



Submission –

An Australian Consumer Law (AG, February 2008)

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Foreword

The author welcomes the ability to make this submission on behalf of Min-it Software.

Min-it Software supplies lending management software to independent non-bank lenders. We received a Highly Commended Award in the Queensland Consumer Protection Awards 2007 issued by the Queensland Office of Fair Trading.

The author holds a Master of Technology Management degree awarded by Griffith University.

Introduction

Prior to making comment on the document, we feel we must comment on the limited amount of time given to those who wish to make submissions on what is clearly a major change of direction for business.

We will not address all the questions but only those that either affects us as a software developer directly or those of our clientele who are independent non-bank lenders within the finance industry.

Our Responses

Question

Should the TPA be renamed? If so, what name should it have, if not the *Competition and Consumer Act*?

On first reading of this document, the conclusion was the question of the suggested name of this legislation is incorrect. The suggested name ought to have been the *Competition and Consumer and Legal Practitioners and Insurance Companies Enrichment Act*. It is ironic that the vast majority of the overly protective contractual clauses that are to the vendor's benefit and stated as being unfair to the consumer have been inserted by lawyers who will ultimately enrich themselves further whilst they reverse the maxim of "caveat vendor" (buyer beware) based on common and case law as practiced for centuries and transform them into "caveat venditor" (seller beware).

Furthermore, the amount of public and professional liability insurance required by businesses to protect themselves from consumer action will certainly reward insurance companies with a great deal of premium revenue. Whilst the document cites the Productivity Commission's identification that "some prices for consumers could rise in the short term"¹, we believe that for some products and services, this has been vastly underestimated. This will be discussed further within the body of our comments.

In our opinion, the MCCA objective agreed on 15 August 2008 as stated below:

*'To improve consumer wellbeing through consumer empowerment and protection, fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers trade fairly'*²

is totally flawed. This fact is further reinforced by the MCCA itself in its definition of "unfair" which states:

*'[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.'*³

¹ Attorney-General's Department, February 2009. *An Australian Consumer Law: Fair Markets – Confident Consumers*, Page 30

² Ibid 1, Page 10

³ Ibid 1, page 30

We do not agree that incorporating the word “Competition” will impart the promotion of competition as suggested⁴ because, whilst not disputing that some of the trade practices or contractual clauses that are cited in the document currently do favour business over the consumer, turning that perspective completely around in order to protect consumers already shows that bias or some form of significant imbalance between the contractual parties will be applied in the reverse direction under statute.

In our opinion, consumer protectionism has grown out of all proportion to the value of purported detriment. Governments throughout the world, including Australian State Governments, have asserted they want to protect “the most vulnerable and disadvantaged”.⁵ When we took this matter up with the Office of Fair Trading Queensland in relation to its decision to impose a cap on interest rates that include all ascertainable credit fees and charges applied during the term of the loan, they were unable to inform us exactly who in society makes up this apparently ever-increasing group. If we can’t define exactly who they are, how do we know they exist at all or how big a problem it actually is? Certainly, those that are homeless are very vulnerable, but to the best of our knowledge, there has been outright failure by any government to enquire into whether or not this societal group is actually likely to buy goods or services that might cause them detriment.

As was pointed out in our submission⁶, one of the main points that came out of the Griffith University seminar⁷ was that there is a significant welfare component to this problem.

Research by the Brotherhood of St Laurence revealed that many of the borrowers of alternative lenders (who are allegedly those disadvantaged) have an income level that is below the Henderson Poverty Line. Our own research shows that the number of beneficiaries as a proportion of total borrowers is extremely low. In fact many non-bank lenders will not lend them money and the industry has welcomed moves such as the NAB NILS and LILS or the ANZ Step Up schemes to assist them. Whilst many acknowledge the need for welfare reform, there is one end-result that crosses every ideological view and that is the need to encourage those receiving benefits to come off them by entering the workforce. The Federal Government has for many years attempted to force beneficiaries off the range of benefits it provides in a bid to achieving this goal al by deliberately keeping the poor in poverty; it is no more than a crude carrot-and-stick approach for welfare recipients. On this basis, has the Federal Government itself been partly causal for any perceived need to protect consumers?

⁴ Ibid 1, page 23

⁵ Ibid 1, page 105

⁶ Min-it Software Submission to OFT Queensland, December 2006. “*Discussion Paper: Managing the Cost of Consumer Credit in Queensland*”, page 20

⁷ Griffith University “Credit Matters: A seminar on Regulating the Cost of Credit”, Brisbane, 10 December 2006.

Just as some see the need to protect the consumer from specific contractual bias, businesses also need to be protected from those consumers that set out to do the wrong things. Many of the contractual clauses that are referred to have been inserted into contracts as a result of case law over the past two centuries, where the legal fraternity has attempted to protect the vendor or supplier from the limited number of consumers that have acted in bad faith. As Governments the world over have failed to provide cheap remedies that businesses can use to recover their debts or possibly even their goods, business has sought to protect itself through contractual means.

We trust we do not need to remind Government that only when the environment provides certainty and allows businesses to make a profit will employment prevail. The stated MCCA objective will do little to promote this.

We would suggest the proper aim of the MCCA and Government should be to bring about truly fair and equal dealing between all contracting parties. Consequently, there should be no empowerment of one party at the expense of the other. There needs to be a redefining of the MCCA objective as it clearly puts undue emphasis and power in favour of the consumer. This, in itself, is unfair. In our opinion, the word “consumer” should not be included in the title of this legislation at all. We would suggest the simple name of Fair Trading or Fair Dealing in Business Act as a replacement name for the Trade Practices Act so that it reflects the need for all parties to deal and trade fairly.

Question

Please set out any views on whether the types of terms described in this chapter should be banned in the initial text of the Australian Consumer Law.

The document cites a number of examples of allegedly unfair contract clauses⁸. Of these, we acknowledge that many do favour the seller or supplier over the other contracting party. Whether they cause significant detriment, however, is another matter and even VCAT's results are mixed. We will touch more on this later.

There are some clauses we believe that should not be deemed unfair, even though they do favour the seller over the consumer. These are:

- clauses that require the payment of fees when the service is not provided;
- clauses that let only the supplier decide whether to renew or not to renew the contract; and
- clauses that require software to be fit for purpose - software EULA's.⁹

Certain services, for example, are costed upon the basis of a fixed monthly supply charge to all consumers. By definition, “provided” does not necessarily mean “used by the consumer” as well. Services can be provided but not supplied or supplied consistently. For example, power or a telephone connection is assumed to be consistently supplied but it may be interrupted for a period of minutes to hours if a motorist has an accident and crashes into a power or telegraph pole or if someone inadvertently digs into a cable. Are those wanting these reforms arguing that all affected consumers be recompensed for the

⁸ Ibid 1, page 31

⁹ Software End User Licence Agreement

loss of power or telephone connection? If the contract has a fixed supply fee plus a user pays supply charge, perhaps some would ask why not? The unintended consequence of this, though, may well be that motorists' third party insurance fees would rise substantially as current limits will likely be grossly inadequate. Contractors' public liability insurance would also rise markedly – and inevitably be passed on – as the risk of damage to utility or telephone lines could easily result in multi-million dollar claims. These fees may be so great that small contractors could not afford the premiums and so are unable to do the work, possibly resulting in greater unemployment.

We do not view a clause that only lets the supplier determine whether or not to renew the contract as being unfair. The supplier should have an overriding right to renew or not, just as a property owner has the similar right as to who is or who is not able to enter their property. There may be any number of reasons as to why the supplier or seller may not want to renew the contract. One example of this would be if the consumer or client is high maintenance and costs more in overheads than the revenue or profit received. If this type of clause is viewed as being unfair, even if it were in some way qualified, some small companies with enough adverse clients might simply decide to close down and restart up in the name of another entity to circumvent this, despite the attendant costs involved.

In the case of software, it is impossible to determine what functionality the client is seeking unless the software is bespoke and developed specifically for an end-user client. Each client may well seek different functionality from the same software. No software is perfect, no matter how much testing is done and so “fit for purpose” becomes an issue; which purpose are we looking at? My partner and I generally spend more time coding for stupidity than we do actually coding for functionality but even so, some of our clients still manage to do things we never expected. As a result, unintended effects may arise that limit or have the possibility to limit or reduce functionality to a particular system. If the end user sees that functionality as critical or essential for their operational or system needs, it may well invoke claims for consequential damages. Some may see this as warranted but we suggest the question as to whether or not a particular software product is fit for purpose will depend entirely upon what functionality the end user was seeking at the time of purchase or execution of the contract.

Microsoft, for example, uses software EULA's for Australia, New Zealand and the Pacific that are subject to Singaporean jurisdiction. If required to take on liability for consequential loss and other damages because of this legislation, we could easily foresee either the cost of that company's software increasing substantially as a result of huge insurance premiums. Alternatively, Microsoft Australia might simply not import any product into this country and require either the retailer to import the product from Singapore (and so take on any manufacturers' liability) or end users forced to download the product over the internet from a site based in Singapore in order to avoid the liability. Microsoft Australia would then merely take on the role of a help centre with no doubt substantial job losses.

Whilst this type of clause will have little if any effect on gaming software, it will have major impact on those that supply business type software or software used by any end user or a consumer if parties to standard term contracts are to be totally covered by this legislation. Failure to exempt software suppliers or developers from liability for consequential damages arising from the effects of this type of clause may easily result in huge insurance premium costs that will have to be passed on to the end user in the form of

higher prices and in addition to the above, may very well have any or all of the following unintended consequences:

- create massive unemployment for existing software workers;
- ceasing innovation due to the failure to put new products onto the market;
- stop new software from being developed altogether or being developed overseas instead;
- software developers being put on contracts to overseas based companies rather than permanently employed by Australian companies; and
- the inability to secure public or professional liability insurance at all.

Our product was designed to assist non-bank lenders manage their loan books at an affordable monthly rental price. Rather than reducing compliance costs as suggested by COAG, based on questions asked of insurers to date, the cost of insuring ourselves for professional and public liability if all these rules were to be introduced without any exemption would require us to increase our rental very substantially (magnitude greater than double or more) but we ourselves would not make any more. The sole beneficiary would be the insurers. The cost of compliance would be a deterrent and significant barrier to entry in the industry. We suggest many smaller entities would be in a similar position in other service-sector industries.

It should not be forgotten that public insurance liability issues today still limit many organisations from holding events and we believe many smaller businesses would be unable to cope with the increased costs involved which will include the need to have every legal contract re-written if they are to avoid being deemed unfair.

In stating these facts, we are not saying a software product should not substantially do what it purports to do. Software is never a truly finished product, as in the sense of a manufactured item; it invariably is subject to ongoing refinement. If there is one, we'd suggest it's either well past its use-by date because the developers are not adding any new features or it may no longer be sold. This matter somehow needs addressing and we suggest that further industry consultation is required before implementation.

Questions

Are there reforms other than those covered in Chapters 10 and 11 that could be included in the Australian Consumer Law, based on existing best practice in existing state and territory laws? In making a suggestion, please address the following questions:

- **What is the nature of the problem facing consumers that the suggested reform will address?**
- **What is the appropriate policy response to address these consumer issues, including non-regulatory approaches?**
- **What benefits would result from this change and can these be quantified?**
- **Is the suggested change appropriate for inclusion in a law which applies generic consumer protections on an economy-wide basis?**

Aside from the comments we will make in regard to the specific questions asked, the document titled *An Australian Consumer Law* is described as an "information and consultation paper"¹⁰ yet it is very clear that many key decision points appear to have already been made and are *fait accompli*. There is to be no consultation. The document

¹⁰ Ibid1, page 1
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cites the Productivity Commission's recommendation that these reforms are "based on best practice in state and territory laws"¹¹. The proposed unfair contract clauses are taken from Victoria¹² but based on Court action to date under VCAT, we would seriously question that this is "best practice" and the comment is nepotistic and self-aggrandisement at best.

In particular, we would specifically refer to the Jet Star v Free appeal¹³ which casts doubt on the initial test case involving AAPT¹⁴ that has led to some successful convictions. As we pointed out in our submission to the MCCA¹⁵, even the Courts have difficulty in determining what is and what isn't an unfair contractual term. In other words, rather than providing certainty, the term is subjective.¹⁶ Business needs some certainty and needs to know that any contract it enters into today will remain enforceable for however many days, months or even years the contract will last.

In this regard, there needs to be cheap and quick remedies available in law under this legislation that allows business to take errant consumers to task. Ultimately, any failure to do so will be passed onto all consumers in the form of higher prices or some consumers may be disqualified from obtaining certain services (we can envisage no or very few instances of a consumer not being able to obtain goods) by the business due to the inherently higher risk they are being asked to take on. This unintended consequence will likely cause some detriment.

In reviewing the suggested unfair contract clauses and enforcement actions

¹¹ Productivity Commission, PC2008 Recommendation 4.1

¹² Fair Trading (Victoria) Act, 19

¹³ Jetstar Airways Pty Ltd v Free [2008] VSC 539 (3 December 2008). Available online <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VICSC/2008/539.html> viewed 14 January 2009

¹⁴ Director of Consumer Affairs v AAPT Ltd (Civil Claims) [2006] VCAT 1493 (2 August 2006). Available online <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VCAT/2006/1493.html> viewed 30/03/2008.

¹⁵ Min-it Software submission to MCCA, April 2008, "*Discussion Paper: Consultation Package – Consumer Credit Code Amendment Bill 2007 and Consumer Credit Amendment Regulation 2007*", Page 8

¹⁶ The following cases provide some substance to this argument:

1. Director of Consumer Affairs Victoria v Craig Langley Pty Ltd & Matrix Pilates & Yoga Pty Ltd (Civil Claims) [2008] VCAT 482 (17 March 2008) Available online: <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VCAT/2008/482.html> viewed 30/03/2008.
 2. Free v Jetstar Airways Pty Ltd (Civil Claims) [2007] VCAT 1405 (27 July 2007) Available online: <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VCAT/2007/1405.html> viewed 30/03/2008.
 3. Zhang v Kilmore International School Ltd (ACN 083 505 131) (Civil Claims) [2007] VCAT 1977 (28 September 2007) Available online: <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VCAT/2007/1977.html> viewed 30/03/2008.
 4. Braithwaite v GH Operations Pty Ltd (Civil Claims) [2007] VCAT 415 (19 March 2007) Available online: <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VCAT/2007/415.html> viewed 30/03/2008.
- Essentially, all four cases essentially centre on whether or not the defendant can rely upon their contractual terms and conditions. If they could not, they were deemed unfair and so unenforceable. In the case of Director of Consumer Affairs Victoria v Craig Langley Pty Ltd & Matrix Pilates & Yoga Pty Ltd, Judge Harbison found against the defendant yet in a somewhat parallel case involving the same industry, Member Ian Proctor found for the defendant in Braithwaite v GH Operations Pty Ltd. In the matter of Free v Jetstar Airways Pty Ltd, Senior Member Vassie stated Jetstar could not rely upon its stated Terms and Conditions, though this decision was appealed and has been referred back to VCAT whilst in Zhang v Kilmore International School Ltd (ACN 083 505 131), Member Ian Proctor again found in the defendant's favour.

contemplated, the document discusses options for taking business to task for doing the wrong thing but as in the Consumer Credit Code, there is no corresponding legislation that allows the reverse action. Having raised this issue a number of times¹⁷, if we are to see fair dealing by both sides, then the regulators must be equally willing to take action against consumers with the same amount of diligence and intensity that they currently display to businesses.

Under the Consumer Credit Code, for example, powers exist for the regulator to take a consumer to Court but are rarely used¹⁸. Queensland has taken one individual to Court for disposing of mortgaged property but despite requests for similar action in other instances, it has not done so. No other regulator has taken similar action anywhere in Australia yet could have done so many times.

Question

Should the scope of the TPA's existing definition of 'consumer' be expanded to cover a wider range of circumstances, such as goods used in business contexts?

See our response to the definition of 'consumer' below.

Question

Should a new definition of 'consumer' retain the monetary limit of \$40,000 or should the limit be increased? If it were increased, what would be an appropriate amount?

We are of the opinion that there should be no threshold limit.

Questions

Should a new definition of 'consumer' exclude any purchases for business purposes, regardless of the existence of monetary limits? Alternatively, should business consumers be entitled to protections available under the Australian Consumer Law, such as implied conditions and warranties? Should a new definition retain the exclusion in relation to 'resupply'? Are there other approaches to the way that 'consumer' can be defined?

We are of the opinion that the definition of consumer should not include any goods or services acquired by or for use in any business. Any move to include goods for business purposes will be contrary to the CER Agreement¹⁹ between Australia and NZ. In New Zealand, business is excluded from all consumer protection and has been since 1993 when that country introduced the Consumer Guarantees Act 1993. New Zealand should not now have to amend its laws merely to align them with Australia. This country should be aligning and harmonising its legislation with that of New Zealand. Allowing businesses to argue that a contractual clause is unfair on the basis of use of standard form contracts

¹⁷ For example, refer to Min-it Software submission to the MCCA, May 2008. "*Discussion Paper: Consumer Credit Code Amendment Bill 2008 and Consumer Credit Amendment Regulation 2008 regarding Default Notice Changes*", pages 7 -8.

¹⁸ For example, under Section 47(1) of the Consumer Credit Code, it is an offence for a mortgagor to dispose of property still subject to a mortgage. *OFT v Muirhead* (Beenleigh). See TradeSmart Update July 2007. Available online: <http://www.fairtrading.qld.gov.au/oft/oftweb.nsf/Web+Pages/1B221029A7C7E96A4A257309000EE0B3?OpenDocument> viewed 02/07/2007

¹⁹ The Australia- New Zealand Closer Economic Relations Free Trade Agreement (ANZCERTA)

will result in many businesses facing huge increased costs. These most certainly will be passed onto consumers in the form of higher pricing and cause detriment to both business and consumer alike.

We would suggest, though, that a tenet for good business practice and applicable to every business would be for it to stand by its products and services. We see no valid reason why the new law could not incorporate some limited degree of protection such as implied conditions and warranties to business' purchasing goods and services but allow some contracting out of consequential and other damages under the contract.

Question

Are there any other definitions currently used in the TPA in relation to consumer protection issues that require modification to improve their operation?

There have been relatively few successful prosecutions under the 'unconscionable conduct' provisions (Section 51AC) of the Trade Practices Act. A submission by the Pharmacy Guild to a Senate Inquiry on the subject suggested that "the protection offered by the unconscionable conduct provisions contained in section 51AC of the Trade Practices Act is illusory".²⁰ What would be considered by any man-in-the-street as unconscionable has been ruled by various Courts as simply 'hard bargaining' and the ACCC, as a result, has adopted the position of not pursuing legal action. In our opinion, the average person would see the regulator as being toothless as this section fails to protect those that do need some protection. Based on media reports, these often appear to be disgruntled franchisees. The Pharmacy Guild suggested that "section 51AC of the Trade Practices Act should utilise the 'harsh and unfair' concept contained in section 12 of the Independent Contractors Act 2006. Were this to occur, there would be a situation where the law relating to independent contractors would apply to all classes of small business - which only appears logical."²¹ We agree wholeheartedly and call on the Government to adopt this position.

Question

Bearing in mind the principle that the Australian Consumer Law should apply to transactions in any sector of the economy, is there a need to augment the current scope of sections 53, 53A and 53B of the TPA with regard to the approaches outlined above? Is the scope of sections 53, 53A and 53B of the TPA sufficiently broad to cover these issues?

We are of the opinion that the provisions contained within the Victorian and New South Wales FTA's should be included in the new legislation.

Question

Should the provisions in section 51A of the TPA be extended to include presumptions in relation to 'false', 'misleading' or 'deceptive' representations for inclusion in the Australian Consumer Law?

²⁰ Pharmacy Guild of Australia, Submission on Senate Inquiry, 2008. Inquiry into the statutory definition of Unconscionable Conduct, page 5. Available online http://www.aph.gov.au/SENATE/committee/economics_ctte/tpa_unconscionable_08/submissions/sub16.pdf viewed 14 March 2009

²¹ Ibid 20, page5

We can see no valid reason why such provisions should not be included in the new legislation.

Should a maximum limit be imposed on the amount or percentage of the purchase price that may be taken as a deposit for goods that have been ordered, but not yet delivered?

The Victorian `black and white` approach under section 19 of the Fair Trading (Victoria) Act 1999 is far more preferable than Section 58 of the Trade Practices Act (Cth)1974.

A maximum limit on the purchase price of ordered but undelivered goods should not be imposed as each business' requirements will be different. For example, a company may need to order goods from a supplier it does not have current credit relationship with and so must pay for the goods up front. There may be some risk involved in this and so any limitation of the amount or percentage of the purchase price that may be taken as deposit may be detrimental to that business.

Question

Should the Australian Consumer Law include a provision providing for minimum standards for consumer documents? If so, what should these standards be?

The Consumer Credit Code requires that all documents be in a minimum of 10 point font, although no default font face is specified²². In our opinion, although we have found this to be satisfactory in the past, we have decided to increase this on the contracts we supply with the system to the equivalent of 12 point Arial so that it is more legible. The sole downside to this is it does increase the amount of paper used per contract. We would suggest that a minimum of 12 point Times New Roman be applied as the standard, which is slightly smaller than Arial.

Question

Should the Australian Consumer Law include a provision relating to the disclosure of a supplier's address in documents, statements or advertisements?

Any requirement for a business to disclose an address in documents or advertisement is applying a one size fits all mentality that simply does not work. Whilst it might be prudent to show an address in one situation, it may not be in others. If an advertiser is trying to catch an individual's attention with a small colourful advertisement, they probably don't want to bulk out an already expensive advertisement by having to show an address. If the business has multiple branches, are they then to be required to show all of them or just a Head Office? This has differing perspectives for marketing in different jurisdictions and in our opinion, the only time an address needs to be shown is either on an invoice, a receipt or statement where the relevant contact address and telephone number can be shown.

Question

²² Section 39 (1) of the Consumer Credit Regulations made pursuant to Section 162(1) (b) of the Consumer Credit Code

Should the Australian Consumer Law include a provision relating to the provision of an itemised bill on request?

We see this as good business practice anyway so we would have no objection to any such inclusion.

Question

Should the Australian Consumer Law extend the current application of section 65 of the TPA to services?

Given the increased use of services due to the loss of manufacturing capability overseas, we would recommend extending these provisions so that there can be no differentiation between the manufacturer of goods or the supplier of a service.