



28 August 2009

By email: economics.sen@aph.gov.au

The Secretary

Senate Economics Legislation Committee

PO Box 6100

Parliament House

Canberra ACT

2600

Dear Sir/Madam,

Re: Inquiry into the *Trade Practices Amendment (Australian Consumer Law) Bill 2009*

I note that this letter comes well past the date for submissions. The West Heidelberg Legal Service was not initially going to make a submission but recently saw the Proof Committee Hansard of the hearings on 21 August 2009 and in view of our client base and their experiences we felt it was incumbent upon us to add our voice to the mix. We are extremely glad to see that the Parliament is examining the importance of consumer protection. As a legal service, we often come into contact with exploitative practices that affect some of the most vulnerable people in our community and so we are pleased to see a strengthening of the regimes that can better protect community.

I. Background to the West Heidelberg Community Legal Service

The WHCLS commenced operation in 1975 with the volunteer legal services of John Cain, the former Premier of Victoria. Informed of the high levels of legal need in the area¹ he offered his services to the newly established West Heidelberg Health Service on a Monday night. The legal service is based within the Olympic village of 1956, the facilities of which were handed over for public housing. Today, due to tightly targeted, segmented waiting lists, many but not all, of the clients of the service come from significantly disadvantaged social backgrounds including families fleeing domestic violence, newly arrived and older migrant communities with a large proportion of people from the Horn of Africa, people with some form of disability

¹ M Cass, R Sackville, *Legal Needs of the Poor*, Australian Government Printing service (1975); M Noone and S Tomsen, *Lawyers in Conflict: Australian Lawyers and Legal Aid* (2006) 216 and J Dickson, '25 Years of Clinical Legal Education at La Trobe University' (2004) 29(1), *Alternative Law Journal*.

or mental health issues, people with poor income support or on social security benefits.

West Heidelberg is one of the most disadvantaged communities in Victoria, Australia. In research into social disadvantage in Victoria conducted in 2006, West Heidelberg was ranked twentieth in the 40 highest-ranking postcodes (out of a total of 726) for general disadvantage. This level of disadvantage was similar in 1999 and 2004. This research looked at 24 indicators, the major ones being computer use, internet access, low-income families, post-school qualifications, disability/sickness support, intervention by State child protection agencies, early school leavers, low work skills, year 12 incomplete, dependency ratio and criminal convictions.²

The legal service operates on a holistic model of problem-solving, appropriate referral, representation and advice, and active involvement in law reform and community education emerging out of identified client problems and emerging systemic issues. It is co-located with the health service. The legal service may take on test cases to improve outcomes for community members however its capacity to do this is constrained due to its resources. The main areas of assistance of our legal service relate to criminal law with some representation, debt, fines, social security law and domestic violence. The WHCLS sees clients mainly from the West Heidelberg area but extends its catchment to include referrals made from other areas. We see clients who have entered into all sorts of consumer contracts from care contracts, telecommunications, water filtration systems, security contracts, gym contracts, finance arrangements, sale of products and so on. We also see clients with issues pertaining to insurance coverage and in fact have been funded in 2008 by the Legal Service Board in Victoria to undertake a project on insurance which has exposed the legal service to some of the client difficulties posed by the conduct of the insurance industry. In addition, in 2009 this legal service has been providing assistance through its project leader to the victims of the recent Victorian bushfires which have thrown up a whole raft of difficulties encountered by clients with insurance and around finance. In view of this experience we feel it is incumbent on us to make a submission and hope that although out of time you will consider seriously the key points we raise.

2. The Insurance Industry exclusion from the proposed Bill

The key question we have is, why has the insurance industry, so late in the consideration of the Bill been excluded from it when all other industries have not? If the argument is that the Insurance Contracts Act covers the field then we would argue that this is not actually the case based on the legal service's experience with case and project work. There remains systemic unfairness in many terms contained within insurance contracts. Accordingly we believe that there is a gap in coverage which if the *Trade Practices Amendment (Australian Consumer Law) Bill 2009* were not to apply to the insurance industry will allow the situation where consumers continue to be sufficiently protected against unfair terms. Our clients do not have the money to afford often to take expensive cases through the courts and there are serious impediments due to limitations on civil law funding to legal aid services which mean

² Vinson T, *Dropping off the Edge: The Distribution of Disadvantage in Australia*, Jesuit Social Services Australia (2007) 66-70.

that many consumers and, some of the most vulnerable members of the community, need protection in a more systemic way from unfair practices and terms and conditions in contracts through such application of the proposed Bill to the insurance industry. In view of the gap in protection for insurance contracts from unfair terms we fail to see how the insurance industry can be excluded when other industries are not.

We therefore seek to endorse the submission made by National Legal Aid both their written submission and their oral submission made on 21 August 2009. We have also read the submission of the Consumer Action Law Centre and based on our case law and project work experience, we would like to also endorse their submission and its recommendations.

3. Term likely to cause Detriment

As stated many members of the community are not in a position to take court action after the event and so the strengthening of provisions to enable greater clarity in advance of what terms that are unfair might look like seems to the legal service to be a good approach to protect a larger group of people in advance from the stress and anxiety that the application of unfair terms and conditions can expose them too. We are reassured that finding a term is 'likely to cause detriment' will assist protect a greater number of consumers by providing a wider remedy because the regulator can examine these terms rather than wait for a particular breach. This seems much more likely to encourage greater care by industry in how it drafts its contracts to begin with.

Case Study

Case Study 1 - Mr L: Unfair Contract Terms – Uninsured Motorists Extension – Third Party Property Policy

Mr L

Mr L, a refugee, purchased a third party property car policy for his vehicle. The policy included Uninsured Motorists Extension which covered him for damage to his car caused by an uninsured driver. However, the insurer interpreted the policy to require Mr L to obtain a police report, and a letter from the other driver admitting liability, and being uninsured. The other driver was charged with numerous charges over the accident including being in possession of a weapon. These policy requirements were unfair but not necessarily in breach of the Insurance Contracts Act. The insurer only backed down when the legal service pointed out that the police report stated that the other driver was on the wrong side of the road, was unlicensed and had threatened our client with violence.

We similarly endorse the National Legal Aid and Consumer Action Law Centre submissions that support such an early intervention and prevention approach to terms that are unfair.

4. Cultural and Linguistic Difference (CALD)

Section 35 was intended to provide standard terms which would protect against unfair contract terms. The effect of *Ham's case* was that, so long as the insurer provided the relevant notices in English at the time of purchase the consumer has no basis for complaint. This has that sometimes complex notices in English are given to people from CALD backgrounds who do not comprehend them. This lends itself to being unfair.

Case Study

Case Study 2- Mrs B

Mrs B purchased a policy with the help of a friend who called the insurer from a public phone. The friend answered all questions about disclosure and did not ask Mrs B for any clarifications. All documentation, the policy and the section 22 disclosure warning notice was sent to Mrs B in English – a language she could not read in relation to disclosure that she had not personally provided. The protections provided by the Insurance Contracts Act cannot assist CALD consumers unless the insurance industry uses interpreters and provides notices in other languages. Mrs B purchased a policy, made a claim, made a complaint to Financial Ombudsman Service without any use of interpreters or ever receiving any correspondence or notices in her own language.

Conclusion

We hope that this submission will prove helpful to the Senate Committee in its Inquiry.

Please do not hesitate to contact the writer on (03) 9450 2032 should you have any further questions.

Yours faithfully,

Dr Liz Curran
Director