

Chapter 10

Committee's view and recommendations

10.1 This chapter presents the committee's view on the key issues raised during this inquiry.

The issue of uncertainty

10.2 This report has noted the principal concern of several submitters to this inquiry is that the bill will lead to greater uncertainty for businesses in their commercial transactions with consumers. Chapter 2 noted the claim of some organisations that standard form contracts will all have to be reviewed in light of the legislation, at significant cost to business. Chapter 4 noted several witnesses' preference for the well-known parameters established in the TPA's unconscionable conduct provisions over the bill's provisions.

10.3 The committee acknowledges these concerns, but believes they are overstated. Similar legislation has been operation in Victoria and the United Kingdom for a considerable period of time, without any evidence that the costs imposed by these laws outweigh the benefits.¹

10.4 Moreover, the committee recognises that there will always be some uncertainty when new legislation is introduced. It recalls that when section 51AC of the TPA was introduced in 1998, for example, there was a similar debate about the uncertainty that those provisions would create for business.²

10.5 The committee also questions the claims that business will have to revise all their standard form consumer contract terms in light of this legislation. Businesses currently offering standard form contracts will have information on which terms in those contracts have caused past tensions and complaints from consumers. To suggest that businesses would need to review all their standard consumer contract terms seems to imply that all the terms they use currently fall foul of the various thresholds set by the bill. The committee believes that businesses will be aware of, and should concentrate their focus on, those terms that are more likely to be caught by the bill's provisions.

10.6 As for the operation of the law itself, the committee believes there is merit to the MTAA's suggestion that the ACCC and ASIC should issue guidelines on the bill's provisions.³ These will complement the grey-list of examples in section 4 of the bill.

1 See Ms Catriona Lowe, *Proof Committee Hansard*, 26 August 2009, p. 64.

2 See Associate Professor Frank Zumbo, *Proof Committee Hansard*, 26 August 2009, p. 32.

3 See Mr Michael Delaney, *Proof Committee Hansard*, 21 August 2009, pp. 18–19.

Recommendation 1

10.7 The committee recommends that the ACCC and ASIC issue a set of guidelines on the operation of the bill's provisions to assist all parties to understand their rights and obligations under the new regime. The guidelines should make reference to the examples in the grey list in section 4 of the bill.

The insurance contract exemption

10.8 As chapter 8 discussed, the committee received considerable evidence criticising the carve-out of insurance contracts from the provisions of the bill. This exemption is not a provision of the bill itself, but a consequence of section 15 of the *Insurance Contracts Act 1984* (ICA).

10.9 On the one hand, the committee believes that in the duty of utmost good faith contained in section 13 of the ICA, there is a platform from which to protect insurance consumers from unfair contract terms. A provision could be inserted into this Act to mirror closely the bill's provisions on contracts in general.

10.10 On the other hand, there is no argument that insurance contracts should not necessarily be subject to both industry-specific legislation and the general consumer protection laws. There are, as the Consumer Action Law Centre points out, many other industries that are subject to industry-specific regulation as well as general consumer laws.

10.11 The committee is encouraged that a process has been in train to make the ICA more effective. However, it believes that the draft bill released in 2007 should now be considered in light of this legislation on unfair contract terms. Further, the onus must be on those who do not believe that these provisions should cover insurance contracts—or at least be mirrored in the ICA—to prove their case.

Recommendation 2

10.12 The committee is of the view that consumers are not provided with adequate protection in insurance contracts under existing law.

10.13 The committee recommends that the government address insurance contract legislation to ensure that the *Insurance Contracts Act* provides an equivalent level of protection for consumers to that provided by the Trade Practices Amendment (Australian Consumer Law) Bill 2009.

10.14 Consideration by the government of the 2004 review of the *Insurance Contracts Act* should determine whether this will be achieved by amending the ICA to achieve a harmonisation with the amendments proposed in the Australian Consumer Law bills, or by amending the Trade Practices Amendment (Australian Consumer Law) Bill 2009 to apply to insurance contracts.

The commencement date of the legislation

10.15 The Minister explained in the Second Reading Speech that while the government had previously announced a possible starting date of 1 January 2010:

...I am mindful of the need for businesses to comply with the new law and that they may need more time. There is provision in the bill for a later commencement, if needed.⁴

10.16 Several submitters to this inquiry have expressed concern that the proposed commencement date will be difficult to meet. ABACUS told the committee that:

Abacus firmly believes that the commencement date of the regime must be postponed. The government's implementation plan for the Australian Consumer Law indicates that legislation is expected to commence on 1 January 2010. Given the bill is still before the Senate and its final form is not yet known, this time frame is simply too short. Significant resources will be required to transition to the new regime. These resources include legal advice, redrafting of contracts, adjusting systems and policies, the printing of new contracts and the retraining of staff in some circumstances. Whilst unfair contracts legislation is already in place in Victoria, that regime has only recently been extended to financial services. There are important differences between that regime and the proposed Australian Consumer Law and it is also important to note that the regime applies only in one state jurisdiction. As this committee would also appreciate, the current pace of regulatory change, whilst each initiative may be supported by Abacus and its members, weighs heavily on our smaller institutions. The proposed time frame for implementation is simply not acceptable for us and will cause significant disruption in this already challenging time. We urge the committee to recommend that the regime is postponed until such time as all consumers can have confidence that their institutions can properly implement the Australian Consumer Law.⁵

10.17 The National Australia Bank has identified its principal concern with the bill as the proposed commencement date. It recommended that a revised date of 1 January 2011 be set 'to enable the considerable work required to ensure compliance with the new regime'. The Bank's submission explained that a majority of its contracts will be considered 'standard form' under the legislation, requiring it to 'review and potentially amend' in excess of 2000 contracts across its businesses.⁶

10.18 The Australian Bankers' Association (ABA) also argued that the proposed 1 January 2010 commencement date 'will not provide financial institutions and other financial service providers with sufficient time to assess the impact on their standard form consumer contracts and make necessary changes to comply'. It claimed that

4 The Hon. Dr Craig Emerson, Second Reading Speech, *House of Representatives Hansard*, 24 June 2009, p. 6987.

5 Mr Mark Degotardi, *Proof Committee Hansard*, 21 August 2009, p. 26.

6 National Australia Bank, *Submission 30*, pp. 1–2.

changes to the terms on which products and services are offered requires a long lead time to ensure that the necessary systems and process changes are made.⁷ The ABA also supports a commencement date of 1 January 2011, coinciding with the responsible lending obligations under the National Consumer Credit Protection Bill 2009.

10.19 GE Capital Finance argued in its submission that the government's proposed deadline of 1 January 2010 is too soon to allow suppliers time to review their agreements and business arrangements. ABACUS suggested that, as an absolute minimum, businesses must be given 12 months from the date of commencement to modify their contracts. It urged the committee to recommend that the government extend the commencement date of the legislation 'by at least 6 months'.⁸

Committee view

10.20 The legislation has been the subject of considerable debate for many months. Business has been aware of successive governments' efforts to address Australia's consumer law framework for some years. It is important that consumers benefit from the protection that this legislation offers as soon as possible.

Recommendation 3

10.21 The committee recommends that the bill be passed.

Senator Annette Hurley

Chair

7 Australian Bankers' Association, *Submission 32*, p. 1.

8 ABACUS, *Submission 33*, p. 9.