

25 August 2009

Dr Richard Grant
Principal Research Officer
Senate Economics Committee
PO Box 6100
Parliament House
Canberra ACT 2600



OFFICE BEARERS

Chair

K Farrell (NSW)

Deputy Chair

T O'Malley (NSW)

Treasurer

I D Nosworthy (SA)

Executive Members

A J Ray (VIC)
Professor R Baxt AO (VIC)
P Doherty (WA)
D Young (QLD)
G A Nicoll (ACT)
B Davies (WA)
F O'Loughlin (VIC)
G Rodgers (QLD)

Dear Dr Grant

Trade Practices Amendment (Australian Consumer Law) Bill 2009

We refer to the Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill 2009 held on Friday 21 August 2009.

Senator Brandis asked whether we could locate the paragraph in the Productivity Commission's report which discussed "material detriment".

In its final report for its *Review of Australia's Consumer Policy Framework* (30 April 2008), the Productivity Commission stated that its preferred approach of unfair terms regulation would include, as a threshold, material detriment to consumers. This is stated as part of Recommendation 7.1 (on pages XXI and 168 of Volume 2) of the report. The Commission commented that this is "something along the lines of the Victorian and UK models" (on page 35 of the summary to the report in Volume 1).

This differs from the approach proposed under the *Trade Practices Amendment (Australian Consumer Law) Bill 2009*. Under the draft provisions of the Australian Consumer Law, detriment has not been made part of the definition of "unfair", but merely as a factor which the court takes into account in making its determination. Section 3(2)(a) of the ACL requires a court to take into account "the extent to which the term would cause, or there is a substantial likelihood that it would cause, detriment (whether financial or otherwise) to a party if it were to be applied or relied on". A court is therefore able to take into account, for example, any detriment as a basis for determining that a term is unfair.

Yours sincerely

Dave Poddar
Chair, Trade Practices Committee
Business Law Section
Law Council of Australia

cc Ms Amanda Bodger, Chair, Trade Practices Committee, BLS, LCA
Mr Stephen Ridgeway, Deputy Chair, Trade Practices Committee, BLS, LCA
Ms Carol O'Sullivan, Section Administrator, BLS, LCA

GPO Box 1989, Canberra,
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone +61 2 6246 3718
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

BLS