

# Chapter 1

## Introduction

1.1 The Trade Practices Amendment (Australian Consumer Law) Bill 2009 ('the bill') was referred to the Senate Economics Legislation Committee on 25 June 2009 for inquiry and report by 7 September 2009.

### The bill

1.2 The bill will ban unfair terms in standard form business-to-consumer contracts. Standard form contracts are contracts that are not individually negotiated: they are often 'take it or leave it' contracts.

1.3 A term will be considered 'unfair' if it causes a significant imbalance in the parties' rights and responsibilities and it is not 'reasonably necessary' to protect the 'legitimate interests' of the supplier.

1.4 A term is likely to be considered unfair if a supplier can vary any term without the consumer's consent or if a supplier can cancel a contract without a corresponding right for the consumer. If a term is found to be unfair, it is void but the rest of the contract remains in effect.

1.5 The bill will cover most standard form contracts, with the notable exception of insurance contracts (see chapter 8). The types of contracts that are most likely to be affected by the legislation are banking and financial services contracts, utility service contracts, internet and telephone contracts and gym memberships.

1.6 The bill has three principal elements:

...the creation of a new national consumer law, to be called the Australian Consumer Law; implementation of national unfair contract terms law and implementation of new penalties for breaches of consumer law; and new enforcement powers for the ACCC and for the Australian Securities and Investment Commission to enforce these laws.<sup>1</sup>

1.7 Schedule 1 Part 1 and Schedule 3 Part 1 of the bill contains provisions to implement the new national unfair contract terms law. Schedule 1 Part 1 creates the Australian Consumer Law (ACL) and its enforcement by the Australian Competition and Consumer Commission (ACCC). Schedule 3 Part 1 'essentially mirrors these provisions but applies them in relation to financial services', with the Australian Securities and Investments Commission (ASIC) as the responsible regulator.<sup>2</sup>

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1 Dr Steven Kennedy, *Proof Committee Hansard*, 21 August 2009, p. 1.

2 Consumer Action Law Centre, *Submission 19*, p. 2.

1.8 Schedule 1 Part 2 of the bill inserts a new part XI into the TPA to allow for the application of the ACL as the law of the Commonwealth, facilitate its application as a law of each state and territory and make provision for its administration, enforcement and amendment.<sup>3</sup>

1.9 Schedule 2 of the bill introduces new enforcement powers and remedies under the *Trade Practices Act (1974)*. This includes pecuniary penalties, disqualification orders, substantiation notices, orders to redress loss or damage suffered by non-party consumers, infringement notices and public warning notices.

### **The Australian Consumer Law**

1.10 This bill is the first of two bills which will introduce the Australian Consumer Law (ACL). The ACL will draw on the existing provisions on unconscionable conduct in part IVA of the TPA, the consumer protections in part V, the liability of manufacturers and importers for defective goods in part VA and part VC offences.<sup>4</sup>

1.11 This bill amends the TPA to establish the ACL as a schedule to the TPA and inserts the unfair contract terms provisions. It also inserts corresponding provisions for financial products and services into the *Australian Securities and Investments Commission Act 1999*.

1.12 The second bill will be introduced in 2010 and will implement the Council of Australian Governments (COAG) reforms including transferring the existing consumer protection and related provisions of the TPA into the ACL (see chapter 2).<sup>5</sup>

### **Unfair contract laws in other jurisdictions**

1.13 In April 1993, the European Union (EU) adopted its *Directive on unfair terms in consumer contracts*. The following year, the United Kingdom implemented this Directive into its national law. These regulations were replaced in 1999 with the Unfair Terms in Consumer Contracts Regulations.

1.14 In 2001, Victoria initiated a review of its fair trading legislation which recommended (in June 2002) the introduction of unfair contract terms laws. These provisions were enacted in October 2003 through the *Fair Trading (Amendment) Act 2003*.<sup>6</sup>

1.15 Section 32W of the Victorian *Fair Trading Act 1999* defines an 'unfair term' as a term that, 'in all the circumstances', causes 'a significant imbalance in the parties'

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3 Dr Steven Kennedy, *Proof Committee Hansard*, 21 August 2009, p. 1.

4 Dr Steven Kennedy, *Proof Committee Hansard*, 21 August 2009, p. 1.

5 Ms Paula Pyburne, Trade Practices Amendment (Australian Consumer Law) Bill 2009, *Bills Digest no. 19, 2009–10*, Parliamentary Library, 18 August 2009, p. 11.

6 Consumer Action Law Centre, *Submission 19*, p. 2.

rights and obligations arising under the contract to the detriment of the consumer'. The Victorian legislation is restricted to business-to-consumer unfair contract terms. This bill contains similar provisions to those currently in Part 2B of the Victorian *Fair Trading Act 1999*.

1.16 The committee has found useful a report by the Consumer Action Law Centre into the consumer protection provisions of the *Trade Practices Act 1974* and how they compare with provisions in the United Kingdom, the United States, Canada and the EU.<sup>7</sup>

### **Conduct of the inquiry**

1.17 The committee advertised the inquiry in the *Australian* newspaper and on the committee's website, inviting written submissions by Friday 31 July 2009. It received 58 submissions from various organisations. Appendix 1 lists these submissions: they are also available on the committee's website at: [http://www.aph.gov.au/Senate/committee/economics\\_ctte/tpa\\_consumer\\_law\\_09/submissions.htm](http://www.aph.gov.au/Senate/committee/economics_ctte/tpa_consumer_law_09/submissions.htm).

1.18 The committee held two public hearings: in Canberra on 21 August 2009 and in Sydney on 26 August 2009. Appendix 2 lists those who appeared at these hearings. The committee thanks all those who contributed to the inquiry.

### **Structure of the report**

1.19 This report has ten chapters:

- chapter 2 outlines the consultative process leading up to the introduction of the legislation;
- chapter 3 outlines the need for a national consumer law and submitters' views on the merit of harmonised consumer laws;
- chapter 4 looks at the key threshold issue of the bill—what is an unfair contract term? It details the bill's definition of 'void' and 'unfair' contract terms and the 'grey-list' of unfair contract terms intended to guide the courts. The chapter also looks at how the bill's provisions on 'unfair contract terms' differ from the Trade Practices Act's 'unconscionable conduct' provisions;
- chapter 5 examines the scope of the bill and in particular, the debate as to whether it should have included business-to-business unfair contract terms;
- chapter 6 focuses on the bill's requirement that the court must take into account the extent to which the term caused 'detriment, or substantial likelihood of detriment' and the extent to which it is 'transparent';

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7 Consumer Action Law Centre, The consumer protection provisions of the *Trade Practices Act 1974*: Keeping Australia up to date, May 2008, [www.consumeraction.org.au/publications/policy-reports.php](http://www.consumeraction.org.au/publications/policy-reports.php)

- chapter 7 looks at the bill's provisions to prohibit contract terms and to exclude certain terms from the bill's remit;
- chapter 8 considers the arguments for and against the exclusion of insurance contracts from the bill's provisions;
- chapter 9 looks at the bill's new enforcement powers in Schedule 2; and
- chapter 10 makes some concluding comments on the bill including the proposed commencement date of the legislation.