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Legislation Committee

Trade Practices Amendment (Australian Consumer Law) Bill 2009 [Provisions]

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Senate Economics Legislation Committee

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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.[1]

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.[2]

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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.[3]

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.[4]

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).[5]

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*.[6]

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.[7]

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 .

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';

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

- 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.

Chapter 2

The consultative process

2.1 In the Second Reading Speech to the bill, the Minister for Competition Policy and Consumer Affairs, the Hon. Dr Craig Emerson MP, stated that the reforms contained in the bill 'are the culmination of a long policy review and development process undertaken by the Australian government in close consultation with the states and territories'.[1] This chapter notes the major steps in that process.

2.2 On 11 December 2006, the then Treasurer, the Hon. Peter Costello MP, commissioned the Productivity Commission to investigate Australia's consumer policy framework, including its administration.[2]

2.3 On 30 April 2008, the Productivity Commission released the findings of its Review of Australia's Consumer Policy Framework. The inquiry found that parts of Australia's consumer policy framework 'require an overhaul'. In particular:

> The current division of responsibility for the framework between the Australian and State and Territory Governments leads to variable outcomes for consumers, added costs for businesses and a lack of responsiveness in policy making. There are gaps and inconsistencies in the policy and enforcement tool kit and weaknesses in redress mechanisms for consumers.[3]

2.4 The report noted that these problems, if unaddressed, will lead to increased costs for consumers and the community. Accordingly, the Productivity Commission urged the need for new institutional arrangements more compatible with 'the increasingly national nature of Australia's national markets'. To this end, it argued that greater responsibility needed to rest with the federal government. And the first step in the process should be:

> The introduction of a single generic consumer law applying across Australia, based on the consumer provisions in the Trade Practices Act (TPA), modified to address gaps in its coverage and scope.[4]

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1 The Hon. Dr Craig Emerson, Second Reading Speech, House of Representatives Hansard, 25 June 2009, p. 6981.

2 http://www.treasurer.gov.au/DisplayDocs.aspx?pageID=&doc=pressreleases/2006/133.htm&min=phc

3 Productivity Commission, *Review of Australia's Consumer Framework*, Volume 1, April 2008, p. 2.

4 Productivity Commission, *Review of Australia's Consumer Framework*, Volume 1, April 2008, p. 2.

The Productivity Commission recommended that the generic consumer law include unfair contract terms with the following provisions:

- a term is established as 'unfair' when, contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract;
- there would need to be material detriment to consumers (individually or as a class);
- it would relate only to standard-form, non-negotiated contracts;
- it would exclude the upfront price of the good or service; and
- it would require all of the circumstances of the contract to be considered, taking into account the broader interests of consumers, as well as the particular consumers affected.[5]

2.5 On 26 March 2008, the Council of Australian Governments (COAG) agreed that its Business Regulation and Competition Working Group would develop an enhanced consumer policy framework in consultation with the Ministerial Council on Consumer Affairs (MCCA).[6]

2.6 On 15 August 2008, the MCCA proposed that:

> …all Australian governments should agree to adopt a new national consumer law, which operates in all Australian jurisdictions and which remains consistent. This law should be based on the current consumer protection provisions of the Trade Practices Act 1974 (TPA) and also incorporate appropriate amendments reflecting best practice in state and territory legislation.[7]

2.7 The MCCA proposed that a national consumer law should include a provision that addresses unfair contract terms. It suggested the following features:

- the term is unfair when it causes a significant imbalance in the parties' rights and obligations arising under the contract and it is not reasonably necessary to protect the legitimate interests of the supplier;

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5 Productivity Commission, 'Review of Australia's Consumer Policy Framework', *Productivity Commission Inquiry Report No. 45*, vol. 2, recommendation 7.1, p. 168. See also Paula Pyburne, Trade Practices Amendment (Australian Consumer Law) Bill 2009, *Bills Digest*, no. 19, 2009–10, 18 August 2009, p. 9.

6 *Explanatory Memorandum*, p. 8. The Ministerial Council on Consumer Affairs (MCCA) and its supporting bodies are responsible for considering consumer and fair trading matters and, where possible, developing a consistent approach to these issues. The membership of MCCA consists of the Australian Government, the governments of the States and Territories, and the New Zealand Government. The Working Group is one of seven established by COAG in December 2007. It is overseen by the Minister for Finance and Deregulation.

7 http://www.consumer.gov.au/html/download/MCCA_Meetings/Meeting_20_15_Aug_08.pdf

- a remedy could only be applied where the claimant shows detriment, or a substantial likelihood of detriment, to the consumer (individually or as a class). Detriment is not limited to financial detriment;
- it would relate only to standard form (i.e. non-negotiated) contracts. Should a supplier allege that the contract at issue is not a standard form contract, then the onus will be on the supplier to prove that it is not;
- it would exclude the upfront price of the good or service, using the approach currently adopted in regulation 6(2) of the United Kingdom's Unfair Terms in Consumer Contracts Regulations 1999; and
- it would require all of the circumstances of the contract to be considered, taking into account the broader interests of consumers, as well as the particular consumers affected.[8]

2.8 The MCCA argued that where these criteria are met, the unfair term would be voided only for the contracts of those consumers or class of consumers subject to detriment (or the substantial likelihood thereof), with suppliers also potentially liable to damages for that detriment, along with other remedies available under the *Trade Practices Act 1974*.

2.9 In September 2008, the Working Group considered the MCCA's proposals and recommended that COAG agree to a single national consumer law.

2.10 On 2 October 2008, a meeting of COAG agreed to establish:

> …a new consumer policy framework comprising a single national consumer law based on the *Trade Practices Act 1974*, drawing on the recommendations of the Productivity Commission and best practice in State and Territory consumer laws, including a provision regulating unfair contract terms. The new national consumer law will deliver on COAG's commitment to a seamless national economy by providing a uniform and higher level of protection for Australian consumers and addressing weaknesses in existing laws. The new policy framework will improve consumer law enforcement powers, reduce compliance costs for business and increase access to information regarding dispute resolution and consumer issues.[9]

2.11 On 17 February 2009, the Standing Committee of Officials of Consumer Affairs (SCOCA) released an information and consultation paper entitled *An Australian Consumer Law: Fair markets—Confident consumers*.[10] The purpose of the paper was to:

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8 http://www.consumer.gov.au/html/download/MCCA_Meetings/Meeting_20_15_Aug_08.pdf

9 Council of Australian Governments, http://www.coag.gov.au/coag_meeting_outcomes/2008-10-02/index.cfm

10 The Standing Committee of Officials of Consumer Affairs is a subcommittee of the MCCA and consists of all chief executive officers of consumer protection agencies.

- explain how the national consumer law will be developed;
- explain the nature and scope of COAG's agreed reforms to create the national consumer law and, in some limited circumstances, seek views on specific aspects of those reforms; and
- seek views and explore options for augmentations and modifications to existing generic consumer protections which are based on best practice in existing state and territory laws.[11]

2.12 Treasury received 102 submissions in response to its consultation paper.[12]

2.13 On 11 May 2009, a consultation paper entitled *The Australian Consumer Law: Consultation on draft provisions on unfair contract terms* was released. It included the exposure draft of the unfair contract terms provisions in the Australian Consumer Law, and in relation to financial services and attracted 96 submissions.[13]

2.14 On 8 May 2009, a draft text of the Intergovernmental Agreement (IGA), which coordinates the application of the Australian Consumer Law, was endorsed by the Ministerial Council on Consumer Affairs. As part of this IGA, any amendment to the national law will require agreement by other jurisdictions.[14]

2.15 On 24 June 2009, the Trade Practices Amendment (Australian Consumer Law) bill was introduced into the House of Representatives and referred to this committee the following day. Several submitters to this inquiry also made submissions to the February and May 2009 consultation papers.

2.16 The Consumer Action Law Centre, the largest specialist legal practice in Australia, has commented: '[R]egardless of one's views on the content of the Bill, it cannot be said that consultation on national UCT [unfair contract terms] regulation for Australia has not occurred'.[15]

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11 Treasury, An Australian Consumer Law—Fair Markets, Confident Consumers, *Consultation paper*, http://www.treasury.gov.au/contentitem.asp?ContentID=1484&NavID=014

12 Submissions, An Australian Consumer Law—Fair Markets, Confident Consumers, *Consultation paper*, http://www.treasury.gov.au/contentitem.asp?ContentID=1501&NavID=014

13 Treasury, An Australian Consumer Law—Fair Markets, *Consultation on draft provisions on unfair contract terms*, http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1537

14 http://www.coag.gov.au/coag_meeting_outcomes/2009-07-02/docs/IGA_australian_consumer_law.pdf
See also Paula Pyburne, Trade Practices Amendment (Australian Consumer Law) Bill 2009, *Bills Digest*, no. 19, 2009–10, 18 August 2009, p. 11.

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

Chapter 3

The need for a national consumer law

3.1 This chapter examines the rationale for introducing national unfair contract terms provisions and submitters' views on the need for, and likely impact of, the legislation.

Rationale for the bill

3.2 In the Second Reading Speech, the Minister for Competition Policy and Consumer Affairs, the Hon. Dr Craig Emerson MP, explained the bill's purpose in the following terms:

> Australians are facing serious economic challenges. In confronting those challenges, we have to deal with complex, sophisticated markets. Marketing is becoming cleverer. Consumers can now shop online and through their mobile phones. They have access to money through new and sophisticated payment systems. And, the range of goods and services available today is enormous. We need national laws that can keep pace with these changes.
>
> This bill will introduce changes that will make life easier for all consumers—through clearer, fairer standard-form contracts and more effective enforcement of our consumer laws. A single national law, supported by better policy development and decision-making processes, is the best means of achieving better results for consumers and business. Rather than relying on nine parliaments to make changes, this new framework will ensure responsive consumer laws with a truly national reach.[1]

3.3 The Minister explained the need to rationalise the 13 generic consumer laws currently operating in Australia in the following terms:

> As we move towards a single, national market—a seamless national economy as called for by the Business Council of Australia and the 2020 Summit—this tangle of consumer laws must be rationalised. We must reduce confusion and complexity for consumers and provide consistency of consumer protection. We must reduce compliance burdens for business.[2]

3.4 In its submission to this inquiry, the Consumer Action Law Centre explained the rationale for national unfair contract terms laws by reciting the 2004 views of the Standing Committee of Officials of Consumer Affairs:

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1 The Hon. Dr Craig Emerson, Second Reading Speech, *House of Representatives Hansard*, 24 June 2009, p. 6981.

2 The Hon. Dr Craig Emerson, Second Reading Speech, *House of Representatives Hansard*, 24 June 2009, p. 6981.

> Standard form contracts can have advantages to both supplier and purchaser provided that a fair balance is achieved between both parties to the contract. They reduce transaction costs for the supplier which would otherwise be passed on to the purchaser. They allow for lengthy and detailed contracts to be finalised with the minimum of time and by lay persons who only need to negotiate the specifics such as price, description of goods and services and delivery times. Over a period of time, people become familiar with the contracts because they are standard and may encourage a general understanding of trading practice.
>
> However, standard form contracts do pose problems. These types of contracts will usually have been drafted by professionals on behalf of the supplier. Generally, the purchaser has no time or opportunity to read the contract before signing, let alone obtain the same standard of advice as the supplier. If there is time to read it, it is doubtful whether the purchaser will understand the meaning and impact of each term in the light of the whole contract…
>
> It has become increasingly clear that many such standard form contracts contain clauses which are unfair or unnecessarily one-sided to the detriment of the purchaser. One reason that these have become so prevalent is that there is little, if any, competition in this regard. Purchasers do not usually "shop around" on the basis of the best contract terms: it would be too impractical an exercise for the vast majority of people to decide, for example, which hire-car company to use based on the best contract terms. Purchasers predominantly focus on price and the quality or characteristics of the product. They may not appreciate that a "good" price has been achieved through the imposition of onerous terms. As a result, terms may well be standard across an industry and even if the purchaser went elsewhere, they would be faced with a similar situation.[3]

3.5 In its April 2008 report into Australia's consumer policy framework, the Productivity Commission argued that there is no need for variation in either the content or enforcement intensity of generic consumer law. It noted that variations between jurisdictions can:

> …lead to divergent requirements for businesses (and variable outcomes for consumers)…[T]he cumulative costs of even individually small differences can be material. And because many of them are seemingly needless, they can also be a source of significant frustration for businesses. More importantly, a continuation of the recent regulatory 'break-outs' will see the compliance burden increase in the future. It will also (inimically) increase as unnecessary specific consumer regulation is repealed (see below) and the generic law becomes the sole means of protecting consumers in a wider range of areas.
>
> …

3 Standing Committee of Officials of Consumer Affairs Unfair Contract Terms Working Party, *Unfair Contract Terms: A Discussion Paper*, January 2004, pp. 16–17. See Consumer Action Law Centre, *Submission 19*, pp. 4–5.

> [T]here is little reason for any variation in the content of the generic consumer law. The generic law reflects broad notions of efficiency, fairness and equity, which the vast majority of consumers and businesses would regard as appropriate and reasonable irrespective of where they live or trade. The broad, principles-based, nature of the generic law allows for its application to a wide variety of particular circumstances. This largely removes any case for variations in the law itself to account for specific local requirements.[4]

Broad views on the bill

Support for harmonised consumer laws

3.6 Several submitters to this inquiry have expressed their support for the government's intention to protect consumers through the introduction of a national unfair contract terms regime.

3.7 The Chair of the Law Council of Australia's Trade Practices Committee told the committee that it is:

> …supportive of the government's desire to nationally reform Australia's consumer protection laws to ensure that laws across all states and territories are harmonised and to ensure businesses are not burdened by unnecessary regulation and inconsistent laws.[5]

3.8 The Association of Building Societies and Credit Unions (ABACUS) emphasised that it is 'strongly supportive' of a single, national approach to regulation in this area.[6] It told the committee: 'I guess we have to provide some kudos to this approach; a single consumer law across all jurisdictions is a really fantastic idea'.[7]

3.9 The Business Council of Australia (BCA) stated in its submission to this inquiry, and in correspondence to the Minister on the exposure draft of the bill, that it 'supports the proposed reform of consumer protection laws in Australia, and in particular the development of a nationally consistent approach in this area'.[8]

3.10 The law firm, Minter Ellison, has highlighted the likely compliance and commercial benefits of the legislation:

> …we welcome the Government's proposal to implement uniform and consistent consumer protection laws in Australia. Any measure which simplifies the compliance regime for business will produce significant

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4 Productivity Commission, *Review of Australia's Consumer Framework*, Volume 1, April 2008, p. 19.

5 Mr Dave Poddar, *Proof Committee Hansard*, 21 August 2009, p. 31.

6 ABACUS, *Submission 33*, p. 1.

7 Mr Mark Degotardi, *Proof Committee Hansard*, 21 August 2009, p. 28.

8 Business Council of Australia, *Submission 20*, p. 1.

> benefits for Australia both in terms of reducing the costs of doing business here and therefore increasing Australia's attractiveness for local and foreign investment, but also for reducing the likelihood of non-compliance which will benefit consumers and businesses alike.[9]

3.11 The Consumer Action Law Centre has noted that national unfair contract terms laws will not only benefit individual consumers but have the potential to provide wider competition benefits by 'increasing consumer confidence in market transactions'. It noted in its submission that:

> Consumer Action has advocated for effective regulation of the use of unfair terms in consumer contracts to be introduced nationally for a number of years and we therefore strongly support the Bill's introduction of national UCT laws. Australia currently lags behind world's best practice in consumer policy, and the lack of national UCT laws is one of the principal reasons that this is the case.[10]

3.12 The Motor Trades Association of Australia told the committee:

> We are great supporters of the COAG agenda and harmonisation. If you sell as much as we do across as wide a sample of goods in a national multiplicity of consumer laws, it is really difficult. We think having a single harmonised law is very attractive. We support it and believe there would likely be savings for the economy, consumers and business. It will be good to have circumstances where we will be able to address compliance by our businesses in a single unified law. I think it is a welcome advance, and it is not one that we are frightened of. We do not think it extends the jurisdiction in a way that is injurious to business at all.[11]

3.13 Associate Professor Frank Zumbo told the committee:

> I welcome the unfair contract term proposals and, having been involved in the area—I have researched it for almost 15 years, I have seen it work firsthand in the UK, I have visited the UK Office of Fair Trading, I have had discussions with Consumer Affairs Victoria—and having looked at the practice in the United Kingdom, in Victoria and in Europe, there is no doubt in my mind that we do need an unfair contract term regime.[12]

Too much regulation and uncertainty

3.14 On the other hand, a key theme of many witnesses' evidence to this inquiry is the uncertainty that the bill's provisions would cause in commercial contracts and, therefore, in commercial transactions. The claim is that the legislation will force businesses to reconsider all their standard form contracts and operate in an

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9 Minter Ellison, *Submission 45*, p. 1.

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

11 Mr Michael Delaney, *Proof Committee Hansard*, 21 August 2009, p. 23.

12 Associate Professor Frank Zumbo, *Proof Committee Hansard*, 26 August, p. 26.

environment where they cannot be sure what terms the courts, and the Minister, will declare 'unfair'.[13]

3.15 The Australian Institute of Company Directors (AICD) highlighted the uncertainty that the bill would create:

> We note the explanatory memorandum aims to provide clarity and certainty in relation to consumer law to protect consumers and to reduce prices for goods and services. Respectfully, we anticipate the bill may in some cases have the opposite effect. We anticipate the bill may cause uncertainty with question marks to be placed over the enforceability of standard form contracts, and that consumers—the people it is designed to protect—may be burdened by possibly higher prices for goods and services.
>
> …
>
> If there is a risk that terms in a contract could be unenforceable for unfairness or for any other reason, the flow-on effects could be significant. Companies may be required to reconsider product structuring, risk allocation, insurance, prices and even the actual supply of some goods and services. It is the uncertainty that is the issue here, perhaps, rather than the general concepts. We anticipate that the lack of clarity in the bill's drafting and the subjective nature of unfairness will also lead to an increase in litigation and costs for companies.[14]

3.16 Colonial First State Property Management argued that the retail leasing industry already has rigorous legislation covering all aspects of retail lease transactions, ensuring that tenants are protected from 'unfair' contracts. It added that imposing further regulation on the industry is 'unnecessary, counter-productive and not conducive to effective business practice'.[15]

3.17 The banking sector has also criticised the bill's impact on business certainty and business costs. The Australian Bankers' Association told the committee:

> Central to our concerns is that the regime will create uncertainty for banks…In practice the operation of this legislation is likely to see customers agreeing on the terms and conditions for their banking services before the customer accepts a financial product, only to later seek to avoid their obligations by claiming a particular term is unfair.[16]

3.18 Not everyone was convinced by this argument that the banks will be hurt by the 'uncertainty' created by the bill's provisions. The Motor Trades Association of Australia, notably, dismissed these fears in the following terms:

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13 See Mr David Bell, *Proof Committee Hansard*, 26 August 2009, p. 35.

14 Mr John Colvin, *Proof Committee Hansard*, 26 August 2009, p. 10.

15 *Submission 11*, p. 3.

16 Mr David Bell, *Proof Committee Hansard*, 26 August 2006, p. 34.

> I am familiar, having been in my position for a long time, with the fact that every amendment to the Trade Practices Act in the way of addressing issues for small business that has been proposed during my long service has involved a Chicken Little recitation from big business that the sky will fall in, that we will suddenly be overwhelmed by a tsunami of lack of confidence, that no bank will lend to anyone—and, strangely, the sun keeps coming up, the money keeps being lent, and business and life go on. So even in the wake, one hopes, of a global financial crisis, I am not convinced that much was going to happen to uncertainty. The fact of the matter is that every banker lives with the uncertainty on every loan always.[17]

3.19 The Insurance Law Service was also dismissive of the 'uncertainty' argument. Ms Katherine Lane, a principal solicitor with the service, told the committee:

> This uncertainty thing again is a furphy. First of all, the legislation has been brought in in the UK. The whole world did not collapse. The UK did not go into receivership…It has been brought in in Victoria and again it did not fall apart. It has made some really useful changes to certain contracts with telecommunication companies that were completely unfair…Regarding this uncertainty thing, I have uncertainty from a consumer movement point of view, too. I do not know whether this is going to achieve its outcomes, and how can we know? We do not have crystal balls. But what we do is put in the best effort we can to make sure that the legislation makes sense. If there is a precedent overseas, that helps; that is great. We want to achieve a certain goal, which is making sure standard form contracts are fair. What is the uncertainty in that?[18]

17 Mr Michael Delaney, *Proof Committee Hansard*, 21 August 2009, p. 19.

18 Ms Katherine Lane, *Proof Committee Hansard*, 26 August 2009, p. 48.

Chapter 4

Defining 'unfair' contract terms

4.1 What is an 'unfair' consumer contract term and how do the bill's provisions differ from the 'unconscionable conduct' provisions in section 51AB of the Trade Practices Act? This chapter explores both these issues.

Void and unfair terms

4.2 Subsection 2(1) of the bill states that a term of a consumer contract is void if:

- the term is unfair; and
- the contract is in a standard form contract.

4.3 In the context of the ASIC Act, a term of a consumer contract is void if:

- the term is unfair; and
- the contract is in a standard form contract; and
- the contract is a financial product or a contract for the supply, or possible supply, of services that are financial services.[1]

4.4 Subsection 3(1) of the bill provides that a term in a consumer contract is unfair if the term:

(a) would cause a significant imbalance in the parties' rights and obligations under the standard form contract; and

(b) is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term.[2]

4.5 If the court finds that a term is unfair, and therefore void, it is treated as if it never existed.[3] Subsection 2(2) of the bill states that the contract continues to bind the parties if it is capable of operating without the unfair term.

The bill's presumptions

4.6 These sections defining 'unfair' and 'void' contract terms carry two important presumptions. The first is that a contract term is not reasonably necessary to protect the legitimate interests of the party advantaged by the term (subsection 3(4)). The second is that the contract is in a standard form (subsection 7(1)).

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1 *Explanatory Memorandum*, p. 13 and p. 28.

2 Subsection 3(1)

3 *Explanatory Memorandum*, p. 21.

4.7 Subsection 3(4) of the bill states that:

> …a term of a consumer contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.

4.8 The Minister has explained this onus of proof in the following way:

> First, it will be for the party advantaged by a term—usually a business—to rebut the presumption that the term is not reasonably necessary in order to protect its legitimate interests. Second, it will be for a party that asserts that a contract which is the subject of a challenge is not in a standard form—again, usually a business—to rebut the presumption that the contract is in standard form. In both cases, there are issues that the business will know and it will be able to introduce the evidence it considers most appropriate to the question. It would be a huge impediment for an individual claimant to prove either of these matters, as they are unlikely to be able to bring evidence before a court without disproportionate effort and expense. A regulator would need to use intrusive and expensive coercive information-gathering powers to obtain the required information to bring a case.[4]

4.9 Subsection 7(1) of the bill states:

> If a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise.

Views

4.10 Several submitters expressed concern at these two presumptions. For example, Colonial First State Property Management (CFSPM), a member of the Shopping Centre Council of Australia, criticised the draft bill for allowing:

> …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.[5]

4.11 The Australian Bankers' Association commented in its submission to the draft legislation in May that the bill wrongly places the onus of proof with the respondent.

4.12 The National Australia Bank (NAB) argued that the bill's automatic presumption of unfairness is not present in existing unfair contracts legislation

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4 The Hon. Dr Craig Emerson, Second Reading Speech, *House of Representatives Hansard*, 24 June 2009, p. 6984.

5 *Submission 11*, p. 3,

overseas. It thereby claimed that the provision is 'untested and undermines fundamental principles of contract law'. Instead, the NAB recommended that the bill should have a 'positive test of unfairness' which specifies a 'materiality threshold'.[6]

4.13 The NAB also criticised the bill's reference to 'legitimate interests' for its lack of clarity. It argued that without clarification of these words:

> …the application of the presumption that a term is not reasonably necessary to protect legitimate interests unless proved otherwise destabilises the freedom of commerce and certainty of contract required for efficient commerce.[7]

4.14 The NAB recommended that the bill specify those considerations which can determine a party's legitimate interests, such as 'accommodating technological change'.[8] The ABA also recommended that the bill should provide guidance on the meaning of 'legitimate interests'.[9]

4.15 In its submission to this inquiry, the BCA reiterated the concerns it expressed in its submission in May on the draft provisions:

> The draft proposals reverse the onus of proof. This represents a significant departure from traditional standards of proof in contractual proceedings and therefore requires further consideration, including cost-benefit analysis. A cost benefit analysis should take into account experiences with the operation of a reverse onus of proof such as that in the UK. One commentator has suggested it "has been an area that has created uncertainty in the UK and will be repeated in Australia".[10]

4.16 Mr Ian Tonking SC argued that the bill's approach is flawed. He wrote in his submission that the bill 'appears to be based on the premise that freedom of contract ought to be retained and protected except to the extent that such freedom, because of inequality of bargaining power or other reasons, leads to unfairness in particular cases'. But in practice, the average consumer may either accept the terms of the contract or decline the opportunity; 'the notion that freedom of contract has any scope in this context is fanciful'.[11] Further, he argued, the bill adopts a case by case basis to determine what is unfair.

4.17 Not all the committee's evidence was critical of the presumptions, however. The Consumer Action Law Centre argued that subsection 3(4) is 'sensible and

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6 National Australia Bank, *Submission 30*, p. 4.

7 National Australia Bank, *Submission 30*, p. 3.

8 National Australia Bank, *Submission 30*, p. 3.

9 Australian Bankers' Association, *Submission 32*, p. 6.

10 Business Council of Australia, *Submission 20*, p. 4. The BCA was citing George Raitt, 'Unfair contracts bill repeats UK problems', *Australian Financial Review*, 23 July 2009, p. 63.

11 *Submission 4*, p. 4.

practical' given it is the party seeking to rely on the term that is in the best position to produce evidence about the term's nature.[12] Similarly, it argued that subsection 7(1) 'is appropriate as it is that party which is in the best position to produce evidence about the way in which it contracts with other consumers'.[13]

Standard form contracts

4.18 As noted, for a contract term to be considered void, the contract must be a standard form (or non-negotiated) contract. Subsection 7(1) of the bill states that if a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party (typically the respondent) to the proceeding proves otherwise.[14]

4.19 The EM states that if a party wishes to argue that a contract has been negotiated and is not in a standard form (and is therefore not subject to the unfair contract term provisions), then the rebuttable presumption requires the party that presents the contract to show that the contract is not a standard form contract. This reflects the fact that the claimant will usually only have evidence of their own contract, and that the respondent is best placed to bring evidence regarding the nature of the contracts it uses.[15]

4.20 Subsection 7(2) of the bill states that in determining whether a contract is a standard form contract, the court may take into account such matters as it thinks relevant but must take into account:

- whether one of the parties has all or most of the bargaining power relating to the transaction;
- whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;
- whether another party was, in effect, required either to accept or reject the terms of the contract (other than the terms referred to in section 5(1)) in the form in which they were presented;
- whether another party was given an effective opportunity to negotiate the terms of the contract that were not the terms referred to in section 5(1);
- whether the terms of the contract (other than the terms referred to in section 5(1)) take into account the specific characteristics of another party or the particular transaction; and
- any other matter prescribed by the regulations.

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12 Consumer Action Law Centre, *Submission 19*, p. 5.

13 Consumer Action Law Centre, *Submission 19*, p. 9.

14 Subsection 7(1)

15 *Explanatory Memorandum*, p. 29.

4.21 The relevant Minister may add to this list through regulations.[16]

Views

4.22 The Consumer Action Law Centre supports the bill's non-prescriptive definition of a standard form contract. It argued that a more prescriptive definition would 'simply provide opportunities for avoidance'.[17]

4.23 Others saw this lack of definition as problematic. Mr Tonking SC argued in his submission that:

> …s.7 includes a rebuttable presumption that any contract asserted by a party to be a standard form contract is a standard form contract unless another party proves otherwise. While the question whether a particular term is a prohibited term may in many instances be beyond dispute, the question whether a particular contract is a standard form contract may well be a matter of dispute.[18]

4.24 In similar vein, the property manager CFSPM has noted that the bill fails to define a standard form contract 'and gives no guidance on how much negotiation over terms must occur before a contract is not considered 'standard'. It explained that retail leases are not 'standard form contracts' and to suggest that they are is 'patently wrong'. Nonetheless, under the provisions of the bill, property managers like CFSPM would face the additional expense of proving that a contract is not 'standard' 'at the whim of a judge'.[19]

4.25 The NAB suggested that the government should delete subsection 7(1) of the bill, and should define a standard form contract in the following terms:

> …contracts that substantially comprise terms and conditions similar to contracts entered into by the supplier for similar goods and services and which meet the elements of a standard form contract set out in section 7(2).[20]

4.26 ABACUS has argued that the bill should not only exclude terms that are part of non-standard form contracts, but also to exclude negotiated contract terms. As it wrote in its submission:

> …if there has been a genuine negotiation of a particular term, a party to that negotiation should not be able to avoid that term just because, taken

16 *Explanatory Memorandum*, p. 30.

17 Consumer Action Law Centre, *Submission 19*, p. 9. The Centre also argued that there is 'little reason' why the bill's coverage could not be extended to cover negotiated contracts.

18 *Submission 4*, p. 7.

19 *Submission 11*, p. 4.

20 National Australia Bank, *Submission 30*, p. 4.

together with other terms, the resulting contract comes within the legislative definition of a standard form contract.[21]

Examples of unfair terms

4.27 Section 4 of the bill provides 14 examples of 'the kinds of terms of a consumer contract that may be unfair'. They are:

(c) a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;

(d) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;

(e) a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;

(f) a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;

(g) a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;

(h) a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;

(i) a term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract;

(j) a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning;

(k) a term that limits, or has the effect of limiting, one party's vicarious liability for its agents;

(l) a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent;

(m) a term that limits, or has the effect of limiting, one party's right to sue another party;

(n) a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract;

(o) a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract; and

21 ABACUS, *Submission 33*, p. 7.

(p) a term of a kind, or a term that has an effect of a kind, prescribed by the regulations.

4.28 The EM states that while these examples give statutory guidance on the types of terms which may be regarded as being of concern, 'they do not prohibit the use of those terms, nor do they create a presumption that those terms are unfair'.[22] It is a 'non-exhaustive, indicative' list of the types of terms that may be considered 'unfair'. As the Minister noted in his Second Reading Speech:

> The use of 'grey listed' terms may be reasonable. And any consideration of a 'grey listed' term is subject to the unfair terms test. And, indeed, the consultation paper the government issued on 11 May 2009 acknowledges that businesses may need to do things like assign contracts or vary agreements.[23]

4.29 The EM notes that the examples given in paragraphs (a), (b), (d), (e), (f), (g) and (h) are examples of terms that allow a party to make changes to key elements of a contract on a unilateral basis. However, this does not prohibit unilateral variation terms, not does it create a presumption that these terms are unfair.[24]

4.30 Paragraphs (i), (k), (l), and (m) are examples of types of terms that have the effect of limiting the rights of the party to whom the consumer is presented.

4.31 Paragraph (c) refers to terms that penalise, or have the effect of penalising, one party for a breach or termination of the contract.

4.32 Paragraph (j) refers to terms that allow for a party to assign the contract to the detriment of the other party, without the other party's consent.[25] This example does not prohibit the use of such clauses, however.

Views

4.33 The Consumer Action Law Centre supported the bill's approach of a general definition of an unfair contract in section 3 and an indicative and non-exhaustive list of examples in section 4. It argued that:

> This two-fold approach to defining an unfair term is consistent with the models of successful unfair contract terms laws enacted in other jurisdictions, and reflects best practice in consumer protection regulation by following a "general-plus-specific" model that allows for flexibility to address changing conditions or practices through use of a general definition, but also incorporates clarity and certainty in relation to known

22 *Explanatory Memorandum*, p. 23.

23 The Hon. Dr Craig Emerson, Second Reading Speech, *House of Representatives Hansard*, 24 June 2009, p. 6984.

24 *Explanatory Memorandum*, p. 23.

25 *Explanatory Memorandum*, p. 24.

> current problems as well as guidance in the interpretation of the general provision.[26]

4.34 Some submitters argue that these examples should be taken out of the bill. GE, for example, is concerned that the examples may be misinterpreted as a more proscriptive list. The NAB warned against amending the list of examples by regulation arguing that without due consultation, there will be further uncertainty about what terms are fair and unfair.[27] Similarly, the BCA argued that:

> The inclusion of a list of examples of unfair contract terms is…inappropriate as each of the examples can be interpreted differently and may themselves create a host of new uncertainties. Additionally, as one commentator states, the result of a list approach *"is that normal provisions, appropriate in many circumstances, are at risk of being held to be unfair"*.[28]

'Unconscionable conduct' and 'unfair contract terms'

4.35 The committee discussed the issue of the extent of overlap between the existing provisions relating to 'unconscionable conduct' in the TPA and the provisions of the bill relating to unfair contract terms. The discussion took place in two contexts:

- firstly, the need for the unfair contract terms provisions in the bill to bolster consumer protection, given the lack of protection afforded under the unconscionable conduct provisions; and
- secondly, the extent to which the unfair contract terms provisions in the bill are essentially doubling up on the TPA's unconscionable conduct provisions, and in so doing, creating greater uncertainty for business.

Treasury's view

4.36 Treasury told the committee that the TPA's unconscionable conduct provisions do not relate directly to questions of contract. Rather:

> …they are directed towards matters of conduct, which can encompass the nature of contracts and the way in which contracts are entered into by parties, including businesses.[29]

4.37 Treasury explained that unconscionability might be characterised as a subset of unfairness:

> The concept of unconscionability in the Trade Practices Act relates to the common-law or equitable notion of unconscionability that exists generally,

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26 Consumer Action Law Centre, *Submission 19*, p. 5.

27 National Australia Bank, *Submission 30*, p. 6.

28 Business Council of Australia, *Submission 20*, p. 4. The BCA was citing George Raitt, 'Unfair contracts bill repeats UK problems', *Australian Financial Review*, 23 July 2009, p. 63.

29 Mr Simon Writer, *Proof Committee Hansard*, 21 August 2009, p. 2.

> and does not seek to define it in any particular way beyond that concept which has been developed by the courts over many centuries, whereas 'unfair contract terms' relates really to a wider consideration of the nature of a term entered into by parties, and the bill sets out a definition of unfairness in this context, which is that there is a significant balance between the parties' rights and obligations arising out of the contract, and the term is not reasonably necessary in order to protect the legitimate interests of the party that would be advantaged by the term. So it does not simply pick up on the general notion of unfairness but seeks to provide some shape to it on the face of the legislation.[30]

The need for unfair contract term provisions

4.38 In expressing their disappointment that the bill does not address business-to-business unfair contract terms (see chapter 5), some submitters drew the committee's attention to the inadequacy of the TPA's unconscionable conduct provisions.

4.39 Associate Professor Zumbo told the committee he doubted whether the government's reviews of the unconscionable conduct provisions of the TPA and the Franchising Code of Conduct would offer an adequate response to protecting small businesses from unfair contract terms. He noted that both reviews focussed on the narrow standard of 'procedural unconscionability'—concerned with conduct surrounding the contract—rather than 'substantive unconscionability', which is solely concerned with the unfairness of the contract terms. Progress on this front, he argued, cannot be considered a substitute for the 'need to deal with the issue of substantive unconscionability through the inclusion of small businesses in the unfair contract terms'.[31]

4.40 In this context, Associate Professor Zumbo supported section 3(1) of the bill and rejected any claim that this basis for defining 'unfair' is nebulous.[32] He told the committee that in the bill:

> We have a definition of what is unfair, which is a significant imbalance between the rights and obligations of the parties, and we have the term 'not reasonably necessary to protect' big business. That becomes the focal point and the fact that you define it in those terms removes all the elements of doubt that that there may be as to what unfairness may mean if you simply say, 'You shall not engage in unfair conduct'. This definition of unfairness in the unfair contract terms regime is a test that sort of mirrors the Victorian test and the UK test and it works well in those jurisdictions.[33]

4.41 Mr Delaney of the MTAA told the committee that:

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30 Mr Simon Writer, *Proof Committee Hansard*, 21 August 2009, p. 2.

31 Associate Professor Frank Zumbo, *Submission 12*, p. 5.

32 As chapter 6 notes, Associate Professor Zumbo does have difficulty with the bill's 'detriment' and 'transparency' tests in subsections 3(2) and 3(3).

33 Associate Professor Frank Zumbo, *Proof Committee Hansard*, 26 August 2009, p. 31.

> The unconscionable conduct provisions have been entirely disappointing, and that is why the government is looking at them. It was an election undertaking, which we were grateful for. Mr Samuel sees it somewhat differently—that over the 10 years or so that they have been in the act the commission has taken every effort to pursue them. There have been a couple of what were thought to be landmark cases, but they have subsequently been entirely confined to circumstances that have not been replicated otherwise. To be fair, there has been some behaviour change, but what the parliament thought it would secure by those changes has just not appeared.[34]

4.42 Ms Ann Dalton of the Pharmacy Guild argued that:

> …the protection offered by the unconscionable conduct provisions currently contained in the Trade Practices Act are illusory, and for that reason was pleased that the Australian Consumer Law at least proposed to cover unfair standard form business-to-business contracts when it was first circulated. Like many other small business groups, such as the Motor Trades Association of Australia, the guild is disappointed that the provision was removed at the last moment. The guild supports the view of the non-government senators expressed in the Birdsville amendments inquiry conducted by this committee, in which they called for the Victorian legislative framework for consumer transactions to be extended to cover business-to-business relationships involving small business.[35]

4.43 The Pharmacy Guild recommended removing the unconscionable conduct provisions of the TPA and framing the Australian Consumer Law 'in a manner similar to section 12 of the Independent Contractors Act'. This section permits reviews of contracts that are generally unfair or harsh and uses the term 'unfair' without any statutory extension.[36]

4.44 Mr Kerry Corke, a consultant to the Pharmacy Guild, told the committee that the concept of unconscionable conduct:

> …as a New South Wales Court of Appeal case called World Best Holdings, discussed in our submission, notes, the concept of what is unfair and what is unconscionable 'overlaps but is not quite the same'. The term 'unfair' is generally taken by that case law to be a lower threshold than unconscionability.[37]

4.45 Mr Corke referred to the case of *Keldote Pty Ltd v Riteway Transport*, the first case of the Federal Magistrates Court that considered the concept of unfair contract in the field of independent contractors. He noted that in this case:

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34 Mr Michael Delaney, *Proof Committee Hansard*, 21 August 2009, p. 20.

35 Ms Ann Dalton, *Proof Committee Hansard*, 21 August 2009, p. 13.

36 Mr Kerry Corke, *Proof Committee Hansard*, 21 August 2009, p. 14.

37 Mr Kerry Corke, *Proof Committee Hansard*, 21 August 2009, p. 14.

> …the test of unfairness involves the common sense approach characteristic of the ordinary jury member by applying standards providing a proper balance or division of advantage or disadvantage between the parties who have made the contract.
>
> We think that probably puts best the reason why a concept of unfairness as a threshold to review an unfair contract is preferable to the higher threshold of unconscionable conduct, although it has to be said at the end of the day it all is a question of fact and degree.[38]

4.46 The Insurance Law Service gave first-hand evidence of the need for a lower threshold than the current unconscionable conduct provisions in the TPA. Ms Katherine Lane gave the example of standard form banking contract relating to fixed rates:

> One person rang up the bank and said, 'I'll fix my rate' and they did not even get consent from the other partner. When the other person said, 'Why were they allowed to fix the rate without my consent?' they were told: 'We've changed the terms of the contract on the unilateral change clause.'…
>
> Unfortunately, for the last many years, even though we have unconscionable conduct provisions and all of that, they have not worked for this type of problem. If I went to court I would lose if I was arguing unfair term. I have been unable to do anything with them and so I have had to advise consumer after consumer after consumer that yes, it is unfair—in fact, this is one of my mantras. I say, 'Yes, that's unfair, but can we do anything about it legally? No. But, by the way, they're talking about bringing in legislation.' I receive lots of calls where people say, 'This is unfair.' Whether it will be or not when we look at it in the light of day is a different story—but do I get thousands of calls from consumers saying things are unfair?[39]

38 Mr Kerry Corke, *Proof Committee Hansard*, 21 August 2009, p. 16.

39 Ms Katherine Lane, *Proof Committee Hansard*, 26 August 2009, p. 48.

Chapter 5

The scope of the bill: business-to-consumer unfair contract terms

5.1 One of the key areas of conjecture in this legislation is the exemption of business-to-business unfair contract terms. This chapter details the arguments for and against this exclusion.

The scope of the bill

5.2 The scope of the bill's unfair contract terms provisions is restricted to business-to-consumer transactions. The bill applies only to consumer contracts in which at least one of the parties is an individual. Contracts between businesses are therefore excluded from the provisions, except in respect of 'sole traders'.[1]

5.3 The Minister for Competition Policy and Consumer Affairs, the Hon. Dr Craig Emerson, explained in the Second Reading Speech that the government is currently reviewing both the unconscionable conduct provisions of the *Trade Practices Act* and the Franchising Code of Conduct. This follows the tabling of two parliamentary committee reports in December 2008: one by this committee into the 'need, scope and content' of a statutory definition of unconscionable conduct in section 51AC of the TPA; the other by the Parliamentary Joint Committee on Corporations and Financial Services into the Franchising Code of Conduct.[2]

Opposition to the exemption of business-to-business contracts

5.4 Several submitters expressed their disappointment at the bill's omission of business-to-business contracts from the unfair contract terms provisions.

5.5 The Association of Consulting Engineers Australia asked that this committee recommend that the government reinstate the bill's application to business-to-business contracts.[3] The Pharmacy Guild of Australia also recommended that business-to-business contracts be covered in the ACL as proposed in the government's May 2009 Discussion Paper.[4]

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1 *Explanatory Memorandum*, p. 17.

2 http://www.aph.gov.au/Senate/committee/economics_ctte/tpa_unconscionable_08/report/report.pdf http://www.aph.gov.au/Senate/committee/corporations_ctte/franchising/report/index.htm See also, Dr Kennedy, *Proof Committee Hansard*, 21 August 2009, p. 5.

3 Association of Consulting Engineers Australia, *Submission 31*, p. 2.

4 Pharmacy Guild of Australia, *Submission 42*, p. 10.

5.6 The Queensland Newsagents' Federation and the Newsagents Association of New South Wales and the ACT expressed in separate submissions to this inquiry their disappointment that business-to-business contracts were excluded from the legislation. They both noted that small business has long campaigned for action on the use of standard form contracts which may be unfair to small business. They asked the committee to recommend that business-to-business contracts 'be put back into the bill or an associated bill'.[5] The Australian Newsagents' Federation was a little more circumspect:

> Whilst the ANF was initially disappointed with the removal of the business-to-business provisions from the amendment, we are greatly encouraged by the Government's announcement to consider the unfair contract terms business-to-business provisions pending current inquiries into the Franchising Code of Conduct and Unconscionable Conduct provisions of the TPA.[6]

5.7 The Motor Trades Association of Australia (MTAA) has noted that the majority of retail motor traders operate under agreements which contain 'certain assignment clauses', such as are listed in section 4 of the bill (see below).[7] The MTAA's Executive Director, Mr Michael Delaney, told the committee that the Association has:

> …for years has argued that legislation should intervene to set a minimum standard of conduct to protect parties to franchise agreements. The inclusion of a business-to-business unfair contract terms of provision would go some way to introducing a behavioural standard. In many of their business relationships retail motor traders have fewer rights of redress against larger stakeholders, such as franchisors, acquirers of goods and services, other suppliers and so on for harsh and unfair behaviour than do consumers against retailers and manufacturers. That is, contracts are presented as take it or leave it standard form agreements. There is often little or no negotiation on the terms of the contract without which the business can often not operate and many contain terms which are detrimental to the small business and which are in excess of what is required to protect the normal commercial rights of the larger party.[8]

5.8 The Council of Small Business of Australia (COSBOA) accepted the removal of business-to-business contracts from the bill provided that section 50 of the TPA is amended to include these contracts. COSBOA also recommended that all government

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5 Queensland Newsagents Federation, *Submission 5*, pp. 1–2; Newsagents Association of NSW and the ACT, *Submission 41*, p. 2.

6 Australian Newsagents' Federation, *Submission 17*, p. 2.

7 Motor Trades Association of Australia, *Submission 15*, p. 3.

8 Mr Michael Delaney, *Proof Committee Hansard*, 21 August 2009, p. 18.

procurement and general contracting should allow their suppliers to negotiate contract terms without this being viewed as a non-conforming contract.[9]

5.9 Associate Professor Frank Zumbo also expressed disappointment with the bill's exclusion of small businesses from the unfair contracts proposals. He gave in his submission a brief chronology of the government's position in the lead-up to the bill's introduction. The draft legislation had included protections for small businesses. As late as June 2009, the then Minister for Competition Policy, the Hon. Chris Bowen, announced that there would be a upfront price cap of $2 million on the size of transactions that would be subject to the unfair contract terms ban. Later that month, however, the new Minister narrowed the provisions to business-to-consumer contracts.[10]

Support for the exemption of business-to-business contracts

5.10 Other submitters argued that the government had got it right by omitting business-to-business contracts from the bill. The Shopping Centre Council of Australia (SCCA) gave several reasons why the bill should not include business-to-business contracts in the regulation of unfair contract terms:

- the Joint Communiqué of the Ministerial Council on Consumer Affairs Meeting of 15 August 2008 and COAG's Communiqué of 2 October 2008 made no suggestion that the national consumer law would be extended to business-to-business contracts;
- although the bill purports to be based on the United Kingdom's *Unfair Terms in Consumer Contracts Regulations 1999*, these Regulations specifically exclude terms in business-to-business agreements;
- no Australian State or Territory regulates business-to-business contracts in the manner proposed by the draft legislation;
- extending the scope of the bill to regulate business-to-business contracts would directly contradict the Government's commitment to reduce unnecessary business red tape and adopt best-practice regulation;
- an expanded bill would 'confer immense power' on the ACCC and is likely to require a significant increase in the resources available to the ACCC and, in consequence be a significant cost to the taxpayer;
- an expanded bill would impose 'significant costs' on Australian businesses, making it likely that the courts would be 'choked with claims by business litigants…seeking to be relieved of their contractual commitments';
- an expanded bill would be 'a direct assault' on long established commercial principles such as freedom of contracts;

9 Council of Small Business of Australia, *Submission 34*, p. 2.

10 Associate Professor Frank Zumbo, *Submission 12*, pp. 3–4.

- businesses, unlike consumers, have sufficient knowledge of the contracting subject matter, have access to legal and other specialist advice and have sufficient bargaining power to resolve these matters without intervention by government;
- if expanded to include business-to-business transactions, the bill would not take into account 'the context of the contract negotiations between businesses' and 'the circumstances where a business compromises and consciously accepts less favourable terms in one area in exchange for more favourable terms in another area'; and
- standard form contracts in business-to-business transactions should be encouraged, not discouraged.[11]

5.11 The Trade Practices Committee of the Law Council of Australia wrote in its submission that it:

> …welcomes the Government's recent decision to restrict the regime to consumers. The 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.[12]

5.12 The Business Council of Australia (BCA) lent its support to the bill's exclusion of business-to-business contracts in the following terms:

> It is also important to recognise that small businesses would also be adversely affected if business-to-business standard form contractual arrangements were included in this regime. Many large businesses deal with hundreds of small businesses and use standard form contracts to minimise the cost of those transactions. Should business to business standard form contracts be included it will likely require contracts to be individually negotiated, and in many cases the cost of such negotiations will not be justified for some smaller contracts. This will effectively eliminate some smaller business-to-business standard form contracts from the market.[13]

5.13 GE has argued that while the bill exempts business-to-business contracts, any future attempt to include them would be 'inappropriate'. It argued that there is no evidence to suggest that unfair contract terms are prevalent in business-to-business contracts to warrant the application of similar legislation.[14]

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11 Shopping Centre Council of Australia, *Submission 9*, pp. 2–4. See also Colonial First State Property Management, *Submission 11*, p. 4–5

12 Law Council of Australia, *Submission 47*, pp. 1–2.

13 Business Council of Australia, *Submission 20*, p. 2.

14 GE, *Submission 26*, p. 2.

What is a consumer contract?

5.14 Subsection 2(3) of the bill defines a consumer contract as a contract for the supply of goods or services or a sale or grant of an interest in land to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.[15]

Views

5.15 The committee received some views critical of the bill's definition of a 'consumer contract'. The National Australia Bank (NAB) argued in its submission that the definition would benefit from a presumption to ensure certainty of whether a standard form contract is regulated or not at the time of contracting. By way of example, it noted that if the subject matter of the agreement was of a commercial nature or the party taking the contract is a business entity, there should be a presumption that it is a business contract and therefore not regulated.[16]

5.16 The Australian Bankers' Association (ABA) has criticised section 2(3) of the bill for defining a consumer contract by focussing on the purpose of the actual acquisition. It argues that the focus on 'personal, domestic or household use or consumption' is 'subjective in nature and will be difficult to implement'.[17] The ABA noted that it will often be difficult for a financial institution to be aware of the purpose for which a customer has acquired a product or service. Accordingly, it recommended that the definition of consumer contract should be similar to that used in Victoria, requiring that both the purpose of the acquisition and the nature of the product be taken into account.[18]

5.17 The Law Council of Australia argued that the definition of 'consumer' in section 4B of the TPA would offer a more objective test of a 'consumer contract' than the approach adopted in the bill. Section 4B of the TPA focuses on the nature of the good or service being supplied and asking whether it is 'of a kind ordinarily acquired

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15 *Explanatory Memorandum*, p. 13. In the ASIC Act, a consumer contract is a contract at least one of the parties to which is an individual whose acquisition of what is supplied under the contract is wholly or predominantly an acquisition for personal, domestic or household use or consumption.

16 National Australia Bank, *Submission 30*, p. 2.

17 Australian Bankers' Association, *Submission 32*, p. 2.

18 Australian Bankers' Association, *Submission 32*, p. 2.

for personal, domestic or household use or consumption'.[19] The bill, on the other hand, inquires into 'the subjective purpose for which an individual acquired the good or service'.[20] The Law Council reasoned that:

> In dealing with standard form contracts and many consumers, businesses are not going to know the subjective intent of the customer in acquiring the goods. We think that the 4B definition is a better one. It has been around a long time, businesses are used to it and it will then be consistent.[21]

Committee view

5.18 The Minister for Competition Policy and Consumer Affairs flagged in the Second Reading Speech of the bill that the issue of business-to-business unfair contract terms 'will—no doubt—be further considered as part of [this committee's] process'.[22] This inquiry has indeed gathered considerable evidence supporting the application of unfair contract terms laws to protect small businesses in their dealings with businesses with greater bargaining power and market power. The committee believes it is important that the government responds to these concerns after completing its reviews of this committee's December 2008 inquiry into section 51AC of the Trade Practices Act and the Joint Committee on Corporations and Financial Services' inquiry into the Franchising Code of Conduct.

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19 Section 4B (1a) of the *Trade Practices Act* states that 'a person shall be taken to have acquired particular goods as a consumer if, and only if:(i) the price of the goods did not exceed the prescribed amount ($40,000); or (ii) where that price exceeded the prescribed amount—the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption or the goods consisted of a commercial road vehicle; and the person did not acquire the goods, or hold himself or herself out as acquiring the goods, for the purpose of re-supply or for the purpose of using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land…'

20 Law Council of Australia, *Submission 37*, p. 2.

21 Ms Amanda Bodger, *Proof Committee Hansard*, 21 August 2009, p. 35.

22 The Hon. Dr Craig Emerson, Second Reading Speech, *House of Representatives Hansard*, 24 June 2009, p. 6983.

Chapter 6

The issues of 'detriment' and 'transparency'

6.1 This chapter looks at two issues that the courts must take into account in determining whether a consumer contract is unfair: the extent to which a term would cause 'detriment'; and the extent to which a term is 'transparent'.

Factors that the court must take into account

6.2 Subsection 3(2) of the bill provides that while a Court may take into account any matters it considers relevant in finding that a consumer contract is unfair, the Court must take into account:

(a) the extent to which it would cause detriment, or a substantial likelihood of detriment (whether financial or otherwise) to a party if the term was to be applied or relied on;

(b) the extent to which a term is transparent; and

(c) the contract as a whole.

6.3 Subsection 3(3) of the bill states that a term is transparent if the term is:

(a) expressed in reasonably plain language; and

(b) legible; and

(c) presented clearly; and

(d) readily available to any party affected by the term.

Detriment (financial or otherwise), or a substantial likelihood of detriment

6.4 On the issue of 'detriment' (subsection 3(2a)), the Explanatory Memorandum (EM) states that the court is required to have regard to whether the term subject to challenge has caused detriment to consumers (individually or as a class), or a substantial likelihood thereof.

6.5 In terms of the bill's reference to 'a substantial likelihood of detriment', the EM states:

> By requiring evidence of a 'substantial likelihood of detriment', the provision requires more than a hypothetical case to be made out by the claimant. In this context, a claimant does not need to have proof of having suffered actual detriment, but that there is a substantial likelihood of detriment relating to the application of or reliance on the term.
>
> In this regard, a term does not need to be enforced in order to be unfair, although the possibility of such enforcement may impact on the decisions

> made by the party that would be disadvantaged by the term's practical effect, to that party's detriment.[1]

6.6 Subsection 3(2a) also states that detriment is not limited to financial detriment. The EM notes: 'This is designed to allow the Court to consider situations where there may be other forms of detriment that have affected or may affect the party disadvantaged by the practical effect of the term'.

6.7 If a court finds that a term is unfair and there is only a substantial likelihood of detriment arising from the application of or reliance on that term, then it is likely that the remedies available would be limited to a declaration that the term is an unfair term and an injunction preventing the party advantaged by it applying or relying on it, or purporting to do so.[2]

Views

6.8 Recall from chapter 2 that the Productivity Commission had recommended a provision referring to 'material detriment' to consumers. Several submitters were critical of subsection 3(2a) of the bill on the basis that its broader definition of 'detriment' will create considerable uncertainty for all parties.

A substantial likelihood of detriment

6.9 The Law Council of Australia was among several submitters expressing concern at the bill's reference to 'a substantial likelihood of detriment'. It noted, and concurred with, the Productivity Commission's finding that if a term is unfair, usually there is no detriment caused by it; it is only when the term is going to be implemented and relied on.[3]

6.10 The National Australia Bank (NAB) also criticised the bill for straying from the Productivity Commission Review's yardstick of 'material detriment'. It argued that the bill's reference to 'a substantial likelihood of detriment' creates 'an unacceptable degree of risk and uncertainty for business and consumers'. The NAB recommended that the definition be amended to require proof of material detriment.[4]

6.11 The Australian Bankers' Association (ABA) has expressed its concern that 'there is no requirement that a claimant suffer detriment in order for a term to be found to be unfair or for redress to be available'. It also argued that a term should only be unfair where it causes actual material detriment.[5]

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1 *Explanatory Memorandum*, p. 20. See also Dr Steven Kennedy, *Proof Committee Hansard*, 21 August 2009, pp. 8–9.

2 *Explanatory Memorandum*, p. 20.

3 Ms Amanda Bodger, *Proof Committee Hansard*, 21 August 2009, p. 33.

4 National Australia Bank, *Submission 30*, p. 4.

5 Australian Bankers' Association, *Submission 32*, p. 5.

6.12 The Association of Building Societies and Credit Unions (ABACUS) argued in both its submission and in verbal evidence to the committee that the concept of detriment should play a greater role in the meaning and the test of unfairness than the bill would have. To this end, one suggestion it made was that the courts should be required to take into account the consumer benefit from a contract term in determining whether or not it is unfair.[6]

6.13 Mr Mark Degotardi, Head of Public Affairs at ABACUS, argued that if the bill's test is not refined to actual consumer detriment:

> The risk that we face and the uncertainty that we must consider as a risk is that under the proposed regime anyone can bring an unfairness claim, and that means that anyone can simply say, 'I think there is a substantial likelihood of detriment.' Whether that case is subsequently proved or not, the cost for us in either defending or dealing with those claims on the uncertainty around our contracts, many of which actually have consumer benefits—we use standard form contracts.[7]

6.14 A different view was put by Associate Professor Frank Zumbo. He argued that as 'detriment' is a possible consequence of unfairness, it is only relevant to questions of damages or compensation that may flow from an unfair contract term. It is not relevant to considering whether or not the contract term is unfair.[8]

6.15 Significantly, this distinction has been acknowledged by Treasury. Mr Writer explained that the concept of detriment in the bill:

> …is purely a remedy. It does not determine unfairness. It goes to the question of what redress might be provided. The definition of 'unfair' does not refer to the question of detriment or make the existence of detriment determinative of that unfairness.[9]

Non financial detriment

6.16 The committee also discussed the issue of non-financial detriment. Treasury told the committee that the concept of non-financial detriment is 'not a particularly difficult concept to define'. Treasury provided the following example:

> If I as a consumer…have a contract with somebody to deliver a sofa to my house and I expect and am given the reasonable expectation that that might be delivered in two weeks and it takes eight, the detriment I might have suffered there is the lack of a sofa for six weeks. I am not necessarily going to quantify that in a financial sense with the business concerned, but the detriment is there still in that I have been compelled to sit on the floor or on

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6 ABACUS, *Submission 33*, p. 4.

7 Mr Mark Degotardi, *Proof Committee Hansard*, 21 August 2009, p. 25.

8 Associate Professor Frank Zumbo, *Submission 12*, p. 8.

9 Mr Simon Writer, Manager, Consumer Policy Framework Unit, *Proof Committee Hansard*, 21 August 2009, p. 6.

> my broken sofa. The provisions are simply designed to give recognition to the fact that a consumer may not want a payment. They may want recognition of that detriment. They may want an apology. They may want to some other form of recompense.[10]

6.17 Treasury explained that:

> …the point of the legislation is to require courts not to arbitrate that question but simply to have regard to the fact that I may have been inconvenienced in a way that is not necessarily easy to place a cost on…[11]

6.18 Treasury told the committee that there will be occasions when, although the customer is not paying a price when they are inconvenienced, it clearly has a value. He added:

> So when we say it is 'non-financial' we are simply saying it is not an amount of money that can be transferred, but certainly your time is valuable and if you lost time by being inconvenienced that would probably be regarded as non-financial detriment.[12]

6.19 The Association of Building Societies and Credit Unions (ABACUS) has argued that the list of matters that the court must take into account 'should be broadened and made more balanced'. Specifically, it claimed that the court should be required to consider the extent of any benefits associated with the use of the term to either the claimant or to other parties to contracts including similar terms. The court must weigh these benefits against consumer protection considerations.[13]

The issue of transparency

6.20 As noted earlier, subsection 3(2b) of the bill states that in determining whether a consumer contract term is 'unfair', a court must take into account 'the extent to which the term is transparent'. The EM notes that a lack of transparency in the terms of a consumer contract 'may be a strong indication of the existence of a significant imbalance in the rights and obligations of the parties under the contract'. It adds, however, that the extent to which a term is not transparent 'is not, of itself, determinative of the unfairness of a term in a consumer contract and the nature and effect of the term will continue to be relevant'.[14] Further, Treasury confirmed to the committee that a contract term can be transparent, but still unfair.[15]

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10 Mr Simon Writer, *Proof Committee Hansard*, 21 August 2009, p. 6.

11 Mr Simon Writer, *Proof Committee Hansard*, 21 August 2009, p. 8.

12 Dr Steven Kennedy, General Manager, Competition and Consumer Policy Division, *Proof Committee Hansard*, 21 August 2009, pp. 7–8.

13 ABACUS, *Submission 33*, p. 5.

14 *Explanatory Memorandum*, p. 21.

15 Mr Simon Writer, *Proof Committee Hansard*, 21 August 2009, p. 6.

Views

6.21 The committee's feedback on the bill's 'transparency' provision was mixed. The ABA supported the inclusion of the clause on transparency. It emphasised the importance of the courts considering 'a range of circumstances specific to each individual contract and parties to that contract'. The Association noted that the bill 'appears to support this view' given the proposed provisions specify that a court may take into account 'such matters as it thinks relevant', and must take into account the extent to which the term is transparent.[16]

6.22 The Consumer Action Law Centre argued that the transparency clause is 'the only part of the Bill's definition of "unfair" that was not in the MCCA-agreed model for UCT provisions and was not foreshadowed in the consultation information paper of February 2009'. The two other matters in subsection 3(2) of the bill—detriment and the contract as a whole—are both 'reasonable and in accord with the MCCA model'.[17]

6.23 The Centre explained that the unfair contract laws are a negotiation problem (a substantive issue), not a disclosure problem (a procedural issue). In this context, the availability, legibility and presentation of contract terms is irrelevant: the key obstacle is the inability of consumers to negotiate the terms of standard form contracts proposed by suppliers.[18]

6.24 The Centre feared that despite the government's good intentions in introducing the 'transparency' test, the test may substantially undermine the operation of the provisions. It could mean that the courts will regard a term as:

> …"less unfair", and thus possibly not unfair at all, if it has been clearly typed out in the contract, regardless of whether it is realistic to expect the consumer to have read, understood or negotiated over that contract term, and regardless of the extent of the unfairness of the content and effect of that term. Despite the EM's statements, the provision is not drafted in terms of a court being required to take into account the extent to which a term is not transparent but the extent to which it is.[19]

6.25 Associate Professor Zumbo has also argued that the bill's reference to whether or not a contract term is transparent in section 3(3) should be deleted. As with the 'detriment' provision, he argued that the test for transparency should be distinct from whether or not the contract term is unfair. Indeed, he argued that a contract term may be transparent but drafted by the larger party in a way that represents a significant

16 Australian Bankers' Association, *Submission 32*, p. 3.

17 Consumer Action Law Centre, *Submission 19*, p. 5.

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

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

imbalance in contractual rights of that party and which goes beyond what is reasonably necessary to protect its legitimate interests.[20]

The contract as a whole

6.26 In terms of proposed section 3(2)(c) concerning 'the contract as a whole', the Consumer Action Law Centre told the committee that:

> …one of the strengths of this law from the point of view of business, based on the concerns that they are expressing about uncertainty and flexibility, is it requires consideration of the contract as a whole. It is difficult to see how a process that looked at a clause could do that without then looking at the entirety of the contract.[21]

6.27 The Law Council of Australia has similarly emphasised the need for an approach which requires an assessment of all the relevant circumstances in every case. It noted that other regulators have taken the view that a term may be fair in one context but unfair in another.[22]

6.28 Significantly, the Law Council made these observations in the context of its concerns with the bill's provisions to prohibit certain contract terms (see chapter 7). While recognising these concerns, the committee highlights that section 3(2)(c) does provide for flexibility in the courts' interpretation of unfair contract terms.

Safeguards and safe harbours

6.29 The committee recognises it is important that this legislation minimises any uncertainty that may arise for businesses in setting standard form contracts. By and large, it believes that the bill does provide adequate safeguards to ensure that consumers do not challenge contract terms indiscriminately.

6.30 For example, this chapter has noted that some witnesses have argued that the 'detriment' provision should be made more central to the unfairness test and should be sharpened to focus on material detriment: others consider it irrelevant to a test of unfairness. The committee believes the bill strikes the right balance. The Productivity Commission argued that 'there are sound economic and ethical rationales for proscribing unfair contract terms that cause consumer detriment'.[23] The committee agrees with the Ministerial Council on Consumer Affairs that the courts should be allowed to take into account non-financial forms of detriment such as inconvenience, delay or emotional distress.

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20 Associate Professor Frank Zumbo, *Submission 12*, p. 9.

21 Ms Nicole Rich, *Proof Committee Hansard*, 26 August 2009, p. 65.

22 Law Council of Australia, *Introductory Statement to Senate Economics Committee*, 21 August 2009.

23 Cited in Treasury, *The Australian Consumer Law—Consultations on draft provisions on unfair contract terms*, 11 May 2009, p. 2.

6.31 On the issue of 'transparency', some submitters supported the clause on the basis that the courts must consider the range of circumstances specific to each individual contract and parties to that contract. Others considered transparency a matter of procedural (rather than substantive) unfairness, and therefore irrelevant to the test of an unfair contract term. Again, the committee believes the transparency of a contract is a matter that the courts should take into account given that unfairness may be exacerbated by the lack of transparency in a term.[24]

6.32 Notwithstanding these and other checks, the committee is interested to pursue the proposal of a 'safe harbour'.[25] A safe harbour would operate by allowing a business to gain authorisation from the regulator to ensure that a term is beyond challenge. The Consumer Action Law Centre has cautioned that a safe harbour may have limited impact in that a court must take into account a contract as a whole when considering a particular term. It noted that any change to other terms of the contract would probably require the business to go back and seek approval for the new contract.[26]

Committee view

6.33 The committee believes the idea of a safe harbour could be considered and suggests that the ACCC and ASIC consider the merit of a safe harbour for certain contract terms.

24 Treasury, *The Australian Consumer Law—Consultations on draft provisions on unfair contract terms*, 11 May 2009, p. 11.

25 See ABACUS, *Proof Committee Hansard*, 21 August 2009, pp. 25–26; Associate Professor Frank Zumbo, *Proof Committee Hansard*, 26 August 2009, pp. 27–28.

26 Ms Nicole Rich, *Proof Committee Hansard*, 26 August 2009, p. 65.

Chapter 7

Prohibited contract terms and contract terms exempt from the bill's provisions

7.1 This chapter looks at two aspects of the bill: the provision for the Minister to prohibit certain contract terms and the provision to exempt certain terms of a given contract from the bill's provisions.

Prohibited contract terms

7.2 The bill states that a prohibited term of a consumer contract is a term of a kind prescribed by the regulations (subsection 6(4)). Subsections 6(2) and 6(3) state that:

- a person must not include, or purport to include, a prohibited term in a consumer contract that is a standard form contract; and
- a person must not apply or rely on, or purport to apply or rely on, a prohibited term of a consumer contract that is a standard form contract.

It adds that in both cases, a pecuniary penalty may be imposed for a contravention (see chapter 8).

7.3 The EM states that no regulations are proposed to be made at the present time and so there are no prohibited terms. Prohibited terms in the ACL may be prescribed by the Minister in accordance with the requirements for the amendment of the ACL (Part XI of the TPA and the Intergovernmental Agreement). Any future prohibition of terms in regulations made by the Minister is subject to a voting process for amending the ACL as set out in the IGA as well as the Australian Government's best practice regulation requirements.[1]

7.4 Prohibited terms under the ASIC Act may be prescribed by the Minister in accordance with the requirements for the amendment of the ASIC Act set out in the *Corporations Agreement 2002*.[2]

Views

7.5 The Law Council of Australia has expressed concern at the potential for the legislation to 'ban terms outright'. It argued that 'whether a term is fair or unfair is wholly dependent on the relevant circumstances of each case'.[3] Mr Dave Poddar, Chair of the Council's Trade Practices Committee, told the committee that:

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1 *Explanatory Memorandum*, p. 27.

2 *Explanatory Memorandum*, p. 28.

3 Law Council of Australia, *Submission 47*, p. 2.

> Whether or not a particular term is unfair should always be dependent upon the assessment of that term in its context and take into account all relevant circumstances. Other regulators have taken the view that a term may be fair in one context but unfair in another. An approach which requires assessment of all the relevant circumstances in every case would maintain the flexibility required for efficient and effective regulation of consumer contracts. Such an approach would be consistent with comparable regimes and does not risk the unintended consequences that may occur, particularly given no economic cost-benefit analysis appears to have been done.[4]

7.6 In this context, the Law Council defended the use of a unilateral variation clause noting that while it may 'on its face' seem unfair, suppliers clearly require some flexibility to vary the terms of their arrangement 'from time to time'.[5] It noted that suppliers cannot reasonably be expected to separately negotiate and agree to variations with millions of customers. Nor would customers expect this to be the case.

7.7 The Law Council cited the Victorian experience to support its argument that an ability to ban terms outright is not needed under the national unfair contract terms law. While there is provision in the Victorian *Fair Trading Act* to proscribe and prohibit certain terms, no term has been proscribed in the 6 years that the Act has operated.[6]

7.8 ABACUS has also argued that whether or not a term is unfair should be judged on all the relevant circumstances of each case. In this context, it feared that despite their efforts in trying to ensure that their standard-form contracts are fair, it will not know until the contract has been signed as subsequent proceedings taken against the term.[7]

7.9 Various submitters also expressed concern at what they saw as the bill's inadequate basis for consulting with stakeholders in prohibiting a term. The Law Council, notably, argued that the process by which the government proposes to ban terms outright 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.[8]

7.10 Mr Poddar elaborated on these concerns to the committee:

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4 Mr Dave Poddar, *Proof Committee Hansard*, 21 August 2009, p. 31.

5 Law Council of Australia, *Submission 47*, p. 2.

6 Law Council of Australia, *Submission 47*, p. 3.

7 Mr Mark Degotardi, *Proof Committee Hansard*, 21 August 2009, p. 27.

8 Law Council of Australia, *Submission 47*, p. 3.

> …there will be government processes and, as part of COAG, the government and the states will consider very carefully as to what provisions are prohibited, but we have seen no other guidance. We have expressed concerns that there is no economic analysis. There have been no underpinnings to show that a government body's decreeing that provisions are inappropriate has been subject to any cost-weighting or benefit economic analysis. We also believe that that is inappropriate because that does not go through parliament to actually ban those types of provisions.[9]

7.11 Similarly, FOXTEL has observed the process of subjecting a term to a general test of unfairness (subsection 3(1)) before prescribing a term as prohibited 'is not clearly drafted in the ACL'. It noted that Victoria's *Fair Trading Act 1999* provides for the Governor in Council to make regulations for or with respect to prescribing unfair terms which are unfair terms for the purposes of Part 2B of the Act. FOXTEL recommended that the regulation making power should 'mirror the approach' taken in Victoria.[10]

7.12 Colonial First State Property Management has argued that the (draft) bill give a court 'extraordinarily wide discretion' to determine what an unfair contract is or when a contract is not a standard form contract.[11]

7.13 Mr Ian Tonking SC noted in his submission that there is nothing in the exposure draft of the bill which provides any criteria for the proscription of a prohibited term. He drew the committee's attention to the clause in subsection 6(3) of the bill that 'a person must not apply or rely on, or purport to apply or rely on, a prohibited term', and the EM's definition of the expression 'rely on' as including 'asserting the existence of a right conferred, or purportedly conferred' by a term.[12] He argued that:

> It is clear from this definition that the prohibition in s.6 would prevent a person from disputing in a court of law or elsewhere whether a particular term was a prohibited term and whether the contract in which it was included was a standard form contract…
>
> One of the consequences of s.6(3) therefore is that, once another party to at [sic] contract has made an assertion that a particular term of the contract has the characteristic of being a prohibited term of a standard form contract, regardless of whether that assertion is made genuinely or has any proper foundation, the other party will be prohibited, under pain of exposure to a pecuniary penalty (and presumably an injunction if applied for), from asserting the contrary, whether in negotiations or in a court of law. A further consequence will be that any legal representative of the party against whom such an assertion is made will be exposed to the possibility of a

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9 Mr Dave Poddar, *Proof Committee Hansard*, 21August 2009, p. 38.

10 FOXTEL Management Pty Ltd, *Submission 7*, p. 1.

11 Colonial First State Property Management, *Submission 11*, p. 4.

12 Mr Ian Tonking SC, *Submission 4*, p. 7. See also *Explanatory Memorandum*, p. 28.

> pecuniary penalty if that person is knowingly involved in asserting the existence of a right conferred, or purportedly conferred, under the contested term, even if appearing in court!
>
> It surely was not the intention to alter the rights of parties to a contract to this extent, namely that, by mere assertion, one party can achieve the result that a particular term of a contract is automatically rendered void because the other party risks exposure to a civil penalty if that party seeks to contest the assertion.[13]

7.14 The BCA focused its criticism on the compliance costs: every time a new term is deemed 'unfair', businesses will need to review all their standard-form contractual agreements and prepare new documents.[14]

Contract terms that are exempt from the bill's provisions

7.15 Section 5 of the bill exempts terms from the unfair contract term provisions in section 2 if they define the subject matter of the contract, establish the upfront price payable under the consumer contract or are required or expressly permitted by a law of the Commonwealth, State or Territory.[15]

7.16 Terms that define the main subject matter or upfront price are often referred to as the 'core terms' of the contract.[16] The Consumer Action Law Centre has noted that the exclusion for core terms is based on the rationale that consumers are much more likely to be 'aware of, consider and negotiate' over these terms than other contract terms.

7.17 However, the Law Council has argued that the bill's exclusion of the upfront price may lead to unintended consequences. As Ms Bodger from the Council's Trade Practices Committee explained:

> 'Up-front price' does not include the payment of any charge or fee which is contingent on an event. For example, it would not pick up an early termination charge. The issue is that a lot of those sorts of charges go into the whole cost modelling for businesses. If they are carved out, it will lead to uncertainty as to whether that charge would be able to be relied upon and therefore whether or not businesses need to redo their pricing models for certain goods and services and bring all the prices up front. It is also thought that if these prices are made very clear, up front, fully disclosed, clearly disclosed, transparent, the ability for a consumer to argue that it was unfair when they had knowledge of it may not be the right balance between supplier and consumer.[17]

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13 *Submission 4*, pp. 7–8.

14 Business Council of Australia, *Submission 20*, p. 3.

15 Schedule 2, Part 2, Division 1, Section 5.

16 Consumer Action Law Centre, *Submission 19*, p. 7.

17 Ms Bodger, Proof Committee Hansard, 21 August 2009, p. 32.

'Excluded assessment' and 'excluded term' constructions—subsection 5(1)

7.18 The Consumer Action Law Centre has expressed concern that while section 5 is intended to be based on the similar provision in the 1999 UK regulations, it is drafted differently. Whereas the UK regulations provide that the assessment of fairness of a term 'shall not relate to' the subject matter or price, the bill states that:

> Section 2 does not apply to a term of a contract to the extent that, but only to the extent that, the term: … (b) sets the upfront price payable under the contract.

7.19 The Centre explains in its submission that the UK provisions only exclude core terms from assessment for unfairness to the extent that the unfairness is alleged to relate to the main subject matter or upfront price. They are otherwise assessable for unfairness. This is called the 'excluded assessment' construction of the provisions. Conversely, the bill's approach entirely excludes core terms from any assessment for unfairness, regardless of whether the unfairness is alleged to arise from a different aspect of the terms. This approach is known as the 'excluded term' construction.[18]

7.20 The Centre recognises that the bill's phrase 'only to the extent that' may mean that the bill follows an 'excluded assessment' approach. However:

> …because it is drafted differently to the UK provision this is less clear, and will probably only be determined following a superior court decision on the issue.[19]

7.21 The Centre argued that it needs to be made clear that section 5 only excludes terms from the unfairness test to the extent that any unfairness relates to the main subject matter or the upfront price. These terms are void for other types of unfairness.

Views on other aspects of Section 5

7.22 The Consumer Action Law Centre is strongly supportive of subsection 5(2) of the bill. This subsection states that the 'upfront price' payable under a consumer contract is disclosed at or before the time the contract is entered into 'but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event'. It noted in its submission that it had concerns that exempting the core term of 'upfront price' would risk creating a loophole for suppliers to avoid scrutiny by imposing additional fees and charges. The Centre is satisfied that this loophole has been closed.

7.23 GE has argued that the exemption on terms which establish the upfront price payable is not sufficiently drafted. It claims that 'clear upfront disclosure, and transparency to the consumer, of the price of products or services under an agreement, should be sufficient to indicate that a price is not unfair'. In other words, in these

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18 Consumer Action Law Centre, *Submission 19*, p. 8.

19 Consumer Action Law Centre, *Submission 19*, p. 8.

circumstances, the consumer would enter (or not enter) into an agreement with a clear understanding of the effect of the relevant term. GE argues it is unjustifiable for these prices to be reviewed at a later stage as 'unfair'.[20]

7.24 GE has also criticised the bill's exemption of 'terms required or expressly permitted by law' for being too narrow. It argued that the exemption should be broadened to exempt terms 'where it is clear that such terms are consistent with, and contemplated by, a law or laws'.[21]

7.25 While strongly supporting the exclusions in section 5 of the bill, ABACUS has argued that the exclusion of price terms in subsection 5(1b) should be broadened to exclude all price terms. It noted that financial institutions need to set and re-set fees on a regular basis and feared that 'without a carve out for price terms a major fee challenging industry will develop'.[22]

7.26 The Investment and Financial Services Association (IFSA) is concerned that the bill applies to standard form contracts for financial products and financial services. It argued that the concepts in the bill will create overlap with other Acts to which the sector is bound and will thereby result in greater uncertainty within the sector. Accordingly, IFSA recommended that:

> (1) clause 5 of the exposure draft which excludes certain terms in a standard form contract should be expanded beyond the use of certain terms to exclude specified types of documents. They would include, but should not be limited to, a standard form document:
>
> i) that is required by law to be provided to a consumer/investor in relation to the provision of a financial product or service; and
>
> ii) the content of which is prescribed by law; and
>
> iii) that is subject to regulatory supervision under the relevant law; and
>
> iv) in respect of which the consumer/investor has statutory right of redress.

20 GE, *Submission 26*, p. 2.

21 GE, *Submission 26*, p. 3.

22 ABACUS, *Submission 33*, p. 6.

Chapter 8

The exclusion of insurance contracts

8.1 Section 8 of the bill excludes certain contracts from the unfair contract terms provisions. These exclusions are: certain shipping contracts which are already subject to a comprehensive legal framework dealing with contractual terms in a maritime law context; and contracts which are constitutions of companies or managed investment scheme.

8.2 Section 15 of the *Insurance Contracts Act 1984* provides that a contract of insurance is not capable of being made the subject of 'relief' under any Commonwealth or State Act. 'Relief', in this instance, is in the form of the judicial review of a contract on the ground that it is harsh, oppressive, unconscionable unjust, unfair or inequitable or relief for insureds from the consequences in law of making a misrepresentation.[1] Schedule 3 of the bill also exempts the constitutions of companies and managed investment schemes from its provisions (clause 12BL(3)).

8.3 The effect of this section means that the unfair contract provisions of either the ACL or the ASIC Act do not apply to contracts of insurance covered by the *Insurance Contracts Act 1984* (ICA). The exemption is not achieved through a provision of the bill.

Opposition to the exemption of insurance contracts

8.4 The committee received considerable evidence opposing the exclusion of insurance contracts from the provisions of the bill.

> The Consumer Action Law Centre described the total exclusion of insurance contracts from the provisions of the bill as 'excessive', 'unreasonable' and a 'significant flaw' in the legislation. It argued that there is no reason why any industry should be exempt from the unfair contract terms provisions, and no reason why insurance contracts with consumers should be treated any differently to other consumer contracts. Indeed:
>
> …many other industries that, like insurance, are subject to industry-specific regulation to address industry-specific matters in addition to being subject to general consumer protection laws…None of these industries are excluded from the UCT provisions because no existing general or industry-specific regulation addresses the problem of unfair contract terms, thus the existence of industry-specific laws in a particular field of commerce is largely irrelevant to whether or not UCT laws should apply to contracts in that field.[2]

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1 *Explanatory Memorandum*, pp. 31–32.

2 Consumer Action Law Centre, *Submission 19*, p. 11.

8.5 The Centre claimed that insurance is 'arguably' one of the areas in which consumers most need unfair contract terms regulation. The ICA, however, does not address the issue of unfair terms in insurance contracts. The Centre recommended inserting a provision:

> …either expressly providing for the provisions in Schedule 3 Part 1 (once enacted) to apply to insurance contracts despite anything to the contrary in section 15 of the Insurance Contracts Act, or amending section 15 of the Insurance Contracts Act to provide that it does not exclude the provisions in Schedule 3 Part 1 (once enacted).[3]

8.6 National Legal Aid Australia (NLA) also urged the committee to reconsider the exclusion of insurance contracts from the bill. It told the committee that it was first aware of this exclusion from the brief reference in the Explanatory Memorandum (EM), adding:

> As far as we are aware no research has been undertaken to date at any level of government on what effect excluding insurance contracts from unfair terms regulation will have on the overall effectiveness of a national consumer law, such as the one envisaged in the bill.[4]

8.7 Ms Elizabeth Shearer, representing the NLA, argued that the duty of utmost good faith in the ICA was not preventing the use of unfair contract terms. She told the committee that:

> Based on our collective casework experience…the requirement to act in utmost good faith and other provisions in the Insurance Contracts Act have not prevented the proliferation of unfair terms in insurance contracts being put into policies or given the courts the real power needed to strike down unfair terms. An example is the case of a third party property motor vehicle claim, where the insurer sought to rely on a clause which said, 'If the car is involved in a no fault accident with an uninsured vehicle, we will cover your damage up to $3,000 but only if you report the accident to the police and provide evidence that the other vehicle is uninsured.' The objective unfairness of this clause is that in order to successfully claim against the policy, our client needed to (1) know about this particular clause, (2) convince the police to take the report despite there being no major property damage or personal injury or (3) provide proof that the other driver was uninsured which, as you could imagine, is a very difficult task. In our view there are sound reasons to expect that the exclusion of insurance contracts from unfair terms regulation, will mean that unfair terms such as those cited in case examples provided to this inquiry will continue to exist in insurance contracts to the detriment of consumers.[5]

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3 Consumer Action Law Centre, *Submission 19*, p. 14.

4 Ms Elizabeth Shearer, *Proof Committee Hansard*, 21 August 2009, p. 43.

5 Ms Elizabeth Shearer, *Proof Committee Hansard*, 21 August 2009, p. 43.

8.8 The NLA rejected the idea that the Insurance Contracts Act is a 'self-contained', 'self-complete' code. Mr David Coorey, a solicitor with Legal Aid New South Wales, quoted from the notes of an annotated version of the ICA which stated: 'The Insurance Contracts Act is not a code of insurance contract law. It only relates to certain aspects of the law relating to insurance contracts'. He argued that if parliament had wanted to enact the ICA as a self-contained code, 'it could have done so and would have done so'.[6]

8.9 The NLA suggested a consequential amendment to section 15 of the Insurance Contracts Act to enable unfair terms in insurance contracts to be dealt with under the Australian Consumer Law.[7]

8.10 The Consumer Credit Legal Centre (CCLC), which runs a process called Insurance Law Service, also argued that the bill's provisions must apply to general insurance contracts. Ms Katherine Lane, a principal solicitor with the service, told the committee that the 'elegance and vision' of the legislation is that it covers a wide range of industries and contracts, 'so to exclude one type is very worrying'.[8]

8.11 The Insurance Law Service argued that while the ICA does have a duty of utmost good faith, it does not provide a consumer with a remedy who has been affected by an unfair term. [9] Ms Lane told the committee that:

> The duty of utmost good faith has failed to make any improvements in decreasing the use of unfair terms in insurance contracts and to provide consumers with a remedy when unfair terms have been used. The industry dispute resolution scheme, which is the financial ombudsman's service, has repeatedly stated in many annual reports and in case decisions that they cannot deal with unfair terms as the duty of utmost good faith does not cover this area.[10]

8.12 The Insurance Law Service recommended that a provision be inserted into the bill either:

- expressly providing for the provisions in Schedule 3 Part 1 (amending the ASIC Act) to apply insurance contracts despite anything to the contrary in section 15 of the *Insurance Contracts Act 1984*; or
- amending section 15 of the *Insurance Contracts Act 1984* to provide that the bill is not excluded and can regulate insurance contracts.[11]

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6 Mr David Coorey, *Proof Committee Hansard*, 21 August 2009, p. 47.

7 Ms Elizabeth Shearer, *Proof Committee Hansard*, 21 August 2009, p. 43.

8 Ms Katherine Lane, *Proof Committee Hansard*, 26 August 2009, p. 43.

9 Insurance Law Service, *Submission 36*, p. 2.

10 Ms Katherine Lane, *Proof Committee Hansard*, 26 August 2009, p. 43.

11 Insurance Law Service, *Submission 36*, p. 5.

Support for the exemption of insurance contracts

8.13 Other submitters strongly supported the exemption of insurance contracts from the unfair contract term provisions. The Insurance Council of Australia, notably, argued that the ICA, the *Corporations Act 2001* and the ASIC Act all 'guard against unfair or unconscionable conduct'.[12] Mr John Anning of the Insurance Council told the committee:

> The evidence does not support the need for the application of the proposed unfair contracts terms of the legislation to general insurance. To do so would result in unwarranted layering of regulatory requirements on insurers and would lead to operating inefficiencies, the cost of which ultimately will be passed on to the consumer. The proposed unfair contract terms legislation, rather than assisting insurers will create uncertainty in the application of insurance terms to claims, which is likely to lead to further disputes thereby increasing inconvenience and delay for consumers in the settlement of claims. The existing exemption under section 15 of the Insurance Contracts Act for insurance contracts from the operation of unfair contract terms legislation should be retained.[13]

8.14 Mr Anning sought to give the committee an historical perspective as to why the existing legal framework for insurance contracts is adequate. He noted that insurance is a 'rare but important example' where the parliament's intent in the 1980s was to establish a comprehensive set of rights and obligations around the insurance contract. He also argued that this framework was working well, citing data from the Financial Ombudsman Service's 2008 annual report showing very few disputes.[14]

8.15 Mr Anning did concede that there was no statutory definition of the ICA's section 13 requirement on the duty of utmost good faith. However, he did cite a 2007 ruling in the High Court where the principle was discussed 'in detail'.[15] He also rejected the claim that the ICA does not address the issue of unfair contract terms citing the findings of a 2004 review (see below).[16]

8.16 Minter Ellison has expressed concern at the potential application of the unfair contract terms provisions to insurance contracts. It notes the clause in section 15 of the ICA that 'relief' 'does not include relief in the form of compensatory damages'. The firm argued that compensatory damages could be claimed by a consumer if a provision of an insurance contract was found to be void under section 12BF.

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12 Insurance Council of Australia, *Submission 43*, p. 2.

13 Mr John Anning, *Proof Committee Hansard*, 26 August 2009, p. 2.

14 Mr John Anning, *Proof Committee Hansard*, 26 August 2009, p. 2.

15 Mr John Anning, *Proof Committee Hansard*, 26 August 2009, pp. 2–3. The case is CGU Limited v AMP Financial Planning Pty Ltd. Mr Anning noted the statements of Justices Gleeson, Crennan and Kirby.

16 Mr John Anning, *Proof Committee Hansard*, 26 August 2009, p. 6.

Accordingly, 'there is a real risk' that the unfair contract terms provisions will apply to insurance contracts unless an express exclusion is inserted into clause 12BL.[17]

The 2004 review of the ICA

8.17 In June 2004, a government-commissioned review of the *Insurance Contracts Act* was made public.[18] The review noted that the Standing Committee of Officials of Consumer Affairs (SCOCA) had appointed a Working Party to review the issue of unfair contract terms generally and including insurance contracts in the national model. The review stated that while the exclusion provided by section 15 was still valid:

> If a nationally consistent model for review of consumer unfair contracts is developed, the balance of consideration may shift and the issue should be revisited.[19]

8.18 The Insurance Council of Australia told the committee that the recommendations of the 2004 panel were the basis for a draft bill which was released for comment in February 2007.[20] It added:

> After a very significant amount of work by all stakeholders, agreement was reached in late 2007 on the broad matters to be addressed in the amending legislation. The Insurance Council is currently hopeful that a bill will be introduced in the current session of parliament. Any consideration of section 15 should therefore take account of the proposed amendments to make the operation of the act more effective, including the introduction of powers to enable ASIC to intervene in any proceeding under the act.[21]

8.19 The committee believes it is important that section 15 of the ICA is now addressed in light of this legislation to introduce national unfair contract law provisions. This is in line with the recommendation of the 2004 review of the ICA.

Views on the inclusion of financial services

8.20 The Investment and Financial Services Association (IFSA) has argued that given the existing regulatory framework of the financial services industry, the bill is 'unwarranted and in fact creates an additional burden that stymies the ability of

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17 Minter Ellison, *Submission 45*, p. 7.

18 Alan Cameron and Nancy Milne, *Review of the Insurance Contracts Act*, June 2004, http://icareview.treasury.gov.au/content/Reports/FinalReport/_downloads/ICAFinalReport.pdf The review was announced on 10 September 2003 by the Minister for Revenue and Assistant Treasurer, Senator the Hon Helen Coonan and the then Parliamentary Secretary to the Treasurer, Senator the Hon Ian Campbell.

19 Alan Cameron and Nancy Milne, *Review of the Insurance Contracts Act*, June 2004, p. 53 http://icareview.treasury.gov.au/content/Reports/FinalReport/_downloads/ICAFinalReport.pdf

20 http://icareview.treasury.gov.au/content/_download/draft_legislation/draft_Bill.pdf

21 Mr John Anning, *Proof Committee Hansard*, 26 August 2009, p. 3.

organisations to provide products and services in a competitive environment'.[22] It highlighted the possibility that investments in managed investment schemes, brokered through Product Disclosure Statements, may constitute a standard form contract. Despite the bill's section 12BL(3) exemption, IFSA feared that these investments 'fall within the ambit of the regime'.[23]

8.21 Minter Ellison has also argued that there is no need for the provisions of the bill to apply to financial services. The firm claimed that there is already 'comprehensive regulation of financial services' in Australia and that a broad ban on unfair terms will create uncertainty and additional compliance costs.

8.22 Minter Ellison noted that regulation of the consumer credit industry 'is about to be significantly increased' if the *National Consumer Credit Protection Bill 2009* is passed in its current form. In this context, 'it would be appropriate' to allow industry to implement the Credit Bill and assess its impact before proceeding with the unfair contract terms legislation.

8.23 In relation to the bill's exemption for constitutions of companies and managed investment schemes, Minter Ellison expressed concern that other conduct relating to a company or investment scheme may give rise to a contract between the member and the issuer. It also queried whether a product disclosure statement for a managed investment scheme is a contract and if so, whether the bill's provisions would apply to product issuers.[24]

Views on the inclusion of building and building services contracts

8.24 The committee received a submission from Master Builders Australia (MBA), which argued there should be an exemption for standard form contracts that are subject to domestic building contract legislation. MBA noted paragraph 4(f) of the bill, which gives the example of a term that permits a unilateral variation in the upfront price payable under the contract without the right of another party to terminate the contract. It claimed that this circumstance will apply to 'the vast majority of building contracts' which are frequently varied 'as consumer's choices are clarified or changed or a builder is required to meet conditions that may be externally imposed'.[25]

8.25 MBA argued that building contracts and building services contracts are already 'more appropriately and highly regulated through specific sector legislation'. For example, sections 79–84 comprising Part 7 of the *Domestic Building Contracts Act 2000 (Qld)* contain provisions that protect consumers by requiring variations in

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22 IFSA, *Submission 39*, p. 3.

23 IFSA, *Submission 39*, p. 3.

24 Minter Ellison, *Submission 45*, p. 4. Product disclosure statements are currently regulated under Division 3, Part 7.9 of the *Corporations Act 2001*.

25 *Submission 1*, p. 7.

writing and setting out the change in the contract price.[26] The MBA warned against adding another 'inappropriate' regulatory layer on this sector specific legislation.

8.26 Master Builders Australia recommended that domestic building contracts be excluded from the scope of the bill by adding that class of contract to the list of excluded contracts in the proposed section 8 of the bill.[27]

26 *Submission 1*, p. 8.

27 *Submission 1*, p. 9.

Chapter 9

Enforcement provisions and remedies

9.1 This chapter examines the enforcement and remedies under Schedule 2 of the bill and the application of the ACL.

Enforcement and remedies—Schedule 2 of the bill

9.2 The bill introduces new enforcement powers to complement the introduction of the new consumer protection laws.[1] It amends the TPA:

- to introduce civil pecuniary penalties for breaches of specified consumer protection provisions;
- to enable the ACCC and ASIC to issue substantiation notices relating to consumer protection in certain circumstances;
- to enable the ACCC and ASIC to seek an order disqualifying a person from managing corporations as a consequence of breaches of various consumer protection-related provisions;
- to allow the ACCC and ASIC to seek certain orders for the benefit of persons that are not parties to proceedings; and
- to allow the ACCC and ASIC to issue an infringement notice containing a financial penalty for suspected contraventions of civil pecuniary penalty provisions of the TP Act and the ASIC Act;
- to provide for the ACCC and ASIC to issue public warning notices relating to consumer protection in certain circumstances.

Civil pecuniary penalties

9.3 For some years, civil pecuniary penalties have existed for the restrictive trade practices provisions of the TPA.[2] However, the consumer protection provisions of the TPA and the ASIC Act are enforced through civil remedies such as injunctions and, in certain circumstances, criminal sanctions. The EM explains that:

> While criminal sanctions provide an important deterrent against the most serious forms of contravening misconduct, and civil remedies can achieve timely outcomes for consumers, there is currently no means of obtaining sanctions in the timely manner available under the civil regime.[3]

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1 See chapters 4–9 of the Explanatory Memorandum.

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

3 *Explanatory Memorandum*, p. 54.

9.4 The bill introduces a civil pecuniary penalty for contraventions of:

- the unconscionable conduct provisions of the TPA and the ASIC Act;
- the consumer protection provisions in the TPA and the ASIC Act relating to unfair practices (except misleading and deceptive conduct);
- the consumer protection provisions relating to pyramid selling;
- certain product safety and product information provisions in the TPA;
- the provision in the ACL concerning the use of prohibited terms; and
- failure to respond to a substantiation notice or providing false or misleading information in response to a substantiation notice.[4]

9.5 Civil pecuniary penalties will not be available for breaches of section 52 of the TPA.

Views

9.6 The Australian Bankers' Association maintained that the proposed civil pecuniary penalties should not apply to a breach of the unconscionable conduct provisions. It argued that the bill's provisions are:

> …inconsistent with the intention behind the use of civil pecuniary penalties, namely, to enable a "middle ground" remedy for provisions which already have criminal sanctions attached. Whether a bank has acted unconscionably will not always be clear and is an issue in respect of which reasonable minds may differ. Often unconscionability is triggered by a party exercising an otherwise valid contractual right. For the reasons that pecuniary penalties do not apply in relation to misleading and deceptive conduct, the ABA believes that pecuniary penalties should be removed in relation to unconscionable conduct.[5]

9.7 The Law Council of Australia argued along similar lines:

> …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…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.[6]

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4 *Explanatory Memorandum*, p. 54.

5 Australian Bankers' Association, *Submission 32*, p. 4.

6 Law Council of Australia, *Submission 47*, p. 6.

Substantiation notices power

9.8 The Minister explained in the Second Reading Speech of the bill that a key gap in the powers of the ACCC and ASIC is 'the lack of an ability to quickly and easily require information to substantiate claims made in representations by businesses'.

9.9 The bill enables the ACCC or ASIC to issue a substantiation notice if a person makes claims or representations intended to promote the supply (or possible supply) of goods or services, the sale (or possible sale) of an interest in land by a corporation or employment which is (or may be) offered by a corporation.[7]

9.10 The EM explains that the substantiation notice requires the person to provide documents within 21 days of the notice being issued, information or documents which could be capable of substantiating the representations or their ability to supply. The ACCC or ASIC may seek information so long as it is relevant to the substantiation of the claim or representation or the person's ability to supply.[8]

Views

9.11 The new power is intended as a preliminary investigative tool where the regulator suspects a representation may not be able to be substantiated and, therefore, in breach of the consumer protection laws.[9]

9.12 However, some submitters have criticised this provision of the bill as both unnecessary and potentially disruptive.

9.13 For example, GE has argued that given the regulators' current information-gathering powers, 'there is no demonstrable policy need for introducing a power to issue substantiation notices'. It further claimed that the 'essential requirement' is that the regulator believes that a business is breaching or has breached the law. Finally, GE argued that there is a need for the bill to clarify how the substantiation notices would apply to information and documents subject to legal professional privilege and other protections.[10]

9.14 The Australian Bankers' Association argued that the new substantiation power:

> …will likely lead to "fishing" type exercises by the relevant regulators and will significantly increase the administrative burden of businesses without corresponding benefits. Both the ASIC and the ACCC already have formal information gathering powers under the ASIC Act and the TPA and this

7 *Explanatory Memorandum*, p. 70.

8 *Explanatory Memorandum*, p. 70.

9 *Explanatory Memorandum*, p. 70.

10 GE, *Submission 26*, p. 6.

> additional preliminary investigative tool is unnecessary. If the Committee believes that such a power is necessary, the ABA believes that at the very least any such power to request substantiation must be accompanied by objectively verifiable and reasonable grounds.[11]

9.15 The Law Council of Australia stated that it is 'not convinced' that substantiation notices will lead to 'additional consumer benefit'. It shared the ABA's concerns on "fishing expeditions". The Law Council described the absence of any 'objective or evidential threshold' as a 'serious omission from the provision given the serious consequences of not complying with these notices'.[12] It recommended inserting a clause into the bill that the regulator must have 'reasonable grounds that the statement is false or misleading'.[13]

Disqualification orders

9.16 Disqualification orders are currently available for breaches of the restrictive trade practices provisions of the TPA and for breaches of the Corporations Act.[14] The bill enables the ACCC and ASIC to seek a disqualification order from the court to ban people who disregard the consumer protection laws from being a director of a company.

9.17 The disqualification orders will apply to the civil pecuniary penalty provisions (except those relating to substantiation notices) and the criminal provisions of the TPA and the ASIC Act. They will not be available in relation to the misleading and deceptive conduct provisions of the TPA (section 52) or the ASIC Act (section 12DA) because these provisions do not create a liability but establish a norm of conduct.[15]

Views

9.18 Master Builders Australia argued in its submission that disqualification orders are not 'a proportionate response'. Rather, it argued the merit of an approach:

> …which emphasises educating businesses, particularly small businesses, about their obligations under the proposed unfair contract provisions…Master Builders notes that disqualification orders, which effectively ban or restrict individuals from participating in specific activities for specific periods of time, including managing corporations, have the potential to bankrupt many small businesses. Furthermore, disqualification orders improperly applied have the potential to seriously disrupt the operation of a business of any size, where a manager is

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11 Australian Bankers' Association, *Submission 32*, p. 4.

12 Law Council of Australia, *Submission 47*, p. 5.

13 Law Council of Australia, *Submission 47*, p. 6.

14 The Hon. Dr Craig Emerson, Second Reading Speech, *House of Representatives Hansard*, 24 June 2009, p. 6988.

15 *Explanatory Memorandum*, p. 66.

> appointed or 'works their way up' based on specialised knowledge and expertise. It is also unclear what benefit these orders would have for the public, so are unlikely to meet a proper cost benefit analysis.[16]

Infringement notices

9.19 Part VIC of the TPA and Part 2 Division 2 of Subdivision GB of the ASIC Act will be amended to provide a mechanism for the ACCC and ASIC to issue a person with an infringement notice containing a financial penalty for suspected contraventions of the following provisions:

- a contravention of the unconscionable conduct provisions (of Part IVA of the TP Act; and of Part 2, Division 2, Subdivision C of the ASIC Act);
- a contravention of certain of the consumer protection provisions relating to unfair practices (except sections 52, 53A(1)(c), 54, 56(1), 58 or 64) of Part V, Division 1 of the TP Act; and of Part 2, Division 2, Subdivision D (except sections 12DA, 12DC(2), 12DE, 12DG(1), 12DI or 12DM) of the ASIC Act);
- a contravention of the consumer protection provisions relating to pyramid selling (of Part V, Division 1AAA of the TP Act; and of Part 2, Division 2, Subdivision D of the ASIC Act);
- a contravention of certain product safety and product information provisions of Part V, Division 1A of the TP Act;
- a breach of the new provision in the ACL concerning the use of prescribed unfair contract terms (in Schedule 2, Part 2, section 6 of the TP Act; and in section 12BJ of the ASIC Act) once those provisions commence; and
- failure to respond to a substantiation notice or providing false or misleading information in response to a substantiation notice (in Part VID of the TP Act; and in Part 2, Division 2, Subdivision GC of the ASIC Act).[17]

9.20 The Minister explained in the Second Reading Speech that this provision of the bill will enable the regulators to deal with alleged breaches of the law without the need for costly legal proceedings. The infringement notices will enable the regulators to deal with minor breaches of the law through the payment of an amount which will enable a person to avoid legal proceedings. While a person issued an infringement notice is not obliged to pay, if s/he does, the regulator cannot take further action for the alleged breach.[18]

9.21 Treasury told the committee that:

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16 Master Builders Australia, *Submission to the Treasury on the consultation paper 'An Australian Consumer Law'*, March 2009, p. 47.

17 *Explanatory Memorandum*, pp. 86–87.

18 The Hon. Dr Craig Emerson, Second Reading Speech, *House of Representatives Hansard*, 24 June 2009, p. 6988.

> Infringement notices are directed to fairly minor breaches. The size of the penalties is fairly small. The largest on the face of the bill is $6,600 for a corporation. So these would not be used to deal with major breaches that might apply in relation to, say, a national company. They are designed to provide the regulator with a means of drawing to a business's attention a potential breach to give them the option of paying the penalty, which that business is entitled not to pay. But that comes with the risk that they may be then subject to enforcement action for a civil pecuniary penalty, which may be a good deal more substantial. In terms of the way in which the regulator approaches this, there is a process under the intergovernmental agreement for the development of a memorandum of understanding between the ACCC, ASIC and the states' and territories' regulators to provide clarity around the way in which they will interact with one another and to provide guidance as to the way in which they will apply these powers on a consistent national basis.[19]

Views

9.22 The Consumer Action Law Centre supports the bill's provisions enabling the regulators to issue infringement notices for breaches of certain consumer protection provisions. It noted that at present, a business can engage in minor breaches 'with relative impunity' because the likelihood of any enforcement action is low. The Centre argued the need for a proportionate response to deal with action that causes minor consumer detriment. It cited the Productivity Commission's assessment that the issuing of infringement notices is desirable to provide scope for the regulators to deal with minor offences in a cost-effective manner.[20]

9.23 However, the Consumer Action Law Centre argued that the provision to issue infringement notices should be extended to include breaches of provisions in any industry codes made under Part IVB of the TPA. It highlighted the new Retail Grocery Industry (Unit Pricing) Code of Conduct and the Horticulture Code of Conduct as prominent examples of where the issuing of infringement notices would assist in more effective enforcement.[21]

9.24 The Australian Bankers' Association views the infringement notices as a potential source of 'reputation damage to legitimate businesses'. It noted that there is no safeguard in the bill to ensure that the infringement notice mechanism is only applied to minor breaches of the relevant provisions.[22]

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19 Mr Writer, *Proof Committee Hansard*, 21 August 2009, p. 11.

20 Consumer Action Law Centre, *Submission 19*, p. 14. Productivity Commission, *Review of Australia's Consumer Policy Framework*, Productivity Commission Inquiry Report No. 45, Volume 2 – Chapters and Appendixes, April 2008,p. 248.

21 Consumer Action Law Centre, *Submission 19*, p. 14.

22 Australian Bankers' Association, *Submission 32*, p. 5.

9.25 Minter Ellison also expressed concern at the adverse impact of the infringement notices:

> …we believe there is a real risk that the lower standard of proof and the ability of ASIC to impose infringement notices without going to court will do significantly more to create a risk adverse culture amongst regulated businesses. We are concerned that a lower standard of proof will mean that ASIC will be more inclined to prosecute breaches. The infringement notice power certainly seems likely to lead to more aggressive enforcement by ASIC.[23]

Redress for non parties

9.26 In 2002, the Full Court of the Federal Court ruled that the existing section 87 of the TPA does not allow orders to be made for those who are not parties to the proceedings.[24]

9.27 The bill inserts new sections 87AAA of the TPA and 12GNB of the ASIC Act to allow the Court to make certain types of orders to redress, in whole or in part, loss or damage suffered by a person that is not party to the proceedings. A court will be able to issue various forms of redress without the need for all consumers affected to be named as parties to the regulator's court proceedings.

9.28 The Court may make orders to redress non party consumers where a person:

- engages in conduct in contravention of an unconscionable conduct provision (of Part IVA of the TP Act and of Part 2, Division 2, Subdivision C of the ASIC Act);
- engages in conduct in contravention of a consumer protection provision relating to unfair practices (of Part V, Division 1 or Part VC of the TP Act; and of Part 2, Division 2, Subdivision D of the ASIC Act);
- engages in conduct in contravention of a consumer protection provision relating to pyramid selling;
- breaches the new provision in the ACL concerning the use of prescribed unfair contract terms (in Schedule 2, Part 2, section 6 of the TP Act; and in section 12BJ of the ASIC Act);
- is a party to a consumer contract and are advantaged by a term in relation to which the Court has made a declaration under section 87AC of the TP Act or section 12GND of the ASIC Act once those provisions commence; and
- the contravening conduct or declared term caused or is likely to cause loss or damage to a class of persons and the class of persons includes non-party consumers.[25]

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23 Minter Ellison, *Submission 45*, p. 10.

24 *Medibank Private V Cassidy* [2002] FCAFC 290. See *Explanatory Memorandum*, p. 77.

9.29 A court will be able to order various types of redress, including:

- declaring a contract or arrangement void in whole or in part;
- varying a contract or arrangement;
- refusing to enforce provisions of a contract or arrangement;
- refunding monies or return property;
- an order to repair goods or supply services at the respondent's expense; or
- an order varying or terminating an instrument creating or transferring an interest in land.[26]

9.30 In the Second Reading Speech on the bill, the Minister stated that:

> Redress for non-parties will allow the ACCC and ASIC to act more effectively where, for instance, thousands of consumers suffer small losses on which each of them might not take action individually because of cost and inconvenience. Businesses should not profit from consumer detriment, just because the amount is small or the harm is spread widely. This is not a general power to award damages, but a power to order redress where that loss or damage is clearly identifiable and there is no need to decide the merits of each case. It could be used to order redress such as an apology, the exchange of goods or a refund.[27]

Views

9.31 The Consumer Action Law Centre strongly supports the bill's provision on non-party consumer redress, arguing that it fills a 'significant gap' in the TPA and ASIC Act's remedy provisions. The Centre's submission cites a 2006 OECD report on consumer redress which argued that regulator powers to obtain consumer redress are not only justified on fairness grounds but can also enhance enforcement outcomes.[28]

9.32 However, the Centre is concerned that the bill does not clarify the types of orders that are intended to be excluded from the court's powers under these provisions. As drafted, the bill states that the court may make orders as it thinks appropriate 'other than an award of damages'. The Centre has argued that:

> An award of damages is a general legal concept that can include many different heads of damages, including direct loss or damage, consequential damage and punitive damages. Refunds of money would address one type

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25 *Explanatory Memorandum*, p. 79.

26 *Explanatory Memorandum*, p. 78.

27 The Hon. Dr Craig Emerson, Second Reading Speech, *House of Representatives Hansard*, 24 June 2009, p. 6988.

28 Consumer Action Law Centre, *Submission 19*, p. 13. OECD Committee on Consumer Policy, Best Practices for Consumer Policy: Report on the Effectiveness of Enforcement Regimes, 20 December 2006, p. 54.

> of direct loss or damage suffered by consumers, and indeed the orders are intended to redress consumer loss or damage generally. It is therefore unclear how the exclusion of orders for an "award of damages" interacts with express provisions enabling orders to redress "loss or damage" including to "refund money". The EM also sheds no light on this question. We are concerned that this confusion could lead to unintended problems or set-backs in future court cases in the absence of further clarification.[29]

9.33 The Centre therefore recommends amending the bill to clarify the types of orders that are intended to be excluded from the court's powers under these provisions, rather than excluding awards of damages generally. To this end, it considered that:

> …it would not be reasonable to exclude orders to redress direct loss or damage suffered by consumers, but consequential loss or damage and punitive damages could reasonably be excluded from the non-party redress provisions.[30]

9.34 Brambles Limited does not support the bill's provision of non-party consumer redress. In its view, the current procedures for representative actions are adequate, making the provision both 'unnecessary and inappropriate'. It added:

> …there is a danger that consumers who otherwise would not be able to make out the elements for recovery (e.g. where they have not relied upon any misleading representation) will be entitled to the benefit of any proposed orders made by a court.[31]

9.35 The Law Council of Australia put its objections to the provisions in the following terms:

> With regard to the non-party redress orders…essential processes and meanings are not clearly set out in the bill. For example, how would the affected class be determined? The bill has similarly not taken fully into account the consequences of some of the proposed enforcement actions on business reputation and consumer perceptions. The committee is also concerned that, under the bill as presently drafted, the regime will have unintended retrospective application once terms are prohibited or declared as unfair.[32]

9.36 On the issue of retrospective application of prohibited terms, Ms Amanda Bodger, representing the Law Council's Trade Practices Committee, explained by way of example:

> …sometime after the introduction of the new regime, businesses have been conducting their business with the standard form contracts for some time and under standard form contracts a fee is required to be paid by a

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29 Consumer Action Law Centre, *Submission 19*, p. 13.

30 Consumer Action Law Centre, *Submission 19*, p. 13.

31 Brambles Limited, *Submission 16*, p. 5.

32 Mr Dave Poddar, *Proof Committee Hansard*, 21 August 2009, p. 33.

> consumer in certain circumstances. The business has been collecting that fee for a number of months or years and believes that the fee is a fair one, action is taken either to get that term declared as unfair or perhaps a regulation is passed prohibiting the collection of an early termination charge or some sort of fee. The bill does not only provide an ability for redress going forward but because the term is void from its inception there is a risk that the regulator could require redress for all amounts that have been paid under that term—for many months, for many years—and the business collecting it in good faith. That is where there is an ability for the regime to act in a retrospective way. That leads to a lot of uncertainty for businesses generally in relation to standard form contracts.[33]

9.37 The Australian Bankers' Association queried whether the provision to offer non-party redress is consistent with the broader principles underpinning the legislation. As it commented in its submission:

> …the effect of a term being declared by a court to be an unfair term should apply only to the specific contract to which the application for a declaration relates. However, the drafting of the Bill's non-party redress provisions suggests that this is not the current intention. For example, s12GNB provides ASIC with the ability to seek redress for "non-parties" who may be affected by a declared unfair term. In permitting the court to grant orders for a class of unidentified persons who may suffer loss or damage (against a party who is advantaged by the declared term in the contract), the availability of non-party redress is by its very nature intended to apply without knowledge of any individual circumstances. This clearly suggests that the effect of a declaration that a court can make will in fact relate to more than one customer's contract. This seems at odds with the policy of the regime that whether a term is unfair will be dependent upon all of the relevant circumstances, the contract as a whole and the transparency of the term.[34]

Application of the Australian Consumer Law

9.38 The ACL will be enacted both nationally and in each of the States and Territories by means of an application law scheme. The law will be legislated by the Australian Parliament, and each State and Territory will apply the nationally agreed law. Amendments to the national law would then require agreement by jurisdictions according to an Inter-Governmental Agreement.[35]

9.39 Schedule 1 Part 2 of the bill inserts a new Part XI into the *Trade Practices Act 1974*. Part XI will:

- apply the ACL as a law of the Commonwealth;

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33 Ms Amanda Bodger, *Proof Committee Hansard*, 21 August 2009, p. 32.

34 Australian Bankers' Association, *Submission 32*, p. 3.

35 Paula Pyburne, *Bills Digest*, 18 August 2009, No. 18, 2009–10, p. 11.

- facilitate its application as a law of each State and Territory; and
- make provision for its administration, enforcement and amendment.

9.40 The Commonwealth Government, using its corporations' power under section 51(xx) of the Constitution, will be the lead legislator. Part XI provides that the ACL applies as a law of the Commonwealth to the conduct of corporations (except in relation to financial products and financial services).

9.41 Part XI will provide for participating States and Territories to enact an applied ACL as part of the law of their respective jurisdictions. The States and Territories are required to enact legislation by 31 December 2010 to apply the ACL.

9.42 Part XI will facilitate the application of the ACL in the States and Territories by:

- allowing them to confer functions or powers on a Commonwealth entity;
- conferring original and appellate jurisdiction on the Federal Court in relation to a matter arising under the ACL in a State or Territory's law;
- providing there is no doubling-up of liabilities in a breach of the ACL as set out in the TP Act, and an applied (State or Territory) ACL; and
- confirming that the ACL provisions in the TP Act do not exclude the operation of an application law of a State or Territory.

9.43 The Intergovernmental Agreement will set out the manner in which the ACL will be implemented, the consultation and voting process for amending it and arrangements for its administration and enforcement (see paragraph 2.15).

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.

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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

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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.

Coalition Senators' Additional Comments

Introduction

Coalition senators welcome this new national consumer law stemming, as it has, from the vision and action of the former Coalition government to whom due acknowledgement should be accorded.

We strongly support the aims of the legislation to enhance and harmonise consumer protection laws and protect consumers' interests by creating a more equitable legal framework.

Coalition senators support the broad principles-based approach to the regulation of contract terms, and recognise that the bill seeks a major shift in business mindset to transacting with consumers.

In making the following additional comments, we are mindful of the extensive consultations that have delivered the national framework of consumer law. We are also conscious that the Australian Consumer Law (ACL) provisions draw heavily from the UK and Victorian approaches to unfair terms in consumer contracts and that this bill draws likewise on the collective experience of similar consumer protection measures in those jurisdictions.

Design of the Australian Consumer Law

Like the Unfair Terms in Consumer Contracts Regulations 1999 in the UK, Schedule 2 of the bill aims to regulate unfair terms rather than unfair contracts. This is an important feature of the ACL.

United Kingdom legislation

The UK Regulations were initially instituted in 1994 in response to an EU directive; they were repealed and replaced in 1999. The other major legislation in the area in the UK is the *Unfair Contract Terms Act 1977*. Given the provenance of the laws it is not surprising that there is some overlap between the two, although, the Act applies to business-to-business contracts whereas the Regulations are confined to natural persons.

Core terms and grey list

Like in the proposed ACL, the core terms—the main subject matter and price—of a UK standard contract do not come within the UK Regulations. There is also a common "non-exhaustive, indicative" "grey list" in the UK Regulations.

Matters to which a court must have regard

In relation to questions of "detriment" and whether a term is "transparent" in the context of matters to which a court must have regard in deciding whether a term is unfair, Coalition senators are attracted to the arguments of the Consumer Action Law Centre and Professor Frank Zumbo that the "transparent" element is superfluous in this clause and should be removed.

We note that the concept of detriment to the consumer is also relevant in the UK Regulations.

Coalition senators recognise that difficulty and unease these concepts have caused from the evidence of a number of witnesses. We are however satisfied, based on the UK and Victorian experience and Treasury and other evidence, that these elements, in their context of "matters to which a court must have regard," are not impassable.

Coalition senators note with satisfaction that the experience in the UK is that the key role in enforcement of the UK Regulations has been with the regulator and not the courts.

Presumptions

Coalition senators have considered the two key presumptions in the ACL: that a contract is a standard form contract where alleged by a party, with the burden on the other party to rebut that presumption; and that a term is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term, with the burden on the party advantaged to prove otherwise.

We recognise the policy reasoning behind these presumptions.

Consumer definition

Insofar as the design of the ACL is concerned, coalition senators are attracted to the argument of the Trade Practices Committee of the Law Council of Australia in relation to the definition of "consumer contracts" in the ACL.

The Law Council gave evidence that consumer contracts "should be defined using the existing [consumer] definition in section 4B of the Trade Practices Act 1974 (TPA). This will enable the regime to provide protection to small businesses, where those businesses are purchasing goods and services under standard form "consumer type" contracts, while preserving consistency and certainty for the overall business community."

The Law Council also reasoned that, contrary to the definition of consumer contract in the ACL which has the element of subjectivity about the intent of the consumer entering into a contract, which the suppler or seller cannot know, the TPA definition on the other hand "has been around a long time, businesses are used to it and it will then be consistent."

Furthermore, coalition senators argue that the definition of consumer contracts under section 4B of should be amended to include all contracts up to an amount of $1million, an increase from the current limit of $40,000.

Coalition senators are also alert to the potential for further harmonisation that the Law Council's suggestion presents, by paving the way for a unified regime applying to unfair contract terms in business -to- consumer and business-to-business transactions.

Business-to-business contracts

The proposed definition of "consumer contract" in the ACL, however, contemplates a transaction of supplying or selling to an individual and does not have application beyond the sole trader business activity.

Coalition senators have noted the Minister's stated intention that regulation in the business-to-business sphere should await the outcome of reviews into the Franchising Code of Conduct and the Unconscionable Conduct Provisions of the TPA.

Under the current regime for business-to-business, the threshold test applicable under both sections 51AB and 51AC delivers a clear nexus to the ability to deliver a fair outcome, however, the statement of offending "the conscience" is nebulous and could be one of the reasons for the inability to pursue a case. This threshold test should be amended to a more definitive term. The malady which must be addressed is the clear and apparent utilisation of bargaining power to exert onerous terms that would not be accepted or considered if bargaining power was comparable.

Coalition senators are divided on the question of the application of the ACL to business-to-business contracts, whether they should be covered by this bill without delay, or pending the outcome of the reviews above, or not at all.

Senator Eggleston observes that Western Australia voiced its opposition to the Minister's decision to remove business-to-business contracts without consulting with the states which would appear to suggest that the government may not have engaged in adequate consultation with the states through the COAG process.

Business' concerns

Coalition senators have considered the concerns of business in relation to uncertainty and compliance costs and the short time frame remaining until the proposed start date of this legislation.

We are of the opinion that costs to business in moving to the new regime will be balanced by the gains from harmonisation of consumer laws to a single national regime.

Safe harbours

Coalition senators are divided on the merits of introducing arrangements into the ACL for safe harbours for business as a means to get the security of regulator sign-off on a contract term.

There is the view that safe harbours will give business the certainty that they are seeking.

On the other hand, there is support for the view expressed by the Consumer Action Law Centre that, because a court must consider the whole contract in deciding whether a term is unfair, it would not be sound for a regulator to give business a safe harbour in relation to a particular term.

Coalition senators recognise the principles-based approach of the consumer law aims to encourage compliance. We note with satisfaction the suggestion that the decision by banks to withdraw penalty fees on retail accounts may have been an anticipatory response to the ACL's focus on unfair contract terms.

An alternative course would be for the regulator to assist business sectors to develop industry specific standard form contracts. One witness to the inquiry observed that new standards had been the outcome in the Victorian experience of unfair terms legislation in telecommunications contracts.

In our view, no contract should contain terms that go beyond the legitimate business interest of the parties if there is a clear and apparent difference in bargaining strength as noted by size or financial strength.

Insurance

Coalition senators are divided on the question whether the ACL should cover unfair terms in insurance contracts.

We note that a number of consumer groups who gave evidence to the inquiry were surprised and disappointed to discover from the bill's EM that insurance contracts would be effectively excluded by section 15 in the Insurance Contracts Act 1984.

The Insurance Council of Australia argued in evidence to the committee that insurance contracts are separately regulated. However, consumer groups expressed despair with the present situation, in relation to both the frequency of consumer disputes in the insurance area and the difficulties consumer advocates encounter in disputing decisions that insurers make on claims. They argued that the absence of access to a suitable low-cost tribunal or dispute resolution service with jurisdiction to hear insureds' claims is a significant hurdle.

In that regard, coalition senators are reminded of the stated intent of the consumer legislation:

> The new policy framework will improve consumer law enforcement powers, reduce compliance costs for business and increase access to information regarding dispute resolution and consumer issues.

The benefit to consumers in the ACL missing from the ICA is the capacity for the regulators to review a term across a class of consumers.

Although divided on the issue of whether the ACL should be the means to address unfair contract terms in insurance, or whether the ICA should be reviewed to deliver the same result, coalition senators are agreed that unfair terms in insurance contracts exist and the problem should be addressed in the public interest.

It is apparent from the evidence of Minter Ellison to the committee that the issue of the ACL and insurance contracts will remain alive where there is the possibility that insurance contracts may be caught by the ACL in any case.

Coalition senators note with interest the recent media reports that Australia Post and Coles plan to enter the general insurance market. It is open to conclude that with two new potentially mass market entrants at this time, the insurance sector industry should be reviewed for some additional protection of consumer interests.

Financial services

Coalition senators are divided on the application of the ACL to financial services contracts as provided for in Schedule 3 of the bill.

The financial services industry presented cogent arguments to the inquiry that the AFS licensing regime under which they are regulated is more than adequate protection for the interests of the consumer.

There is also the view held among coalition senators that the consumer law framework which includes financial products and services which the committee has before it in this bill, is the considered view of extensive consultation, including sign-off by the states.

Enforcement

The bill contains amendments to the TPA to give enhanced powers to the regulator to compel businesses to provide information and to penalise businesses for unconscionable conduct and other breaches. There are sound public policy reasons for strengthening the capacity of the regulators to investigate possible breaches of the ACL and the TPA and to deal with contraventions expeditiously.

The proposed capacity for the regulators to issue public warning notices relating to consumer protection in certain circumstances is a powerful message to business in a language business understands. The incentive to business to manage this reputation risk will be a potent legislative driver to usher in a new era of consumer best practice.

With reference to the example on bank fees earlier, we reiterate that the community may already be reaping the rewards of that consumer fairness focus.

Conclusion

Coalition senators recognise that this bill represents the first phase of reforms to the consumer regime and that the measures represent in large part a catch up with consumer regimes that have existed in the EU for more than a decade.

We acknowledge the evidence and the disappointment from some presenters and submitters to this inquiry that the bill does not go far enough – particular mention is made of the cases put to us for the ACL to apply to business-to-business, insurance and body corporate unfair contract terms. Coalition senators record their view that concerns relating to these areas should be reviewed with a view to addressing these concerns in an appropriate manner.

Coalition senators record our broad support for the bill.

Senator Alan Eggleston
Deputy Chair

Senator Barnaby Joyce

Senator Bushby's Additional Comments

Introduction

I acknowledge the additional comments provided by the Coalition Senators who are voting members of the Economics Legislation Committee and other than as noted below, fully endorse them.

As a participating member, I attended the hearings into these bills and agree that there is scope in circumstances where two parties to a contract have unequal bargaining power for one party to include terms in a standard form contract which may prove to be unfair to the party holding little power. Further, this imbalance of bargaining power has been employed and continues to be employed, by unscrupulous businesses to the unfair detriment of consumers and, at times, small businesses.

Clearly, in my view, the consequences of such action by the unscrupulous, justifies intervention by legislators to protect an unfairly impacted party from the consequences of having to comply with such an unfair term or terms.

In an overall sense, I am persuaded by the arguments of the Law Council of Tasmania and others, that the circumstances as to what constitutes ‘unequal bargaining power’ and ‘unfair’ will vary depending on the circumstances surrounding each set of parties, their reasons for entering the contract and their level of understanding and ability to consider and accept the consequences of the terms to which they are agreeing. As such, I am of the view that the 'principles based approach' to addressing the very real mischief that needs to be addressed, may prove to be unsophisticated in practice, may lead to the creation of unnecessary uncertainty for both business and consumers, may actually preclude many terms in contracts that are in the circumstances fair and may even allow the inclusion as fair of some terms, that, were the circumstances to be examined, would be unfair.

I welcome the move to nationalise the approach to consumer protection in the area of consumer trade law and recognise that the rationalisation of jurisdictions dealing with this issue will result in some savings for businesses that operate across state borders.

However, I am persuaded by the argument that the problems in compliance and certainty introduced as part of this legislation will add to the costs of many of the goods and services provided under the standard forms contracts affected. Ultimately, this cost will be passed onto all consumers of such goods and services as a cost of addressing actual detriment to a sub-set of such consumers, and, more pointedly in the context of the legislation as written, as a cost of addressing the possibility of detriment arising from the mere presence of an unfair term in such a contract.

Specific Issues

A number of specific matters were put forward by submitters that raise issues in my mind with respect to the effect of the proposed legislation.

Uncertainty

The issue raised by all business submitters was that of uncertainty.

On the basis of the evidence received, it is arguable that anyone who signs up to a standard form contract will be able to allege that its terms were unfair if they find later that they don't like the contract, find their circumstances have changed, or for any reason choose that they no longer wish to remain a party to it.

Once they have alleged that such a contract contains unfair terms, the onus of proof shifts entirely to the business to prove otherwise.

The clear impact of this will be the removal of any degree of certainty a business might assume would apply upon such a contract being entered – and effectively rendering many, if not all forms of standard form contracts unenforceable.

If, in fact, the legislation turns out to have this impact, the advantage of standard form contracts in clarifying rights of parties for common goods and services, eliminating negotiation costs and, hence, reducing prices, would evaporate. The only possible outcomes then would be a revision of the manner and terms on which parties to such transactions contract, or higher prices for those goods and services.

Uncertainty resulting from this legislation is exacerbated by the lack of a clear definition for ‘standard form contract’ and ‘company’s legitimate interests’.

This lack of certainty also increases the personal risk to Directors of companies who will no longer be able to rely on the enforceability or even legality of standard form contracts drafted by their employees.

Lead-in time for the legislation

Issues were also raised regarding the start dates of the obligations under the proposed legislation. If business as a whole is to ensure its that its standard form contracts are fully reviewed and brought into line with what they understand to be required, longer lead in times will be required – particularly given the uncertainty surrounding definitions and what needs to be included to ensure that such contracts comply.

It seems to me that a longer transition period – maybe 12 months – would be more workable. In this regard it is worth noting evidence that it took some 12 months for the disruption caused by the introduction of equivalent provisions in both the UK and Victorian legislation, to work through the consequent confusion caused by the lack of clarity in the definition of what constituted an unfair term.

It is worth noting that the Government's reasoning for removal of business to business from the effect of this legislation was that it was too vague and likely to lead to uncertainty. Surely, if this is the case between businesses, it could be said to apply to standard form contracts between businesses and consumers.

Duplication of Regulatory Regimes

Many industry sectors are already very heavily regulated, including, but not limited to, the insurance industry (which has long been regulated in reflection of the potential for insureds to be treated unfairly) and more recently the financial services sector.

The insurance sector has been exempted from the effect of this legislation.

Although I acknowledge there remain many issues of unfairness in the way some insurance contracts are applied, I do not consider this proposed legislation to be the best way of addressing those issues. In many cases it is the application of the terms that is unfair, not necessarily the terms themselves and it is this that needs to be better addressed in the context of the regulation of the insurance industry.

It is worth noting evidence from the Insurance Council of Australia that over 98% of insurance claims are paid out without question and only 0.065% of claims go to the insurance ombudsman.

In terms of the financial services industry, they made a strong case that their current and very recent regulation requires them already, through their fiduciary and common law obligations, to treat their clients fairly and, indeed, to prefer the rights of investors over those of their shareholders.

It is their view that extending this legislation to cover their industry will not add to existing consumer protection but will add to the cost of the services they provide to consumers.

These two examples highlight my preferred approach to addressing the issue of unscrupulous exploitation of unequal bargaining power in standard form contracts. That is, in those industries that are already regulated, I am persuaded that it would be preferable to use that regulation to ensure that consumers are treated fairly.

Where industries are not regulated, it would be appropriate to apply such a law as proposed as a 'catch all' to ensure all remaining consumers are protected from unfair provisions, subject, of course, to fixing the issues highlighted above.

Safe Harbours

Professor Zumbo suggested that one way to improve certainty is to provide what he described as ‘safe harbours’. As the legislation currently stands, there is scope for grey lists to be compiled with terms that may or may not be unfair. This fails to provide any certainty and, in fact, will probably add to the uncertainty.

As I understand it, Professor Zumbo suggests that if a business were able to get their standard form contract signed off as compliant with the ACL by an appropriate regulator, with such a sign off providing them with protection against an unfair term allegation, it would vastly improve business certainty.

Despite my view that what is actually unfair depends on the specific circumstances of a case, I am attracted to Professor Zumbo's suggestion as it would significantly improve certainty of the enforceability of contracts if a general test of unfairness could be applied to standard form contracts prior to their being entered into.

Business to Business

Evidence was also received that there is a need for the ACL to cover business to business transactions.

It is clear to me that there are also situations where small businesses lack bargaining power, are effectively 'consumers', and are just as subject as individuals to unscrupulous activities when entering into standard form contracts.

Indeed, in many circumstances, small businesses can be easier prey for the unscrupulous than well informed consumers.

As such, there is clearly a need for a legislative framework that provides equivalent relief for small business from inappropriate and unfair contract terms in situations where there is clearly unequal bargaining power.

The ACL as proposed, however, may not deliver that relief in a way that will be of net benefit to either of the parties involved (for the reasons discussed above in respect of individual consumers) and, in that sense, the removal of business to business contracts from the scope of the proposed legislation was the correct decision.

Consideration should be given to what mechanisms exist, or may be able to be introduced, that will assist in this context.

Greater ease of access to existing remedies

Treasury was asked about the extent to which existing remedies contained in the Trade Practices Act already provided protection against unscrupulous conduct of the sort the proposed legislation is intended to curb, such as that provided under Section 51AB.

Treasury's view was that the proposed unfair contracts aspect of the ACL would provide additional avenues of redress for consumers.

Other witnesses stated that the section 51AB remedies were rarely used, in part because of cost, and also, in evidence suggested to me, because they possibly are not fully tested in terms of their ability to offer remedies for matters such as unscrupulous behaviour by a party with unequal bargaining power in a standard form contract.

Of interest is the evidence by Treasury that all remedies available to be pursued under the ACL can be pursued in state based forums:

> Mr Writer—The unconscionable conduct provisions will also form part of the Australian Consumer Law, which will be applied as a law of the states and territories.
>
> Senator BUSHBY—So people would be able to go to a small claims court and bring an unconscionable conduct action.
>
> Mr Writer—Potentially, although that may be subject to the limitations imposed on the nature of actions brought in those forums.
>
> Senator BUSHBY—But local dispute resolution methods are provided.
>
> Mr Writer—Yes. That is available.

As such, one of the major benefits that I see in this legislation is that it has the potential to reduce to a significant extent one of the major barriers to justice, that being the cost and ease of access to it!

In many ways, this is a more important development, in ensuring that consumers (individuals and small businesses) who are the victims of unscrupulous dealings, have access to remedies, than the introduction of the proposed new unfair contracts protections.

If state jurisdictions ensure there are appropriate low cost dispute resolution forums in place that offer consumers access to all remedies available under the ACL, it may well be the case that remedies such as those in section 51AB may prove far more effective than they have so far proven to be.

Conclusion

The proposed ACL is in itself a significant step forward in terms of consumer protection. However, with respect to the unfair contracts section of the proposed ACL, it is my view that the specifics of that proposal do not provide the best way to address the very real and serious issues that do occur between parties of unequal bargaining power, as the uncertainty and other consequences appear likely to be to the benefit of neither party.

Many industry sectors are already regulated. To the extent that the regulation fails to fully address unfair contract issues within each of those sectors, consideration should be given to amendments to those regulations to provide a fairer balance.

Where no industry specific regulation exists, consideration of general protection, such as that contained in this proposed legislation, should be considered. However, the potential costs, uncertainty and other consequences highlighted by the submissions should be addressed.

If the Government does proceed with unfair contract provisions as currently proposed, consideration should be given to the introduction of 'safe harbour' provisions along the lines suggested by Professor Zumbo.

Sitting above issues surrounding the specific application of the proposed unfair contract provisions is the benefit that will flow from other aspects of the introduction of the ACL, notably including the greater access to remedies that can flow from low cost state based dispute resolution forums – forums that will be able to hear cases based on remedies previously only able to be used in expensive court based actions. To some extent, this may off-set the need for specific action on unfair contracts, as remedies previously not utilised for this purpose, may become available through greater use and judicial development.

Senator David Bushby

Minority Report by Senator Xenophon

Introduction

1.1 The Trade Practices Amendment (Australian Consumer Law) Bill 2009 amends the Trade Practices Act 1974 to implement a national consumer law regime (the Australian Consumer Law) which will address unfair contract terms and include penalties, enforcement powers and consumer redress options.

1.2 The intent of the Bill is positive in that it will give consumers greater opportunity to challenge unfair contract terms, and in that regard I broadly support the Bill. However, in order to strengthen the unfair contract terms framework and give greater certainty to businesses and to consumers alike, there are a number of matters which should be considered and the Bill amended accordingly.

Background

1.3 The introduction of a national law to deal with unfair contract terms is long overdue. Internationally, the European Union adopted its Directive on unfair terms in consumer contracts in 1993, and was followed by the United Kingdom the following year. These overseas laws are tried and tested and have been positive for consumers and could be similarly positive for Australian consumers.

1.4 Victoria is currently the only state to have unfair contract laws, which were introduced in 2003 and have been the impetus behind the current national proposals to deal with unfair contract terms.

1.5 There are currently 13 generic consumer laws operating around the country and this national legislation will reduce confusion and complexity for consumers and give greater certainty to businesses and reduce compliance costs.

1.6 However, the Bill does not include business-to-business contracts and therefore small businesses cannot access the laws in circumstances where they may be similarly affected by unfair contract terms. Until as recently as June 2009, the draft legislation included an upfront price cap of $2 million on the size of transactions that would be subject to the unfair contract terms. However, this was removed in late June 2009 to standard form business-to-consumer contracts only.

1.7 Standard form contracts are generic contracts that have been drawn up for use in a particular industry, such as mobile phone providers, fitness centres, franchising and shopping centres. Essentially, they are template contracts where there is no negotiation on the part of the consumer or small business.

1.8 However, the unfair contract laws in this Bill do not apply to all contracts. For example, insurance contracts will be exempt pursuant to section 15 of the Insurance Contracts Act.

Provision of 'Safe Harbours' and the removal of exemption for insurance contracts

1.9 To give greater business certainty, provisions for 'safe harbours' should be considered, whereby businesses and business associations can choose to approach the ACCC to seek approval or authorisation of particular contracts or contract terms.

1.10 In his submission to the Committee, Associate Professor Frank Zumbo from the University of New South Wales proposed this mechanism that would create `model contracts' or 'model contract terms' and, as a result, facilitate the development of fairer contracts or contract terms which can apply to whole industries and contract groups.

1.11 It would be in the public interest to allow contracts to be reviewed under the safe harbour mechanism before an exemption is granted to the contract under the laws. Accordingly, by including 'safe harbours', there would be no need for outright exemptions in the Bill.

1.12 In this way, the unfair contract laws in the Bill would apply to insurance contracts which are currently exempt from this Bill pursuant to section 15 of the Insurance Contracts Act. Under that Act, insurance contracts are excluded from the operation of any Act (Commonwealth, State or Territory) that provides relief in the form of judicial review of harsh or unfair contracts".

1.13 The Consumer Action Law Centre states in its submission:

> "…there are no reasons why any particular industry need be exempt from coverage under unfair contract terms regulation. The policy reasons for introducing unfair contract term laws apply top consumer contracts generally, regardless of the specific product or service provided."

1.14 To leave insurance contracts exempt from this Bill would undermine its intent, which is to provide safeguards for consumers against unfair contract terms. Insurance contracts can be incredibly confusing, lengthy and jargon-filled and in most cases is not clearly understood by consumers.

1.15 While the Insurance Contracts Act includes provisions against unfair or unconscionable conduct, National Legal Aid provides a number of case examples of breaches of the Insurance Contracts Act with regard to unfair terms. In its submission to the Committee, it stated:

> There has been considerable public reporting over the last two decades on what might be described, in one form or another, as examples of systemic unfairness in the drafting of terms in insurance policies.
>
> The Insurance Council of Australia as recently as this year has acknowledged the existence of unfair terms in insurance contracts, referring to two particular examples of unfair terms that are specifically permitted by the Insurance Contracts Act…

1.16 Given this, insurance contracts should not be exempt. Alternatively, to maintain its exemption, insurance contracts should be subject to independent rigorous review against legislative criteria to assess whether it should remain exempt from this new national legislation. The proposed safe harbour mechanism allows for such independent rigorous review.

Courts' consideration of 'detriment' and 'transparency'

1.17 The inclusion of 'detriment' and 'transparency' was a key issue among the majority of submissions to the Committee inquiry.

1.18 As it stands, courts have the discretion to consider all aspects of cases before them, and should not be constrained to focus on 'transparency' and 'detriment' specifically when it comes to determining whether or not a contract is unfair. The mandatory requirement for the Court to focus on transparency and detriment will require the court to address these specific questions and will effectively turn these mandatory requirements into tests in themselves and in a manner that negatively impacts on the consumer.

1.19 National Legal Aid argues that the concept of 'transparency' implies that consumers are able to make informed choices about contract terms, however it stated in its submission that their case work would suggest the opposite.

> … because most consumers do not read contracts – most rely on a notion that traders will act in a fair and reasonable way when it comes to enforcing their rights. Even when they read contracts, consumers do not often understand how a particular clause will operate in practice. And, even when a contract is read and understood, standard clause contracts are non-negotiable – it is a falsity to think that consumers can somehow bargain their way through amending or deleting a clause in a contract that is unfair but transparent.

1.20 Associate Professor Frank Zumbo also argued in his submission that a term can be considered 'transparent' but may still be 'unfair'.

> …on the simple, but objective basis that the larger party's bargaining power allows the larger party to draft and impose a contract term in such a way as to (i) represent a significant imbalance in the contractual rights and obligations in the larger party's favour; and (ii) in a manner that goes beyond what is reasonably necessary in order to protect the legitimate interest of the larger party.

Unfair Terms

1.21 One example of an unfair term is the charging of fees to customers paying bills by cash.

1.22 In July 2009, Telstra announced that it would be introducing a range of fees that would reduce face-to-face customer service and drive more customers towards

online bill payments. It follows similar moves by its competitors, Optus, Vodafone and 3.

1.23 Under this policy, customers will be charged a $2.20 administration fee for bills paid by mail, in person or at an Australia Post retail outlet.

1.24 It is understood the move will cost as much as 2 percent of every bill and is set to save the company "several hundred million dollars" a year in administration costs.

1.25 While it is understood that customers who are able to demonstrate financial hardship will not be penalised (eg. Telstra will exempt those with a pensioner or disability card from paying the new fees and other additional credit card charges) , it is still an unfair term as it is penalising those who choose not to use or do not have access to the internet to pay their bills.

Exclusion of small businesses

1.26 The exclusion of small businesses from the Bill is arbitrary, given there are sufficient safeguards in the proposed framework to maintain business certainty for big business.

1.27 Further, the inclusion of 'safe harbours' would also justify the reinstatement of small businesses, as the 'safe harbours' would also be available to provide for complete certainty in relation to the business-to-business contracts involving small businesses.

1.28 In its submission, the Pharmacy Guild of Australia called for business-to-business contracts to be included under the legislation to protect small businesses. It notes occasions when "large pharmaceutical companies can impose strenuous terms of supply on pharmacists that may be regarded as objectively unfair".

1.29 One example the Pharmacy Guild of Australia provided to the Committee was:

> For example, some drug companies may not supply product to pharmacists at a particular price unless they commit to a particular sales growth target and a requirement to hold particular levels of stock. On occasion, this can be objectively unfair because it is an exercise of inequality of bargaining power.

1.30 This view is echoed by the Motor Trades Association of Australia, which stated in its submission to the Committee:

> In many of their business relationships, retail motor traders have fewer rights of redress against larger stakeholders (such as franchisors, acquirers, other suppliers and so on) for harsh and unfair behaviour than do consumers against retailers and manufacturers. That is, contracts are presented as 'take it or leave it' standard form agreements, there is little and often no negotiation on the terms of the contract (without which the business can

> often not operate) and many contain terms which are detrimental to the small business and are in excess of what is required to protect the normal commercial rights of the larger party.

1.31 This argument was also supported by Associate Professor Frank Zumbo who provided this case example to the Committee:

> … for example, a mobile phone contract that relates to consumers and then you have a mobile phone contract that relates to small businesses. The small business mobile phone contract would not be included in these proposals. But a mobile phone for a small business person could have equally unfair contract terms in the same way that a mobile phone contract for consumers can.

1.32 As such, Associate Professor Zumbo calls for the definition of "consumer contract" to be reverted back to the original drafting of the legislation, where "small business would have been included in the unfair contracts proposals if the standard form contract was for $2 million or less".

Conclusion

1.33 The introduction of a national consumer law is a positive measure for upholding consumer rights and will consolidate the numerous and varying legislations around the country. It will also reduce time and costs for businesses and provide greater certainty to consumers and business. However, these positives should not be confined to just business-to-consumer contracts, but should be extended to business-to-business contracts involving small businesses.

1.34 On the whole, I support the Bill's intent, however, I believe it can go further to protect not only consumers, but big and small business.

Recommendation 1

1.35 That the Bill not be passed in its current form.

Recommendation 2

1.36 That the Bill include provisions for 'safe harbours'.

Recommendation 3

1.37 That insurance contracts not be exempt from the legislation.

Recommendation 4

1.38 That the Bill be amended so that the terms 'detriment' and 'transparency' may be used as guides-only for courts, not as mandatory considerations.

Recommendation 5

1.39 That the Bill be amended to deal with the unfair contract term of customer fees for paying bills with cash.

Recommendation 6

1.40 That the Bill be amended to include business-to-business contracts involving small businesses where the upfront price payable for the services, goods or land supplied under the contract is below $2 million.

Nick Xenophon

Independent Senator for South Australia

7 September 2009

APPENDIX 1

Submissions Received

Submission Number	Submitter
1	Master Builders Australia
2	Redfern Legal Centre
3	Mr Gregory Carroll
4	Mr Ian Tonking SC
5	Queensland Newsagents Federation
6	Mr Ian Douglas
7	FOXTEL Management Pty Ltd
8	Unit Owners' and Body Corporate Alliance
9	Shopping Centre Council of Australia
10	The Law Society of New South Wales
11	Colonial First State Global Asset Management
12	Associate Professor Frank Zumbo
13	Motor Trades Association of Queensland
14	Confidential
15	Motor Trades Association of Australia
16	Brambles Limited
17	Australian Newsagents' Federation Ltd
18	AHIA Australian Health Insurance Association
19	Consumer Action Law Centre
20	Business Council of Australia
21	Consumer Credit Legal Centre (NSW) Inc
22	Housing Industry Association Ltd (HIA)
23	NetChoice
24	Australian Finance Conference
25	Australian Institute of Company Directors
26	GE Capital Finance Australasia Pty Ltd
27	Australian Institute of Architects
28	Westpac
29	Law Society of NSW
30	National Australia Bank
31	Association of Consulting Engineers Australia (ACEA)
32	Australian Bankers' Association Inc
33	Abacus – Australian Mutuals
34	Council of Small Business of Australia
35	Bank of Queensland
36	Insurance Law Service
37	SingTel Optus Pty Limited
38	Australian Information Industry Association (AIIA)
39	Investment & Financial Services Association
40	Confidential
41	The Newsagents Association of NSW & ACT Ltd (NANA)
42	The Pharmacy Guild of Australia

43 Insurance Council of Australia
43 Insurance Council of Australia – Supplementary Submission
44 Freehills
45 Minter Ellison Lawyers
46 Business Software Alliance
47 Law Council of Australia, Trade Practices Committee, Business Law Section
48 Confidential
49 Legal Aid Queensland
50 AAMI
51 Mr Michael Peters
52 National Legal Aid
53 Choice
53 Choice – Supplementary Submission
54 Service Station Association Ltd
55 NIBA National Insurance Brokers Association of Australia
56 AIIA Australian Information Industry Association
57 Queensland Consumers Association
58 West Heidelberg Community Legal Service

Additional Information Received

Received on 25 August 2009 from the Law Council of Australia. Answers to Questions on Notice taken on notice on Friday 21 August 2009.

Received on 28 August 2009 from the Motor Trades Association of Australia. Answers to Questions on Notice taken on notice on Friday 21 August, 2009.

TABLED DOCUMENTS

26 August 2009, SYDNEY NSW:

Consumer Action Law Centre:

- *'Motor Finance Wizard – the experiences of Consumer Action clients'* Case Study
- *'Case Study – unfair term in UME insurance policy'* Case Study
- *'Case studies on credit assistance at retail point-of-sale'* Case Study
- *'The consumer protection provisions of the Trade Practices Act 1974 Keeping Australia up to date* Report May 2008

APPENDIX 2

Public Hearings and Witnesses

CANBERRA, FRIDAY 21 AUGUST 2009

BODGER, Ms Amanda, Partner, Mallesons Stephens Jaques; and
Member, Trade Practices Committee, Business Law Section, Law Council of Australia

BOWDEN, Mr Ron, Chief Executive Officer
Service Station Association Ltd

COOREY, Mr David, Solicitor, Civil Litigation
Legal Aid New South Wales

CORKE, Mr Kerry, Consultant to the Pharmacy Guild of Australia

DALTON, Ms Ann, Director, Government Relations & Policy
Pharmacy Guild of Australia

DEGOTARDI, Mr Mark, Head of Public Affairs
Abacus Australian Mutuals

DELANEY, Mr Michael, Executive Director
Motor Trades Association of Australia

GIJSELMAN, Mr Matt, Senior Adviser, Policy & Public Affairs
Abacus Australian Mutuals

HITTER, Ms Monique, Director, Civil Law
Legal Aid New South Wales

KENNEDY, Dr Steven, General Manager, Competition and Consumer Policy Division
Department of the Treasury

LAMONT, Mr Colin, Chairman
Unit Owners and Body Corporate Alliance

PODDAR, Mr Dave, Partner, Mallesons Stephens Jaques; and
Chair, Trade Practices Committee, Business Law Section, Law Council of Australia

REID, Mr Patrick
Pharmacist

RIDGEWAY, Mr Stephen, Partner, Blake Dawson; and
Deputy Chair, Trade Practices Committee, Business Law Section, Law Council of Australia

SCANLAN, Ms Sue, Deputy Executive Director
Motor Trades Association of Australia

SHEARER, Ms Elizabeth , Director, Client Information, Advice and Civil Justice Services
Legal Aid Queensland, and representing National Legal Aid

WRITER, Mr Simon, Manager, Consumer Policy Framework Unit
Department of the Treasury

SYDNEY, WEDNESDAY 26 AUGUST 2009

ANNING, Mr John, General Manager, Policy and Regulation
Insurance Council of Australia

BATTEN, Mr Richard, Partner, Minter Ellison Lawyers
Investment and Financial Services Association

BELL, Mr David, Chief Executive Officer
Australian Bankers' Association

COCKBURN, Mr Milton, Executive Director
Shopping Centre Council of Australia

COLVIN, Mr John, Chief Executive Officer
Australian Institute of Company Directors

COX, Ms Karen, Coordinator, Insurance Law Service
Consumer Credit Legal Centre (New South Wales) Inc.

GILBERT, Mr Ian, Director, Retail and Regulatory Policy
Australian Bankers' Association

LANE, Ms Katherine, Principal Solicitor, Insurance Law Service
Consumer Credit Legal Centre (New South Wales) Inc.

LOWE, Ms Catriona, Co-CEO
Consumer Action Law Centre

O'REILLY, Mr David, Director, Policy and Regulations
Investment and Financial Services Association

RICH, Ms Nicole, Director, Policy and Campaigns
Consumer Action Law Centre

WATTERSON, Ms Leah, Senior Policy Adviser
Australian Institute of Company Directors

ZUMBO, Associate Professor Frank
Private capacity