

Redfern Legal Centre



Our ref: PQ acl

24 July 2009

The Committee Secretary
Senate Standing Committee on Economics
Parliament House
CANBERRA ACT 2600

By e-mail : economics.sen@aph.gov.au

Dear Sir/Madam

Unfair contract terms – Trade Practices Amendment (Australian Consumer Law) Bill 2009

I am writing to you on behalf of Redfern Legal Centre, regarding the abovementioned Bill.

By way of background, I refer to my previous submissions on behalf of Redfern Legal Centre, regarding proposals to implement a national law to void unfair contract terms (1).

We support the general principles in the proposed amendments described in the Minister's Second Reading speech (Hansard, 24 June 2009, House of Representatives).

Since 2003, together with other consumer law and credit law representatives from around Australia, the writer has been actively involved in working towards better regulation of unfair contract terms. Our particular interests include financial services, so we are pleased with the proposal to implement better regulation of such standard form consumer contracts, by voiding unfair terms. It is our hope that this provision might eventually be extended to other types of contracts.

Meaning of Unfair

We are unsure about section 3(1)(a) of the Bill, in that the term "significant imbalance" could be difficult for the Courts to define. It is potentially highly subjective. For example, something which is highly significant for a disabled person (such as capacity to sign their name on a contract) may be of no significance to someone who can.

We support section 3(1)(b) of the Bill, which states that a term of a consumer contract is unfair if (in addition to the above) it is not reasonably necessary for the protection of the legitimate interests of the party who would be advantaged by the term.

Presumption that term not necessary

We also support the requirement that the party advantaged by a term must rebut the presumption that a term is not reasonably necessary [(2RS) and s.3(4) of the Bill].

Detriment

Redfern Legal Centre strongly supports the provision of the new law which makes it clear that a claimant does not need to prove that he or she has suffered actual detriment in order to realistically commence legal action [(2RS) and s.3(2)(a)]. The writer foresees possible problems with the Courts' assessment of what constitutes "substantial likelihood" of detriment. Fortunately, the fact that the provision enables an alternative – "the extent to which the term would cause" [detriment] - may reduce the chance of such problems.

Proof that contract not in standard form

We support the requirement that the party advantaged by the term must prove that the contract is not in a standard form [(2SR and s. 7(1)]. The writer foresees future deliberate manipulation of standard form contracts by dodgy lenders, however.

Prohibition of terms in future

We note that in future, certain terms might be able to be prohibited by regulation. The procedure for doing so seems unwieldy (2SR, p.5). Of more importance is that "in a credit contract, 'consideration' is both ... interest ...and principal" (ibid.) Whilst we acknowledge that the interest charged on a credit contract is a business decision, the difficulty for consumers is that it is often hard to determine how much the interest charge is.

Section 52

It is unclear to the writer why civil pecuniary penalties will not be available for breaches of section 52 of the Trade Practices Act.

Enforcement

We note that national guidelines on the enforcement of the new Consumer Law are being developed.

Thankyou for the opportunity to comment on the proposed law, and for your assistance to the disadvantaged of our community.

Yours sincerely

REDFERN LEGAL CENTRE

(Signed, P. K. Quarry)

Penny Quarry
Senior Solicitor

Endnotes

(1) These include a submission dated 5 March 2009 to the SCOCA Australian Consumer Law Consultation, Competition and Consumer Policy Division, Treasury; two submissions dated February 2008 and August 2007 to the Productivity Commission's Review of Australia's Consumer Policy Framework; and a submission dated 12 March 2004, to the SCOCA Working Party on Unfair Contract Terms. I also assisted other consumer law and credit law community representatives with a submission on behalf of the Consumers Federation of Australia to the SCOCA Working Party, in 2004.

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