

29 July 2009

The Department of the Senate
Economics Committee
P.O. Box 6100
Parliament House
CANBERRA ACT 2600

By email

Dear Sir/Madam

Trade Practices Amendment (Australian Consumer Law) Bill 2009

FOXTEL welcomes the opportunity to comment on the introduction into Parliament of the *Trade Practices Amendment (Australian Consumer Law) Bill 2009* (the "ACL").

FOXTEL is pleased that contract terms will be subject to a general test of unfairness. The general test, pursuant to s 3(1) of the ACL will assess whether a term "would cause a significant imbalance in the parties' rights and obligations arising under the contract; and whether "it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term".

FOXTEL notes that pursuant to s 4(n) of the ACL the regulations may introduce further examples of kinds of terms of a standard form contract that may be unfair. FOXTEL understands that the intention of this power under the regulations is to introduce additional terms when necessary to expand the list of examples of terms which may be considered unfair. Furthermore, it is apparent from the drafting of Part 2 Division 1 of the ACL that these introduced terms would also be subject to the general test of unfairness.

However, with respect to the impact of the regulations on prohibited terms pursuant to Part 2 Division 2, it is stipulated at s 6(4) of the ACL that "a prohibited term of a standard form contract is a term of a kind prescribed by the regulations". FOXTEL recognises that it may be the intention of the ACL to deem certain terms as "unfair", subject to the general test pursuant Part 2 Division 1, prior to implementing a regulation making power to "prohibit" the term; however, FOXTEL submits that this process of subjecting a term to a general test of unfairness before prescribing a term as prohibited is not clearly drafted in the ACL.

FOXTEL notes that the *Fair Trading Act 1999* (Vic) provides for terms to be determined as “prescribed unfair terms” in the regulations. Pursuant to s 165(1)(ab) of the *Fair Trading Act 1999* (Vic), the Governor in Council may make regulations for or with respect to prescribing unfair terms which are unfair terms for the purposes of Part 2B of the *Fair Trading Act 1999* (Vic). FOXTEL submits that the regulation making power of the ACL should mirror the approach taken in Victoria.

Please do not hesitate in contacting me if you have any questions regarding FOXTEL’s submission, or if FOXTEL can offer you any additional information or assistance.

Yours sincerely



Lynette Ireland
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