

22 May 2009

By email: australianconsumerlaw@treasury.gov.au

The Australian Consumer Law:
Consultation on draft unfair contract terms provisions
Competition and Consumer Policy Division
Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir/Madam

Australian Consumer Law – submission on draft unfair contract terms provisions

Thank you for the opportunity to comment on the draft legislative provisions to implement a national unfair contract terms law.

Consumer Action Law Centre's (**Consumer Action**) views on the draft unfair contract terms provisions set out in the consultation paper released on 11 May 2009 (the **Paper**) are set out below. This submission is also endorsed by:

- Consumer Credit Legal Centre NSW; and
- Consumer Law Centre of the ACT.



**Consumer Credit
Legal Centre NSW**



In summary, we repeat our strong support for effective national unfair contract terms regulation. We consider that the draft legislation in the Paper largely reflects the policy intent previously communicated by the Ministerial Council on Consumer Affairs (**MCCA**) and the Council of Australian Governments (**COAG**). However, there are some instances in which we recommend changes and these are set out below.

More importantly, the draft provisions in the Paper do not include any provisions that would enable the regulators to take their own legal action to prevent the inclusion or use of an unfair term in a standard form contract, as opposed to action on behalf of a consumer or consumers and as opposed to action to prevent the inclusion or use of a 'prohibited term' prescribed under

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the legislation. We understand that it is proposed to address these powers in a separate section of the Bill (which has not been released for comment). Clearly, it is difficult to comment on the effectiveness of what is proposed given its absence from the current draft. For present purposes we must therefore simply make it clear that we do not support the proposed unfair contract terms law unless such provisions are found in the final Bill, as otherwise the law simply will not be effective.

For conciseness, when discussing issues below that are common to both sets of draft provisions, we refer only to the provisions of the draft *Trade Practices Amendment (Australian Consumer Law) Bill 2009: Unfair and prohibited contract terms*. However, our comments apply equally to the mirror provisions set out in the draft *Trade Practices Amendment (Australian Consumer Law) Bill 2009: Unfair and prohibited contract terms relating to financial services etc.*

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

Part 2 Division 1 – Unfair terms

General definition and effect

Consumer Action generally supports the proposed provisions setting out the definition and effect of an unfair term in a standard form contract and consider that they are consistent with the stated policy intent of the provisions. Further, we strongly support draft section 3(4), which provides that the party asserting that a term is reasonably necessary in order to protect their legitimate interests bears the onus of proving that this is the case. As the Paper points out, it is the party seeking to rely on the term that is in the best position to produce evidence about the term's nature.

We also strongly support the inclusion of draft section 4, which sets out an indicative and non-exhaustive list of terms that may be unfair under the general definition of an unfair term in draft section 3. As we noted in our submission to the initial consultation and information paper of February 2009, this two-fold approach to the definition of 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 combining the flexibility of a general definition that allows for changing practices with the clarity and certainty of additional guidance in the interpretation of the general provision.

Omission of 'supplier' and 'consumer'

The draft provisions represent the first time that references to a 'supplier' and a 'consumer' have been omitted from the definition of an unfair term. For example, the definition now includes the element that the term is unfair if it is not reasonably necessary to protect the legitimate interests of 'the party who would be advantaged by the term'. This is a change from the original MCCA and COAG proposal that provided for a term to be unfair if, in this regard, it was not reasonably necessary to protect the legitimate interests of the 'supplier'.

The Paper's explanation for this change is that 'there are circumstances where it is the "consumer" in a transaction who provides and insists on the use of a standard-form contract' (p9). However, this is only true for business-to-business transactions; individual consumers simply do not draft and provide standard-form contracts to businesses from which they wish to purchase goods or services, nor are they likely to be in a position to insist on the adoption of such contracts in the unlikely event they are prepared.

There has been insufficient time to consider the possible implications of this change. However, at a minimum we would recommend that the Government consider whether the concept of "the party who would be advantaged by the term" in draft section 3(1)(b) might better be replaced by a concept of the party who substantially drafted or prepared the contract. Otherwise, we envisage that the legislation might make it possible for a business to challenge a contract term that a consumer sought to rely on down the track if a situation arose in which the effect of the term was helpful to the consumer against the business' wishes. The intent of the law is to address the lack of market power consumers have to influence the content of standard-form contracts, not to enable a business to re-write a contract it was responsible for if it later changes its mind.

The same concern applies to the draft section 4, which now defines the examples of possible unfair terms by reference to "one party but not another" instead of "suppliers" and "consumers". Taking out the references to suppliers and consumers strips the law of its reflection of the underlying policy intent, which is not to interfere with individual bargains made between contracting parties generally, but specifically to address the imbalance in market power between consumers and suppliers in the modern marketplace.

"Extent to which transparent" consideration

Draft sections 3(2) and 3(3) also introduce a concept that was not foreshadowed in the initial consultation and information paper. Consumer Action agrees that it is reasonable for the court to be required to consider possible consumer detriment and the contract as a whole in determining whether a contract term is unfair. However, the requirement for the court to consider 'the extent to which the term is transparent' (s.3(2)(b)) is a new development.

The Paper explains that the intention behind introducing this consideration is to draw the Court's attention to unfairness that is exacerbated by a lack of transparency of the term (p11). Despite good intentions, however, we consider that this "transparency" requirement may substantially undermine the effect of the law. As stated above, unfair contract terms laws are designed to

address consumers' inability to negotiate the terms of standard-form contracts proposed by businesses and the technical legibility, presentation and availability or otherwise of those terms is largely irrelevant to this concern. As the Standing Committee of Officials of Consumer Affairs (**SCOCA**) has previously explained:

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...*

However, standard form contracts do pose problems. These types of contract 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. Even if the putative purchaser did read and understand the contract, the supplier may not be prepared to change clauses at their request.* This 'take it or leave it' attitude places purchasers in a difficult position: *agree to the terms or forgo the product or service.* Although, at law, there may not be a circumstance of duress, for example, or unconscionable conduct on the part of the supplier prior to or at the time that the contract is made, the purchaser may have no option but to agree if he or she wants the product.

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* [our emphasis].¹

Requiring the court to consider the technical disclosure of a contract term (a procedural issue), as opposed to its nature and effect (a substantive issue), again arguably subverts the policy intent of the Bill. There is a real concern that inclusion of the mandatory consideration of transparency could have the practical effect that 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 the contract term, and regardless of the extent of the unfairness of the content and effect of the term.

Given the market problem that unfair contract terms laws are intended to address, it is misconceived to obligate the court to consider disclosure issues in assessing unfairness. The considerations set out in draft section 3(3) may be relevant to an assessment of whether a particular contract term is unfair in particular circumstances, but in a great many incidences the transparency of the term simply will not be a material issue in determining the substantive fairness or unfairness of a term. We therefore strongly recommend that the draft provisions be

¹ SCOCA Unfair Contract Terms Working Party, *Unfair Contract Terms: A Discussion Paper*, January 2004, pp16-17.

amended to remove the mandatory requirement for the court to consider the extent to which the term is transparent in determining whether a term is unfair.

Transparency could perhaps be retained as a consideration specifically listed that the court *may* take into account, amongst others, if it considers relevant. This would be a more appropriate reference to the issue of the “transparency”, or technical disclosure, of a contract term than elevating it to a central consideration for the court.

Exclusion of terms that define main subject matter and upfront price

Consumer Action strongly supports the draft legislation’s clarification that ‘upfront price’ does not include ‘any other consideration that is contingent on the occurrence or non-occurrence of a particular event’. This better reflects the policy intent behind the exclusion of upfront price from assessment for unfairness and also reflects the Productivity Commission’s recommendation on this issue.²

Draft section 5 is drafted slightly differently to the UK provisions whose approach it is intended to follow. Regulation 6(2) of the UK Unfair Terms in Consumer Contracts Regulations 1999 states that the *assessment of fairness of a term* shall not relate to the subject matter or price, whereas the proposed Australian provision states that the entire draft section 2 voiding unfair contract terms *does not apply to a contract term to the extent that* the term defines the subject matter or sets the upfront price.

Again, there has been insufficient time to consider the possible implications (if any) of the differences and it is possible that the proposed drafting is, in fact, superior to the UK provisions in some respects. We therefore simply note that the Government should ensure it is confident the drafting only excludes such terms from assessment for unfairness to the extent that the unfairness is alleged to relate to the main subject matter or upfront price, and that the terms are otherwise assessable for unfairness. This is different to an approach that entirely excludes these core terms from any assessment for unfairness under the unfair contract terms law, regardless of whether the unfairness is alleged to arise from a different aspect of the terms.

The recent legal proceedings in the UK between the UK Office of Fair Trading and the major UK banks in relation to the application of the UK regulations to certain banking contract terms included a consideration of this very issue, with the Court having to decide whether an ‘excluded term’ construction or ‘excluded assessment’ construction was the correct way to interpret regulation 6(2) as it applied to price.³ The Court held that the ‘excluded assessment’ construction is correct, that is, the UK regulations only exclude assessment of the fairness of the price under the contract term, but not assessment of the term’s unfairness otherwise.

² Productivity Commission, *Review of Australia’s Consumer Policy Framework: Productivity Commission Inquiry Report Volume 2 – Chapters and Appendixes*, No. 45, 30 April 2008, pp 161-62.

³ *Abbey National plc and Others v Office of Fair Trading* [2009] EWCA Civ 116 §§8-13; *Office of Fair Trading v Abbey National plc and Others* [2008] EWHC 875 (Comm) §§422-436.

Part 2 Division 2 – Prohibited terms

Consumer Action supports the inclusion of Division 2 enabling certain terms to be prohibited by regulation.

However, the Paper advises that no terms will be prohibited at this time (p18). The Victorian *Fair Trading Act* contains similar provisions enabling unfair terms to be prescribed in regulations but no terms have ever been prescribed under these provisions. In our view, this experience suggests that these proposed provisions are highly unlikely ever to be invoked unless it is seen that prohibiting a term is workable and not unduly onerous in practice.

To do this, we strongly recommend that at least one or two terms should be prohibited by regulation at the time of the commencement of the new provisions. The initial consultation and information paper listed a large number of potential candidates and Consumer Action considers that strong cases can be made that some of these terms will always be unfair in a standard form contract and should not be permitted. For example, it is hard to justify the continued inclusion in standard form contracts of terms that mandate compulsory arbitration, terms that deny the existence of pre or post contractual representations and terms that provide for a flat or fixed early termination fee.

Part 2 Division 3 – Standard form contracts

Given the policy intent to apply the Australian unfair contract term law only to standard-form contracts, Consumer Action supports draft section 7. It does not provide for a prescriptive definition of a standard-form contract, which we agree would provide opportunities for avoidance. It also provides that the party asserting that a contract is not a standard-form contract bears the onus of proving that this is the case, which we agree is appropriate since that party is in the best position to produce evidence about the way in which it contracts with other consumers.

Unfair and prohibited contract terms relating to financial services etc

Consumer Action strongly supports the application of unfair contract terms provisions to all consumer contracts, including for financial products and services including consumer credit contracts.

Enforcement issues

The Paper makes it clear that a finding that a contract term is void as unfair will not be a contravention under the relevant Act. It will only be a contravention to include, apply or rely on a prohibited term (p21).

At present, the regulators' enforcement powers and ability to seek remedies under the relevant Acts are triggered upon contraventions. This means that additional provisions need to be inserted into the Acts to enable the regulators to take legal action to prevent the inclusion or use of a general unfair term (as opposed to a prohibited term) in a standard form contract.

However, the draft unfair contract terms provisions do not include any additional provisions of this sort.

We understand that the draft provisions in the Paper are intended to form part of a final Bill, the other part of which will include provisions to amend and add to current regulator enforcement powers and remedies. We therefore strongly recommend that the final Bill include such provisions, enabling the regulators to take their own legal actions to prevent the inclusion or use of an unfair term in a standard form contract.

We do not support the proposed unfair contract terms law unless such provisions are found in the final Bill. This is because, as we have noted in the past, including in our submission to the initial consultation and information paper, the effectiveness of unfair contract terms laws critically depends on the ability of government regulators to enforce it.

This is a different sort of legal action to a regulator-led representative action on behalf of a consumer or consumers. Unfair contract terms laws are intended to address the widespread inclusion of unfair terms in standard-form contracts as a general feature of the modern marketplace. The nature of the problem is that it is a market-wide problem, not one that affects the odd individual or group of individuals. Thus, one of the most important features of unfair contract terms laws (including the EU, UK and Victorian models) is that they allow the regulator to take proactive action to address the inclusion or use of an unfair term in a standard-form contract in use in the marketplace, and do not merely bestow legal rights to take action on the individual consumers affected by a contract term.

We have also noted that another benefit of unfair contract terms regulation is their strong pro-competition effect in promoting consumer confidence and increased market participation and in addressing sub-optimal consumer contracting decisions. However, these benefits do not accrue if the law does not enable pre-emptive regulator action to weed out unfair terms and instead is limited to remedies after the fact because, under this sort of model, consumers continue to face a high risk of encountering unfair terms and carry the burden of having to pursue a remedy. Consumers cannot have confidence that they will not be placed in this situation.

The Victorian unfair contract terms law provides for specific provisions to enable the Victorian regulator to seek declarations, interim injunctions and/or permanent injunctions against unfair terms, as otherwise the same issue would arise that enforcement powers are triggered only upon a contravention. These provisions are found in sections 32ZA and 32ZC of the Victorian *Fair Trading Act 1999*. We strongly recommend that the national unfair contract terms law similarly provide for specific provisions to enable the regulators to seek declarations and injunctions against the use of unfair terms.

The Victorian Act also includes a section 32ZB providing the regulator with information gathering powers to facilitate its consideration of whether a contract term is an unfair term. We strongly recommend that a similar provision also be included in the national unfair contract terms law, as the existing regulator information gathering powers are, again, only available to consider possible contraventions of the law.

Please contact Catriona Lowe on 03 9670 5088 or at ceo@consumeraction.org.au if you have any questions.

Yours sincerely

CONSUMER ACTION LAW CENTRE

A handwritten signature in black ink, appearing to read 'C. Lowe', with a vertical line extending downwards from the end of the signature.

Catriona Lowe
Co-CEO

A handwritten signature in black ink, appearing to read 'N. Rich', with a horizontal line extending to the right from the end of the signature.

Nicole Rich
Director – Policy & Campaigns