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SCOCA Australian Consumer Law Consultation  
Competition and Consumer Policy Division  
Treasury.  
Langton Crescent  
PARKES ACT 2600

By e-mail: [australianconsumerlaw@treasury.gov.au](mailto:australianconsumerlaw@treasury.gov.au)

Dear Sir/Madam

Re: Submission to proposed new national consumer Legislation

My submission relates essentially to 'unfair' penalty clauses and the need for regulatory provisions to effectively protect consumers against unfair practices. I will provide an illustration of the severe consequences a consumer actually suffered as a result of an unfair penalty clause of which he was unaware, being enforced. My Submission on proposed changes will follow.

### **ILLUSTRATION**

A consumer ('Mr X') purchased an overseas airline ticket with [REDACTED] for travel between Sydney and the Middle East. Mr X was unaware that his ticket was non-refundable. Although a regular traveller to the Middle East he has never been told by any travel agent that his ticket was non-refundable and the consequences thereof. He assumed he could pay a reasonable fee to 'extend' his stay.

I must admit that prior to this case I had not heard of non-refundable airline tickets for air travel and I also travel regularly and on this occasion I used the same travel agent. Despite paying for business class travel, I was not told that my ticket was valid for a very limited time and more importantly about any penalties. I discovered this as a result of Mr X's case which is being litigated. A relative also travelled business class, to the same destination, but through a different travel agent. He also was not advised of any time limit or restrictions. I would point out that the fare we each paid was not promoted as a 'cheap' or 'introductory' fare. In fact they were more expensive than some of the other airlines.

I would indicate that each of our electronic ticket had an attachment of an entire page dedicated to a warning to re-confirm the flight 72 hours prior to departure or risk losing the booking. Our itinerary had several notations to verify flight times prior to departure. Surprisingly, nothing on either the ticket or itinerary warned us of the validity dates of the ticket or that it was non-refundable.

Conditions (particularly in pre-printed contracts) which place a high burden on one party should be brought to that party's attention before entering a contract. To allow one party to rely on onerous

conditions of which the defaulting party has no knowledge or real understanding would be unfair and unjust. Even with legal proceedings on foot, Mr X has not been provided with a copy of the terms and conditions applicable to his contract.

Whilst overseas Mr X required urgent dental attention on the day prior to his scheduled departure date. He paid ██████████ US\$80 to extend his stay on medical grounds. When he tried to book a return seat, he was told his ticket had expired and he would have to pay a penalty of US\$1,054 plus \$100 re-issue fee, for a return flight. No waiver was offered on medical grounds. He refused to pay the amount requested so he lost the return value of his ticket. He was then put to expense to purchase a cheaper ticket with an alternate airline for US\$960.

Mr X held of a '4 month' ticket. The 'penalty' demanded consisted of a recalculated fare between the two destinations based on the *highest* of the applicable '6 month' fares.

Subsequent to the commencement of legal proceedings ██████████ has amended its Fare Conditions to allow a credit towards purchase of an alternate ticket. However, I believe this 'credit' is artificial if the newly calculated fare is so far removed from the original fare paid that the consumer is still effectively paying for a one way ticket.

It is common practice for airlines to overbook particularly during high season. It is difficult then to justify the practice of penalizing a passenger by forfeiting the return portion of the journey or by demanding the 'highest' fare applicable at the time of original travel. The 'penalty' is clearly quantifiable if it is based on some fare applicable on the date of purchase.

An 'off the cuff' remark advising the ticket is valid for a limited period falls far short of the standard required to bring the non-refundability element and consequential loss to the attention of the passenger. Full and proper disclosure should be made by an Airline (and its representatives) so that an informed decision can be made to accept the penalty, extend the period or change the airline.

I believe some regulatory intervention is urgently needed to protect consumers from unfair practices.

## **SUBMISSION:**

### **THE NATURE OF THE PROBLEM FACING CONSUMERS**

Penalty clauses which fall into the category of an 'unfair term' are notorious for appearing in many negotiated and non-negotiated (pre-printed) contracts.

For the purposes of this submission I refer to penalty clauses generally. However, I include as an example, non-refundable airline tickets and where relevant contracts which have an expiry date eg credit notes, gift certificates.

Of significance is that more often than not penalty clauses place an undue and often onerous burden on a consumer. Penalty clauses are generally not enforceable unless the 'penalty' is a genuine pre-estimate of the innocent party's loss where a breach of contract occurs. Often the penalty is a full or partial loss of the bargain where the contract expires before full performance eg airline tickets, credit notes, gift certificates. It can be in the form of 'interest' on monies owed for work done but not paid by the due date eg services contracts. Another less offensive penalty is the fixed sum payable if the debt for services is not paid by the due date or not paid in the method prescribed eg supply contracts

There is no Statutory regime which proscribes unfair 'penalty clauses' in contracts. Consequently, a consumer is at the mercy of a trader who nominates a fixed but excessive sum as the penalty. Alternatively, a consumer may only discover the excessive penalty when a breach actually occurs. The breach may occur through no fault of the consumer but in fact due to the supplier or trader's fault. This can have dire consequences particularly where full performance of the contract is essential to the consumer.

Clearly, where loss is genuinely suffered due to the consumer's fault, compensation for the innocent party for a breach of contract is expected and reasonable. What is unacceptable is when no real loss is suffered or the penalty is so excessive the non defaulting party receives a 'windfall' or is unjustly enriched.

A penalty clause should be brought to the attention of a consumer before entering into the contract. In addition, a copy of all of the documents comprising the terms of the contract should be provided before entering into the contract. Unless the consumer is fully aware of any financial burden to be suffered for a breach of the contract the consumer has been denied the opportunity to make an informed decision. To allow a supplier or trader to enforce such a clause would in the circumstances be unjust.

Of course the problem with simply providing written documents is that consumers may not read them. Often the terms and conditions are incomprehensible, confusing or misleading. Often the contract is far too long or comprises several documents. Realistically, consumers neither have the time nor inclination to read a very long contract and particularly one that comprises several documents. Even if they do read the document(s) consumers often do not properly understand the true nature and extent of the rights and obligations contained therein.

Even where the content of a penalty clause has been explained to the consumer there is no certainty that the clause was fair or that it was properly or adequately explained. Even when the clause has been explained there is no certainty that the consumer understood its true nature and effect. In pre-printed contracts the consumer has no opportunity to negotiate the clause and is often subjected to unjust and unfair penalties. .

Penalty clauses generally, can be confusing, misleading or inherently unfair. They should be drafted in a clear and simple manner and should disclose a fixed sum as the damages. In addition a written copy thereof should be provided to the consumer.

Further, the penalty should be disclosed on all subsequent documents given to the consumer eg receipts, tickets, bills, invoices. The consequences of an airline ticket being non-refundable can be severe. Thus, a notice showing the validity dates as well as the words 'This Ticket is Non-Refundable' (if applicable) should be prominently printed on the ticket.

Strong measures are needed to protect consumers from traders who unjustly enforce these unfair penalties to the detriment of the consumer. The Common Law appears to be ineffective in adequately protecting consumers against unfair penalty clauses. Consumer Legislation is not uniform nation-wide and where available the onus is on the consumer to 'prove' the clause was unfair. Indeed a daunting and expensive task for ultimately a 'paper victory'.

There appears to be no real deterrent factor for suppliers or traders who engage in unfair practices where the burden of proof lies with the consumer.

### **THE APPROPRIATE POLICY RESPONSE TO ADDRESS THESE CONSUMER ISSUES, INCLUDING NON-REGULATORY APPROACHES**

#### ***POLICY RESPONSE:***

Penalty clauses are not always categorized as such. However, for the protection of consumers and to avoid doubt any clause which is substantially a penalty clause should be deemed to be an 'unfair term' and unenforceable.

A national regulatory Law which codifies the Common Law regarding unenforceable 'penalty' clauses will greatly encourage suppliers and traders to claim compensation which is commensurate with their actual loss where a breach of contract occurs.

Having unfair penalty clauses proscribed by Legislation removes any uncertainty inherent in relying on the Common Law

Such a Law would also be required to impose penalties sufficiently severe to deter and/or punish suppliers or traders who breach or attempt to circumvent the Law.

By contrast, it protects consumers against unscrupulous or indeed ignorant traders who hold consumers to onerous penalties. This is particularly necessary where a consumer was unaware of its existence or could not negotiate the 'penalty'.

It would promote fair practice and consumer protection if the Australian Consumer Law contained provisions similar to those existing in the Victorian Fair Trading Act 1999

However, in view of the recent Victorian case of Jetstar Airways Pty Ltd v Free [2008] I would respectfully suggest that the new Legislation proscribe unfair 'penalty' clauses (whether or not the clause is thus categorized) in printed contracts.

The new Legislation could codify the Common Law position by expressly providing that

- 1. any penalty must be disclosed as a fixed sum; and**

2. the fixed sum must be a genuine pre-estimate of the loss which would be suffered in the event of a fundamental breach; and
3. the clause must expressly state that the fixed sum is a genuine pre-estimate of the loss to be suffered.
4. Where a dispute arises the party seeking to enforce the clause would be required to prove that the pre-estimate reasonably reflected the actual loss suffered.

The relevant section(s) would thus preserve the right to be compensated for genuine loss whilst protecting a consumer by deeming a clause which fails the prescribed test as an 'unfair' penalty clause and therefore unenforceable. The Legislation would need to prescribe penalties for those who breach or try to oust or circumvent the relevant section(s).

#### ***NON-REGULATORY APPROACH:***

Absent Legislation it is left to the Courts to determine whether the penalty clause is 'unfair' and therefore unenforceable. This is a most unsatisfactory solution for consumers. Most consumers would rather suffer the loss and walk away than embark on a risky legal journey to have to prove their case before they could obtain any redress. Even if successful the financial or even emotional costs far outweigh what is ultimately a paper victory. Moreover, absent any severe consequences, there is no real deterrent against suppliers and traders who use penalty clauses unconscionably.

Self regulation through industry codes of practice would be desirable and would assist in promoting fair dealing within the marketplace. However, not all industries have regulatory bodies or associations and even where they exist, membership may not be mandatory.

Public awareness campaigns to alert consumers, suppliers and traders of their rights and obligations would be effective whether or not some Regulatory regime is in place. The ACCC currently provides pamphlets on consumer rights in regards to refunds and services. A clause could be added providing information on unfair penalty clauses. Of course, simply being aware of one's rights does not always lead to a just outcome. Consumers are generally aware of their rights regarding refunds and faulty goods but this knowledge of itself does not ensure suppliers or traders comply with their legal obligations. However, most business will comply with the Legislation once a consumer brings the relevant parts to the attention of the business. By comparison Legislation prohibiting unfair penalty clauses would be similarly effective.

#### **WHAT BENEFITS MAY RESULT FROM THE CHANGE AND WHETHER THESE CAN BE QUANTIFIED**

I support the proposed Australian Consumer Law and I believe incorporating 'unfair' penalty clauses therein would remove the uncertainty which exists in the status quo regarding these clauses.

The change would help suppliers and traders become aware of their obligations and ensure transparency in disclosure of costs and charges.

The onus would be on suppliers and traders to ensure any penalty clause meets the prescribed criteria. It would also go a long way in preventing suppliers and traders from engaging in unfair practices by arbitrarily enforcing unfair penalties. It would also remove the current burden on consumers who must first 'prove' the clause is unfair or that the supplier or trader engaged in unfair practices, before a remedy is granted.

The change further serves to improve consumer protection and confidence by increasing the burden on suppliers and traders to comply with the law.

It would clearly promote fair competition on an industry-wide basis.

**WHETHER THE PROPOSED CHANGE IS APPROPRIATE FOR INCLUSION IN A LAW WHICH APPLIES GENERIC CONSUMER PROTECTIONS ON AN ECONOMY-WIDE BASIS.**

Penalty clauses in contracts are not industry specific. They appear in almost all consumer contracts in some form and are detrimental to only one party.

In pre-printed forms there is usually no bargaining power for the consumer. It is a case of 'take it or leave it'.

The clause itself is not always expressed as a 'penalty clause' nor is the actual penalty categorized as a 'penalty'.

In the absence of some regulatory consumer protection the consumer is left in an economically vulnerable position and at the mercy of the supplier or trader.

Thus, some form of a national regulatory approach is appropriate to create certainty which in turn promotes fair practices and consumer protection on a national level.

Thank you for the opportunity to comment on the proposed new Legislation.

Yours faithfully,

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