Law Council
OF AUSTRALIA

Mr John Hawkins
Committee Secretary
Senate Standing Committee on Economics
P O Box 6100
Parliament House
Canberra ACT 2600

Dear Mr Hawkins,

Trade Practices Amendment (Australian Consumer Law) Bill 2009

I have pleasure in enclosing a submission on the Trade Practices Amendment (Australian Consumer Law) Bill 2009. The submission has been prepared by the Trade Practices Committee of the Business Law Section of the Law Council of Australia.

The submission has been endorsed by the Business Law Section. Owing to time constraints, the submission has not been reviewed by the Directors of the Law Council of Australia Limited.

If you have any questions in relation to the submission, in the first instance please contact the Committee Chair, Dave Poddar, on [02] 9296 2281.

Yours sincerely,

Bill Grant
Secretary-General

6 August 2009

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

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

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

Submission to the Senate Standing Committee on Economics on the *Trade Practices Amendment (Australian Consumer Law) Bill 2009*

Submission by the Trade Practices Committee of the Business Law Section of the Law Council of Australia

7 August 2009

The Law Council of Australia is the peak national body representing the legal profession in Australia.

The Trade Practices Committee of the Business Law Section of the Law Council of Australia (**Committee**) has keenly followed the development of the Australian Consumer Law and has previously made submissions to Treasury on the *An Australian Consumer Law - fair markets, confident consumers* discussion paper in March and on the exposure draft to the *Trade Practices Amendment (Australian Consumer Law) Bill 2009* in May.

The Committee is pleased to offer the following comments on the *Trade Practices Amendment (Australian Consumer Law) Bill 2009* (**Bill**).

The Committee is supportive of the Government's desire to nationally reform Australia's consumer protection laws. This submission will focus on the Committee's key concerns to ensure the proposed laws are appropriately framed from a legal perspective. The Committee also welcomes the Government's decision that the provisions largely not deal with business to business transactions at this time. The Committee believes that while it may well be appropriate for the proposed law to be heavily balanced in favour of consumers in most circumstances, it is much more problematic for the economic and legal underpinnings of such provisions to extend more broadly to business to business transactions and this extension would create an uncertain and negative overall impact on business.

In our suggestions below we have also sought to address some specific concerns for small business arising from the application of the proposed laws. We emphasise however that the Committee's comments on the application of the laws to business apply equally for small and big business. Small business operators may in many circumstances be the very business sector most subject to these wide ranging laws.

Finally, the Committee has significant concerns that the Bill, which has conferred quite substantial powers and discretions on Regulators, lacks sufficient checks and balances to safeguard the legitimate legal rights of individuals and businesses in the face of public warning notices, infringement notices and substantiation notices. Although these provisions may well be aimed at "fly by night operators" they have such general application to the overall business community that in the Committee's view greater requirements need to be satisfied before such notices should be issued.

National unfair contract terms provisions

(a) Restriction to genuine consumer customers

The Committee has made two previous submissions to Treasury in relation to the proposed national unfair contract terms regime. The comments made in those submissions remain relevant.

The Committee considers that the Bill is a significant improvement on some of the previous proposals for this legislation, and it is now much more likely to meet the stated policy objectives of the Australian Consumer Law.

In particular, the Committee welcomes the Government's recent decision to restrict the regime to consumers. This result is consistent with the recommendations of the Productivity Commission, which focussed on using the regime to address the unfair disadvantage suffered by consumers when they are unable to bargain effectively in

relation to "take it or leave it" arrangements. Moreover, it will bring the Australian regime in line with other international models of unfair terms regulation.

The Committee also welcomes the Government's decision to incorporate a definition of "consumer contracts" in preference to adopting the June proposal to exclude from the regime "a standard form contract where the upfront price payable for the services (including financial services), goods or land supplied under the contract exceeds $2 million".

In the Committee's view, there would be considerable legislative and practical efficiencies in defining a consumer contract by reference to the existing definition of "consumer" in section 4B of the Trade Practices Act 1974 (Cth). Section 4B focuses on the nature of the good or service being supplied by asking whether it is "of a kind ordinarily acquired for personal, domestic or household use or consumption". Further, if the prices of the relevant goods and services fall within the prescribed monetary limit established by the legislation, they will be taken to have been acquired by a "consumer", irrespective of whether they are ordinarily acquired for personal, domestic or household use or consumption. Such an approach would be more effective and economically efficient as it will not require an additional and potentially difficult inquiry into the subjective purpose for which an individual acquired the good or service. In addition, such a definition would also afford some protection to some small businesses under the law, while preserving the 'consumer' focus that is intrinsic to the overall policy objectives of this legislation.

In relation to the use of a monetary threshold, the Committee considers that if that were to be reconsidered, it is vital to the success of this regime that its boundaries are very clearly set out to ensure there is certainty of application for all. In the Committee's view the $2 million "upfront price" threshold was inserted without sufficient rationale or definition.

In conclusion, the Committee believes that the greatest certainty for business and consumers is to use the existing section 4B definition. Doing so would also assist in addressing issues that have been raised by small business, for instance, in relation to retail electricity supply contracts.

(b) Prohibited terms

The Committee is concerned about the Government's decision to retain the ability to ban terms outright and considers this to be wholly inconsistent with the policy objectives underpinning the regime.

Whether a term is fair or unfair is wholly dependent on the relevant circumstances of each case. This includes the nature of the customer, the goods and services or the industry, the interests and commercial drivers of the other party and contract as a whole (including countervailing terms). However, under a power to ban terms outright, this case-by-case assessment of unfairness will not occur. An example raised by the Committee in a previous submission is a unilateral variation term. A unilateral variation clause may on its face seem unfair. However, in ongoing service contracts (such as gas, electricity, internet, mobiles, Pay TV etc) the supplier clearly requires some flexibility to unilaterally vary the terms of the arrangement from time to time. Suppliers cannot reasonably be expected to have to separately negotiate and agree variations (for example, a small price increase) with millions of customers. The Committee firmly believes that customers themselves would not expect the terms of ongoing service

arrangements to remain the same as on the day the contract is entered into. If a unilateral variation clause also included an obligation on the supplier not to vary within any fixed term period, or only to vary with prior reasonable notice to the customer and the customer had the ability to terminate, such a clause should not be unfair. However under the Bill as it is currently drafted, such a clause may be prohibited 'per se' and leave no opportunity for these specific circumstances to be considered.

The experience in Victoria provides support for the proposition that the ability to ban terms outright is not needed under the national regime. Although the Victorian Fair Trading Act provides an ability to proscribe (and prohibit) certain terms by regulations, no term has been proscribed in the 6 years that the Fair Trading Act has been in operation.

The Committee is also concerned about the process by which the Government proposes to ban terms outright and is not persuaded that it incorporates sufficient opportunities for industry and consumer input prior to the power being exercised. The process is devoid of any independent or stakeholder consultation and although the Minister has stated that the process will be subject to the Government's "best practice regulation" processes and an intergovernmental voting process, these alone do not amount to adequate safeguards for what is a very important power, and one that has the potential to have widespread detrimental effects if exercised incorrectly. The Committee believes that this proposal to prohibit contractual terms does not follow standard legislative processes. In particular, it avoids the scrutiny and debate of Parliamentary and democratic processes.

Enforcement powers

(a) General comments

The Committee understands the need for the new enforcement powers to operate flexibly, but considers it vital that appropriate safeguards be included to ensure these powers are not misused, or inadvertently create injustice. In the Committee's view, the proposed powers do not have sufficient safeguards against Regulator error, while Regulators themselves will be asked to assume a substantial burden without a sufficient level of guidance and support. This is of particular concern for provisions such as unconscionable conduct, section 52 (which will be subject to public warning powers and substantiation notices) and section 53C (which will be subject to infringement notices and public warning powers), the latter of which is judicially untested and has already been the subject of much debate and confusion.

Moreover, the new enforcement powers should only be introduced where there is a sound policy basis for doing so and where existing enforcement measures are clearly insufficient to achieve the same outcome. The Committee remains unconvinced as to the policy justification for introducing some of the proposed enforcement powers.

For example, the Productivity Commission specifically noted in its final report that State and Territory Regulators rarely issue substantiation notices and was unconvinced about the introduction of public warning powers. Given the questions that have been raised about proposed enforcement powers, the Committee believes the Government should commit to a review of the enforcement powers that are eventually introduced sooner than the proposed 5 years.

These proposed powers are highly problematic and, as the Dawson Review found, create issues for the Regulator, business and consumers as to their application and the expectations they create.

(a) Public warning powers

The Committee supports this power being subject to the public interest test currently proposed in the Bill.

However, the Committee notes that while the Government has stated that this power is currently used to deal with "fly by night" or "phoenix companies", the drafting is currently very wide and there is no guarantee this power will be reserved purely for these particular instances. Moreover, under the Bill as it stands the power can be exercised where the Regulator has no more than "reasonable grounds to suspect" a breach, which is a disproportionally low standard given the seriousness of this power. The Committee considers that given the stated objective of this power is to minimise potential harm to consumers, it should be a requirement of the legislation that the Regulator has to believe there is a reasonable likelihood of the conduct in question causing harm before such a warning can be issued.

Further, although there is no Regulator immunity from defamation actions, this alone is an unsatisfactory remedy for the misapplication of such a power because once a notice is issued, the reputational damage can be very hard to repair. In addition, many corporations cannot sue for defamation under the uniform defamation laws.

Overlap with existing practices

The Committee also notes that Regulators already have what amount to early warning procedures they can employ to alert the public via their (often sophisticated) use of the media and other communication channels. Currently, each time the ACCC commences action, or agrees to an administrative remedy, a media release (or more than one) is issued (in fact, the ACCC issued no less than 382 during the 2008-2009 financial year). These releases usually attract a great deal of publicity, along with published section 87B undertakings and other orders.

In addition, the ACCC (and State and Territory Regulators) have embarked on a variety of initiatives to provide early warnings to consumers, including SCAM Watch, Consumer Affairs Victoria's "Dob-in-a-Scam" and the Australian Consumer Fraud Taskforce. All of these measures effectively warn the public of suspected breaches of the Trade Practices Act and potentially harmful conduct and help reduce consumer detriment. They serve the same purpose as a public warning notice and provide the same outcome.

Finally, the Bill provides no indication of the form and content of these notices, which is an important issue that ought to be addressed in the drafting (similar to the form and content of the other notices proposed).

(b) Infringement notices

The Committee also has a number of concerns about the proposed infringement notice power.

Infringement notices, which can be issued against a person without it being conclusively established that they have contravened a provision of the Act, have the capacity to inflict substantial reputational damage on a business in addition to the prescribed monetary penalty. Although the Bill notes that payment of a fine is not determinative of the fact that a person contravened the Act, the Committee believes that it is likely to be seen as such in the broader community.

Owing to the nature of these notices, the Committee believes that many businesses are unlikely to risk challenging an infringement notice, even if they consider they have an arguable defence to the alleged contravention, because of the potential costs and time involved in doing so.

Such a situation presents great concerns to the Committee because of this clear potential for innocent persons to be the subject of punitive regulatory action.

If the Senate Committee determines that there are sound policy reasons for the introduction of this power, the power should be limited to minor breaches. In the second reading speech, Minister Emerson described this power as being reserved for "minor breaches of the law", however this is not reflected in the drafting. The infringement notice power is very wide and covers many consumer protection provisions, including those attracting criminal penalties.

Moreover, the power has been extended to provisions of the Trade Practices Act that have little useful precedent or no precedent at all to guide the Regulator's decisions. For example, the new section 53C has not been judicially tested and there is nothing within the notice provisions that would prevent the ACCC from issuing an infringement notice based on its interpretation of section 53C, which may or may not be correct.

The Committee has significant concerns that these infringement notices prejudice a person's right to natural justice and do not have sufficient redress for an incorrect regulatory assessment. If the Government is minded to press forward with such infringement notices, they should be limited to minor breaches of the law where the facts are not likely to be in dispute, as recommended by the Australian Law Reform Commission in its report *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (2002).

(c) Substantiation notices

Overall, the Committee is not convinced that substantiation notices will lead to additional consumer benefit, especially in the light of the ACCC's existing information gathering powers. For example, according to the ACCC's annual report, it issued a total of 1000 section 155 notices in the 2007/2008 financial year, made up of 482 (compulsorily acquire information), 184 (provide information in writing), 171 (provide documents) and 163 (appear in person). This is a substantial use of this power which shows, in the Committee's view, that the ACCC does not face significant barriers to using its current information gathering powers when required. Accordingly, this "preliminary investigative tool" is not required. The Committee is also very concerned that this power will invite costly and disruptive "fishing expeditions" given the absence of a threshold to the exercise of this power or Regulator accountability in the provision.

The Committee is concerned about the breadth of this power. As currently drafted, the ACCC (and State and Territory Regulators when the Australian Consumer Law is finalised) does not have to meet any objective or evidential threshold before being able to exercise this power. This is a serious omission from the provision given the serious consequences of not complying with these notices (including civil penalty penalties and public warning notices). Also, as the power is expected to be used mostly in section 52 matters, being matters in respect of which reasonable minds do differ regarding the overall impression of the representation, it is vital that some safeguards be placed around the exercise of this power.

The Explanatory Memorandum provides that the ACCC can use this power to investigate suspected breaches of the consumer protection provisions where "they think it is reasonable to do so" but this threshold has not been reflected in the drafting of the provision. The Committee would recommend the approach in Queensland, where the Regulator must have "reasonable grounds that the statement is false or misleading" (*Fair Trading Act* (Qld) 1989).

A significant issue that the Committee believes should be addressed in the drafting is the treatment of information and documents, especially those subject to legal professional privilege or trade secrets, under this power. In the Committee's view, this power must be subject to an exception for information or documents subject to legal professional privilege, mirroring section 155(7B) of the Trade Practices Act. The Committee also submits that section 155AAA of the Trade Practices Act be amended to include information obtained by the ACCC under section 87ZL as "protected information".

(d) Non-party redress orders

The introduction of non-party redress is a significant amendment to the Trade Practices Act and it is vital that the provisions set out clearly how this process will operate. A number of uncertainties exist with the current drafting including:

- the Court is not able to make an "award of damages" but may make other orders such as orders for refunds. In many cases, a refund and damages would amount to the same thing. When a customer's loss is not equal to the cost of the good/service, can orders for a refund be made?

- what is the process for determining who falls within the affected class? For example, would a consumer need to demonstrate that they were affected by the contravening conduct (eg. they relied on the misleading conduct)?

(e) Civil penalties

In the Committee's view, civil pecuniary penalties should not apply to the unconscionable conduct provisions, for the same policy reasons underpinning the decision not to apply penalties to section 52. Civil pecuniary penalties are intended to bridge the gap between civil remedies and criminal penalties and apply only to those consumer protection provisions that attract criminal sanction. Currently, no criminal sanctions apply to unconscionable conduct under the Trade Practices Act. Moreover, whether a corporation has acted unconscionably is rarely a clear cut issue and often a matter upon which reasonable minds do vary. The Committee considers that appropriate and adequate sanctions already apply under the Trade Practices Act to address unconscionable conduct and the imposition of civil pecuniary penalties is inappropriate and unwarranted.

If you have any questions in relation to the submission, in the first instance please contact the Committee Chair, Dave Poddar, on [02] 9296 2281.

6 August 2009