

The NetChoice Coalition

Promoting Convenience, Choice, and Commerce on The Net

Level 6, Art Wall Building
13 Kirketon Rd
Darlinghurst NSW 2010
www.netchoice.org



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The Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: economics.sen@aph.gov.au

NetChoice submission on Australian Consumer Law review, draft provision regarding unfair contract terms

Dear Secretary,

NetChoice welcomes the opportunity to comment on the Australian Consumer Law (ACL) Consultation on draft unfair contract terms.

NetChoice was established in the United States almost ten years ago as a coalition of trade associations and e-commerce businesses, and added AOL, eBay, IAC, NewsCorp and Yahoo as coalition members. In 2008, NetChoice established an Australian chapter and added members such as DealsDirect, Dinosaur Deals, Paymate, and POLi.

In addition to these leading platforms for e-commerce, over 10,000 online businesses and consumers around the world have enrolled on the NetChoice website to signal their interest and stay informed about public policies affecting e-commerce.

Together, these platforms and online buyers and sellers represent a broad range of perspectives that share a goal to promote the choice, convenience, safety, and security of e-commerce. NetChoice members have a common interest in raising the bar for e-commerce providers to help consumers build trust and confidence in the online channel.

When necessary, NetChoice fights threats to online commerce and promotes policies that protect innovation in online technologies and business models. NetChoice has been fearless in exposing the anti-competitive agendas behind calls for more internet regulation or application of legacy regulations that discriminate against online versus offline commerce.

We have a strong record of working with governments to draft laws that not only protect consumers, but also promote competition from and within the e-commerce

channel. Our goal is to find workable solutions to internet challenges, rather than unrealistic regulations that often bring unintended consequences.

Our worldwide experience leads us to offer four comments on the draft ACL revisions:

1. Government is right to create a single national standard to avoid a patchwork of state regulation of e-commerce.
2. The proposed standard of “likelihood of detriment” could actually compromise industry efforts to protect online consumers through the imposition of certain requirements on participating sellers.
3. The new “likelihood of detriment” standard creates litigation risks because it hinges on potential rather than actual detriment.
4. The draft proposal for unfair contract terms could impose significant and discriminatory burdens and litigation costs on e-commerce providers.

These points are explained in detail below.

1. A national standard is preferable to a patchwork of state laws

By adopting a national standard, Australia can avoid the patchwork of laws that impedes e-commerce in the United States, where 51 state governments (including the District of Columbia) can create different regulatory regimes for consumer protection.

Moreover, some US state regulations actually conflict with one another, such as the example of mandatory consumer notices when customer credit card numbers are lost or stolen. Most state laws allow a delay of notice while law enforcement investigates the breach, but some states do not permit any delay. This creates a conflict among state laws, since an e-commerce company usually has records for customers from all states.

To reduce differences and eliminate conflicts in US state law, it is often necessary to pre-empt states from enacting new laws or enforcing existing laws that differ from a proposed national law. Such pre-emption is difficult to justify and explain to advocates of states’ rights, but it is essential in order to bring about a national standard for interstate commerce.

Whether by statute or by consensus, we believe that states and territories should defer to a national standard in order to serve consumers consistently as they do business with e-commerce companies operating anywhere in Australia.

2. The proposed standard of “likelihood of detriment” could actually compromise industry efforts to protect online consumers

The e-commerce experience requires consumers to trust a virtual business they’ve never visited, and pay for goods before they’re presented. It is surprising that this system of trade works at all, and even more remarkable that e-commerce has become such a vital aspect of business models and consumer preferences.

However, e-commerce is a fragile affair that depends entirely on the continued trust and confidence of both buyers and sellers. This is necessary to an even greater extent than in the traditional world of brick-and-mortar retail. Consider what happens when an online buyer has a bad experience shopping in a traditional store: they simply cross the road to another store and avoid shopping at the offending retailer. But if this same buyer has a bad experience buying online, they often associate their bad experience to the entire online channel, not just to the single offending website.

When a customer loses trust in e-commerce, it is very difficult to bring them back as an online shopper. That is why pioneering e-commerce platforms such as Amazon, eBay, and Overstock have gone to such lengths to require sellers on their platforms to commit to performance standards for customer satisfaction and protection of customer information. These agreements are business-to-business (B2B) and not consumer contracts, but our reading of the ACL draft revisions indicates that B2B contracts might also be subject to the new law.

If B2B contracts were to be covered by the new law, the standard of “likelihood of detriment” could compromise consumer protection measures in contracts used by e-commerce platforms and payment services.

Sellers who enter contracts with e-commerce platforms and electronic payment services should expect a very high likelihood of detrimental consequences if they fail to live up to contract terms. For instance, some e-commerce platforms and marketplaces follow the long-time practice of credit card companies by requiring sellers to protect customers’ credit card numbers and other personal information. If a seller loses a customer’s credit card numbers or leaves them vulnerable to theft, they may be penalised or even dropped from the platform. This consequence might well be detrimental to the seller. In fact, detrimental effect is what gives force to these kinds of consumer protection obligations in the seller’s contract.

3. The new “likelihood of detriment” standard creates litigation risks because it hinges on potential rather than actual detriment

NetChoice believes that the requirement in section 3(2)(a) of a term being unfair if *‘there is a substantial likelihood that it would cause detriment (financial or otherwise) to a party...’* is too low a threshold for imposition of remedies.

It is a novel approach subject to widely-varying interpretation, which would raise uncertainties about legal risks and increase costs of legal proceedings – both for online retailers as well as consumers. If legal proceedings were to be brought on the basis of *a substantial likelihood of detriment*, one successful case could potentially lead to (at least) thousands of others. The lack of a clear definition of *a substantial likelihood of detriment* means proving such a claim will be virtually impossible - the burden of proof will fall upon consumers, who will be required to demonstrate that detrimental effects were incurred. For the retailer, the time and resources required to defend each case are likely to be far out of proportion to the claims being made.

For these reasons, NetChoice submits that there should instead be a standard of actual detriment – not merely the likelihood of detriment – for a finding of unfair contract terms. Moreover, we would recommend that cases alleging unfair terms be judged within the context of all facts and circumstances, and not just the literal terms of the agreement. This would bring the ACL closer into line with the Productivity

Commission's recommendations and with current interpretation of the Victorian *Fair Trading Act*.

However, if *likelihood* alone were to become the law, we have a further suggestion to consider. NetChoice is aware of the concerns of several companies (from a range of industries) about lowering the level of detriment that could trigger remedies. These expressions of concern are coming from diverse perspectives such as telecommunications, banking, logistics and online search and advertising. NetChoice shares these concerns and would recommend alternate text such as "*likelihood of material detriment*".

4. The draft proposal for unfair contract terms could impose significant and discriminatory burdens and litigation costs on e-commerce providers

NetChoice has argued in many jurisdictions against laws that would impose burdens on e-commerce that would not be imposed on comparable transactions done in a traditional brick-and-mortar retail setting. Regulation of contract terms inherently impacts e-commerce more than offline retail, for the simple fact that online purchases usually require customers to agree to a terms of use before proceeding to checkout. Nothing like this is required when customers walk up to a sales counter in a store to make a purchase.

For example, Australia's leading online department store, DealsDirect, requires first-time purchasers to register as members and consent to terms & conditions described on their website (see <http://www.dealsdirect.com.au/terms-conditions>). These terms are reasonable and customary among online retailers, and typically include commitments regarding use and protection of member data and members' rights to return products.

To be sure, these member/purchaser contracts are probably not reviewed carefully by experienced online shoppers. But these terms are probably quite reassuring to consumers making their first online purchase. Certainly these terms are relied upon by a customer to determine their contractual rights if they're not satisfied with a purchase or the handling of their personal data.

The practice of including explicit terms for purchasers has become a useful feature of the e-commerce landscape. These terms have been continuously tested and improved as a result of years of scrutiny by regulators and through private lawsuits. As noted above, NetChoice supports efforts to set a national standard for review of these contract terms. This comports with consumer groups' comments during the Productivity Commission's Review of Australia's Consumer Policy Framework. We agree with CHOICE, whose submission stated, "Unfair contract terms legislation and minimum standards approaches should be used to mitigate potential for consumer harm in online contract formation and online trading¹."

However, new regulations on contract terms should avoid raising compliance costs and litigation risks for online retailers, particularly for small businesses. Many brick-and-mortar retailers are discovering that they can reach consumers around the world just by opening an online store. But they should not face a gauntlet of regulation and legal challenges just to sell online, especially considering that they offer no similar contracts to buyers entering their brick-and-mortar store.

¹ <http://www.choice.com.au/files/f129518.pdf>

E-commerce is a young, dynamic industry characterised by small companies who are unable to bear the costs of extensive legal reviews of their website terms, let alone the costs of protracted litigation that could result from a law based on the likelihood of detriment. Furthermore, any new regulations should take care not to inhibit innovations in the technologies and business models driving the e-commerce channel today. Innovation and new market entrants are powerful forces to increase competition and serve Australia's online consumers.

NetChoice strongly supports increased protection of consumers using e-commerce, and we are happy to provide further details on any of the points listed above.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Steve DelBianco', with a long horizontal flourish extending to the right.

Steve DelBianco
Executive Director
NetChoice
+612 9360 0660