



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

AllA response to the
Senate Economics
Legislation Committee

July 2009

Background – About AIIA

This submission represents the response of the Australian information and communications (ICT) industry represented by AIIA, to the Senate Economics Committee reviewing amendments to the Trade Practices Act which propose a national law voiding standard-form consumer contracts containing unfair terms.

The Australian Information Industry Association (AIIA) is Australia's leading information and communications technology industry body. AIIA's role is to lead and represent the ICT industry in Australia to maximise the potential of the Australian economy and society. AIIA's membership encompasses all sectors of the ICT sector including hardware, software, services and telecommunications. It has almost 400 member companies, from individual incorporated consultants, small to medium enterprises to the world's leading multinational corporations. AIIA member companies employ over 100,000 Australians, generate combined annual revenues of more than \$40 billion (approximately 5% of GDP) and export more than \$2 billion in goods and services each year. AIIA's Board of Directors includes the Chief Executives of some of the world's leading global ICT and telecommunications organisations.

In Summary

Industry Practice

AIIA members frequently adopt standard-form contract mechanisms in their dealings with consumers because of the increased efficiencies such contracts can deliver in terms of shortened negotiation timeframes, greater contractual certainty and less costs for both parties. Efforts by the government to introduce nationally consistent consumer laws are welcomed by AIIA, especially if it leads to lower compliance costs through reduction of multi-jurisdictional complexities. The risk of state jurisdictions pursuing their own possibly divergent regulatory regimes in this crucial area is high, and should be avoided where possible.

However, AIIA is concerned that as currently drafted, the proposed Bill departs from previous COAG considerations of such a framework as well as from models used elsewhere in Australia and internationally. Because of the inherent uncertainty in the Bill, in relation to what is 'unfair' and what is 'standard-form', consumer costs will rise as risks and uncertainties are priced-in by business. Transition costs falling on business will include re-drafting all consumer contracts to ensure they do not fall foul of unfair terms restrictions, and given these restrictions are in themselves so vague, the costs will be

considerable. This outcome is in contrast to the stated objectives of the Bill as set out in the Explanatory Memorandum, reading speeches and the initiating Productivity Commission Report.

Costs

The proposed amendments, if passed into law, will introduce uncertainty, risk and delay into the contracting process, all of which will be costed into the final agreement, to the detriment of the consumer. Businesses will feel compelled to allocate risk in their contractual arrangements and factor in a margin for that increased uncertainty.

No Harm

AIIA is especially concerned that there is no substantial evidence of material harm currently being visited on consumers that would warrant such a fundamental departure from the tenets of sound contracting, most especially in the area of onus of proof and certainty of intention. The Productivity Commission itself noted that there is sparse evidence of consumer harm and that the proposed new law must be limited in application so as not to weaken the capacity of business to deal appropriately with consumers acting in bad faith, or *encourage a move away from standard-form contracting*, since this is well recognised as delivering significant cost savings to both parties. The Bill does not adhere to these aims; it risks creating the opposite outcome.

Specific Concerns

What is "Unfair"?

The definition of "unfair" does not require evidence of any actual detriment to the consumer. Instead, contract terms that can theoretically be considered unfair will meet the test. In *applying the test of unfairness courts will be required to consider the contract as a whole*; AIIA suggests it would be preferable, and in line with COAG suggestions, if an additional mandatory test required consideration of *the circumstances as a whole*. Such broader circumstances should include the interest of the consumer affected, *at the time when the contract was entered into and not at the time when the parties are in dispute*.

What is “Standard-Form?”

The Bill does not define a standard-form contract; rather it poses a list of criteria to apply in so determining. These criteria include the extent of the opportunity to negotiate, and a “take it or leave it” approach by the supplier. If a consumer alleges that a contract is standard-form it will be presumed to be so unless the supplier proves otherwise. The uncertainty inherent in this approach is inimical to achieving efficiencies for suppliers and lower costs for consumers; as an example, it is unclear just how much ‘negotiation’ is required before a contract will move outside the scope of the Bill’s provisions – must every term in the contract to which the new laws would apply, be ‘negotiated’?

Further, it is common in contractual relationships that parties have, *and accept that they have*, unequal bargaining power. One party may, for convenience, use this inequality to their own advantage by accepting a standard-form contract so as to obtain lower prices or a speedier process. If so, it seems inequitable to then allow that party the opportunity to resile from that decision and challenge the previously accepted terms as unfair. Such exigencies must be recognised if this proposed national law is to deliver benefits to consumers and business alike.

Onus of Proof?

The Bill currently sets a very low bar to the bringing of a claim, while the onus is automatically placed on the other party through the incorporation of rebuttable presumptions. The proposals thus reverse the common law onus of proof by requiring that the party relying on the term must show that the term in question is ‘reasonably necessary’ to protect legitimate interests. If consumers wish to act in bad faith it becomes relatively easy for them to initiate claims by alleging a term is unfair, even after they have signed the standard-form contract. This will increase the risk of unmeritorious and frivolous litigation, or threats of litigation. The ability for business to deal fairly, cheaply and efficiently with the majority of their customers will be curtailed if suppliers are forced to adopt a ‘belts and braces’ approach to their contracting processes.

What is a “Consumer Contract?”

The Bill proposes that a consumer contract will be one (inter alia) for the supply of goods or services whose acquisition is wholly or predominantly for personal, domestic or household use. Suppliers will thus be required to assess their customers’ ‘acquisition purpose’ in order to determine if the new law will apply to them. As an example, an

individual 'consumer' may acquire a mobile phone from a supplier without indicating that the device is being purchased for use as part of the consumer's employment. In those circumstances it is unreasonable to expect the supplier to enquire of the consumer the purpose of the purchase. Frequently, due to online purchasing environments, a supplier simply cannot interrogate its customers in order to ascertain the purpose for which they are making their purchases.

Jurisdictional Concerns

A key issue in such a global industry as ICT concerns overseas suppliers imposing conditions which may be quite onerous on the local distributor. Is the local distributor able to pass on those conditions to the consumer? If not, how does the local distributor cover its own exposure? While it may be argued that a local distributor could justify passing on the terms set by the foreign supplier (on the basis of it being reasonably necessary to protect legitimate interests), it is uncertain how this argument will be accepted.

This example illustrates the underlying problem; overseas suppliers, most especially those from the United States, have much more 'strength' to get standard contract terms and conditions accepted, than a supplier in Australia. This means that it may be difficult for an Australian reseller/distributor to get terms and conditions of supply from the foreign owner, which would be acceptable if passed through to customers in Australia. This uncertainty also has implications for online sales.

Conclusion

While a national approach to consumer law is to be applauded, AIIA is concerned that the Bill departs from the underlying principles of contract law as they apply to the onus of proof and certainty. The Bill also represents a significant regulatory burden to Australian businesses, large and small, because it will undoubtedly increase risk and thus cost (which will inevitably be passed on to consumers). During transition, costs imposed on business will increase as they are required to re-draft current contracting tools. AIIA recommends that the government reconsiders the Bill as drafted and establishes a further consultation process with industry, consumers and business to clarify the optimal approach which should be adopted to achieve the desired outcome of a national consumer law.