the industry, to improve the probity, competence and skills of security personnel and the mobility of security industry licences across jurisdictions. The proposals also include the introduction of minimum and ongoing probity standards throughout Australia.

Fingerprinting security providers and using fingerprints for ongoing probity checks will play a critical role in improving initial identification and probity checks to expunge unsuitable persons from the industry. Mandatory fingerprinting serves a dual purpose in introducing higher standards in the industry. Firstly, it provides for the positive identification of applicants by matching them to a single identity connected to their fingerprints. Secondly, the use of fingerprint records provides for a more accurate identification at the point of licence issue and then offers a higher standard of ongoing probity checking because probity is not only checked against existing criminal history but against unidentified latent prints that have been obtained from unsolved crime scenes.

To meet the requirements of another element of the Stage One COAG reform, Queensland is required to add to Schedule 1 of the SP Act ('Disqualifying Offences') an offence against Part 5.3 of the Criminal Code as set out in the Schedule to the Commonwealth *Criminal Code Act 1995* or a terrorist offence against state and territory laws or an overseas jurisdiction.

Achievement of the Objectives

Australian Consumer Law amendments

Upon commencement of the ACL (Queensland), and with accompanying commencement of the ACL by the Commonwealth, and other States and Territories as agreed under the IGA, the ACL will be in place across Australia. Given that adoption of the ACL by participating jurisdictions

relies upon an application law model in all jurisdictions except Western Australia (which will have mirror legislation), future amendments to the ACL schedule of the CCA are likely to be consistently applied across jurisdictions, increasing national uniformity. By signing the IGA, participating jurisdictions have agreed to abide by processes for cooperative negotiation of amendments to the ACL while the IGA, in its current form, is in force.

Security Providers Act 1993 amendments

Commencement of the amendments to the SP Act are reasonable and appropriate as these will bring Queensland in line with other jurisdictions which have already introduced mandatory fingerprinting (namely New South Wales, South Australia, Western Australia and the Northern Territory). As noted above, these reforms will also help ensure that the security industry is not infiltrated by criminal elements.

Alternatives to the Bill

Australian Consumer Law amendments

The primary policy objective of the Bill could be achieved by an actual, or effective, conferral of powers to the Commonwealth, resulting in a one regulator model for enforcement of the ACL. The IGA provides for States and Territories to exercise such an option. In its "Report on Australia's Consumer Policy Framework", the Productivity Commission stated that the option to make the Australian Government solely responsible for enforcing the new national generic law had intrinsic merit, especially in the longer term.

However, the States and Territories are responsible for enforcing a large body of specific consumer regulation outside the ACL, and as recognised by the Productivity Commission report, the loss of regulatory synergies and the costs of creating a parallel regional office network were powerful arguments against a single regulator model. Furthermore, the Australian Competition and Consumer Commission and State and Territory Governments were not supportive of the one regulator model.

The Productivity Commission concluded that early implementation of a one regulator model for all of the proposed national generic consumer law would be problematic. But given its view that the one regulator model should remain on the longer term policy agenda, the Productivity Commission proposed that the Australian and State and Territory

Governments jointly explore the scope and means to overcome any obstacles to, and potential risks of, the approach.

Previous to COAG agreeing to a single law, multiple regulator model, Queensland along with the other States and the Territories, were committed to a process of harmonising laws. Harmonisation sought to make laws more uniform across jurisdictions taking into account jurisdictional differences, regulatory priorities and policies. In practice, accounting for these differences in priorities and policies hindered the timeliness of harmonisation efforts. Harmonisation could be relied upon as an incremental approach to achieving increased uniformity if there were significant changes in expectations about timing, outcomes and reform methodologies.

Security Providers Act 1993 amendments

Legislative amendments are the only viable option for implementing the COAG reform requiring mandatory fingerprinting for security provider licences, and to include terrorism offences in the list of disqualifying offences.

Estimated Cost for Government Implementation

Australian Consumer Law amendments

Application of the ACL is one of several reforms covered by the National Partnership Agreement to Deliver a Seamless National Economy (NPA). The NPA provides arrangements for the States and Territories to receive national partnership payments from the Commonwealth, comprising facilitation payments for net set-up costs and revenue forgone by the States and Territories associated with reform implementation, and reward payments contingent on achievement of key milestones.

For the full raft of NPA reforms, Queensland received $20.1 million in facilitation payments for 2008-09, and is eligible for reward payments of up to $92.6 million over five years to 2012-13. As recognised by Queensland's agreement to the conditions and details of the NPA, the Bill as it applies the ACL, will be cost neutral from a whole of Government perspective, assuming receipt of reward payments associated with the agreement.

As the ACL includes a broader set of consumer provisions compared to the existing FTA in Queensland there are potential impacts of the ACL (Queensland) on the workload of the Queensland Civil and Administrative

Tribunal (QCAT) and the Queensland Courts. In particular, the unfair contract terms provisions of the ACL introduce new subject matter into the consumer law in Queensland. Also, statutory consumer guarantee provisions provide specific protection for consumers which extend on the current implied conditions and warranties provisions of the Queensland *Sale of Goods Act 1896*. The ACL provides new enforcement powers, remedies, and the opportunities for representative action by the regulators. More generally, the reforms might require additional national education and empowerment initiatives.

While it is not possible to estimate the number of unfair contract term matters (in particular) that will be brought before the Courts over the long term, unfair contract term matters may represent an additional short term burden on the Courts in Queensland. However, the most significant impact may arise through existing arrangements that fall outside the application of the ACL as a law of Queensland, which vest Federal jurisdiction on the Courts in Queensland. For example, the unfair contract terms provisions are already in effect under Commonwealth law from 1 July 2010 and it is expected that Commonwealth regulators will be most active in dealing with the unfair contract term matters. The Commonwealth will also have new subject matter under the Commonwealth applied ACL from 1 January 2011 including statutory consumer guarantees and unsolicited consumer agreements.

In regard to new enforcement powers, remedies and representative action, it is expected that while the nature of some actions taken by the Queensland regulator may differ under the ACL (Queensland), to what has been observed under the FTA, it is not expected that there will be a substantial rise in the number of matters brought before the Courts by the Queensland regulator.

Civil pecuniary penalties, while being a new power, are not expected to be used often by the Queensland regulator based on current data. The introduction of a new infringement notice system will reduce the workload of courts as the non-payment of infringement notices will not allow the Queensland regulator to seek a court order requiring payment for non-payment although the regulator will be able to take further action should they withdraw the infringement notice. Also, while court orders under the ACL have been restructured to be more specific than those under the FTA, their scope has not necessarily been broadened as the current FTA allows the court to make any order the court thinks appropriate.

As the national compliance and enforcement framework for the ACL is still being developed, a more thorough assessment of the expected effects of the ACL (Queensland) on actions by the Queensland regulator is not possible at this time. The new consumer policy framework requires increased coordination among jurisdictions, the details of which are yet to be settled.

Security Providers Act 1993 amendments

The Department of Employment, Economic Development and Innovation has estimated the implementation costs for mandatory fingerprinting reform to be $2.710 million in the 2010-11 financial year, (allowing for the purchase of 'LiveScan' units and set up costs), $2.028 million for the 2011-12 financial year, $2.083 million for the 2012-13 financial year, and $2.138 million for the 2013-14 financial year, ongoing. Inclusive in these numbers is the ongoing maintenance of systems and provision of services at $0.495 million in 2010-11, $0.233 million in 2011-12, $0.240 million in 2012-13, and $0.246 million in 2013-14, ongoing.

In the 2010-11 Budget, the Cabinet Budget Review Committee approved funding to cover these costs. Costs will be partially recovered through the introduction of a once-off fingerprinting fee of approximately $100. The Queensland Police Service will also incur costs to install new static, digital LiveScan fingerprinting units in select police stations throughout Queensland to enable convenient access for security provider licence applicants, and create new staff positions to undertake fingerprinting for security provider licence applicants and related processes, and maintain the LiveScan machines. The controlled appropriation for services cost to the Queensland Police Service is $1.892 million from 2013-14 ongoing. The Department of Employment, Economic Development and Innovation's controlled appropriation for services is $0.246 million from 2013-14 ongoing. Particular details of the scheme include:

- New static 'LiveScan' units and infrastructure will be installed in 14 strategic police stations in Cairns, Mt Isa, Townsville, Mackay, Rockhampton, Gladstone, Maryborough, Maroochydore, Stafford, Dutton Park, Goodna, Beenleigh, Broadbeach and Toowoomba. These stations have been identified as being likely to offer the best coverage for LiveScan units and to provide for simpler establishment of interfaces with the national fingerprint identification system.

- Static units are to be supported by a mobile 'Livescan' unit which will help cover rural, regional and remote areas where licensees and

licence applicants would otherwise be disadvantaged due to travel distances.

- To avoid adversely impacting on policing functions, security industry fingerprints will be taken by additional, civilian employees (not uniformed officers) and results will be analysed by additional, specialist fingerprint analysts.
- In remote locations, fingerprints will be taken by police using traditional 'wet' prints which are then sent to Brisbane for processing.

Importantly, implementation of mandatory fingerprinting will avoid the use of watch houses (where most fingerprint infrastructure is currently installed) as this poses safety and security risks for applicants and supervising officers. In addition, the use of watch houses would also mean that uniformed officers (rather than civilian employees) would be required to take fingerprints which could adversely impact on core policing duties. Queensland Police will ensure the secure storage of licensees' fingerprints, and destruction of a licensee's fingerprints once a licence expires or is cancelled, or the licence applicant withdraws their application after being fingerprinted.

Including terrorism offences in the list of disqualifying offences will not impose additional costs.

Consistency with Fundamental Legislative Principles

Australian Consumer Law amendments

Individuals' rights and liberties

Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to the rights and liberties of individuals. Proposed amendments to the FTA may be considered to adversely affect an individual's rights and liberties by introducing new offences, penalty amounts, disqualification orders and further regulation of business activities.

The ACL (Queensland) provides additional penalties, remedies and redress provisions that enable a greater range of proportionate regulatory responses in comparison to the FTA. While the regulator is able to issue infringement notices against a greater number of breaches under the Bill than under current Queensland law, the regulator will not be able to pursue an individual for non payment of an infringement notice. Under the Bill, infringement notices are an initial first step where the regulator can proceed

to seeking a civil pecuniary penalty or taking criminal proceedings after the infringement notice has been dropped. The Bill will introduce civil pecuniary penalties of up to $1.1 million for a body corporate and $220,000 for other persons, for contraventions of various consumer protection-related provisions. As with the current FTA, many of the consumer protection provisions will have corresponding criminal offences but with increased maximum fines up to $1.1 million for bodies corporate and $220,000 for persons other than a body corporate. However, the ACL does not contain penalties which provide for imprisonment.

The increase in penalty amounts and additional powers and remedies is necessary to allow Commonwealth and State and Territory regulators to have appropriate penalties to cover the full extent of businesses activities being captured by the new law, from large corporations to small business. The ACL will provide national consistency and allow courts to have available appropriate penalties taking into account: the seriousness of the breach of the law; the size of the contravening business; the amount of loss or damage caused; and, the extent to which the business cooperated with any investigation. The integration of the infringement notices system with civil pecuniary penalties will enable a more targeted and proportionate regulatory response, in addition to increasing the deterrent effect of consumer law provisions where serious matters come to the attention of regulators.

The maximum penalty amounts and additional powers and remedies are generally based on those currently provided in the Commonwealth TPA. The current penalty amounts were changed as part of the Trade Practices Amendment Bill (No.1) 2000 based on the Australian Law Reform Commission recommendation that penalties be increased, from $40,000 in the case of a person and $200,000 in case of a corporation, to $220,000 for persons and $1.1 million for bodies corporate, in order to reflect the community's disapproval of conduct that breached the consumer protection provisions of the TPA. The FTA has not had a similar review of penalties giving consideration to Australia's consumer policy framework.

By applying the ACL as a law of Queensland, section 109 (Interim bans on consumer goods or product related services that will or may cause injury to any person etc.) of the ACL (Queensland) includes the ability for the responsible Minister to make interim bans. This power will be used for consumer goods and product related services and replaces the power to make interim orders under section 85A (Interim orders) of the FTA for goods. The Bill retains section 85A (Interim orders) of the FTA but

amends the section so that it can only be used for services. The FTA does not provide provisions establishing appeal procedures. Due to the limited time period of interim bans and their use where consumer goods, product related services or services are likely to cause death or injury, the FTA and the ACL (Queensland), and the Bill to amend them, do not provide for a process of appeal.

By applying the ACL as a law of Queensland, the Bill introduces a new power allowing the responsible Minister to issue a recall notice for consumer goods. As recall notices are expected to be used almost exclusively by the Commonwealth for national recalls, clauses 39 to 42 of the Intergovernmental Agreement for the Australian Consumer Law state that 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. The ACL of the Commonwealth imposes requirements on the responsible Commonwealth Minister, through the ACCC, to consult with affected suppliers before issuing a recall notice. Commonwealth administrative review laws, such as the *Administrative Decisions (Judicial Review) Act 1977* (Cwlth) will also continue to apply to decisions made by a responsible Commonwealth Minister under the product safety provisions of the ACL.

Under the ACL (Queensland), the Minister may require a supplier to conduct a mandatory recall where the recall is likely to affect no more than two States or Territories. The clauses also require parties to endeavour to notify the Ministerial Council on Consumer Affairs of a decision to issue a recall notice. As with interim bans, recall notices are used where consumer goods will or may cause injury. As with interim bans, the Bill does not include provisions establishing a process of appeal. The *Judicial Review Act 1991* will apply to recall notices made under the ACL (Queensland).

Under section 249 (Privilege against exposure to penalty or forfeiture—disqualification from managing corporations) of the ACL (Queensland) a person cannot refuse to comply with a requirement in a proceeding arising out of the ACL (Queensland) or a requirement under the ACL (Queensland) to: answer a question or give information; produce a document or any other thing; or do any other act: on the ground that doing so may tend to expose the person to a disqualification order under section 248 (Order disqualifying a person from managing corporations).

This provision is required to ensure that persons who are capable of providing assistance to regulators in respect of their investigations are not capable of frustrating those investigations by claiming the common law

privilege against exposure to a penalty when complying with a statutory requirement or a requirement in a proceeding. Similarly, the Corporations Act was enacted by the *Corporations Amendment (Insolvency) Act 2007* to remove or abrogate the common law privilege against exposure to penalties when complying with a statutory requirement or a requirement in a proceeding. Prior to the High Court decision in *Rich and another v Australian Securities and Investments Commission* [(2004) 209 ALR 270] disqualification orders were considered to be protective in nature rather than constituting a penalty. Section 249 is required to reverse the effect of that case such that a person is not capable of claiming that he or she is entitled to refuse to do certain things because it may expose them to a 'penalty'.

Where best practice provisions are included in the ACL, the penalty amounts are based on the range of penalty amounts used in existing State and/or Territory legislation. Disqualification orders effectively ban or restrict individuals from participating in specific activities for specific periods of time, including managing corporations or undertaking specific business conduct and will be an addition to current remedies in the FTA. Although disqualification orders impact significantly on the individual, they are designed to protect consumers, providing a serious deterrent for individuals from engaging in illegal conduct without imposing the graver consequence of a criminal conviction.

In the application of the ACL, further regulation will be placed on business through the introduction of unfair contract terms, consumer guarantees and a new national product safety framework. These may be seen to infringe upon the right to conduct business without interference; however, amendments to the current legislation are essential to address poor conduct issues in relation to standard form consumer contracts, the lack of effective protections for consumers based on implied conditions and warranties under current laws and inconsistencies in Australia's product safety framework.

The ACL is based on the recommendations of the Productivity Commission's inquiry into Australia's consumer policy framework and further endorsed by COAG's agreement to implement a single law multiple regulator model based on the TPA, best practice in State and Territory consumer laws and other COAG agreed reforms including unfair contract terms, consumer guarantees and civil pecuniary penalties. The creation of a single national generic consumer law will address the current inconsistencies and gaps in legislation and differing enforcement of

consumer laws across the Commonwealth and States. Ultimately, the regulatory burden and costs to businesses operating nationally should be reduced.

Overall, it is considered the benefit to the broader public interest arising from the ACL (Queensland) outweighs and more than balances any impost on individuals or businesses.

Reversal of the onus of proof

Outside of the reversal of the onus of proof existing under the FTA, the ACL reverses the onus of proof in relation to a number of provisions not currently in the FTA. Reversals or partial reversals of the onus of proof have been included in the ACL in situations where:

- it would be impossible or unreasonable to expect a consumer or a regulator to meet the conventional standard of proof; and
- the supplier would easily be able to meet the standard of proof.

Provisions of the ACL have been developed in accordance with the Commonwealth Attorney General's Department's *A Guide to Framing Commonwealth Offences, Civil penalties and Enforcement Powers*.

The substantive changes to the FTA relate to false testimonials and unfair contract terms, both of which are new to Queensland.

The evidentiary burden of proof is reversed in relation to false or misleading representations concerning testimonials. This reversal of the burden, in section 29(2), recognises the potential difficulty faced by consumers in obtaining information about the basis for a testimonial. Requiring a representor to adduce evidence about the validity of a testimonial is not onerous, particularly given that the relevant evidence is likely to be easily available to the representor, but not to the consumer.

The unfair contract terms provisions include two additional reversals of the onus of proof. These are:

- in section 24(4), a term of a consumer contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term
- in section 27(1), if a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise.

Again, the relevant evidence is likely to be difficult for a consumer to obtain and relatively easier for the party who would be advantaged by the term to provide.

Issues relating to the reversal of the onus of proof were raised by stakeholders responding to the Senate Economics Committee review of the second ACL Bill. The Committee argues that this has only been done where it is impossible or unreasonable to expect a regulator to meet the conventional standard of proof. In the case of solicited contracts, the Committee determined that it is not unreasonable to expect that the supplier has evidence of the contract, rather than the consumer.

The institution of Parliament

The ACL is being implemented using an application law model that allows a single law to be adopted by the Commonwealth and the States and Territories as a law of their respective jurisdiction. Although there is an agreement among Australian Governments to reform Australia's consumer policy framework and to use their best endeavours to maintain a consistent national generic law, these agreements, so far as implementation of the Australian Consumer law is concerned, do not restrict the institution of Parliament in any legally binding way.

Although the proposed Bill to implement the ACL results from an agreement by COAG and not the Queensland Parliament, the Bill must pass through Parliament in the ordinary way. As such, further amendments in Queensland to the proposed Bill can allow for local variations in the application of the law. Administrative and enforcement arrangements of the ACL (Queensland), to the extent that these are provided for statutorily, are also under consideration by Parliament and require its approval.

It is arguable that the proposed amendments to the FTA to implement the ACL infringe fundamental legislative principles prescribed under the *Legislative Standards Act 1992* section 4 (2)(b) by having insufficient regard to the institution of Parliament. However, the national legislative scheme reflects the policy intention by executive government but does not legally restrict the institution of Parliament which can amend the substance of the ACL (Queensland) by altering the Queensland application law provisions.

The application law model, in respect of future amendments to the ACL as a schedule to the CCA, might be regarded as a breach of the fundamental legislative principles. For example, the IGA for the ACL provides that the Commonwealth will not introduce a Bill into the Commonwealth

Parliament to amend the ACL unless the proposed amendment is supported by the Commonwealth; and four other Parties (including at least three States). If the proposed process under the IGA is adhered to, it is possible that the Commonwealth will be able to make amendments to the ACL without the support of Queensland which will be applied as a law of Queensland through the application law. Should these circumstances arise, the Queensland Parliament is able to vary the application of the ACL to prevent amendments to the ACL taking effect in Queensland. There are, however, potential time or process constraints preventing amendments to the ACL taking effect in Queensland in a timely manner.

The application provisions include a system to deal with future modifications of the ACL text by Commonwealth legislation. Section 139G of the CCA provides the Governor-General may make regulations prescribing matters required or permitted by Schedule 2 to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to that schedule. Section 139G(4) provides that a regulation may exempt from Schedule 2 conduct engaged in by a specified organisation or body that performs functions in relation to the marketing of primary products or exempt a specified contract or exempt prescribed conduct engaged in, in the course of a business carried on by the Commonwealth or by a prescribed authority of the Commonwealth.

Among other things, section 17 of the Bill's application provisions provide that a modification made by a Commonwealth law to the ACL text does not apply as a law of Queensland, if the modification is declared by a regulation under the FTA to be excluded. The regulation only has effect if its making is notified before the end of no later than 2 months after the date of the modification. However, to ensure uniformity across jurisdictions as changes are made to the ACL text, the date on which the modification has effect on the ACL (Queensland), is the date on which the Commonwealth Act effecting the modification receives Royal Assent or the regulation effecting the modifications is registered under the *Legislative Instruments Act 2003* of the Commonwealth.

Section 29 (No doubling-up of liabilities) of the Bill's application provisions recognises that the same conduct is capable of being punished under more than one law (including the ACL (Queensland), the ACL of another State or Territory, or the ACL of the Commonwealth), and removes this double jeopardy. The section has its counterpart in section 150H of the Commonwealth's application of the ACL which provides that the Commonwealth cannot take action for a contravention or offence if a

participating State or Territory has punished the offender for the same contravention or offence.

Under section 29, in some cases, the Queensland regulator may be bound by the action of another jurisdiction where an offender has been punished for the same offence in that jurisdiction. For example, if a false representation (the act or omission) is made by a business in a newspaper that is published in New South Wales, and the newspaper is read in both Queensland and New South Wales, it would create an offence in both States. If the business in New South Wales is prosecuted and punished in that State, then Queensland cannot seek to punish the business and vice versa. If punishment is sought and obtained in New South Wales, then the Queensland regulator will not be able pursue another form of punishment even if it believes the punishment in New South Wales was too lenient, not appropriate or more importantly did not adequately provide redress or compensation for Queensland residents affected by the false representation. Also under section 29, Queensland could not seek to have the court make a civil pecuniary penalty order if New South Wales punished the business, in any way, for the false representation that formed the contravention of the ACL.

Section 29 recognises that although there are multiple regulators, increased coordinated, uniformity of action and consistency of outcome is required under a single national law to prevent issues arising such as double jeopardy. While section 29 seeks to protect against double jeopardy, the practical operational impacts of the applied law model mean some restrictions on the independent action of regulators will result as the reform objectives prioritise uniformity ahead of the right of regulators to act unilaterally.

Security Providers Act 1993 amendments

Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to the rights and liberties of individuals. The mandatory requirement for a security provider to agree to supply their fingerprints in order to hold a security licence is arguably a breach of the fundamental legislative principle ensuring the rights and liberties of individuals. The taking and holding of fingerprints could be seen to be a breach of an individual's right to privacy. While this is recognised, the breach is balanced by the interests of public safety with the measure assisting in the protection of the community and critical infrastructure. Security providers have great trust placed in them by the community as they are responsible for ensuring personal safety and protecting property.

By requiring fingerprints to be taken and used for ongoing probity, the industry is being screened to exclude inappropriate persons, a necessary measure following evidence of organised crime infiltrating the industry.

Safeguards will also be put into place to mitigate privacy concerns. The provision of information to the licence applicant will satisfy the requirements of the Information Privacy Principle 2 of Schedule 3 of the *Information Privacy Act 2009* by ensuring the applicant is made aware:

- of the purpose of taking their fingerprints;
- that the taking of their fingerprints is required under the SP Act;
- that the fingerprints will be stored by the Queensland Police Service and will be uploaded on to the National Automated Fingerprint Identification System (NAFIS); and
- that the fingerprints will be available to police services in Australia and used within Queensland for the purposes of identification and ongoing probity checks which, by necessity, will include being used for general policing.

The applicant will be fully informed of this in writing before they consent to having their fingerprints taken.

Fingerprints will be taken by trained staff employed by the Queensland Police Service in special areas of designated police stations throughout Queensland. In locations where this is not available, it will still be possible for licence applicants to have their fingerprints taken using the 'wet print' method.

The fingerprint records will be stored securely by the Queensland Police Service in the Fingerprint Bureau, and electronically on NAFIS. The Fingerprint Bureau is located at the Queensland Police Service's Roma Street Headquarters in a secure facility. The NAFIS database is operated and secured by CrimTrac, an Australian Government agency. CrimTrac acts as an information broker and as a Commonwealth agency must operate in accordance with the Commonwealth *Privacy Act 1988*. Section 14 of the Commonwealth *Privacy Act 1988* specifies eleven Information Privacy Principles that govern how CrimTrac may collect, store, use and disclose personal information.

The fingerprints will be used for initial identification verification and for ongoing probity checks for the duration of the licence. Ongoing probity checks using fingerprints is part of the COAG agreement. Complete and thorough probity checking cannot be undertaken without allowing the use

of fingerprint records for general policing. This is done by a matching process run through NAFIS.

As the fingerprints are only required while a security provider licence is current, the amendments provide for destruction of prints, in the presence of a justice and within a reasonable time of the licence ceasing, either through expiration of the licence period, or refusal or cancellation of a licence by the chief executive, or the licence applicant withdrawing their application.

Ongoing probity checks using fingerprints are already conducted for licence holders under the *Casino Control Act 1982* and the *Gaming Machine Act 1991* and for all serving officers in the Queensland Police Service, who are required to have their fingerprints taken under the *Police Service Administration Act 1990*.

Mandatory fingerprinting of security providers has already been introduced in New South Wales, South Australia, Western Australia and the Northern Territory. The use of fingerprints for ongoing probity checks in the manner described above is consistent with those jurisdictions. Victoria has also recently introduced legislative amendments to allow for the use of fingerprints for ongoing probity checks. This legislation, when enacted, will operate in the same way as the Queensland legislation.

Consultation

Australian Consumer Law amendments

As development of the ACL is part of a COAG reform agenda, a consolidated national approach to community consultation was adopted. Multiple consultation stages were conducted to inform the key steps in the development process requiring agreement between jurisdictions, and settling of ACL legislation by the Commonwealth. Over 600 submissions have been considered collectively in relation to Productivity Commission reports informing the ACL reform process, options papers addressing the nature of provisions to be included, regulatory impact statements assessing proposed elements of the law, and Standing Committee on Economics enquiries into Commonwealth ACL Bills.

Security Providers Act 1993 amendments

The Australian Government's Attorney-General's Department engaged the Centre for International Economics (CIE) to prepare a Regulation Impact Statement (RIS) in 2007 to examine harmonisation of security industry

regulation. The CIE consulted with peak industry bodies, security firms, government agencies, major users of private security, academics and training organisations. Although this was a national RIS, each state was examined in some detail and the RIS took into account the impacts on Queensland. The report identified no net adverse outcomes for mandatory fingerprinting; rather the higher probity standards would lead to an increase in community safety.

Subsequent to the COAG agreement to institute these reforms, the peak industry body for the security industry, the Australian Security Industry Association Limited (ASIAL) was consulted on a number of occasions by the Department of Employment, Economic Development and Innovation. ASIAL fully supports the proposal to make fingerprinting of all security providers mandatory and has urged State and Territory jurisdictions to introduce the amendments as soon as possible.

Consultation between the Department of Employment, Economic Development and Innovation and the Queensland Police Service has been thorough and ongoing. Consultation has also occurred with Queensland Treasury, the Department of the Premier and Cabinet, and the Department of Justice and Attorney-General, including the Privacy Unit.

Uniform or complementary legislation of the Commonwealth or another State

Australian Consumer Law amendments

The Bill will give effect, in Queensland, to part of the COAG agreed reforms to Australia's consumer policy framework whereby all jurisdictions have agreed to adopt the ACL text as a single instrument of generic consumer protection legislation. To the extent that the law is uniformly adopted by jurisdictions, the ACL (Queensland) will be the same as other participating jurisdictions as signatories to the IGA.

Security Providers Act 1993 amendments

As noted above, the Bill implements nationally agreed reforms to better harmonise regulation of the security industry. In particular, the Bill will implement a COAG reform from an agreement to introduce mandatory fingerprinting of security providers in all jurisdictions and to ensure that offences which would disqualify a person from working in the security industry are uniform across the country.

Notes on Provisions

Part 1 Preliminary

Clause 1 sets out the short title of the Bill.

Clause 2 provides for the commencement of the Bill fixed by proclamation.

Part 2 Amendment of Fair Trading Act 1989

Clause 3 provides that Part 2 amends the FTA.

Clause 4 amends the title of the Act to remove the reference to "consumer authorities" and inserts "a commissioner for fair trading". This reflects that consumer authorities are no longer established under the Act however the role of a commissioner for fair trading is retained.

Clause 5 replaces the objective in section 3 (Objective of this Act) with the Ministerial Council on Consumer Affair's overarching objective for consumer policy: "To improve consumer wellbeing through consumer empowerment and protection, fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers trade fairly." The objective is included in the IGA.

Clause 6 omits section 4 (Application of the Act) and inserts section 4 (This part does not apply for the Australian Consumer Law (Queensland)) as an aid to statutory interpretation to make it clear that definitions and provisions outside of the ACL (Queensland), except for section 1 (Short title and citation) and section 3 (Objective of this Act), do not apply for interpretation or operation of the ACL (Queensland). Furthermore, to ensure uniformity of the ACL (Queensland) with provisions in the FTA that are outside the ACL (Queensland), the clause inserts section 4A (Application of Act) that mirrors part 3, division 1, section 20 (Application of the Australian Consumer Law) being inserted by clause 18 of this Bill.

Section 4A makes it clear that the FTA is not to be construed as merely applying in the territorial area of Queensland, and that the extraterritorial competence of the Queensland legislature is being used.

The clause also inserts a section 4B (Reference to this Act or to a particular provision of the Australian Consumer Law (Queensland)) that ensures a reference to the FTA includes a reference to the ACL and that a reference to a particular provision of the ACL means schedule 2 of the CCA applying as a law of Queensland.

Clause 7 removes definitions from section 5 (Definitions) which are now provided as definitions in the ACL as needed, defines FTA consumer offence provisions and FTA offence provisions, which are offence provisions that are retained in the FTA, and includes references to definitions that are used for application of the ACL as a law of Queensland. FTA consumer offence provisions include compliance with a safety standard for services (section 84(1)) and supplying services in breach of a permanent ban or interim order (section 86). FTA offence provisions include the FTA consumer offence provisions and any other provisions in the FTA (which are outside of the ACL) that create an offence, such as embargo notices, court orders and enforcement provisions.

Clause 8 replaces section 5A (Meaning of *engaging in conduct* and *conduct*) of the FTA with section 2(2) of the ACL (Queensland). Section 2 (Definitions) of the ACL text defines terms that are relevant to the understanding, interpretation and application of the provisions of the ACL.

Clause 9 removes section 5B (Effect of provisions dealing with enforceability of a contract) of the FTA which relates to provisions in the FTA, part 3, which are being repealed.

Clause 10 amends section 5C (Further meaning of acquisition, supply or resupply of goods or services) of the FTA to remove "goods" as the FTA consumer offence provisions apply only to services.

Clause 11 removes section 5E (Meaning of making a representation), section 5F (Meaning of persons involved in contravention), section 5G (Meaning of related corporation) and section 6 (Meaning of consumer) of the FTA which are now provided by provisions of the ACL (Queensland). The meanings of persons involved in contravention , related corporation, and consumer, are provided for in sections 2, 6 and 3 of the ACL (Queensland) respectively.

Clause 12 removes headings which refer to or rely on the Consumer Affairs Council and Office of Fair Trading. The Consumer Affairs Council does not have a statutory role under the ACL. The removal of the Office of Fair Trading under the Act implements a Queensland specific recommendation to remove the requirement for a statutory office. The clause also inserts section 8 (Commissioner for fair trading) which retains the role of the Commissioner for fair trading, and allows some flexibility for an appointment to the role, for administrative purposes. The Commissioner for fair trading is the person who is the chief executive, without further appointment. However, if the chief executive appoints another person to be the Commissioner, that person is the Commissioner while the appointment is in force. A person may hold the office of Commissioner as well as an office under the *Public Services Act 2008.* Section 8(5) adopts but clarifies the wording from the repealed section 19(2) that judicial notice must be taken of the Commissioner's signature.

Clause 13 amends section 19 (Commissioner and other officers) to provide that inspectors and officers necessary to assist the Commissioner for fair trading are appointed under the *Public Service Act 2008* and that judicial notice must be taken of the Commissioner's signature.

Clause 14 removes section 20 (Office of Fair Trading) of the FTA which requires there to be an Office of Fair Trading under the Act. The removal of the Office of Fair Trading under the Act implements a Queensland specific recommendation to remove the requirement for a statutory office. An office, or other unit of public administration, independent of any requirements under the FTA, as amended by this Bill, can administer the Act through the Commissioner for fair trading.

Clause 15 amends section 21 (Functions of office), to provide the functions of the Commissioner for fair trading. In effect the functions of the Office of Fair Trading are transferred to the Commissioner for fair trading. The clause consequently renames section 21 (Functions of commissioner). The clause also removes functions relevant only to operations of the Consumer Affairs Council or Consumer Safety Committee, as Clauses 12 and 17 respectively, repeal the statutory establishment of these bodies.

Clause 16 renumbers sections due to repeal and amendment.

Clause 17 removes Part 2, division 3 (Consumer Safety Committee) of the FTA which provide for the establishment, functions and powers of a Consumer Safety Committee. The Consumer Safety Committee does not have a statutory role under the ACL. This amendment does not prevent

similar committees or processes producing the like effect being established outside of the Act.

Clause 18 removes Part 3 (Trade practices) of the FTA which are provided as consumer protection provisions in the ACL. Part 3 of the FTA is replaced with interpretative provisions for the application of, modification of and reference to the ACL. The clause also inserts Part 3A (Provisions supporting application of the Australian Consumer Law as a law of Queensland) and Part 3B (Provisions utilising the Australian Consumer Law provisions). These parts and sections are explained below.

'Part 3 The Australian Consumer Law

Section 14 contains interpretative provisions for the application of, modification of and references to the Australian Consumer Law. Section 14(1) contains a list of definitions. An explanation of their origin or purpose is as follows:

application law – the same as in part XI of the inserted into the CCA by the Commonwealth.

Australian Consumer Law – the same as in part XI of the inserted into the CCA by the Commonwealth.

Australian Consumer Law text – means the text described in section 15.

Competition and Consumer Act – means the CCA of the Commonwealth.

instrument – the same as in section 4 of the CCA.

Intergovernmental Agreement – means the Intergovernmental Agreement for the Australian Consumer Law made on 2 July 2009.

jurisdiction – means a State or the Commonwealth.

law – in relation to a Territory, means a law of, or in force in, that Territory.

modifications – the same as in part XIAA of the inserted into the CCA by the Commonwealth.

month – the same as in "calendar month" under section 22 of the *Acts Interpretation Act 1091* of the Commonwealth.

participating jurisdiction – the same as in section 140 (Definitions), part XIAA inserted into the CCA by the Commonwealth.

proclamation – means a proclamation of the Governor.

State – includes a Territory.

Territory – means the Australian Capital Territory or the Northern Territory of Australia.

this jurisdiction – means Queensland.

Section 14(2) provides for terms used in Part 3 (The Australian Consumer Law) to have the same meanings as in the Australian Consumer Law applying as a law of Queensland.

Section 15 (The Australian Consumer Law text) defines the Australian Consumer Law text that will be applied to become the Australian Consumer Law (Queensland).

Section 16 (Application of the Australian Consumer Law) is the operative clause of the Bill. It applies the Australian Consumer Law text as the law of Queensland subject to sections 17, 18 and 19 inserted through clause 18.

Section 17 (Future modifications of Australian Consumer Law text) provides a system to deal with future modifications of the Australian Consumer Law text by Commonwealth legislation. Among other things, the system provides that a modification made by a Commonwealth law to the Australian Consumer Law text does not apply as a law of Queensland, if the modification is declared by a regulation under the FTA to be excluded. The regulation only has effect if its making is notified before the end of no later than 2 months after the date of the modification. A modification also ceases to apply if a further regulation under the FTA so provides.

Section 18 (Meaning of generic terms in Australian Consumer Law for purposes of this jurisdiction) contains interpretive provisions for the purposes of Queensland administering the Australian Consumer Law. The Australian Consumer Law text includes the terms such as "regulator" which need to be given the appropriate meaning within Queensland.

Section 19 (Interpretation of Australian Consumer Law) provides that the *Acts Interpretation Act 1901* of the Commonwealth applies to the interpretation of the Australian Consumer Law instead of the Queensland *Acts Interpretation Act 1954*.

Section 20 (Application of Australian Consumer Law) makes it clear that the Australian Consumer Law is not to be construed as merely applying in the territorial area of Queensland, and that the extraterritorial competence of the Queensland legislature is being used.

Section 21 (References to Australian Consumer Law) and section 22 (References to Australian Consumer Law of other jurisdictions) provide a system for referring to the Australian Consumer Law.

Section 23 (Division does not apply to Commonwealth) provides that "participating jurisdiction" or "other jurisdiction" for the purposes of applying the ACL as a law of Queensland does not include the Commonwealth.

Section 24 (Application law of this jurisdiction) provides that the Bill and the Australian Consumer Law of Queensland will bind the States (to the full extent of its constitutional capacity to do this). This is consistent with section 2A (1) (Application of the Act to Commonwealth and Commonwealth authorities) and section 2B (Application of Act to States and Territories) of the CCA and will apply to a State only when carrying on a business.

Section 25 (Application law of this jurisdiction) is the counterpart of section 24 (Application law of this jurisdiction) inserted by clause 18, and provides that the Bill and the Australian Consumer Law of another State or Territory will bind Queensland. This will apply to the State only when carrying on a business.

Section 26 (Activities that are not businesses) makes it clear that certain activities carried on by governments or government authorities do not amount to carrying on a business (for the purposes of sections 24 (Application law of this jurisdiction) and 25 (Application law of this jurisdiction) inserted by clause 18), and defines terms relevant to this section. This section corresponds to section 2C (Activities that are not business) of the CCA.

Section 27 (Jurisdictions not liable to penalty or prosecution) provides that the State or any participating jurisdiction is not liable to pecuniary

penalties or prosecution for an offence. This is consistent with sections 2A(3) (Application of Act to States and Territories) and 2B(2) (Application of Act to States and Territories) of the CCA. Section 27 does not apply to an authority of any jurisdiction.

Section 28 (Conferral of functions and powers on certain bodies) allows for the conferral of functions and powers to promote the uniform administration of the ACL, as if the ACL (Queensland) is a law of the Commonwealth.

Section 29 (No doubling-up of liabilities) recognises that the same conduct is capable of being punished under more than one law (the Australian Consumer Law (Queensland), the Australian Consumer Law of another jurisdiction, or the Australian Consumer Law of the Commonwealth), and removes this double jeopardy. The clause has its counterpart in section 150H (No doubling-up of liabilities) of the CCA.

‘Part 3A Provisions supporting application of the Australian Consumer Law as a law of Queensland

Division 1 (Infringement notices) creates an infringement notice regime that will apply to specific provisions of the ACL and to FTA consumer offence provisions. In order to provide a nationally consistent infringement notice regime for the ACL the infringement notice regime for the Queensland ACL operates outside of the infringement notice regime under the Queensland *State Penalty Enforcement Act 1999*. To the extent possible, Division 1 mirrors the infringement notice regime under Schedule 2, Division 5 (Infringement notices) of the CCA. The ACL infringement notice regime allows the regulator to issue a penalty that a person can (but does not have to) pay to avoid liability to further court action. As an ACL infringement notice does not have to be paid, an unpaid infringement notice cannot be referred to the State Penalties Enforcement Registry.

Section 30 (Purpose and effect of this division) sets out that the purpose of the division is to provide for the issue of an infringement notice to a person for an alleged contravention of an infringement notice provision as an alternative to proceedings for a pecuniary penalty under the ACL (Queensland).

There is no requirement that an infringement notice be issued for an alleged contravention of an infringement provision. This division does not affect the liability of a person to proceedings under the offence provisions of the ACL (Queensland) in relation to an alleged contravention of an infringement notice provision if an infringement notice is not issued or an infringement notice is withdrawn. Also, the court is not prevented from imposing a higher penalty than the penalty specified in the infringement notice if the person does not comply with the notice.

Section 31 (Issuing infringement notice) allows the commissioner to issue an infringement notice to a person if they have reasonable grounds to believe that person has contravened an infringement notice provision specified in the section. The commissioner can only issue one infringement notice to the person for the same alleged contravention of the infringement notice provision.

To have effect the infringement notice must be issued within one year after the day on which the contravention of the infringement notice provision is alleged to have occurred. The infringement notice does not have any effect if the notice relates to more than 1 alleged contravention of an infringement notice provision by the person.

Section 32 (Matters to be included in infringement notice) provides that an infringement notice must include various matters, including a number of formal and administrative requirements.

Section 33 (Amount of penalty) specifies the penalties for alleged contravention of infringement notice provisions for relevant categories of person. The value of a penalty unit is the same value it has under the *Crimes Act 1914* of the Commonwealth. A penalty unit is $110 at the time of writing, as defined in section 4AA of the *Crimes Act 1914*.

Section 34 (Effect of compliance with infringement notice) provides that if a person, to which the infringement notice is issued, pays the penalty specified in the infringement notice within the compliance period and in accordance with the notice the person is not regarded as having contravened the infringement notice provision or having been

convicted of an offence constituted by the same conduct that constituted the alleged contravention. Furthermore, in the circumstances described, no proceedings may be started or continued against the person in relation to the alleged contravention of the infringement notice provision or an offence constituted by the same conduct that constituted the alleged contravention.

This reflects the intention behind the infringement notice mechanism of providing a process through which the entity may forestall court proceedings by the regulator in relation to the alleged contravention.

While the regulator cannot take further action in respect of the alleged contravention, this does not prevent private parties from doing so.

Section 35 (Effect of failure to comply with infringement notice) provides that if a person does not comply with an infringement notice — that is, if he or she does not correctly pay the penalty specified in the infringement notice within the infringement notice compliance period and the infringement notice is not withdrawn — the regulator may bring civil or criminal proceedings against the person not for failing to pay, but in relation to the alleged contravention to which the notice relates.

Section 36 (Infringement notice compliance period for infringement notice) provides that the infringement notice compliance period is initially 28 days. However, the regulator may extend the infringement notice compliance period once for a further period of 28 days.

Section 37 (Withdrawal of infringement notice) provides that the recipient of an infringement notice may make written representations to the regulator seeking its withdrawal. Evidence given to the regulator in making such representations is not admissible as evidence in a proceeding other than proceedings based on the evidence or information given being false or misleading.

The regulator may withdraw an infringement notice if it considers it appropriate, by written notice to the person. The regulator may withdraw the notice whether or not the person has sought a withdrawal.

The withdrawal notice must include various matters. In addition to the formal and administrative requirements, the withdrawal notice must inform the person that he or she is liable to civil or criminal proceedings in relation to the alleged contravention.

The regulator may withdraw the infringement notice with the intention of not pursuing the alleged contravention, in which case the regulator would not commence proceedings against the entity. Alternatively, the rationale behind the withdrawal may be that the regulator considers that the alleged contravention is more serious than the regulator initially believed, and warrants civil or criminal proceedings.

Division 2 (Embargo notices) allows inspectors to issue an embargo notice. To the extent possible, Division 2 mirrors Schedule 2, Division 6, Subdivision E (Embargo) of the CCA. An embargo is a temporary mechanism to prevent the continued supply or movement of consumer goods or product related services that may pose a danger to the community. Consumer goods or equipment used to supply product related services, may also be secured by an inspector remaining with the goods, or by locking the goods or equipment up or other wise, for up to 24 hours, where there is a high risk of non-compliance with an embargo notice.

Section 38 (Definition for div 2) provides that, under Division 2, the definition of services includes product related services.

Section 39 (Embargo notices) provides that an inspector who enters premises under section 89 (Power of inspectors) may give an embargo notice to the occupier of the premises if the inspector is satisfied on reasonable grounds that goods or services have been supplied, or offered to be supplied, in contravention of the FTA. An embargo notice must:

- be in writing;
- specify the consumer goods or product related services to which the notice relates;
- prevent the supply of those specified consumer goods or product related services or, the case of consumer goods, the movement, transfer, alteration, destruction or other interference with specified consumer goods; and
- explain the effect of an order to secure consumer goods or product related services.

An inspector may issue an embargo notice by causing a copy of the notice to be served on the occupier of the premises, or if the occupier cannot be located after all reasonable steps have been taken to do so,

by causing a copy of the notice to be given to be served on a person on the premises who is believed to be in regular contact with the occupier, or causing a copy of the notice to be affixed to the premises or thing on the premises, in a prominent position.

In addition, Section 39 sets out the actions required of suppliers and persons acquiring goods if goods are supplied in contravention of an embargo notice.

Section 40 (Embargo period for embargo notice) specifies that an inspector cannot issue embargo notices for longer than:

- 28 days; or
- 24 hours, where the inspector secures consumer goods or equipment under section 43 or 44.

On application of an inspector, made before the initial embargo period ends, a Magistrates Court may extend an embargo notice for a specified period.

An inspector must notify the occupier of the premises to which the embargo notice relates before making such an application and the occupier is entitled to be heard in relation to the application.

Section 41 (Multiple embargo notice for supply of the same kind of goods or services from the same premises) provides that an inspector may not issue an embargo notice in relation to the same consumer goods or product related services for the same premises within 5 days of the previous embargo notice ending.

Section 42 (Power of inspector to secure goods) provides that if an inspector has issued an embargo notice in respect of consumer goods and the inspector who gives the notice believes on reasonable grounds that it is necessary to secure the consumer goods or equipment in order to ensure that the notice is complied with, the inspector may do anything that the inspector thinks is necessary to secure those consumer goods.

Section 43 (Power of inspector to secure equipment used to supply services) provides that if an inspector has issued an embargo notice in respect of product related services and the inspector who gives the notice believes on reasonable grounds that it is necessary to secure the equipment used to supply the services in order to ensure that the notice is complied with, the inspector may do anything that the

inspector thinks is necessary to secure those consumer goods or equipment.

Section 44 (Approval relating to embargoed goods or services) provides that the owner of consumer goods or another person who has an interest in the goods may, in writing, ask the commissioner for approval to supply the goods or to move, transfer, alter, destroy or otherwise interfere with the goods.

A person who would be the supplier of product related services or another person, whose interests would be affected if the services were not supplied, may ask the commissioner for approval to supply product related services that are subject to an embargo notice.

Under section 44(3) approval may be given by the Commissioner to a request to supply the goods or to move, transfer, alter, destroy or otherwise interfere with the goods or to a request to supply product related services that are subject to an embargo notice.

Section 45 (Compliance with embargo notice) provides that a person commits an offence if that person, in the knowledge that an embargo notice has been given, does or causes another person to do an act or thing, or omits or causes another person to omit, to do an act, contrary to the embargo notice.

A person does not commit an offence if he or she has the consent of the Minister or the Commissioner or an inspector to do, or not do the act or thing, or an act was done for the purpose of protecting or preserving the consumer goods or equipment used to supply services.

Division 3 (Orders for the preservation of property) includes section 46 (Court may make an order for preserving money or other property held by a person) and section 47 (Compliance with orders made under this divisions) which mirror section 137F (Court may make orders for the purpose of preserving money or other property held by a person) and 137G (Compliance with orders made under section 137F) of Schedule 2 of the CCA. Section 46 and 47 effectively replace section 102 (Power of the court to prohibit payment or transfer of money or other property – TPA s 87A) of the FTA.

Section 46 (Court may make an order for preserving money or other property held by a person) gives the court powers to make orders to preserve assets.

Section 47 (Compliance with orders made under this division) creates an offence for failing to comply with an order made under section 46 (Court may make an order for preserving money or other property held by a person).

Division 4 (Court Jurisdiction) confers jurisdiction on Queensland courts to deal with particular matters arising under the ACL (Queensland). Division 4 does not deal with offences under the ACL (Queensland) or any FTA consumer offence provision. Proceedings for offences are dealt with by the amendments made to section 94 (Proceedings for offences) of the FTA at clause 36 of the Bill.

Section 48 (Purpose and scope of division) provides that the purpose of Division 4 is to confer jurisdiction on Queensland courts to deal with particular matters arising under the ACL (Queensland) except for offences under the ACL (Queensland) or any FTA consumer offence provision.

Section 49 (Jurisdiction extends to provisions having wider application) ensures that there are no unintended gaps in jurisdiction by stating that jurisdiction conferred on any entity to deal with matters arising under a particular provision of the ACL (Queensland) extends to matters dealt with in part 3B (Provisions utilising the Australian Consumer Law provisions). The example for subsection (2) is an aid to statutory interpretation.

For example, under part 3B of this Act, the application of chapter 5, part 5-2, division 2 (Injunctions) of the ACL (Queensland) is extended to particular provisions of this Act, including for example the FTA consumer offence provisions. Under this division, depending on circumstances, either the District Court or the Supreme Court has jurisdiction for injunctions under the Australian Consumer Law (Queensland). That jurisdiction arrangement will therefore also apply for injunctions relating to contraventions of the FTA consumer offence provisions even though those do not form part of the Australian Consumer Law (Queensland).

Section 50 (Proceedings referred to court of competent jurisdiction) provides a table setting out proceedings for particular sections of the ACL (Queensland). For a court, the proceeding is determined by any civil jurisdictional limit, including any monetary limit, applying to the court, and for the tribunal it is determined by whether the subject

matter of the proceeding would be a minor civil dispute as defined under the QCAT Act.

Section 51 (Proceedings referred to particular court) provides a table specifying the nature of proceedings for particular sections of the ACL (Queensland) and the court where the proceeding must be heard.

Division 5 (Miscellaneous) provides for the operation of the ACL civil pecuniary penalty regime in Queensland courts.

Section 52(1) is an aid to statutory interpretation where a pecuniary penalty applies by providing that if a proceeding before a Queensland court is seeking a remedy (under the ACL (Queensland) chapter 5, part 5-2), for which a pecuniary penalty can be ordered (under section 224), the court need only be satisfied of the matter on the balance of probabilities. In short the matter is a civil matter and not a criminal matter.

Section 52(2) provides that if a proceeding before a Queensland court is seeking a remedy (under the ACL (Queensland) chapter 5, part 5-2), for which a pecuniary penalty can be ordered (under section 224) and the court orders a corporation to pay a pecuniary penalty but the corporation does not have the resources to pay the pecuniary penalty, the executive officers of the corporation are jointly and severally liable. In this circumstance executive officers have access to certain defences to a liability under section 52(3). It is a defence if it is proven that where they were in a position to influence the conduct of the corporation in relation to the act or omission they exercised reasonable diligence. It is a defence if it is proven that they were not in a position to influence the conduct of the corporation in relation to the act or omission.

Section 52(4) is a machinery provision dealing with concurrent proceedings that allow the District Court to exercise jurisdiction if 2 or more relevant proceedings are to be dealt with concurrently and, under part 3A division 4 (Court jurisdiction), the District Court would have jurisdiction for at least 1 but not all of the relevant proceedings.

Section 53 (Interpretation of offence provisions) is an aid to statutory interpretation that clarifies that any statement included in chapter 4 of the ACL (Queensland), to the effect that an offence is an offence of strict liability, may be disregarded for the purposes of the ACL (Queensland). This is required as the term "strict liability" has no statutory meaning in Queensland law. While the use of the term

"strict liability" is expressly dealt with in the Commonwealth Criminal Code, it should not be interpreted that the Commonwealth Criminal Code applies to offences against the ACL (Queensland).

It should be noted that the Queensland Criminal Code, section 23(2) applies an equivalent of strict liability by making immaterial the result intended to be caused by an act or omission constituting an offence unless intention to cause the result is expressly declared to be an element of the offence.

Section 53(2) also provides that, despite section 19 (Interpretation of Australian Consumer Law) of the Bill, inserted through clause 18, sections 41 (Penalty at end of provision), 41A (Penalty other than at end of provision), 43 (Appropriation of penalties), 44(4) (Summary proceedings), 45 (Offence punishable only once) and 46 (Bodies corporate) of the Queensland *Acts Interpretation Act 1954* apply in relation to offences under the Australian Consumer Law (Queensland). These sections of the Queensland *Acts Interpretation Act 1954* are procedural matters about offences which are needed and could otherwise be lost by disapplying the Queensland *Acts Interpretation Act 1954* through section 19 of the Bill. The *Acts Interpretation Act 1901* of the Commonwealth is silent on these procedural matters.

Section 54 (Gazettal of notice under the Australian Consumer Law (Queensland) about an interim ban, recall notice or safety warning) provides that if the Minister, under the ACL (Queensland), publishes a written notice on the internet under sections 109 (Interim bans on consumer goods or product related services that will or may cause injury to any persons etc.), 111 (Ban period for interim bans), 113 (Revocation of interim bans), 122 (Compulsory recall of consumer goods), 129 (Safety warning notices about consumer goods and product related services) or 130 (Announcement of the results of an investigation etc.) then the Minister must, as soon as practicable, after the publication of the written notice on the internet, publish a gazette notice containing a copy of the written notice. This is to ensure that gazettal is used to maintain a public record of written notices published on the internet.

Section 55 (Limitation on right to itemised bill) provides that if a person is entitled, as a consumer, to request the supplier of legal services to give the consumer an itemised bill under section 101 (Consumer may request an itemised bill) of the ACL (Queensland)

and the person is entitled to request a law practice to give the person an itemised bill relating to the legal services, under section 332 (Request for itemised bill) of the *Legal Profession Act 2007*, then section 101 of the ACL (Queensland) ceases to have application to the legal services.

‘Part 3B Provisions utilising the Australian Consumer Law provisions

Section 56 (Australian Consumer Law (Queensland) not limited) provides that the extended application of the ACL (Queensland), to the provisions which are continued as part of the FTA, does not affect the operation of the applied law.

Section 57 (Defences) ensures uniformity by providing that the defences in the ACL (Queensland) under chapter 4, part 4-6 (Defences) extend to the FTA offence provisions. Part 4-6 of the ACL (Queensland) provides defences applicable to criminal proceedings of: an honest and reasonable mistake of fact (section 207), where the contravention was caused by the act or default of another person or an accident or cause beyond the person’s control, and where the person took reasonable precautions and exercised due diligence to avoid the contravention (section 208) and where an advertiser publishes an advertisement in the ordinary course of business and does not know and had no reason to suspect the advertisement amounted to a contravention (section 209).

Section 58 (Prosecutions to be commenced within 3 years) ensures uniformity by providing that section 212 (Prosecutions to be commenced within 3 years) of the ACL (Queensland) extends to the FTA offence provisions as if the FTA offence provisions were part of the ACL (Queensland). Under the ACL (Queensland), criminal prosecutions must be commenced within 3 years of the commission of the offence.

Section 59 (Preference must be given to compensation for victims) ensures uniformity by providing that section 213 (Preference must be given to compensation for victims) of the ACL (Queensland) extends

to the FTA offence provisions as if the FTA offence provisions were part of the ACL (Queensland). The ACL (Queensland) provides that compensation for victims of contraventions of the ACL (Queensland) must be given preference over the imposition of a fine under Chapter 4 of the ACL (Queensland).

Section 60 (Penalties for contraventions of the same nature for FTA offence provisions) ensures uniformity by providing that section 214 (Penalties for contraventions of the same nature etc.) and 215 (Penalties for previous contraventions of the same nature etc.) of the ACL (Queensland) extends to the FTA offence provisions as if the FTA offence provisions were part of the ACL (Queensland). Section 214 of the ACL (Queensland) provides that a court must not apply multiple fines in respect of the same conduct that exceed the maximum penalty for an offence. Section 215 has similar effect to section 214, but applies when fines are applied in separate proceedings.

Section 61 (General provision about injunctions and other remedies) ensures uniformity by providing that section 216 (Granting of injunctions etc.) of the ACL (Queensland) extends to the FTA offence provisions as if the offence provisions were part of the ACL (Queensland). To the extent that section 216 relates to granting of an injunction, the ACL (Queensland) applies to codes of practice prescribed under the FTA. Section 216 of the ACL (Queensland) provides that a court may grant an injunction or make a non-punitive or adverse publicity order in the same proceedings as those for a contravention of a provision of Chapter 4.

Section 62 (Undertakings for matters arising other than under Australian Consumer Law (Queensland)) ensures uniformity by providing that section 218 (Regulator may accept undertakings) extends outside of the ACL to any relevant matter in relation to which the commissioner has power or function under the FTA other than the ACL (Queensland). Section 218 of the ACL (Queensland) allows a regulator to accept court-enforceable undertakings in connection with a matter in relation to which the regulator has a power or function under the ACL.

Section 63 (Public warning notices) ensures uniformity by providing that chapter 5, part 5-1, division 3 (Public warning notices) of the ACL (Queensland) applies to the FTA consumer offence provisions, embargo notices and codes of practice prescribed under the FTA as if

the provisions were part of the ACL (Queensland). Public warning notices allow enforcement agencies to inform the public about persons engaged in business practices that may amount to a contravention of consumer law provisions. Such notices are intended to stop or reduce the detriment caused by those business practices. They provide regulators with an enforcement tool that can be used in a preventative manner to avoid persons being adversely affected by conduct that may breach consumer law provisions.

Section 64 (Pecuniary penalties for FTA consumer offence provisions) ensures uniformity by providing that chapter 5, part 5-2, division 1 (Pecuniary penalties) of the ACL (Queensland) extends to the FTA offence provisions. Civil pecuniary penalties enable a targeted and proportionate regulatory response, in addition to increasing the deterrent effect of consumer law provisions. Civil pecuniary penalties allow regulators to seek penalties and redress for consumers simultaneously.

Section 65 (Injunctions) ensures uniformity by providing that chapter 5, part 5-2, division (Injunctions) of the ACL (Queensland) extends to a contravention of an FTA offence provisions or code of practice prescribed under the FTA as if the provisions were part of the ACL (Queensland). Section 232 (Injunctions) confers a wide power on the court to grant an injunction in whatever terms it considers appropriate if it is satisfied that a person has engaged in, or is proposing to engage in, conduct that would amount to a contravention (or involvement in a contravention) of Chapters 2, 3 or 4 of the ACL (Queensland).

Section 66 (Actions for damages) ensures uniformity by providing that chapter 5, part 5-1, division 3 (Damages) of the ACL (Queensland) applies to the FTA consumer offence provisions, embargo notices and codes of practice prescribed under the FTA as if the provisions were part of the ACL (Queensland). Where a person contravenes a provision of Chapter 2 or 3 of the ACL (Queensland) and another person suffers loss or damage because of that conduct, the other person may recover the amount of loss or damage against the person or any person involved in the contravention. Actions for damages must be commenced within 6 years after the day on which the cause of action accrued (when the loss or damage occurred).

Section 67 (Orders for compensation or redress) ensures uniformity by providing that chapter 5, part 5-1, division 4 (Compensation orders etc. for injured persons and orders for non-party consumer redress) of

the ACL (Queensland) applies to a contravention of specified relevant FTA consumer offence provisions. Section 237 (Compensation orders etc. on application by an injured person or the regulator) allows any person who has suffered loss or damage (or a regulator on their behalf) to seek compensatory orders after a finding of a contravention, whether by way of motion during proceedings after such a finding, or as a separate, subsequent proceeding. Section 239 (Orders to redress etc. loss or damage suffered by non-party consumers) allows that when a person has engaged in conduct that contravenes particular provisions of the ACL (Queensland) or where the party advantaged by a term in relation to which the court has made a declaration under section 250 (Declarations relating to consumer contracts), a court may make such orders to redress the non-party consumers (other than an award of damages) as it thinks appropriate.

Section 68 (Non-punitive orders) ensures uniformity by providing that section 246 (Non-punitive orders) of the ACL (Queensland) extends to the FTA offence provisions as if the FTA offence provisions were part of the ACL (Queensland). Section 246 allows a court, on application of a regulator, to make a non-punitive order where a person has contravened the ACL (Queensland). A non-punitive order includes: a service order related to the conduct for community benefit; an order to ensure conduct does not occur for a period; an order requiring the disclosure of information; or an order requiring an advertisement to be published.

Section 69 (Adverse publicity orders) ensures uniformity by providing that section 247 (Adverse publicity orders) of the ACL (Queensland) extends to the FTA offence provisions as if the FTA offence provision were part of the ACL (Queensland). Section 247 allows the court, on application of a regulator, to make an adverse publicity order. An adverse publicity order requires a person to disclose information that he or she has in their possession, or have access to, and publish an advertisement at their own expense.

Section 70 (Orders disqualifying a person from managing a corporation) ensures uniformity by providing that section 248 (Order disqualifying a person from managing a corporation) of the ACL (Queensland) includes an FTA consumer offence provision and an embargo notice. A court may order that a person is disqualified from managing corporations, for a period the court considers appropriate,

for a contravention, or being involved in a contravention of particular provisions for the ACL.

Section 71 (Privilege against exposure to penalty or forfeiture—disqualification from managing a corporation) ensures uniformity by providing that section 249 (Privilege against exposure to penalty or forfeiture – disqualification from managing corporations) of the ACL (Queensland) includes an FTA consumer offence provision and an embargo notice. A person cannot refuse to comply with a requirement in a proceeding arising out of the ACL or a requirement under the ACL to: answer a question or give information; produce a document or any other thing; or do any other act: on the ground that doing so may tend to expose the person to a disqualification order under section 248 (Order disqualifying a person from managing a corporation).

Section 72 (Publication of advertisement in the ordinary course of business) ensures uniformity by providing that section 251 (Publication of advertisement in the ordinary course of business) of the ACL (Queensland) includes an FTA consumer offence provision and an embargo notice. Section 251 ensures that publishers are not liable for breaches in advertisements they publish as part of their business unless they have knowledge of, or should have known, that the advertisement would contravene the ACL (Queensland).

Section 73 (Supplying services for the purpose of resupply) ensures uniformity by providing that section 253 (Supplying product related services for the purpose of re-supply) of the ACL (Queensland) extends to include supplying of services that did not comply with a safety standard for the services prescribed under section 83 (Safety standards) of the FTA. Section 253 provides that if a particular contravention was committed by the supplying of consumer goods that: did not comply with a safety standard; or were supplied by a supplier who did not comply with an information standard for such goods: it is a defence if the defendant proves that: the goods were acquired for the purpose of resupply; the goods were acquired from a person carrying on business in Australia (other than as an agent of an overseas supplier); and either: the defendant did not know and could not with reasonable diligence have ascertained the non-compliance with the safety standard or that he or she was not complying with an information standard; or the defendant relied in good faith on a

representation by the person from whom he or she acquired the goods that there was no safety or information standard for such goods.

Clause 19 amends the heading of part 4 of the FTA to only refer to safety and codes of practice. Information standards are not part of the FTA and are now provided in Part 3-4 (Information standards) of the ACL (Queensland).

Clause 20 removes Part IV, Division 1 (Information provisions) from the FTA as they are now provided in Part 3-4 (Information standards) of the ACL (Queensland).

Clause 21 retains the ability to make safety standards for services and removes the ability to make safety standards for goods from section 83 of the FTA, which are under Part 3-3 (Safety of consumer goods and product related services) of the ACL (Queensland).

Clause 22 removes references to goods in section 84 (Compliance with safety standard) of the FTA and implements "offer for supply" where services might be offered for supply. This is to reflect that the definition of supply for services under section 5 (Definitions) of the FTA, which is being amended by clause 7, also includes "offer for supply". Clause 22 also updates the penalty amount for a breach of section 84 of the FTA to equal section 194 (Supplying etc. consumer goods that do not comply with safety standards) of the ACL (Queensland). Clause 22 also removes the ability of the Crown to retain goods supplied in contravention of a safety standard under sections 84(3) and (3A) of the FTA, as the equivalent provision for safety standards for consumer goods are under Part 3-3 (Safety of consumer goods and product related services) of the ACL (Queensland).

Clause 23 amends the definition of regulating instrument under section 84A (Definition for div 3) of the FTA to retain the ability to regulate the safety standard of services under the FTA and remove the ability to regulate the safety standard of goods. The safety standard of goods will be regulated by the safety standards for consumer goods under Part 3-3 (Safety of consumer goods and product related services) in the ACL (Queensland).

Clause 24 retains the ability to make permanent bans for services and removes the ability to make safety standards for goods, which are regulated as consumer goods under Part 3-3 (Safety of consumer goods and product related services) as part of the ACL (Queensland).

Clause 25 amends section 85A (Interim Orders) of the FTA to remove the reference to the Consumer Safety Committee. Clause 25 also simplifies the making of an interim order by providing that an interim order is made in all cases by gazette. The ban period for interim orders has also been amended to equal the time period provided for interim bans under Part 3-3, Division 2 of the ACL (Queensland).

Clause 26 amends section 86 (Offence) of the FTA to implement "offer for supply" to reflect the definition of services under section 5 (Definitions) of the FTA, which is being amended by clause 7. Clause 26 also updates the penalty amount for an offence under this provision to equal the penalty amount Clause 22 also updates the penalty amount for a breach of section 84 of the FTA to equal section 194 (Supplying etc. consumer goods that do not comply with safety standards) of the ACL (Queensland).

Clause 27 amends section 87 (Seizure etc. of goods in certain cases) of the FTA to allow inspectors to seize and detain goods that the inspector suspects on reasonable grounds are intended for supply or have been supplied in contravention of a relevant offence provision or relevant pecuniary penalty provision of either the FTA or the ACL (Queensland). The definition of "supplied" includes a reasonable suspicion of a contravention of a relevant pecuniary penalty provision or an embargo notice offence provision.

Clause 28 amends section 88B (Commissioner's power to ask for substantiation of claims about the supply of goods or services) of the FTA by removing the power of the Commissioner for fair trading to ask for substantiation of claims. This power is provided for under Part 5-1, Division 2 (Substantiation Notices) of the ACL (Queensland).

Clause 29 amends section 89 (Powers of inspectors) by fixing references to the Office of Fair Trading which is no longer established under the Act.

Clause 30 amends section 90 (Power to obtain information) of the FTA by fixing references to the Office of Fair Trading which is no longer established under the Act.

Clause 31 amends section 91A (General power to seize goods) of the FTA to refer to the offence provisions under section 87 (Seizure etc. of goods in certain cases) of the FTA instead of section 86 (Offence) of the FTA.

Clause 32 amends section 91B (Returning the seized goods) of the FTA to deal with the return of goods where there has been a pecuniary penalty proceeding involving seized goods.

Clause 33 amends section 91D (Hearing procedures) of the FTA to reference appropriate Acts.

Clause 34 and 35 replace the power of the Commissioner for fair trading to accept undertakings under Part 5, Division 1B (Commissioner's power to accept undertakings) with powers adopted under Part 5-1, Division 1 (Undertakings) of the ACL (Queensland).

Clause 36 amends section 91L (Register of undertakings) of the FTA to allow continued use of a register of undertakings for undertakings made under the Part 5-1, Division 1 of the ACL (Queensland).

Clause 37 amends section 92 (Offences) to include a note to make it clear that parties to offences commit an offence under chapter 4 of the ACL (Queensland).

Clause 38 removes section 92A (Aggregate penalties limited) which is now provided for in section 214 (Penalties for contraventions of the same nature etc.) of the ACL (Queensland).

Clause 39 amends section 92B (Attempts to commit offences) of the FTA by removing references to provisions in the FTA and replacing them with provisions in Chapter 4 (Offences) of the ACL (Queensland), the FTA consumer offence provisions and the embargo notice provisions.

Clause 40 amends section 94 (Proceedings for offences) of the FTA to provide for the higher penalties under the ACL (Queensland) but retains the decision making structure of section 94 which determines the court of jurisdiction based on penalty amount.

The ACL (Queensland) maximum penalty amount determines whether proceedings for an offence commence in a summary way or on indictment. Proceedings for an offence where the penalty is less than the "higher level penalty amount" of $1,100,000 (if the person committing the offence is a body corporation) and $220,000 (if the person committing the offence is not a body corporate), shall be taken in a summary way under the *Justices Act 1886*.

Proceedings for an offence, where the penalty is the same as the "higher level penalty amount" or more, may be prosecuted in a summary way or on indictment at the election of the prosecution. Where the prosecution elects to take an indictable matter in a summary way the maximum penalty will be half of the penalty that may be imposed for that offence.

Clause 41 removes the reference to the TPA in the heading of section 95 (Conduct by directors, servants or agents – TPA s 84).

Clause 42 updates references in section 96 (Vicarious liability) to the relevant provisions of the ACL (Queensland) which replace those parts of the FTA.

Clause 43 amends the heading and removes subsections 1 to 4 of section 97 (Defences in proceedings for an offence against this Act – TPA s 85) which are provided for in the defence provisions in part 4-6 (Defences) of the ACL (Queensland). Section 97(6) is also removed as it is provided for by section 29 (No doubling-up of liabilities) of the Queensland application provisions inserted through clause 18 of the Bill.

Clause 44 removes the power to seek injunctions, under section 98 (Injunctions – TPA ss 79(4) and 80) of the FTA which is provided for by injunctive powers in Part 5-2, Division 2 (Injunctions) of the ACL (Queensland). The clause also removes section 99 (Actions for damages) which is provided for by section 236 (Actions for damages) of the ACL (Queensland). The clause also removes section 100 (Compensation and other remedial orders – TPA s 87) of the FTA which is provided for by part 5-2, division 4 (Compensation orders etc. for injured persons and orders for non-party consumers) and division 5 (Other remedies) of the ACL (Queensland).

Clause 45 updates references in section 101 (Mode of enforcement of compensation) to the relevant provisions of the ACL (Queensland) which replace those parts of the FTA.

Clause 46 removes section 102 (Power of Court to prohibit payment or transfer of money or other property – TPA s 87A) and 103 (Jurisdiction) which are provided for by Part 3A, Division 3 of the Queensland application provisions.

Clause 47 amends section 103A (Examination costs) to include references to ensure that the Commissioner for fair trading can recover the reasonable costs of examination in relation to a safety standard under section 83 (Safety standards) of the FTA or an information standard or safety standard under the ACL (Queensland). The amended includes allowing the Commissioner for fair trading to recover the reasonable costs of examination if the examination results in an order being made under section 109 (Interims bans on consumer goods or product related services that will or may cause injury to any person etc.) and 114 (Permanent bans on consumer goods or product related services) of the ACL (Queensland).

Clause 48 amends section 104 (Impersonation) to replace the reference to "office" meaning the Office of Fair Trading with "department", in line with

the removal, by clause 14, of the requirement that there to be an Office of Fair Trading under the Act.

Clause 49 amends section 105 (Reference to consumer authorities and other matters restricted) to restrict the use of references to the Office of Fair Trading or the department for a matter falling within the functions of the Commissioner for fair trading. Clause 49 also removes references to the Consumer Safety Committee and Consumer Affairs Council.

Clause 50 removes section 108 (Severability) which is provided for by section 16 (Severability) of the ACL (Queensland).

Clause 51 effectively removes elements of section 109 (Limitation of action) which reference the council, the committee and officer of the office, in line with the removal by other clauses of the statutory requirements for the entities referenced by these terms. Officer of the office is replaced by officer of the department.

Clause 52 removes section 109A (Insurance contracts – limitation on effect of information sharing) which is provided for by section 133 (Liability under a contract of insurance) of the ACL (Queensland).

Clause 53 amends section 110 (Preservation of secrecy) by removing references to a member of the council, or the committee and replacing a reference to officer of the office with officer of the department. As section 110 removes references to the council, committee and the office the clause also inserts subsection 6 to provide for the former council, committee and office. This is to ensure that a person who was a member of the former council, committee and office are bound by section 110.

Clause 54 removes section 111 (Service of documents etc.). Unless otherwise provided for in the Act, where documents are issued under a provision in the ACL (Queensland) the service of documents must be in accordance with section 28A (Service of documents) of the *Acts Interpretation Act 1901* (Cwlth). Unless otherwise provided for in the Act, where documents are issued under a provision outside of the ACL (Queensland) but within the Fair Trading Act, the service of documents must be in accordance with section 39 (Service of documents) of the *Acts Interpretation Act 1954* (Qld). In relation to the service of documents, both the Commonwealth and Queensland Acts Interpretation Acts are in effect identical.

Clause 55 updates references to the relevant provisions of the ACL which replace substantively similar provisions in section 112 (Evidence) of the FTA.

Clause 56 and 57 make changes to the transitional provisions of the FTA. The transitional provisions deal with references to Office of Consumer Affairs or Office of Fair Trading as well as undertakings and proceedings that may be ongoing and need to continue once the Fair Trading (Australian Consumer Law) Amendment Act 2010 takes effect.

Clause 58 removes the reference to "goods" from the subject matters for regulations.

Part 3 Amendment of Security Providers Act 1993

Clause 59 sets out the name of the Act being amended.

Clause 60 inserts the new section 7A. Section 7A will insert a definition of who is a relevant person to assist in identifying who has to be fingerprinted.

Clause 61 inserts new provisions into section 10. The new section 10(8) will provide that a relevant person must agree to have his or her fingerprints taken by the Commissioner of Police for the chief executive to consider the relevant person's licence application. If the Commissioner of Police already holds each relevant person's fingerprints because the Commissioner of Police has already taken the fingerprints under section 27, then the chief executive may consider the licence application.

The new section 10(9) provides that an application for a security provider licence must be accompanied by a fee for fingerprinting if such a fee is prescribed by a regulation. Section 54(2)(c) of the SP Act provides a head of power for a regulation setting fees payable under the SP Act. The fees accompanying the application must include the fee for each relevant person for the application.

The new section 10(10) provides that the new section 10(9) does not apply if the Commissioner of Police already holds the relevant person's fingerprints taken under section 27. If the Commissioner of Police has already taken a relevant person's fingerprints under section 27 and still

holds those fingerprints, there is no need to be fingerprinted again and no fee payable as a result.

The new section 10(11) provides that if a relevant person's fingerprints are not taken under the new section 27 for the application, the fingerprint fee for that relevant person that was paid according to the requirements of section 10(9) must be refunded.

Clause 62 amends section 14 regarding a decision on an application for a licence. Section 14(1) states that the chief executive must consider an application for a licence and either grant the licence or refuse to grant the licence. A new subsection (6) is inserted which provides that a decision on the application for a licence made under section 14 is subject to new section 28(1). New section 28(1) provides that if the fingerprints of each relevant person applying for a licence have not been taken by the Commissioner of Police under section 27, then the chief executive must refuse to grant the licence.

Clause 63 amends section 20. Clause 63(1) amends section 20(2) by inserting the new section 28(2) as another exception to section 20(2), so that if the fingerprints for each relevant person for the application for the renewal of a licence have not been taken by the Commissioner of Police under section 27, then the chief executive must not renew the licence under section 20(2).

Clause 63(2) inserts the new section 20(7) which provides that an unrestricted licence renewal application may only be considered by the chief executive if each relevant person for the application is agreeable to having his or her fingerprints taken by the Commissioner of Police. If the Commissioner of Police already holds each relevant person's fingerprints because the Commissioner of Police has already taken the fingerprints under section 27, then the chief executive may consider the renewal application.

Clause 63(2) also inserts new section 20(8) which provides that an application for renewal of a security provider licence must be accompanied by a fee for fingerprinting if such a fee is prescribed by a regulation. Section 54(2)(c) of the SP Act provides a head of power for a regulation setting fees payable under the SP Act. The fees accompanying the application for licence renewal must include the fee for each relevant person for the application.

The new section 20(9) provides that the new section 20(8) does not apply if the Commissioner of Police already holds the relevant person's fingerprints

taken under section 27. If the Commissioner of Police has already taken a relevant person's fingerprints under section 27 and still holds those fingerprints, there is no need to be fingerprinted again and no fee payable as a result.

The new section 20(10) provides that if a relevant person's fingerprints are not taken under the new section 27 for the licence renewal application, the fingerprint fee for that relevant person that was paid according to the requirements of section 20(9) must be refunded.

Clause 64 inserts a new part 2, division 7. Division 7 is about fingerprint procedures and includes new sections 27, 28, 29, 30 and 31.

The new section 27 is about fingerprints to be taken and applies if a person is agreeable to having his or her fingerprints taken by the Commissioner of Police. If this is the case, the chief executive must ask the Commissioner of Police to take the person's fingerprints to assist the chief executive to decide whether the person is or continues to be an appropriate person to hold a licence. Section 27 also applies to assist the chief executive in identifying the person about whom the chief executive is making a decision.

The Commissioner of Police must comply with the chief executive's request.

The new section 28 provides that the chief executive must refuse to grant a licence if the fingerprints of each relevant person for the application for the licence have not been taken by the Commissioner under section 27. The chief executive must also refuse to renew an unrestricted licence if the fingerprints of each relevant person seeking renewal of the unrestricted licence have not had their fingerprints taken by the Commissioner of Police under section 27.

The new section 29 requires the Commissioner of Police to give the chief executive information about a person's identity derived from the fingerprints of the person taken under section 27. Such information might include the Central Names Index (CNI) number for a set of fingerprints, or aliases that are recorded against a set of fingerprints on the National Automated Fingerprint Identification System (NAFIS), which is a database held by CrimTrac.

However, the Commissioner of Police must not give information about a person's identity under the new section 29(1) if the Commissioner of Police is reasonably satisfied that to do so:

- may prejudice or otherwise hinder an investigation to which the information may be relevant; or
- may affect the safety of a police officer, complainant, informant, or other person.

The new section 30 provides for what purpose the Commissioner of Police may use the fingerprints taken under section 27. Section 30 provides that the Commissioner may use the fingerprints to comply with section 29, that is, give the chief executive information about a person's identity derived from fingerprints of the person taken by the Commissioner of Police under section 27. The Commissioner may also use the person's fingerprints taken under section 27 for performing a function of the Queensland Police Service. This could include such functions as comparing the fingerprints to latent fingerprints stored on NAFIS, using the fingerprints in the investigation of a crime if the fingerprints are found to match latents from unsolved crime scenes, and using the fingerprints as evidence in a court proceeding.

The fingerprints will be held securely by the Commissioner under the same requirements for other information as provided for in the *Police Service Administration Act 1990*, including an offence for the unlawful disclosure of information. Similar offence provisions are contained within the SP Act. This will assist in addressing privacy concerns.

The new section 31 is about the destruction of fingerprints. The chief executive must request the Commissioner of Police to destroy a person's fingerprints taken under section 27 within a reasonable time in the following circumstances:

- an application is made for a licence or a renewal of an unrestricted licence; and
- a relevant person's fingerprints have been taken under section 27 for that application; and

either:

- the applicant withdraws the application; or
- the chief executive refuses to grant or renew the licence.

Section 31 also applies in the following circumstances where the licensee's fingerprints have been taken under section 27 for an application for a licence or renewal of a licence and either:

- a person's licence is cancelled under section 22; or

- a licensee does not apply, under section 20 for renewal of the licence before the licence ends.

In circumstances where the chief executive refuses to grant a licence or refuses to renew a licence, the chief executive cancels a licence, or the chief executive refuses to renew the licence under section 22, destruction of the fingerprints will not occur until the applicant's review rights under section 26 of the SP Act have been exhausted.

New section 31(4) compels the Commissioner of Police to comply with the chief executive's request to destroy a person's fingerprints. The Commissioner of Police must comply within a reasonable time. New section 31(5) requires that when the Commissioner of Police complies with the chief executive's request under section 31(3) to destroy the fingerprints, this must be done in the presence of a justice.

Clause 65 inserts a new part 7 after section 64 to insert transitional provisions. The intention of this clause is to clarify that the requirements to be fingerprinted for new licence applicants and applicants for renewal of an unrestricted licence do not apply where the application is in the process of being decided at commencement of section 65. Clause 65 also defers the application of section 20(7) to (10) and part 2, division 7 in relation to a relevant person applying for renewal of an unrestricted licence, which defers fingerprinting for a period of three months for applicants renewing unrestricted licences.

Clause 65 inserts the new section 65 which provides that the provisions relating to the requirement to fingerprint new applicants, namely sections 10(8), 10(9), 10(10) and 10(11) and part 2, division 7, do not apply to an application that has been received and date stamped by the Office of Fair Trading and is still in the process of the chief executive deciding that application immediately before the commencement of section 65.

The new section 65(2) provides that the provisions relating to the requirement to fingerprint applicants for renewal of an unrestricted licence, namely sections 20(7), 20(8), 20(9) and 20(10) and part 2, division 7, do not apply to an application that has been received and date stamped by the Office of Fair Trading and is still in the process of the chief executive deciding that application immediately before the commencement of section 65.

Therefore, any relevant person with an application that has been received by the Office of Fair Trading immediately before commencement of these amendments will not be required to be fingerprinted. Only relevant

persons whose applications are received on or after commencement must be fingerprinted.

Clause 65 also inserts the new section 66 which provides that section 20(7), 20(8), 20(9) and 20(10) and part 2, division 7 do not apply until the day that is three months after the commencement of section 66. This means each relevant person applying for renewal of an unrestricted licence will not be required to be fingerprinted upon commencement of section 66, but will be required to be fingerprinted from the day that is three months after its commencement. Each applicant for renewal will not have to agree to be fingerprinted until three months after commencement of section 66. Consequently, each applicant for renewal will not be required to have their fingerprints taken under section 27 until the day that is three months after commencement of section 66, nor will the other provisions under part 2, division 7 apply until the day that is three months after commencement of section 66. This is to ensure a smooth implementation of the mandatory fingerprinting requirements through a staged implementation process.

Therefore, applicants for new licences will be required to be fingerprinted from commencement of section 66. Fingerprinting of applicants for the renewal of an unrestricted licence will not commence until three months later.

Clause 66 inserts new definitions in Schedule 2 (Dictionary) for 'fingerprint' and 'relevant person'. The definition of 'fingerprint' is the same as that contained in the *Police Powers and Responsibilities Act 2000*.

Clause 66 also inserts a new disqualifying offence into the Schedule 2 definition for 'disqualifying offence' to add an offence against a provision of the Commonwealth *Criminal Code*, part 5.3, or a law of a state, or an overseas country, that relates to terrorism.

Part 4 Amendment of other Acts

Clause 67 provides that part 3 includes a schedule which amends the Acts mentioned in the schedule. The schedule includes consequential amendments to Acts which reference provisions in *Fair Trading Act 1989* which will be in the ACL (Queensland) and reference the *Trade Practices Act 1974*. The schedule also makes amendments that insert a note to aid in statutory interpretation which states "An offence against the Fair Trading

Act 1989 includes an offence against the Australian Consumer Law (Queensland) which forms part of that Act."

1. *Chicken Meat Industry Committee Act 1976,* section 2.
2. *Civil Liability Act 2003*, 28(1)(b), 32F.
3. *Competition Policy Reform (Queensland) Act 1996*, section 3(1), 4(1)(b) and (c), 8(6), 27(1), (2) and (4), 34, 35 and 39.
4. *Criminal Proceeds Confiscation Act 2002*, schedule 2, part 2, item 5.
5. *Dental Technicians Registration Act 2001*, section 45(2)(c)(i).
6. *Electricity Act 1994*, section 120ZL, 120ZM, 120ZM(1)(b), 120ZM(2) to (4) and 135BU(2)(c).
7. *Gas Supply Act 2003*, section 270ZJA, 270ZJB, 270ZJB(1)(b) and 270ZJB(2) to (4).
8. *Gladstone Power Station Agreement Act 1993*, section 30.
9. *Health Practitioners (Professional Standards) Act 1999*, section 124(1)(g)(iii).
10. *Introduction Agents Act 2001*, section 4(2), Section 20(2), Section 26(d) and (e) and Schedule 2.
11. *Jurisdiction of Courts (Cross-vesting) Act 1987*, section 10, 10(b).
12. *Medical Radiation Technologists Registration Act 2001*, section 45(2)(c)(i).
13. *Occupational Therapists Registration Act 2001*, section 45(2)(c)(i).
14. *Property Agents and Motor Dealers Act 2000*, section 373I(1)(b) and editor's note to section 373I(1), Section 573C(7), editor's note and 574(7), editor's note.
15. *Queensland Building Services Authority Act 1991*, Section 89(h) and 90(1)(c).
16. *Queensland Competition Authority Act 1997*, section 72(2)(c)(i).
17. *Racing Act 2002*, section 113G(2), 113G(3).

18. *Retail Shop Leases Act 1994*, part 6, division 8A, editor's note that appears immediately after the division heading, Section 46B(5).

19. *Retirement Villages Act 1999*, Section 25.

20. *Speech Pathologists Registration Act 2001*, section 45(2)(c)(i).

21. *State Buildings Protective Security Act 1983*, section 4(6).

22. *Subcontractors' Charges Act 1974*, section 5(6)(b)(iii).

23. *Sugar Industry Act 1999*, section 236.

24. *Tourism Services Act 2003*, section 13(3)(c), 14(d), 29(1)(a), 32(3), 96(1)(a) and Schedule 2. Inserts a transitional provision.

25. *Transport Operations (Passenger Transport) Act 1994*, section 154B, 154L(1)(b) and (c)(i) and (2), Schedule 3.

26. *Travel Agents Act 1988*, section 6.