The Pharmacy Guild of Australia

SUBMISSION TO SENATE ECONOMICS COMMITTEE INQUIRY INTO THE TRADE PRACTICES AMENDMENT (AUSTRALIAN CONSUMER LAW) BILL 2009

Contact
Ms Ann Dalton
The Pharmacy Guild of Australia
PO Box 7036
Canberra BC ACT 2610
Tel: 02 6270 1888
Fax: 02 6270 1800
Email: ann.dalton@guild.org.au

TABLE OF CONTENTS

EXECUTIVE SUMMARY

The Pharmacy Guild of Australia welcomes the opportunity to comment on the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (**the Bill**).

The Guild acknowledges:

- the work of the Productivity Commission in its publication *Review of Australia's Consumer Policy Framework;*
- the subsequent decision of the Ministerial Council of Consumer Affairs (**the Ministerial Council**) contained in its communiqué of 15 August 2008 (affirmed by COAG on 2 October 2008) to establish a new consumer framework comprising a single national consumer law based on the *Trade Practices Act 1974* (**the TPA**) , which draws on the Productivity Commission Report and best practice in State and Territory consumer laws;
- the proposals contained in *An Australian Consumer Law – Fair Markets Confident Consumers* (**the Discussion Paper**) and
- the contents of the *Intergovernmental Agreement for the Australian Consumer Law*, signed in Darwin on 2 July 2009

The concept of the 'seamless (national) economy' that is promoted by COAG behoves a single piece of legislation declaring the rights and obligations of parties (including consumers) engaged in trade and commerce within Australia.

The Guild agrees the TPA should contain the provisions housing the Australian consumer law.

However, the Guild considers that the crux of the legislation – what is considered to be an 'unfair contract' – is unnecessarily narrow and does not protect the interests of Australia's approximately 5000 community pharmacies, and of Australian small business generally.

The Guild believes that statutory relief from unfair contracts should be provided to contracts generally, and not merely standard form contracts.

At the very least the Australian Consumer Law should cover business to business contracts.

This is because it is the experience of the Guild that from time to time large pharmaceutical companies can impose strenuous terms of supply on pharmacists that may be regarded as objectively unfair.

The Guild was pleased that the exposure draft of the Bill was to extend to business to business contracts.

It was disappointed to read in the Minister's second reading speech introducing the Bill into the House of Representatives that the coverage of business to business contracts was removed.

There has been no detailed statement as to why the Government has retreated from the position indicated in the Discussion Paper.

There is nothing to be gained from a further review on this issue, as mooted in the Bill's second reading speech.

Recommendation 1

That business to business contracts be covered by the Australian Consumer Law, as proposed in the Discussion Paper published on 11 May 2009.

More generally, the Guild has long been concerned about the dichotomy of bargaining power between larger businesses and small businesses such as pharmacies, particularly as it relates to the negotiation of retail leases with the large corporations operating shopping centres (particularly) in the growth corridors of Australia's major cities.

The Guild is of the view that when a large corporation (such as a landlord of a major shopping complex) takes advantage of the asymmetric relative dependency that it possesses over the smaller trader (such as a pharmacist) to such an extent that 'hard bargaining' becomes objectively unfair, this should be grounds to call into aid remedial legislation.

Obviously, these types of transactions are not covered in standard form contracts.

The Guild believes that an Australian Consumer Law should finally deal with what should be regarded as an 'unfair contract' in Australian trade and commerce for both consumers and small business.

The Guild notes the additional comments on the report made by non-government senators in the Senate Standing Committee on Economics report *The Need Scope and Content of a Definition of Unconscionable Conduct for the Purposes of Part IVA of the Trade Practices Act 1974*, which concluded that the current Victorian legislative framework for dealing with unfair contract terms in consumer transactions should be included in the Trade Practices Act to cover business to business contracts.

It is noted the framework referred to by the non-government senators is broadly that proposed in the Bill to govern how and when relief from unfair standard form consumer contracts can be gained.

The Guild believes that if the TPA is going to provide relief against unfair contracts, the issue should be dealt with holistically.

Recommendation 2

That rather than a further inquiry, this Bill should deal holistically with the issue of unfair contracts in this Bill

Schedule 1 of the Bill should be amended so it gives effect to a concept of an 'unfair contract' similar to that contained in section 12 of the *Independent Contractors Act 2006*

The provision does not define 'unfair'. It applies the ordinary dictionary meaning of the term of unfair, as being:

> 1. Not fair; biased or partial; not just or equitable; unjust. 2. Marked by deceptive dishonest practices. (Macquarie Dictionary)
>
> Or
>
> Not equitable; unjust; not according to the rules, partial (New Shorter Oxford English Dictionary)[1]

Drawing from NSW Industrial Commission jurisprudence, the Federal Magistrates' Court found in *Keldote Pty.Ltd v. Riteway Transport Pty.Ltd*

> 96. Arising out of the above considerations and drawing on the reasons for judgment of the Full Court of the Industrial Court of New South Wales in *Port Macquarie Golf Club Ltd v Stead* (1996) 64 IR 53, which concerned the then s.275 of the *Industrial Relations Act 1991* (NSW), the following principles would appear to be applicable to considering applications for review under the ICA:
>
> s.12 directs attention to the particular circumstances of the individual contract concerned. Whether or not a contract is unfair or harsh is a matter to be decided upon examination of the facts of each particular case;
>
> unfairness or harshness may arise either from the terms of the contract itself or from the circumstances surrounding its formation. That is to say, it may be substantively unfair or harsh or procedurally unfair or harsh;
>
> the test of unfairness involves the commonsense approach characteristic of the ordinary jury member by applying standards providing a proper balance or division of advantage and disadvantage between the parties who have made the contract;

The Guild believes that the unfair contract provisions to be contained in the Australian Consumer Law should be drawn in a similar manner – even if the coverage of the Law is not expanded to include general small business contracts.

The ordinary meaning of 'unfair' should be permitted to operate, rather than the artificial (and somewhat difficult) statutory definition of 'unfair' contained in item 2 of Division 1 of Part 2 of Schedule 1 to the Bill.

It also believes that a so called 'grey list' of particular practices that might be unfair in a particular circumstance is of no particular assistance – what is an unfair contract is controlled by the terms of the definition. The presence of non-exhaustive examples is only liable to confuse rather than assist.

---

[1] Paragraph 77 of *Riteway*.

Conclusion

So that a consistent Australian jurisprudence can develop, the Guild believes that a single test for what constitutes an unfair contract should apply to all contracts in which consumers and small business are parties, based on the *Independent Contractors Act* model.

This would bring together the work of the Ministerial Council (referred to earlier) and recommendations of the minority senators in the *Need Scope and Content of a Definition of Unconscionable Conduct for the Purposes of Part IVA of the Trade Practices Act 1974* inquiry.

Recommendation 3

That the terms of section 12 of the *Independent Contractors Act 2006* should be employed to define what is an unfair contract under the Australian Consumer Law, with consumers and small business capable of gaining access to relief under the provision.

SUBMISSION TO SENATE ECONOMICS COMMITTEE INQUIRY INTO THE TRADE PRACTICES AMENDMENT (AUSTRALIAN CONSUMER LAW) BILL 2009

1. Introduction

1.1 The Pharmacy Guild of Australia welcomes the opportunity to comment on the contents of the Trade Practices Amendment (Australian Consumer Law) Bill 2009 **(the Bill)**.

1.2 The Guild is a national employers' organisation registered under the *Workplace Relations Act 1996*, which functions as a single legal entity rather than a federation. It was first established in 1928 and currently has Branches in every State and Territory.

1.3 The Guild's members are the pharmacist proprietors of some 5,000 community pharmacies, which are small retail businesses operating throughout Australia. Approximately 90% of all pharmacist proprietors are Guild members.

1.4 Community pharmacy makes a significant contribution to the Australian economy with an annual turnover of $13.2 billion and $200 million in tax revenue, employing some 15,000 salaried pharmacists and 35,000 pharmacy assistants.

1.5 The Pharmacy Guild of Australia is a Registered Training Organisation and is the leading provider of vocational and education training for pharmacy and dispensary assistants in Australia.

1.6 The Guild's mission is to service the needs of proprietors of independent community pharmacies.

1.7 The Guild aims to maintain community pharmacies as the most appropriate primary providers of health care to the community through optimum therapeutic use of medicines, medicine management and related services. A range of services are provided to members including:

(a) to negotiate an ongoing Agreement between the Government and the Guild to facilitate suitable conditions for approved pharmacies to dispense under the Pharmaceutical Benefits Scheme (PBS), including an appropriate level of remuneration;

(b) to maintain close liaison and negotiation with governments, manufacturers, wholesalers and other organisations involved in the health care delivery system;

(c) to implement strategies to enhance the professional role of pharmacists and to assist community pharmacists practising in rural and regional areas of Australia to ensure that the current network of community pharmacies in Australia is maintained; and

(d) to provide economic and management information to community pharmacists to assist them in making their pharmacies more efficient.

1.8 This submission will be limited comment to legislation contained in Schedule 1 of the Bill, relating to the establishment of an Australian Consumer Law and the creation of a mechanism to provide relief from unfair contracts.

1.9 The Guild acknowledges the decision contained in the Intergovernmental Agreement to establish a unified Australian Consumer Law signed in Darwin on 2 July 2009, which builds on the previous work of the Ministerial Council on Consumer Affairs discussed in chapter 1 and 2 of the Explanatory Memorandum accompanying the Bill.

1.10 The concept of the 'seamless (national) economy' promoted by COAG behoves a single piece of legislation declaring the rights and obligations of parties (including consumers) engaged in trade and commerce within Australia.

1.11 The *Trade Practices Act 1974* (**the TPA**) and its regulations deal with a variety of issues, ranging from access to infrastructure to the regulation of restrictive and unfair business practices, and from product safety to the regulation of relations between franchisors and franchisees.

1.12 As such, the Guild agrees the TPA should contain the provisions constituting an Australian Consumer Law and that the ACCC should be the body generally responsible for breaches of the Law.

1.13 However, the Guild considers that the crux of the legislation – what is considered to be an 'unfair contract' – is unnecessarily narrow and does not protect the interests of Australia's 5000 community pharmacies, and of Australian small business generally.

1.14 The Guild believes that statutory relief from unfair contracts should be provided to contracts generally, and not merely standard form contracts.

1.15 It notes that most of the development work was co-ordinated by a Ministerial Council with specific responsibility for consumer affairs.

1.16 This means that the current narrow proposal may have been the inadvertent result of 'silo thinking'; full weight may not have been given to the concerns of small business who are dealing with larger corporations with resultant inequalities of bargaining power.

1.17 The Guild will shortly set out its preferred option.

1.18 However, before doing so it should note that it is disappointed that business to business contracts are not covered by the Bill.

2. Removal of Business to Business Contracts from the ambit of the Bill.

2.1 The Guild believes that at the very least the Australian Consumer Law should cover business to business contracts.

2.2 This is because it is the experience of the Guild that from time to time large pharmaceutical companies can impose strenuous terms of supply on pharmacists that may be regarded as objectively unfair.

2.3 For example, some drug companies may not supply product to pharmacists at a particular price unless they commit to a particular sales growth target and a requirement to hold particular levels of stock.

2.4 On occasion, this can be objectively unfair because it is an exercise of inequality of bargaining power. This will particularly be the case if the catchment area for consumers of a particular pharmacy is so small that it is simply uneconomic for a pharmacist to stock a drug servicing the clinical needs of a very small portion of the consumer base.

2.5 Moreover, if the commercial decision is then made not to stock the product, consumers will encounter increased difficulty in obtaining the particular drug, leading to self-evident health policy concerns.

2.6 The Guild was pleased that the exposure draft of the Bill was to extend to business to business contracts.[2]

2.7 It was disappointed to read in the Minister's second reading speech introducing the Bill into the House of Representatives:

> The unfair contract terms law reforms were agreed by COAG in October 2008 and were based on the extensive consultation undertaken by the Productivity Commission.
>
> These reforms are based on the extensive practical experience of the Victorian government in implementing and enforcing similar laws.
>
> Since then the government has sought views on both the reforms more generally in February and on an exposure draft of the unfair contract terms provisions in May. In response to these consultations the Treasury received just under 200 submissions from many consumers, businesses and other stakeholders.
>
> The government has also had numerous meetings with key stakeholders about these changes. And I understand that the Treasury has met and spoken with a wide range of people about these provisions.
>
> We have consulted, and we have listened. And this is reflected in the provisions set out in this bill, which differ in key respects from those that the government exposed in May, particularly in respect of the exclusion of business-to-business transactions.

[2] The Treasury *The Australian Consumer Law Consultation on Draft Provisions on Unfair Contract Terms* 11 May 2009

> In relation to the question of whether business-to-business contracts—and particularly those involving small businesses—should be included under the unfair contract terms provisions, the government is currently reviewing both the unconscionable conduct provisions of the Trade Practices Act and also the Franchising Code of Conduct.
>
> Both of these reviews cover issues relating to the protections afforded to businesses in circumstances where they are dealing with other businesses with greater bargaining power and market power. In responding to these reviews, the government is seeking the views of businesses—large and small—about the effectiveness of our current laws. The government will further consider this issue when these reviews are completed.[3]

2.8 There has been no detailed statement as to why the Government has retreated from the position indicated in the Discussion Paper.

2.9 There is nothing to be gained from a further review.

Recommendation

That business to business contracts be covered by the Australian Consumer Law, as proposed in the Discussion Paper published on 11 May 2009.

2.10 The Guild's preferred structure of an unfair contact law is now discussed.

[3] House of Representatives *Hansard* 24 June 2009 pp.28-29

3. The Guild's preferred model for unfair contract law in Australia

Background

3.1 The Guild has long been concerned about the dichotomy of bargaining power between larger businesses and small businesses such as pharmacies, particularly as it relates to the negotiation of retail leases with the large corporations operating shopping centres (particularly) in the growth corridors of Australia's major cities.

3.2 Many of the approximately 5,000 community pharmacies referred to in paragraph 1.3 of this submission operate in these shopping centres.

3.3 Members of the Guild have found it increasingly difficult to negotiate leases with landlords, when leases come up for renewal.

3.4 Having a degree of security of tenure is important so that reasonable employment security for employees can be provided.

3.5 A lease term must also be of sufficient length so as to be able to amortise all costs of establishment, operation, ongoing investment and trade to normal profitability.

3.6 Many original leases proceed on the basis that there is a high probability that leases will be renewed. Rental structures reflect this. This investment can include the purchase price of the business (or establishment costs), fitout (often fixed to walls, costly and detailed dispensaries required to comply with state legislation) and building the brand value of the business as a business or as an established business trading at the location.

3.7 However, it is the experience of the Pharmacy Guild that when renegotiating leases, some landlords make an offer on a 'take it or leave it basis' as someone else (unspecified as to use or identity) will take the premises.

3.8 Alternatively, the landlord will seek a rent increase at renewal that is pitched at a level that captures much of the value that has been earned by the tenant, but just low enough to permit the tenant to continue trading – knowing that the tenant, who is bound to cover finance costs and the like – cannot simply walk away.

3.9 The Guild fully participated in the Productivity Commission inquiry that led to the publication of the report *The Market for Retail Leases in Australia* (the **Retail Lease Report**) and closely monitored the ACCC inquiry that led to the publication of *The Report of the ACCC Inquiry Into the Competitiveness of Retail Prices for Standard Groceries* (**the Groceries Inquiry**).

3.10 Both the Retail Lease Report and the Groceries Inquiry found that zoning and planning laws increasingly encourages the development of retail space in a single area (and increasingly under a single roof with a single owner) and discouraging development of retail spaces in other areas.

3.11 This has led to a degree of ownership concentration, with the Retail Lease Report finding that 63% of all retail space is owned by institutional or company investors, 31% by private investors/owner occupiers, with the remainder owned by other

companies. It also found that six companies or funds own 85% of retail space in Australia's 'super-regional' centres.[4]

3.12 In particular, the Retail Lease Report found:

> The retail market operates within the confines of zoning and planning controls.
>
> While such controls can have merit in preserving public amenity and contributing to the cost-effective use of public infrastructure, their application can limit competition and erode the efficient operation of the market for retail tenancies.
>
> They restrict the number and use of sites, can confer some negotiating power on incumbent landlords and retail tenants, and restrict commercial opportunities of others. Zoning and planning controls can particularly advantage owners that have control over large conglomerations of retail space located some distance from competitors and their tenants. They can also disadvantage businesses that wish to gain access to additional space.
>
> Where the tenant and landlord are of similar size and there is competitive provision of retail space, there is no evidence of an imbalance in bargaining position (for example, there are many small landlords and small tenants on retail strips, and large tenants dealing with large landlords).
>
> **Where there is a large landlord of a centre which is a drawcard to the consuming public, and many small existing and prospective specialty tenants competing for limited retail space, imbalances in negotiating power can exist. Large centre landlords who are able to offer contracts on a 'take it or leave it' basis, provide a clear indication that demand for such retail space has been outstripping supply.**[5] (emphasis added)

3.13 The Guild also notes that the Commission decided that, whilst making the observations extracted above and finding that the retail tenancy market is generally operating satisfactorily, it nevertheless said:

> In the Commission's assessment, the term 'war' is not representative of the balance of evidence provided in this inquiry — a few skirmishes, some lingering resentment, hard bargaining and some disappointments, but not 'war'**. This is not to say, however, that the market is working perfectly. Indeed, the Commission heard evidence of difficult commercial negotiations and cases involving significant personal loss**. [6]

[4] Retail Lease Report p21; 24.

[5] Retail Lease Report pp.xx-xxi.

[6] Retail Lease Report p.83

3.14 The Guild notes that the Groceries Inquiry found that although the grocery market was 'workably competitive', the buying power of Woolworths and Coles may adversely effect individual competitors.[7]

3.15 It would also appear from this transcript that the Chairman of the ACCC considers this behaviour not to be outside the terms of current trade practices legislation:

> Q. Well let's turn to page 432 of your report. You've obtained documents going back to 2002 and they show that rebates have increased in almost 60 per cent of cases and that Woolworths and Coles are taking longer to pay their suppliers. What do you make of that?
> **A. Ah there's increasingly tougher dealings that are going on as far as Woolworths and Coles are concerned and indeed Metcash in dealing with their suppliers.**
>
> Q. Doesn't that say they've got too much power?
> **A. Ah I think what it says is that we are a major operator and in any industry you have a significant power in dealing with suppliers. That is inevitable. That will always occur. Ah it's going to occur in an economy the size of Australia with 21 million people.**
>
> Q. But how can it be workably competitive if they're squeezing those bigger rebates and discounts from suppliers and the gains aren't being passed onto consumers?
> **A. We need to keep in mind there's a difference between the vertical supply chain and the tough dealings that occur at retailer level and dealing with their suppliers. And the++ horizontal process, that is the horizontal competition between the independent sector, the Aldis, the Franklins in New South Wales, Coles and Woolworths. That's where the workable competition is occurring. But let's be the first to state that it is not as vigorous a horizontal competition between those retail players as we would otherwise like to see.**
>
> Q. When you say it's tough dealing, you had confidential information from small suppliers saying that they would be de-listed, they were threatened with being de-listed, unless they accepted longer terms of settlement or paid a bigger rebate to the major supermarket chains. Isn't that bullying?
> **A. Ah no what it is you're simply tough dealing. Look we have this in every industry where we have parties that have got strong market power and let's not just separate the major supermarket chains in this area. Metcash itself has strong market power in dealing with it's suppliers as the almost monopoly supplier to the independent operators. Ah what we have is…**
>
> Q. … Pay us more money or wait one, two, maybe three months to get paid, or we'll push your products off the shelf. That's just tough dealing, that's not bullying?
> **A. That's tough dealing ah in this sense that what they're really saying is we have alternative suppliers that are prepared to supply us. Whether it is extending the terms or it's increasing the rebates or it's getting a lower price, what they're saying is we have alternative suppliers that will supply us, now you meet those**

[7] Groceries Inquiry p.xx.

> **competitive terms, in terms of the supply line, otherwise we'll go to those alternative suppliers now.**[8]
> (our emphasis added)

3.16 On a fair reading of the Retail Tenancy and Groceries inquiries, it is simply the case that in some circumstances, when small businesses are attempting to supply or purchase goods and services from larger corporations, the party possessing substantial market power will go beyond a 'hard bargain' or 'tough dealing' to conduct that is objectively unfair.

3.17 One of the technical concepts explored in the Groceries Inquiry was the relative dependency between large and small traders.

3.18 It found:

> The idea is that a buyer and a seller are in a supply bilateral relationship and the relationship is of substantial financial importance to the seller but of lesser importance to the buyer, this will impart bargaining power on the buyer.
>
> This may occur for two separate but interrelated reasons. First, where there is an unequal relative dependency on the relationship, there is likely to be an asymmetry in the respective consequences should either party walk away from the relationship. If the buyer walks away from negotiations, the consequences for the seller would be significant—whereas the consequences for the buyer of the seller walking away would be less significant. Second, because the consequences for the buyer of walking away are not significant, any threat by the buyer to walk away from negotiations would be a credible threat. The interrelationship of these two factors in the case of a relatively dependent seller and a relatively non-dependent buyer would result (all else being equal) in the buyer having greater bargaining power than the seller.
>
> **The effect of asymmetric relative dependency on the relationship is captured in an OECD definition of a retailer having buyer power, which states that a:**
>
> **… retailer is defined to have buyer power if, in relation to at least one supplier, it can credibly threaten to impose a long term opportunity cost (i.e. harmful or withheld benefit) which, were the threat carried out, would be significantly disproportionate to any resulting long term opportunity cost to itself. By disproportionate, we intend a difference in relative rather than absolute opportunity cost.**
>
> The relative bargaining power of buyer and seller will be an important determinant in the outcome of negotiations over the supply price (and other terms) between buyer and seller. Bargaining power in a bilateral bargaining relationship is best described as being exercised by threatening to impose a cost, or to withdraw a benefit, if the other party does not grant a concession—for example, a price discount.

[8] Four Corners – transcript of interview with Graham Samuel for the program *The Price We Pay*, broadcast 1September 2008 http://www.abc.net.au/4corners/content/2008/s2351993.htm accessed 15 September 2008.

> Buyer power in this context is the ability of powerful buyers to exercise bilateral bargaining power against less powerful sellers to negotiate more favourable price discounts and other favourable terms in these individual supply relationships than would be negotiated in the absence of buyer power.
>
> ……
>
> The more outside options that either buyer or seller has, the stronger will its bargaining position be relative to the other party (all other things being equal). If a buyer and seller are negotiating a supply deal and if the buyer's outside options improve or the seller's outside options deteriorate, the consequence in general will be that the buyer will have improved bargaining power and will be able to capture a greater share of the joint net benefit, or joint surplus, arising from the deal between buyer and seller.[9]
>
> (our emphasis added)

3.19 The Guild is of the view that when a large corporation (such as a landlord of a major shopping complex) takes advantage of the asymmetric relative dependency that it possesses over the smaller trader (such as a pharmacist) to such an extent that 'hard bargaining' becomes objectively unfair, this should be grounds to call into aid remedial legislation.

3.20 Obviously, these types of transactions are not covered in standard form contracts.

3.21 The Guild believes that an Australian Consumer Law should finally deal with what should be regarded as an 'unfair contract' in Australian trade and commerce for both consumers and small business.

3.22 The Guild notes the additional comments on the report made by non-government senators in the Senate Standing Committee on Economics report *The Need Scope and Content of a Definition of Unconscionable Conduct for the Purposes of Part IVA of the Trade Practices Act 1974*, which concluded as follows:

> We are concerned that small businesses are being denied access to a remedy in relation to unfair contract terms in their contracts with big businesses. As noted by Associate Professor Zumbo, judicial scrutiny of unfair contracts terms is currently lacking:
>
> > Ensuring greater judicial scrutiny of unfair terms in consumer transactions and business to business relationships involving small businesses would go a long way to promoting ethical business conduct. Such judicial scrutiny of unfair contract terms is currently lacking and unfortunately can act as a green light to unethical business intent on including contract terms that go beyond what is reasonably necessary to protecting their legitimate interests.
> > In such circumstances, a new national legislative framework within the *Trade Practices Act* is needed to deal with unfair terms within business to business relationships involving small businesses.

[9] Groceries Inquiry pp.314-5.

In this regard, we believe that the current Victorian legislative framework for dealing with unfair contract terms in consumer transactions should be included in the Trade Practices Act to cover business to business transactions.

3.23 It is noted the framework referred to by the non-government senators is broadly that proposed in the Bill to govern how and when relief from unfair standard form consumer contracts can be gained.

Recommendation

That rather than a further inquiry, this Bill should deal holistically with the issue of unfair contracts in this Bill.

Guild's preferred model – adoption of legislation contained in the Independent Contractors Act

3.24 The Guild believes that if the TPA is going to provide relief against unfair contracts, the issue should be dealt with holistically.

3.25 Schedule 1 of the Bill should be amended so it gives effect to a concept of an 'unfair contract' similar to that contained in section 12 of the *Independent Contractors Act 2006* which reads as follows:

> **Court may review services contract**
>
> (1) An application may be made to the Court to review a services contract on either or both of the following grounds:
>
> (a) the contract is unfair;
>
> (b) the contract is harsh.
>
> (2) An application under subsection (1) may be made only by a party to the services contract.
>
> (3) In reviewing a services contract, the Court must only have regard to:
>
> (a) the terms of the contract when it was made; and
>
> (b) to the extent that this Part allows the Court to consider other matters--other matters as existing at the time when the contract was made.
>
> (4) For the purposes of this Part, ***services contract*** includes a contract to vary a services contract.[10]

[10] Section 5 of the *Independent Contractors Act 2006* defines a services contract as a contract for services between an independent contractor and either a constitutional corporation or the Commonwealth.

3.26 The provision is based on independent contractors provisions contained in NSW, Queensland and federal industrial relations legislation.[11]

3.27 The Federal Magistrates' Court has considered it in *Keldote Pty.Ltd v. Riteway Transport Pty.Ltd* (**Riteway**).[12]

3.28 The court noted that the provision does not define 'unfair'. It applied the ordinary dictionary meaning of the term of unfair, as being:

> 1. Not fair; biased or partial; not just or equitable; unjust. 2. Marked by deceptive dishonest practices. (Macquarie Dictionary)
>
> Or
>
> Not equitable; unjust; not according to the rules, partial (New Shorter Oxford English Dictionary)[13]

3.29 It also noted an applicant submission that, in the Australian Industrial Relations Commission, Munro J found in *Re Transport Workers Union of Australia*:

> It is both well established and widely recognised that industrial tribunals have avoided rigidity in defining terms such as 'unfair' and harsh'. Those words are not terms of art. They should be understood by a commonsense approach, as words in common usage with no special or technical meaning.[14]

3.30 Drawing from NSW Industrial Commission jurisprudence, the Court in *Riteway* found that section 12 should operate in this manner:

> 96. Arising out of the above considerations and drawing on the reasons for judgment of the Full Court of the Industrial Court of New South Wales in *Port Macquarie Golf Club Ltd v Stead* (1996) 64 IR 53, which concerned the then s.275 of the *Industrial Relations Act 1991* (NSW), the following principles would appear to be applicable to considering applications for review under the ICA:
>
> > s.12 directs attention to the particular circumstances of the individual contract concerned. Whether or not a contract is unfair or harsh is a matter to be decided upon examination of the facts of each particular case;
> >
> > unfairness or harshness may arise either from the terms of the contract itself or from the circumstances surrounding its formation. That is to say, it may be substantively unfair or harsh or procedurally unfair or harsh;

---

[11] Section 106 *Industrial Relations Act 1996*(NSW); section 276 *Industrial Relations Act 1999* (Qld); section 832 *Workplace Relations Act 2006* (Cth).

[12] FMCA 1167 22 August 2008.

[13] Paragraph 77 of *Riteway*.

[14] (1993) 50 IR 171 at 214.

> the test of unfairness involves the commonsense approach characteristic of the ordinary jury member by applying standards providing a proper balance or division of advantage and disadvantage between the parties who have made the contract;

3.31 The Guild believes that the unfair contract provisions to be contained in the Australian Consumer Law should be drawn in a similar manner. – even if the coverage if the law is not expanded to include general business contracts.

3.32 The Guild believes that allowing the ordinary meaning of 'unfair' should be permitted to operate, rather than the artificial (and somewhat difficult) statutory definition of 'unfair' contained in item 2 of Division 1 of Part 2 of Schedule 1 to the Bill.[15]

3.33 It also believes that a so called 'grey list' of particular practices that might be unfair in a particular circumstance is of no particular assistance – what is an unfair contract is controlled by the terms of the definition. The presence of non-exhaustive examples is only liable to confuse rather than assist.

3.34 So that a consistent Australian jurisprudence can develop, the Guild believes that a single test for what constitutes an unfair contract should apply to all contracts in which consumers and small business are parties, based on the *Independent Contractors Act* model of what constitutes an 'unfair contract' to apply to all consumer and small business contracts.

3.35 This would bring together the work of the Ministerial Council (discussed earlier) and recommendations of the minority senators in the *Need Scope and Content of a Definition of Unconscionable Conduct for the Purposes of Part IVA of the Trade Practices Act 1974* inquiry.

Recommendation

That the terms of section 12 of the *Independent Contractors Act 2006* should be employed to define what is an unfair contract under the Australian Consumer Law, with consumers and small business capable of gaining access to relief under the provision.

[15] The Guild acknowledges the Ministerial Council's definition is an attempt to improve on the test for unfairness which calls for examining whether particular behaviour is 'contrary to the requirements of good faith', the definition of what constitutes 'unfairness' in force in the United Kingdom and Victoria and criticised in *Free v . Jetstar Airways Pty.ltd, Civil Claims* [2007] VCAT 1405.