

SHOPPING CENTRE

COUNCIL OF AUSTRALIA

17 March 2009

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

By email: australianconsumerlaw@treasury.gov.au

Dear Sir/Madam

An Australian Consumer Law: Fair Markets – Confident Consumers

Summary

This submission by the Shopping Centre Council of Australia (SCCA) is responding to issues raised in Chapter 10 of the Consultation Paper 'An Australian Consumer Law: Fair Markets – Confident Consumers'. In particular we are responding to two of the questions posed:

- *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 a business context?*
- *Should a new definition of 'consumer' specifically deal with small businesses and farming undertakings?*

We strongly believe the answer should be 'no' to both questions.

We also object to the Consultation Paper's inclusion of 'retail tenancies' in the list of standard form contracts that would be covered by unfair contract terms (p.33.) This betrays a lack of understanding of the nature of retail tenancy leases and retail tenancy negotiations and a lack of awareness of how highly regulated retail leases are in all States and Territories.

Regulation of business to business contracts

The definition of 'consumer' will determine the application and scope of any unfair contract terms regulation. In this context, the SCCA is strongly opposed to any regulation of unfair contract terms in a business-to-business relationship. This is because business entities, unlike ordinary consumers, already have sufficient knowledge; have access to specialist and legal advice; and have sufficient bargaining power to resolve such matters without intervention by government. In the case of small businesses, which on some occasions might not have equal bargaining power, they are usually already protected by extensive government regulation.

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Additional regulation of this relationship, by including it in the net of a proposed business-to-consumer regulation, is unwarranted and would cause considerable legal confusion. It would inevitably also involve additional compliance costs to businesses which, in many cases, will be passed on to consumers in the form of higher prices. There would also be additional costs to taxpayers through the additional compliance responsibilities of publicly-funded regulatory bodies.

The relationship between business and consumers is quite different to that between business and business. Businesses, whether large or small, must do their homework if they are to succeed and must take responsibility for the business decisions they make. There is no shortage of information and advice available to small businesses (most of it free of charge or at nominal cost), including from relevant industry associations.

The business-to-business contract, unlike the business-to-consumer contract, is also commercial in nature and one on which small businesses could be expected to obtain legal advice. Even if legal advice is not obtained businesses, including small businesses, have greater knowledge of contractual terms than consumers and have greater resources to enforce other legal and contractual remedies. In a competitive market, businesses (again including small businesses) also have greater opportunity to negotiate terms than do ordinary consumers.

If it is thought that only small businesses should benefit from this expansion of the definition of consumer there is also the issue of how to define a 'small business'. For the purposes of the operation of 'unfair dismissal' laws, for example, there is a debate about whether this should be defined as a business employing fewer than 20 employees; fewer than 50 employees; or fewer than 100 employees (which is the current law in Australia.) In the area of retail tenancies, to take another example, the States have been unable to agree on a standard definition of small retail businesses (i.e. those to be covered by retail tenancy legislation.)

Nor can it be assumed that the word 'unfair' is capable of unambiguous definition in a business-to-business context. There has been a debate for nearly a decade in Australia that section 51AC of the Trade Practices Act should be amended to include the words 'harsh' and/or 'unfair.' This has been resisted by successive Federal Governments on a number of grounds, including the fact that adding a concept of 'unfairness' would make the section (in the words of a Senate Committee) "unworkably ambiguous, by calling on concepts with an unclear legal meaning."(Senate Committee report on small business protections in the Trade Practices Act, 2004)

The Productivity Commission also considered the notion of 'unfairness' in a business-to-business sense in its inquiry into the market for retail tenancy leases in 2008. The Commission said: "Attempting to legislate what constitutes a 'fair transaction', and what does not, is inherently difficult and is likely to add further uncertainty to the meaning of unconscionability and potentially constrain the efficient operation of the market as returns to superior bargaining skills are eroded, costs of disputation are increased and the efficiency of investment is diminished by increasing uncertainty." The Commission also concluded that introducing regulations relating to 'fairness' in business-to-business transactions could lead to 'moral hazard'. "Businesses would be afforded greater protection when undertaking negotiations or in a business transaction, increasing the likelihood of bad decision making through the reduced negative consequences of such decisions."

Finally we note that no Australian State or Territory has included business-to-business contracts within its laws relating to unfair contract terms. It would be inappropriate therefore, in a law which seeks to standardise Australian consumer laws, to expand the scope of those laws to include businesses, or small businesses, without justification for doing so.

No evidence to warrant regulation of business to business contract terms

One of the key principles of regulatory reform is only to impose regulation where there is evidence of a problem and a clear case for action has been established. There is no evidence presented in the Consultation Paper of problems with standard unfair contract terms in retail leasing which might justify additional regulation.

Also relevant are the principles of freedom of contract (that individuals should be free to bargain among themselves without government interference) and sanctity of contract (that parties of free will are bound by the terms of the contract as framed, in the circumstances that existed at the time the contract was entered into, subject to any variations that were subsequently agreed by both). It has long been held that Government should not restrict commercial enterprise, freedom of contract nor interfere with the sanctity of contract unless a case for action has clearly been established and there is a clear net benefit to the community, and, should be the very minimum necessary to achieve its objectives.

Retail leases are not standard 'take it or leave it' contracts

The Consultation Paper (at page 33) includes retail tenancies in a list of standard form contracts that would be covered by unfair contract terms regulation. This is not correct. Retail leases are not standard contracts. Nor are they 'take it or leave it' contracts. They are the outcome of negotiations between a supplier of retail space for lease and a buyer of retail space for lease.

A retail lease governs in great detail the relationship between a landlord and a tenant for at least five years. The retail tenancy relationship in shopping centres, particularly the larger shopping centres, can be very complex and does not lend itself to a standard lease. It would be impossible to develop a model retail lease which would be suitable for all retail property formats and locations. We note that the Western Australian Government began an exercise in 2005 to reach agreement on certain standard retail lease clauses but abandoned it after one year when it proved impossible to find a consensus on the form of these clauses, not even among retailers.

Certainly shopping centre owner companies will have their own company lease frameworks but these are only a starting point. Negotiations over the terms of these leases will take anything from several days to several months and are normally conducted by lawyers on both sides. (Indeed some states such as Queensland actually *require* tenants to obtain legal advice before signing a retail lease.) This is not surprising given that retail leases can be worth hundreds of thousands of dollars in rent, fit out and other occupancy costs.

Retail leases are already heavily regulated

If there is no general exclusion of business-to-business transactions in the proposed regulation of unfair contracts we strongly urge that retail leases be

specifically excluded because retail leases in all state and territories are subject to very detailed and prescriptive regulation governing all aspects of the retail tenancy relationship, beginning even before a tenant signs a lease. Where a tenant claims a lessor has breached one of the rules there is adequate redress by easily accessible and low cost mediation and, as a last resort, legal proceedings. The legislation or regulation is:

- ACT *Leases (Commercial and Retail) Act 2001*;
- NSW *Retail Leases Act 1994*;
- Northern Territory *Business Tenancies (Fair Dealings) Act 2003*;
- Queensland *Retail Shop Leases Act 1994*;
- South Australia *Retail and Commercial Leases Act 1995*;
- Tasmania *Fair Trading (Code of Practice for Retail Tenancies) Regulation 1998*;
- Victoria *Retail Leases Act 2003*;
- Western Australia *Commercial Tenancy (Retail Shops) Agreements Act 1985*.

This legislation was introduced for the very purpose of ensuring that retail leases do not contain provisions that are 'unfair'. Indeed, this legislation sets out in great detail what constitutes a 'fair' lease. For example, retail tenancy regulation requires the disclosure of certain information to prospective tenants prior to signing a lease; prohibits the use of certain lease terms such as rent 'ratchet clauses'¹; limits the expenses allowed to be charged as outgoings under the lease; and imposes penalties for misleading, deceptive and unconscionable conduct. In addition most state and territory governments have 'drawn down' the provisions of section 51AC of Part IVA of the Trade Practices Act, relating to unconscionable conduct, into their retail tenancy legislation. This legislation, among other things, discourages the use of 'take it or leave it' retail leases.

Nevertheless, as a business to business contract, there is a responsibility on all retail tenants to read the information provided to them and to seek advice before signing a lease. There is a wealth of information and advice available to retail tenants, usually free of charge, from government agencies. As noted previously, some states, such as Queensland, even require some prospective retail tenants to obtain a 'financial advice report' and a 'legal advice report'. These are reports provided by a qualified accountant and a lawyer, respectively, certifying that they have provided the tenant with advice about the tenant's financial and legal rights and obligations under the lease (see section 22D(1)(b) Retail Shop Leases Act).

It is clear therefore that further regulation of retail leases under unfair contract terms regulation would not only be unnecessary but also confusing and would undoubtedly lead to legal inconsistencies. It would also add yet another layer of regulation on an already overburdened industry in this regard.

¹ A ratchet clause is any provision in a lease that precludes or prevents a reduction of rent or limits the extent to which rent may be reduced.

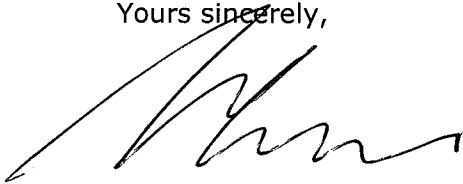
Conclusion

In summary, the SCCA the opposes the inclusion of businesses, whether small, medium, or large, in the definition of consumer within any proposed Australian consumer law. We also strongly object to the Consultation Paper's inclusion of 'retail tenancies' in the list of standard form contracts that would be covered by unfair contract terms (p.33.) This betrays a lack of understanding of the nature of retail tenancy leases and retail tenancy negotiations and a lack of awareness of how highly regulated retail leases are in all States and Territories.

Background

The Shopping Centre Council represents shopping centre owners and managers. Our members are AMP Capital Investors, Brookfield Multiplex, Centro Properties Group, Colonial First State Property, Dexus Property Group, Eureka Funds Management, GPT Group, ISPT, Jen Retail Properties, Jones Lang LaSalle, Lend Lease Retail, Macquarie CountryWide Trust, McConaghy Group, McConaghy Properties, Mirvac, Perron Group, Precision Group, QIC, Savills, Stockland, and Westfield Group.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Milton Cockburn', written over the typed name below.

Milton Cockburn
Executive Director