

Legal Aid Queensland (LAQ) welcomes the opportunity to make this submission to the Senate Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill 2009 on 'unfair terms'.

Purpose of this submission

This submission

- Supports the Bill
- Provides Legal Aid Queensland's top 10 examples of unfair terms
- Calls for the inclusion of insurance contracts in coverage of the Bill
- Suggests deletion of the 'transparency test' which imports a procedural fairness requirement into a provision which is all about substantive unfairness of a contract's terms.

What we do

Legal Aid Queensland's ("LAQ") civil law services seek to make legal rights a reality for disadvantaged people. We provide community legal education, legal information, legal advice, extended assistance and casework services in relation to consumer issues.

More than 15 000 clients receive civil law advice from us annually.

We also have a specialist Consumer Protection Unit (CPU) with a focus on consumer credit which is staffed by 3 full time lawyers. That unit provides advice to over 1000 Queenslanders each year and conducts limited casework to the extent our resources permit. The unit gives priority to matters where there may be a more wide-ranging beneficial effect for all consumers and where clients have been victims of consumer injustices.

For years LAQ's Consumer Protection unit has gathered examples of unfair contracts.

LAQ is aware that vulnerable consumers are at particular risk of entering unfair bargains and have difficulties advocating for their rights. The Bill will be a valuable tool to assist us in redressing the balance for our clients. For this reason we welcome and support the Bill.

Our 10 top unfair contracts and a synopsis of the offending terms are listed below;-

Legal Aid Queensland's top 10 unfair terms

No 1 - in an insurance contract

An assumption that the insured will receive cover when buying insurance is often not the case. Not only does the insured not necessarily get what they paid for, many consumers are simply unaware what it is that they have paid for.

By way of example, in a Comprehensive Motor Vehicle policy, a Certificate of Insurance read “Not insured when [client] drives the vehicle”. Insurer knew client was the main driver of the vehicle. Client, who was a young driver with a poor driving record, wasn’t advised on the phone of the written exclusion when he paid almost \$3 000 for comprehensive motor vehicle insurance. Driver assumed that because he was buying a comprehensive motor vehicle policy and paying a lot of money for it (based on his poor driving record) he was covered. Insurer rejected the policy after an accident advising him that he was “insured as an insured but not as a driver of the vehicle”..

No 2 – in a hire car contract

Our clients have faced seemingly random deductions from their credit cards months after hiring a car. Clauses in many contracts allow these deductions on the basis of damage not apparent when you returned the car after hire. The damage is often quantified by in-house repairers linked to the hire company.

Consumers pay to protect themselves from a claim if they have an accident. By contrast, the exclusion terms in many car rental contracts leave the consumer without any insurance at all for common accidents (such as undercarriage damage, damage caused by an animal, damage caused by rain or hail). From our perspective, the insurance is often illusory which makes the choice to rent a car a very risky proposition with most risk being passed onto the hirer and consumers oblivious of this until after an accident has occurred.

No 3 – consumer leases for cars

Instead of buying a car with finance, many vulnerable consumers get all the responsibility of maintaining and insuring a car but none of the rights of ownership. Some lenders even keep a set of car keys. Fringe lenders are preferring this ‘finance’ option presumably because it is to their advantage. The lease is expensive but the consumer takes the car in many cases without the benefit of registration or even a safety certificate. Many such leases have unilateral change clauses, allowing alteration of the frequency and amount of lease payments during the term of the lease. This makes it very difficult for cash strapped families to budget. Many clients are car dependent because of the limited public transport options available in outer city suburbs and opt for the car-yards who offer this form of finance because of intensive television advertising and because they are aware that they are credit impaired and their finance choices are limited.

No 4 – telecommunication

Phone companies in Australia sign customers up to lengthy and confusing contracts. Some of the worst terms in mobile phone contracts allow the company to change the terms when it chooses and specifically, (1) reserve right to collect payment for services marketed and sold using the phone but never authorised by the owner;(2) authorise the unilateral right to ban user’s access to some unspecified phone numbers on commercial reasons; (3)prevent the freedom of moving ‘sim’ cards from one handset to another without any valid justification.

No 5 – tertiary education

Many small tertiary education suppliers promise training but fail to deliver. Some contracts provide for hefty fees up front and the forfeiture of all fees arbitrarily (eg if you fail to attend on the first day of the course even if you are sick). Consumer are without remedy when the consumer discovers

that the course is not recognized by industry despite assurances of job prospects and the utility of their 'qualification' by the training provider.

No 6 – home alarm monitoring for 10 years

In Queensland home alarm systems with monitoring have been sold door to door to vulnerable elderly pensioners who are told that they need the system because they have been identified as living in a high risk area for crime. Some contracts LAQ have seen provide for monthly payments for terms as long as 10 years with no prospect of early termination. Given that the average length of a home loan in Australia is 3 years, lengthy terms, payable regardless of whether the person continues to reside at the address, are inherently unfair.

No 7- finance broker – pay your home off sooner

Queensland does not enjoy the protection of finance broker legislation. Some unscrupulous brokers promise borrowers a better deal and ask for high up-front fees which are payable even if the client is significantly worse off after a re-finance is brokered. Terms requiring fee payment without reference to whether the loan products offered are suitable have been common in Queensland. Some clients have been signed up to very expensive finance with high fees and interest rates up to 240% with security over their homes. Many of the loans entered into have been predatory, that is they delay the inevitable sale of the home but ensure that any equity is stripped by the refinance.

No 8- products purchased at seminar sales

A vast array of products from holiday credits to beds are sold at seminars which consumers are invited to attend with offers of free gifts, plane tickets, holidays and dinners. The products are frequently over-priced and unaffordable for the clients targeted. Clients at Legal Aid have not been allowed to leave the seminar premises until the end of a presentation. LAQ have examples of clients who have signed just so that they could return home to care for their children. Frequently clients are at the mercy of the seminar presenters as they have been driven from the airport to the location of the seminar. Cooling off periods (if they exist) are often buried in thick contracts (one contract had a cooling off period term placed 60 pages into the contract).

No 9- impotence treatment

A term in a lengthy impotence treatment contract (product worth more than \$5 000) requires consumers to try up to 4 different delivery methods of the product before being entitled to a refund if the product doesn't work. Men enticed to try the product to improve sexual prowess are comfortable using a nasal spray, the advertised delivery mechanism. They are told that a refund is possible if the product is ineffective. Having paid their money up front they are contractually bound to try various interventions culminating in an injection to the penis at the time of sexual activity before being eligible for a refund. Clearly many would have been daunted if they understood the drastic measures required to obtain a release.

No 10- gym contract

Consumers believe they are signing up for 12 months gym membership and are caught out when the contract automatically extends if they do take steps to end the contract within the time window dictated in the fine print. A gym contract involves payment for future services not yet enjoyed and yet, a consumer who is unable to continue because of health problems or job relocation may be obliged to pay out the term of the contract.

Our Recommendations

We support the Bill which will bring Australia in line with international consumer protection standards. We look forward to using the Bill to address particular consumer injustices which result from the type of terms illustrated in our 10 top unfair terms above.

'transparency'

We support the reasoning and recommendations in the submission to the Inquiry by Consumer Action Law Centre concerning 'transparency' - Delete Schedule 1 Part 1 item 1 sections 3(2)(b) and 3(3), and Schedule 3 Part 1 item 7 sections 12BG(2)(b) and (3), from the Bill.

If the concept of 'transparency' is retained then we support the amendment to be proposed in the submission of National Legal Aid which will be formulated and submitted by National Legal Aid.

Insurance contracts

The Productivity Commission¹ recommended that Australia was in need of generic unfair terms protection that should apply to all consumer contracts. The Ministerial Council on Consumer Affairs (MCCA) and the Council of Australian Governments (COAG)² was equally supportive of such a development.

We are not aware of any recent assessment by any level of government on the social or economic impact of *not* applying unfair terms protection to insurance contracts. In our view, the social and economic impact of *not* having unfair terms legislation applying to insurance contracts will be significant.

In 2008, for example, there were 69,433³ refused claims, often in respect of unfair or unreasonable exclusion clauses drafted by insurers. Unfair terms legislation would ensure that a more level playing field exists, particularly in the drafting of insurance contracts on fairer terms for consumers

Once the new 'unfair terms' provisions commence, consumers will have higher expectations of all standard form contracts and there is no reason to increase the gap between consumer expectation and the actuality of many current insurance contracts. Insurance contracts are of particular concern because our major asset, the family home is dependent on insurance protection, and, insurance policies are aggressively marketed with many representations made in advertising illusory after an inspection of the terms of the policy. Much consumer angst and grief can be avoided by ensuring a level playing field in telecommunication, credit AND insurance contracts.

In the event that LAQ is able to assist the Senate Inquiry further with case examples or further data of concerning terms in consumer contracts, please contact our Civil Justice (consumer protection) unit on (07) 3238 3940.

¹ Productivity Commission Recommendations – See in particular Recommendation 4.1 and 4.2 (30 April 2009)

² Ministerial Council on Consumer Affairs Communiqué (23 May 2008)

³ Calculated by deducting 3,103,106 (claims paid) from 3,172,539 (claims made): FOS General Insurance Code of Practice, Overview of 2007-2008 Financial Year, p. 6