

EMAIL

To Secretary, Senate Economics Legislation Committee - economics.sen@aph.gov.au

From Colonial First State Property Management Pty Ltd

Subject Trade Practices Amendment (Australian Consumer Law) Bill 2009

Date 30 July 2009

We refer to your email to Darren Steinberg dated 7 July 2009 inviting written submissions on the *Trade Practices Amendment (Australian Consumer Law) Bill 2009* ('**the Bill**').

By way of background, on 22 May 2009 Colonial First State Property Management Pty Ltd ('**CFSPM**') lodged the attached submission to the Australian Consumer Law in Treasury ('**Submission**') in response to the proposed new unfair contract provisions to the *Trade Practices Act 1974* (Cth) ('**TPA**').

In summary, CFSPM strongly opposed the introduction of the new unfair contract provisions to the TPA to the extent that they applied to business-to-business transactions and rejected any further regulation of the retail leasing industry.

Fortunately, prior to introducing the Bill into Federal Parliament, the new Minister for Competition Policy, Craig Emerson, excluded all business-to-business contracts from the Bill.

However, in anticipation of any proposal to re-introduce an extension of the Bill to business-to-business contracts, we confirm that CFSPM maintains its position for the reasons detailed in its Submission and strongly opposes any additional regulation of the retail leasing industry.

Further, as a member of the Shopping Centre Council of Australia ('**SCCA**'), CFSPM has reviewed and strongly endorses the content of the SCCA's submission to the Committee dated 29 July 2009 in relation to the Bill to the extent that it should not regulate business-to-business contracts.

Yours faithfully,

Colonial First State Property Management Pty Ltd

The Australian Consumer Law: Consultation on
draft provisions on unfair contract terms dated
11 May 2009

Submission by Colonial First State Property Management Pty Ltd

22 May 2009

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The Australian Consumer Law: Consultation on draft provisions on unfair contract terms dated 11 May 2009

1 Introduction

1.1 Background

Colonial First State Property Management Pty Ltd (**CFSPM**) is one of Australia's leading managers and developers of retail property in Australia. It manages approximately \$11.5 billion in retail assets across Australia, including Chadstone, Chatswood Chase and Queens Plaza, with more than 4,000 tenants and 250 million visitors a year.

CFSPM also has more than \$2.9 billion worth of retail development projects in the pipeline, with \$1.3 billion of projects currently under development.

CFSPM has a long and successful history in retail property and understands how to create a successful environment for retailers.

1.2 Submission

This submission is in response to the Australian Government's Consultation Paper entitled 'The Australian Consumer Law: Consultation on draft provisions on unfair contract terms' issued 11 May 2009 (**'Consultation Paper'**), relating to the proposed new unfair contract provisions to the *Trade Practices Act 1974* (Cth) (**'the Proposed Legislation'**).

1.3 Shopping Centre Council of Australia's Submission

CFSPM is a member of the Shopping Centre Council of Australia (**SCCA**).

CFSPM has reviewed and also strongly endorses the content of the SCCA's submission in relation to the Consultation Paper and objects to the Proposed Legislation to the extent detailed in the SCCA's submission.

2 Proposed Legislation

2.1 The Purpose

The Honourable Chris Bowen MP states that 'the introduction of a national unfair contract terms law will be one of the most important consumer reforms in the new Australian Consumer Law...[because]...unfair contract terms harm and exploit customers...they are common and exist in many contracts for the provision of everyday goods and services...[and]...reduce competition

by making contracts difficult to understand' (at Page iii of the Consultation Paper).

This may well be the case for consumers, however, for purely business-to business deals, the Proposed Legislation will have far-reaching and undesirable consequences.

Whilst it is endeavouring to achieve a 'national' consumer protection law, the Federal Government is proposing to drastically expand the regulation of contracts in Australia to include those transacted by businesses.

The Proposed Legislation may endorse 'fairness' however in the context of the retail industry and commercial business generally, the Proposed Legislation is inherently 'unfair' and will do more harm than good for the reasons outlined below.

2.2 The undesirable features of the Proposed Legislation

(a) *The Proposed Legislation would serve to 'over-regulate' the retail leasing industry.*

Retail leases in every State and Territory in Australia are subject to very rigorous regulation governing all aspects of retail lease transactions from the inception of lease negotiations through to completion¹.

The very essence of retail legislation is to ensure that tenants are protected from 'unfair' contracts and imposes various obligations on landlords to ensure that tenants are, amongst other things, treated fairly, equally and according to minimum standards. For example, retail legislation (inter alia):

- (i) requires the disclosure of certain information to prospective tenants before signing a lease;
- (ii) limits the recovery of outgoings under a lease;
- (iii) outlines the minimum lease requirements in the case of a relocation or demolition of a retail tenancy;
- (iv) prescribes the amount of compensation a landlord is to pay a tenant in certain circumstances;
- (v) in most jurisdictions, prevents the recovery of lease preparation costs; and

¹ *Leases (Commercial and Retail) Act 2001 (ACT);
Retail Leases Act 1994 (NSW);
Business Tenancies (Fair Dealings) Act 2003 (NT);
Retail Shop Leases Act 1994 (Qld);
Retail and Commercial Leases Act 1995 (SA);
Fair Trading (Code of Practice for Retail Tenancies) Regulation 1998 (Tas);
Retail Leases Act 2003 (Vic); and
Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA)*

- (vi) imposes penalties for misleading, deceptive and unconscionable conduct.

In some jurisdictions, the retail legislation even requires prospective tenants to obtain financial and legal advice before entering into a lease.² However, generally speaking, the retail legislation imposes a responsibility on tenants to carefully read the information provided to them and to seek advice before signing a lease.

To impose further regulation on the retail leasing industry is therefore, unnecessary, counter-productive and not conducive to effective business practice.

(b) *The Proposed Legislation creates uncertainty and comes at a financial cost to businesses and consumers*

- (i) Regrettably, the Proposed Legislation puts the concepts of sanctity of contract (that parties accept and are bound by the terms of a contract) and freedom of contract (that parties are free to bargain among themselves without unnecessary government regulation) into disrepute.

The Proposed Legislation allows parties to challenge 'standard form contracts' that they once had formally agreed to, on the basis that the terms are unfair, simply because they later don't like the terms and no longer wish to be bound by them.

Consequently, the whole notion of businesses being able to rely on their contractual terms with certainty is eroded and exposes them to the very significant risk of vexatious litigants and costly litigation. Such costs will inevitably flow through to the costs of goods and services and in tough economic times, this is the last thing that businesses and consumers need.

It has long been held that unless a compelling need for regulation has been established and there is a clear benefit to the community, governments and courts should not restrict or interfere with the principles of freedom of contract or the sanctity of contracts.

Given that there is no evidence presented in the Consultation Paper of problems with standard contract terms in retail leasing which justifies additional regulation, CFSPM believes that the Proposed Legislation (to the extent that it applies to 'business to business' contracts) is unwarranted and would cause considerable uncertainty and legal confusion, at a financial cost, to the landlord, tenant and ultimately, the consumer.

² See section 22D of *Retail Shop Leases Act 1994* (Qld)

- (ii) Parties want laws that ensure certainty and are capable of being interpreted and applied correctly and consistently without wide judicial discretion.

The Proposed Legislation fails to achieve this by the inclusion of vague terms which give considerable discretion to judges to make determinations on the basis of their own perceptions rather than clear and consistent standards. For example, the Proposed Legislation gives a court extraordinarily wide discretion to determine what an 'unfair' provision is or when a contract is *not* a 'standard form contract'.

It provides a non-exhaustive list of the kinds of terms of a standard form contract that may be unfair and allows the court to take into account 'such matters as it thinks relevant' (*refer to clauses 3 and 4 of the Proposed Legislation*). It also fails to define a 'standard form contract'. Rather, it introduces a presumption that all contracts are standard form contracts and gives no guidance on how much negotiation over terms must occur before a contract is not considered 'standard'.

This would create serious uncertainty for businesses who are otherwise seeking reasonable certainty from a contract in order to ensure that parties enter into a lease that will not be subsequently challenged on an 'undefined' and arbitrary basis.

Certainly within CFSPM's business, the effect of such uncertainty can be stifling. Retail leases are not 'standard form contracts'. They are the outcome of often extensive negotiation between landlords and tenants, which can be quite complex and take anywhere between one week to several months to resolve. To suggest that retail leases are a 'standard form contract' is patently wrong and property managers, like CFSPM, would then be faced with the additional expense of proving that a contract is not 'standard' at the whim of a judge.

- (c) *The Proposed Legislation unnecessarily regulates 'business to business' contracts*

Unlike the 'business to consumer' contract, the 'business to business' contract is commercial in nature and one which both parties could be expected to seek legal advice before entering into that contract. Certainly, within the CFSPM business, this is recommended for every transaction, irrespective of whether the retail legislation applies or not.

However, even if legal advice is not obtained, businesses generally have greater knowledge of contractual terms than consumers and have greater resources to other legal and contractual remedies

than consumers. CFSPM is a prime example of this, particularly when entering into contracts with subcontractors and builders. It's long-standing experience in property management and development of retail shopping centres puts it in good stead to enter into business contracts with various subcontractors and builders without the need for government intervention.

This then begs the question: why do businesses entering into contracts with other businesses require the protection of this regime?

It could well be because the Proposed Legislation is being introduced without rigorous policy consideration and proper debate. Certainly, no evidence of the need for this regulation has been produced in the Consultation Paper nor has any other piece of legislation in Australia been passed to regulate 'business to business' contracts in the manner contemplated by the Proposed Legislation.

The Government is urged to give this submission, and that of other businesses, serious consideration before rushing the Proposed Legislation into Parliament. The consequences of not doing so could be diabolical on Australian businesses and ironically produce unfair results.

3 Conclusion

The Consultation Paper notes many perceived concerns, without quantifying, substantiating or evaluating their frequency, severity or consequences. In fact, it fails to produce any evidence of the need to regulate 'business to business' contracts.

CFSPM does not support the Proposed Legislation to the extent that it applies to 'business to business' transactions, nor does it support further regulation of the retail leasing industry.

In addition to comments contained in this submission, CFSPM strongly supports the submission of the SCCA and recommends that the Proposed Legislation is amended to exclude 'business to business' contracts or at the very least, amended to exempt retail leases that are already subject to comprehensive regulation.

Further regulation should only be introduced after a careful evaluation of the harms it is seeking to avoid, and not as a 'knee jerk' reaction to perceived imbalances or problems. A failure to do so can have significant implications on businesses and consequently, consumers.