

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Additional Estimates

13 – 14 February 2013

Question: AET 121-123

Topic: Unfair Contract Terms

Written: Received from Committee – 22 February 2013

Senator RYAN asked:

121. Have any business sought to have consumer contracts reviewed by the ACCC to ensure their compliance with the law?
- If, so how many businesses and contracts and what is the nature of the advice the Commission has provided?
- Have contracts been effectively endorsed as not offending the unfair contract term provisions?
122. What are some examples of contractual terms that have been found to be unfair under the legislation and what corrective action has the Commission recommended and/or what consequences have arisen resulting from identified breaches?
123. What problems has the ACCC perceived in relation to the implementation of the unfair contract terms law?

Answer:

121. No contracts have been endorsed by the ACCC as not offending the unfair contract term provisions. The unfair contract term provisions allow the courts to determine whether a particular provision is unfair and whether that term should be struck out from a standard form consumer contract. Whole contracts would generally not be declared unfair.

The ACCC's role with respect to the unfair contract term provisions does not involve approving the standard form contracts used by Australian businesses. The ACCC aims to facilitate compliance with the unfair contract term laws by providing targeted guidance to businesses about the types of issues that often give rise to consumer concerns, particularly as these often vary across different sectors.

The ACCC has worked co-operatively with a substantial number of businesses to facilitate compliance with the unfair contract terms provisions of the Australian Consumer Law (ACL). In some cases, businesses have approached the ACCC to seek guidance and in other cases the ACCC has approached businesses to seek their co-operation with making voluntary amendments. In addition to working with individual businesses, the ACCC has worked directly with industry associations on standard form contracts developed by associations for their members.

In working with businesses to achieve compliance with the unfair contract terms laws the ACCC provided information on its concerns and considered information from businesses as

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to why they believe the terms were commercially necessary and should remain in their consumer contracts.

The ACCC also worked jointly with state and territory ACL regulators to engage with businesses and facilitate compliance with the unfair contract term provisions.

On 15 March 2013 the ACCC released its public report which highlights the outcomes of the ACCC's review of standard form consumer contracts across a range of industries. The report also identifies problematic contract terms and related practices that raise concerns with the ACCC. As part of the implementation of the unfair contract laws, the ACCC has reviewed over 200 standard form consumer contracts.

122. An overarching concern identified through the ACCC's work in implementing the unfair contract terms laws related to the level of fairness in consumer contracts and that some contracts are unfairly balanced in favour of businesses. The following types of terms have been identified by the ACCC as potentially raising concerns under the unfair contract terms laws:
1. contract terms that allow the business to change the contract without consent from the consumer
 2. terms that cause confusion about the agency arrangements that apply and that seek to unfairly absolve the agent from liability
 3. terms that unfairly restrict the consumer's right to terminate the contract
 4. terms that suspend or terminate the services being provided to the consumer under the contract
 5. terms that make the consumer liable for things that would ordinarily be outside of their control
 6. terms that prevent the consumer from relying on representations made by the business or its agents
 7. terms seeking to limit consumer guarantee rights
 8. terms that remove a consumer's credit card chargeback rights when buying the service through an agent.

The ACCC worked with businesses in a number of industries to remove or change unfair terms in standard form contracts and address identified issues. Some businesses contacted by the ACCC chose not to change their standard form contracts to address problematic terms.

In addition to identifying terms which raised concern under the unfair contract terms laws, the ACCC also identified other businesses practices which raised concerns under other consumer protection provisions set out in the ACL.

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The ACCC is now moving from a compliance to enforcement response to resolve these outstanding issues.

123. Generally the ACCC has observed good cooperation in the implementation of the unfair contract terms law by businesses, industry associations and other ACL regulators. The full extent of the new law is still being clarified, but the ACCC has identified contracts with issues that may pose problems under both unfair contract term laws and broader consumer protection laws. The ACCC is investigating some identified issues with a view to taking action in court under both the unfair contract terms and misleading and deceptive conduct provisions of the ACL.