

An Australian Consumer Law

Fair Markets — Confident consumers

Submission by the New South Wales Shadow
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1. Unfair contract terms

It has been quite some time since the unfair contracts laws of the UK (1977) first came to attention in Australia but, since then, only Victoria has really taken a substantial step towards legislating for problem contractual terms here by amendments to its Fair Trading Act (2003).¹

The Productivity Commission has indicated that consumer detriment from unfair terms in standard form contracts was likely to be “non-trivial”.² We don’t actually know a great deal about the breadth and depth of impact of such terms and contracts. These things are difficult to measure.

We agree with the types of non-negotiable contracts that should be covered by unfair contract terms legislation, including utilities, communications, residential and retail leases, software end-user licences, e-commerce, banking and financial services and the rest outlined on page 33 of the Paper.

Of course it would be most helpful to small business operators if there could be guidance as to the wording and form of ‘fair’ standard terms. In many instances this might prove impossible but there are certain types of standard clauses which could readily be expressed, perhaps by schedule, to be fair. Then what is ‘fair’ might have to be reassessed from time to time, as social standards and equity imbalances shift in the marketplace.

Examples might include clauses for:

- ❖ Dispute resolution processes, including the appointment of an arbitrator, the division of costs for the process, and a statement that the consumer maintains the right to go straight to the consumer or small claims tribunal of their state or territory.
- ❖ Deposits, prepayments and the calculation of genuine damages to be retained by vendors should a consumer back out of the contract before completion.
- ❖ Procedures for cancellation of the contract before completion.
- ❖ The time period for the vendor to make any refund required by the contract.
- ❖ Limiting the circumstances under which the vendor can change a key clause of the contract.
- ❖ Limiting the vendor’s rights to assign the contract to a third party.

¹ *An Australian Consumer Law: Fair markets – Confident consumers* (‘ACL’) p.29 footnote 38

² Productivity Commission PC 2008 II.152-154; ACL p.29 footnote 39

Recommendation: There should be a simple legislative procedure by which other contracts presented to consumers and small business operators might be declared ‘standard form’ and covered by this scheme.

We agree with the principles from the Paper dealing with unfair contracts. In particular:

- ❖ “A 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.”
- ❖ “Remedies will be available only where the claimant (an individual or a class) shows detriment to the consumer (individually or as a class), or a substantial likelihood of detriment, not limited to financial detriment.”³
- ❖ “The provision will relate only to standard form, 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.”
- ❖ “The provision will 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 (UTCCR).”
- ❖ “The provision will 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.”

Terms to be banned

We agree with the principles behind the list of terms to be banned, referred to on pages 35-42 of the Paper, except for the following:

“Terms denying the existence or validity of pre- or post-contractual representations made to consumers; ‘entire agreement’ terms; terms deeming something a fact.”

These clauses play an important role in limiting the agreement to what is actually placed in writing. Recollections of conversations and ‘promises’ are difficult to deal and add enormous uncertainty to a transaction. It becomes one person’s word against another. This can result in delay in resolving problems, in legal expenses and emotional stress.

It might be argued that consumers are always better off with the open opportunity to challenge the written text of a standard, non-negotiated contract, and that traders have nothing to fear if they are dealing fairly.

³ ACL p.32

While this view has its attractions it is often the case that individual marketplace contracts are but part of a large web of contracts, each of which relies to some degree on the existence of the others: from the consumer to the retailer, to the supplier or manufacturer, to employment and to the finance arrangements that underpin the enterprise. One relies on the other.

In many consumer transactions the trader and any industry body would certainly be able to identify the most common areas of conflict and misunderstanding with consumers of their products and services.

Case study

A recent consumer complaint involved the purchase of vinyl flooring to cover a deteriorating parquet floor area in a hall used by the Girl Guides. The Guides took advice from a specialist flooring company, which recommended then laid the new vinyl. Unfortunately the vinyl began lifting and peaking within a few weeks – the old parquet surface had not been properly prepared.

The standard form contract/order form used by the flooring company incorporated a YES/NO checklist of 'extras' to the simple supply of the flooring material. These included: take up of existing floor covering; take away and dump existing floor covering; shifting of furniture or appliances; extra floor preparation; stairs; trims; other work. For the Guides' contract YES was selected for 'extra floor preparation', 'trims' and 'other work'.

This checklist is proving helpful in resolving the problem for the Guides with the supplier. Many other industries could offer their own checklists to the same end.

In creating an 'unfair terms' regulation for 'entire agreement' clauses it would be helpful to permit the use of such clauses where the standard form contract requires the completion of a 'common dispute' checklist by the salesperson and the consumer together at the same time.

Recommendation: Examples of unfair terms and clauses should be set out. They could be banned generally or, where more appropriate, if used in particular contexts.

Are pricing structures to be caught by the unfair terms provisions if these structures are convoluted? It is noted that up-front prices are to be excluded from the unfair contracts provisions⁴, while false or misleading representations about price are currently caught by s.53 TPA and there is a provision for the cash price to be stated in certain circumstances.⁵

⁴ ACL pp.5, 34

⁵ s.53C TPA

There should be a provision in the new Act which deems a pricing structure unfair when it includes elements such as:

- ❖ Compounding of interest
- ❖ Hidden fees
- ❖ At no obvious point a clear presentation of the total price
- ❖ Additional charges which can amount to a significant proportion (e.g. 20%) above the nominal price.

Recommendation: the inclusion of a provision banning difficult pricing structures in standard non-negotiated contracts.

2. Product safety regulatory regime

According to CHOICE, “Every year around 750 people die and tens of thousands are injured in Australia in product safety related accidents.”⁶ A CHOICE report, *Product Safety – It’s no accident*, states that of “153 products tested [by CHOICE] for safety in the last six years 33% failed!”⁷

While Australia has a developed product safety regulatory network, it is anticipated that a stronger national coordination and control will result in valuable improvements and an enhanced capacity to develop standards and gather meaningful data.⁸

A single national law

In the area of product safety it is appropriate to implement a single national law that binds everyone, rather than to continue with somewhat ‘mirror’ laws in each state and territory.

Product bans

We support the proposal that only the federal Minister can issue a permanent ban while state/territory Ministers can issue interim bans of up to 60 days. States can refer products to the ACCC for consideration of making an interim ban permanent. This all seems a positive direction.

Product recalls

This is the realm of the federal Minister. Again, it aids coordination to require suppliers and manufacturers to notify voluntary product recalls to the federal Minister only, with responsibility on the ACCC to then inform all relevant state/territory agencies. This will encourage consistency in the message to the marketplace.

Product standards

What is not clear from the paper is whether the proposed Act will do anything to speed up the process of developing or adopting standards. We have received comments from the community about the slowness of the standards process.

⁶ *Product Safety – It’s no accident*, CHOICE, January 2008, p.1

⁷ *Ibid*, p.1

⁸ AACL, p.14: “Product safety standard provisions, modelled on those in the TPA, are included in the NSW, NT, WA, Queensland and Victorian FTAs. Victoria, Queensland and SA also have legislation that allows for mandatory standards to be applied to services.”

A case in point is the current push, following this summer's bushfires in Victoria, to develop or mandate building restrictions to apply in bushfire-prone areas. People will commence rebuilding burnt-out towns shortly, yet there are calls for the incorporation of fire shelters or the use of particular construction materials and techniques. Will the federal Minister have a role in these product standards?

Taking the example of baby products, it is of concern that there is still no Australian Standard for high chairs despite their potential to cause injury to infants (sharp edges, scissor action of folding mechanisms, stability). Ditto for playpens. By comparison a mandatory safety standard was introduced for cots in 1997, portable cots in 2009 and child safety restraints for use in vehicles long ago.

Why are some major children's products still outside the mandatory standards area? The establishment of greater federal coordination and control of product safety should have an aim to tackle safety problems within a whole-of-category framework, rather than simply focusing on a category one product at a time as circumstances (e.g. CHOICE testing) bring them into the public arena.

Research

It is also imperative that the national agency has substantial research capability as well as acting as coordinator and analyst of data collected from all eight states and territories.

Early warning

The agency should clearly understand that it has a role as an 'early warning' provider with a responsibility to take prompt action to help prevent injury rather than simply to collect the data after the event and issue sanctions.

3. Enforcement and compliance

We support:

- ❖ The split of enforcement and compliance responsibilities between ACCC and ASIC at a national level and state and territory fair trading offices.⁹
- ❖ ASIC having primary responsibility for enforcement of laws relating to consumer credit and financial services.¹⁰
- ❖ The introduction of civil pecuniary penalties for breaches of the consumer protection provisions to be based on Part IVA and Part V of the Trade Practices Act (and to become part of the new Act), with a view to facilitating the obtaining of compensation for consumers adversely affected by traders who breach these provisions. This scheme should provide regulators with a more graded series of sanctions to apply with greater flexibility.
- ❖ The proposed disqualification notices and substantiation orders will also be valuable tools for regulators.

The proposed national **public warning power** is more problematic. As the paper notes, versions of this power exist in all but one state/territory. “Typically, public warnings are issued to inform the public of potentially harmful conduct taking place in the very short term. Those who are the subject of such warnings are usually ‘fly by night’ operators, itinerant traders and financial, investment and property spruikers and advisors who often move across state and territory borders.”¹¹

Regulators do not have complete protection from **defamation** proceedings for public warnings that identify specific traders. Should there be statutory immunity for regulators? No. The potential exists for error in ‘naming and shaming’ a business which could seriously harm that business (as well as its owners, employees and potentially its customers who might be tainted by association).

The decision to issue a public warning, particularly as envisaged by this scheme in circumstances where rapid action is required to protect the public against a current scam or problem, will always be made on imperfect information and by officials under pressure to act decisively and quickly. Our legal system has the means to assess damages where a

⁹ ACL pp.14,15

¹⁰ ACL p.43

¹¹ ACL p.47

business has been unfairly defamed. The issue here is that those means and processes are slow to deliver judgment and costly to pursue.

What are necessary are both a revitalised, **nationally coordinated process** for issuing public warnings and a clear liability for regulators who unfairly damage a business. The point for action is to establish a reasonably rapid and inexpensive forum for compensating unfairly affected businesses. This **compensation** would include financial payment and/or remedial advertising.

If compensation cannot flow rapidly to an affected business then it may be too late to save that business (and its owners, employees, customers, suppliers, etc). The best form of warning notice legislation will both encourage state and federal legislators to issue timely warnings for the protection of consumers while ensuring mistakes are compensated for swiftly.

4. Non-party redress power

This is an exciting development for consumer protection and marketplace fairness for business competitors.¹² Our legal system struggles with the issue of providing small amounts of compensation to large numbers of affected consumers. Representative actions provide one means of tackling these claims but the mechanics of running these actions are extensive and expensive. The legal profession does very well out of them.

It makes great sense to create this new power and also to provide an administrative framework for the passing of small amounts of compensation to those affected – the thousands of people with the same poorly made toaster or who have to throw away contaminated foodstuffs or medications.

Financial institutions, for example, have some experience now with handing back small sums of money to their customers when regulators or internal processes identify a problem. Our society has reached a point where entire compensation processes can be administered online, from claims substantiation to payout.

The difficulty here is not with the principle but with the legislative drafting, bearing in mind the various constitutional and other difficulties with compensation orders to non-parties.

¹² ACL p. 52: “A key objective of the consumer policy framework is to provide a range of redress options in response to large-scale consumer detriment. As part of the Australian Consumer Law, there will be a power for consumer regulators to seek orders from the court to seek redress for persons who are not parties to the particular action.”

Submission by NSW Shadow Minister for Fair Trading to the paper *An Australian Consumer Law*

5. Definition of ‘consumer’

Chapter 10 of the Paper raises the problem that in Australia the different jurisdictions have developed individual definitions of ‘consumer’ in their legislation. Clearly this should be tidied up now, for the benefit of all.

The definition should be the same nationally in all consumer-related legislation.¹³ It is important to close the loophole which allows traders (including internationally based and online/mail order businesses) to target the state or territory with the most favourable definition for any particular dispute.

It might remain appropriate to have a specialised form of definition of ‘consumer’ in relation to financial services (as regulated by ASIC), so that the primary consumer definition is not rendered needlessly complex and dense. A financial services consumer definition, however, should endeavour to use as much of the terminology of the primary definition as is helpful and should not introduce new layers or terms which are not specifically necessary for the area of financial services.

There remains the issue of whether small business providers should be incorporated in the definition of ‘consumer’, on the basis that they are in a similar position to consumers when it comes to their own, larger suppliers.

While the concern here is sound it would nevertheless be preferable to retain a clear distinction between consumers and small businesses and farming undertakings. Definitions should remain separate though the legislation can still cover each group as appropriate. An example, as identified in the paper, is whether the purchase of a commercial vehicle should be a consumer transaction covered by the general consumer protection provisions of the TPA and FT Acts. This seems sensible as the small business owner faces most of the same issues here as a consumer buying a sedan or wagon for private use (express warranties, repairs, financing, inclusions, performance, implied conditions and warranties, etc). While the new Act should cover this type of transaction it would be highly preferable to follow a ‘small business’ chain through the Act and into enforcement, rather than lose the thread by blending this into consumer transactions.

Recommendation: the development of a single national definition of consumer.

¹³ AACL p.63

6. National standards for consumer documents

Victoria's *Fair Trading Act* incorporates some guidelines for acceptable clarity in consumer documents, particularly contracts. These include clear expression, legibility and use of a font (for typed/printed documents) not less than 10 point in size. It would seem sensible to make these standards national.

Once again, examples should be provided for the guidance of traders and their advisers. Additional standards should require:

- ❖ highlighting of key dates and deadlines of importance to the consumer (e.g. a cooling off period or a date for final payment)
- ❖ highlighting of any actions which the consumer must take to preserve rights or to advance the agreement
- ❖ provision of contact details for the supplier
- ❖ provision of information about where documents can be found online. This would enable a consumer to use the power of current technologies to, for example, search a document for key words (e.g. "forfeit", "warranty", "price"), to cut-and-paste for inclusion in correspondence with the trader or in dispute resolution forums

7. Name of the new Act

The paper asks the question “Should the Trade Practices Act be renamed?”¹⁴

The suggested new name, the Competition and Consumer Act, does achieve the purpose of aligning the key federal marketplace law with the name of the key federal marketplace agency, the Australian Competition and Consumer Commission (ACCC). However, what does this say about the other major federal marketplace regulator, ASIC, or the state/territory regulators (‘fair trading’)?

If the purpose of the new Act is to bring all the agencies and departments together into a more nationally coordinated and streamlined scheme it seems unhelpful to name the Act after an existing federal agency with an established reputation.

The link to the ACCC is too close and misleading as well as potentially confusing for traders and consumers. The long-standing public education direction of state/territory agencies in this area has been to foster an understanding that these laws are here not just to protect one side of the marketplace (that is, consumers or traders) but to highlight that everyone benefits from a fair, regulated marketplace where honest traders can flourish under fair competition rules while consumers have strong protections.

¹⁴ AACL p.24

Appendix 1 History

- 11 December 2006-30 April 08 Productivity Commission reviews consumer law framework¹⁵
- December 2007 Productivity Commission publishes draft report; public hearings take place and submissions are sought
- 26 March 2008 COAG agrees that the Business Regulation and Competition Working Group, in consultation with the Ministerial Council on Consumer Affairs (MCCA), would develop an enhanced consumer policy framework
- 8 May 2008 Productivity Commission's *Review of Australia's Consumer Policy Framework* is published
- 23 May 2008 MCCA agrees to develop detailed policy proposals for implementing the recommendations of the Productivity Commission
- 15 August 2008 Ministerial Council on Consumer Affairs agrees to move to practical implementation of the agreed policy
- 2 October 2008 COAG agrees to introduce a new national consumer policy framework and national law
- 17 February 2009 Standing Committee of Officials of Consumer Affairs issues the paper: *An Australian Consumer Law: Fair Markets — Confident consumers*
- 17 March 2009 Deadline for submissions

¹⁵ AACL, pp. iii and iv and 6

Appendix 2 Timeline

The timeline for the implementation of these reforms is:¹⁶

- By 30 June 2009: finalisation of the Inter-Governmental Agreement (covering the Australian Consumer Law and including product safety);

- By 30 June 2010: finalisation and agreement of the text of the legislation for the Australian Consumer Law, including the product safety reforms; and

- By 31 December 2010:
 - the Australian Parliament is to have passed legislation for the Australian Consumer Law (including product safety) and amend the TPA;
 - the Parliaments of the States and Territories are to have passed application Acts to apply the Australian Consumer Law (including product safety) in their own jurisdictions; and
 - commencement of the Australian Consumer Law in all Australian jurisdictions.

¹⁶ AACL pp.11,12