



Motor Trades Association of Australia

The Secretary
Senate Economics Legislation Committee
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Dear Sir/Madam

Thank you for the opportunity to participate in the Senate Economics Legislation Committee's Inquiry into Unfair Contract Terms. The comments presented below are made on behalf of the Motor Trades Association of Australia (MTAA).

MTAA is the peak national representative organisation for the retail, service and repair sector of the Australian automotive industry. The Association represents the interests, at the national level, of over 100,000 retail motor trade businesses with a combined turnover of over \$160 billion and which employ over 308,000 people. The Association is a federation of the various state and territory motor trades associations, as well as the NSW based Service Station Association (SSA) and the national Australian Automobile Dealers Association (AADA). MTAA also has a number of Affiliated Trade Associations (ATAs), which represent particular sub-sectors of the retail motor trades ranging from motor vehicle body repair to automotive parts recycling.

Retail motor traders, both as providers of goods and services to consumers, and as small business consumers themselves, have a substantial interest in this proposed new Australian consumer law framework. Consumers of course make a substantial investment in the purchase and ongoing operation of their motor vehicles. Small businesses also, in many of their business relationships, are not dissimilar from consumers. Although business-to-business contracts are not included under the new regime, it should be noted that the vast majority of retail motor traders employ five or less persons and have fewer rights of redress against larger stakeholders than most consumers. Relevantly, in relation to consultation on unfair contract terms, many retail motor traders operate under standard form agreements; either in the form of franchise arrangements or, as in the case of body repairers, where their services are acquired by a larger party under a standard form contract.

While the Association would like to state that it is extremely disappointed that business-to-business contracts are not included in the *Trade Practices Amendment (Australian Consumer Law) Bill 2009* (the Bill), MTAA supports the decision to reform Australia's consumer laws and supports the introduction of a new national consumer law. The Association does though raise in this submission a number of matters relating to the proposed unfair contract terms regime. Those comments are set out below.

Notwithstanding the Association's unhappiness at the exclusion of business-to-business contracts from the unfair contract terms provision proposed to be added to the Trade Practices Act (TPA), MTAA remains interested in, and willing to participate in, all further consultations over this policy and legislation.

Exclusion of Business-to-Business Contracts

As noted above, MTAA is extremely disappointed with the Government's decision not to include business-to-business contracts in the Bill. This is particularly so given the exposure draft of the Bill, released by the Government in May this year, clearly included business-to-business conduct and that there did not appear to be any consultation with any small business representatives, about the change of policy position by the Government, ahead of the tabling of the Bill.

MTAA also notes that it received correspondence from the then Minister for Competition Policy and Consumer Affairs, the Hon Chris Bowen MP, dated 22 January 2009, which stated that:

'... COAG has agreed to introduce a national provision regulating unfair contract terms as part of a new national consumer law. The new law will apply nationally and in each State and Territory. The new provision will prohibit the use of contract terms where there is a significant imbalance in the bargaining positions of the parties and where the term is not reasonably necessary to protect the legitimate interests of the supplier. The new provision will apply to non-negotiated contracts and will extend to contracts entered into by businesses, including small businesses. Remedies will only be available where there is proof of detriment or a substantial likelihood of detriment.'

The introduction of a national unfair contract terms provision will provide for national consistency in regulation and will enhance competition and consumer protection by improving the clarity and transparency of contracts, all of which will benefit the franchising sector.'

The same advice was provided to MTAA in a letter from the then Minister for Small Business, Independent Contractors and the Service Economy, the Hon Dr Craig Emerson MP, dated 22 December 2008. MTAA therefore was led to believe that there had been a clear commitment on the part of the Government to include business-to-business dealings in the proposed unfair contract terms regime.

In light of this, it is disappointing that the Government has now changed its position and chosen not to extend the protection of the new consumer regime to small businesses. Further, MTAA believes that the Government at this stage could and should, include in the Bill the necessary legislative amendments to provide for business-to-business contracts to be included in the proposed new regime and thus allow for the fair treatment of small businesses in their dealings with larger, more powerful parties.

In many of their business relationships, retail motor traders have fewer rights of redress against larger stakeholders (such as franchisors, acquirers, other suppliers and so on) for harsh and unfair behaviour than do consumers against retailers and manufacturers. That is, contracts are presented as 'take it or leave it' standard form agreements, there is little and often no negotiation on the terms of the contract (without which the business can often not operate) and many contain terms which are detrimental to the small business and are in excess of what is required to protect the normal commercial rights of the larger party.

The proposed legislation does not proscribe any unfair terms nor will it 'ban' unilateral variation clauses. However, the proposed legislation does contain a list of examples of terms that might be considered unfair. That list includes aspects of termination clauses, certain renewal or non-renewal terms, variation clauses and certain assignment clauses. The majority of retail motor traders operate under agreements which contain such clauses. Such clauses consistently exist most notably in franchise agreements, under which many retail motor traders operate. MTAA for years has argued that legislation should intervene to set a minimum standard of conduct to protect parties to franchise agreements. The inclusion of a business-to-business unfair contract terms provision would go some way to such a behavioural standard being introduced.

It is unclear why the Government would believe that 'captive' businesses (such as franchisees and those who rely substantially on one acquirer), who are in the main small operators, should be treated in a different manner to consumers. The bargaining power of those captive businesses is extremely limited and they have neither the resources nor the knowledge (often) to assert their rights against a larger, well advised, well resourced and often, international, corporation.

MTAA submits that arrangements in respect of an unfair contract terms regime could be introduced into the TPA in the same way that the unconscionable conduct provisions are in the Act where there are three sections which deal with unconscionable conduct. Section 51AA prohibits a corporation from engaging '*in conduct that is unconscionable conduct within the meaning of the unwritten law, from time to time, of the States and Territories*', but does not apply to conduct covered by sections 51AB and 51AC. Importantly, those two sections deal with unconscionable conduct respectively in relation to consumers (s51AB) and in business dealings (s51AC). The only threshold applying in relation to those sections is in s51AC where a listed public company cannot claim relief under that section.

MTAA submits that this approach would allow the proposed new regime to apply to business-to-business dealings without there being a need to introduce thresholds based on the type of transaction or the size of a business; which would avoid confusion and debates inevitably associated with the introduction of 'artificial' barriers. The introduction of sections 51AA and 51AC to the TPA has not caused any reduction in commerce or indeed resulted in any new risks for business.

MTAA notes that the Government has stated its intention to consider the issue of business-to-business standard form contracts when the current reviews into the unconscionable conduct provisions of the Trade Practices Act and also the Franchising Code of Conduct are complete. It is noted though that timeframes for the completion of those reviews have not been released by the Government. MTAA is disappointed that there will therefore be a further delay in the inclusion of business-to-business contracts in the unfair contracts regime. This creates further uncertainty and unrest for small businesses negotiating contracts during this interim period.

As an alternative, MTAA submits that the Committee may wish to recommend to the Senate that the legislation be amended to include an unfair contracts regime for those business-to-business dealings which are covered by codes of conduct mandated under the Trade Practices Act. This would for example, then include all franchise agreements and those agreements covered by the Oil Industry Code of Conduct. The fact that there are mandated, under the Trade Practices Act, codes for certain sectors of the economy indicates that there has been a history of disputation and market power imbalance between the contracted parties in those sectors. Unfortunately, those Codes tend to focus on pre-contractual behaviour and not on the behaviour of parties once an agreement is on-foot; which is where issues and disputes arise.

MTAA submits that the introduction of an unfair contracts regime which covers business-to-business contracts would encourage behaviour change and would not necessarily involve a significant number of unfair contract terms matters reaching the courts.

Definition of Consumer Contract

MTAA welcomes the inclusion of a definition of ‘consumer contract’ into the proposed legislation. The Association notes that there is no definition of consumer in the Bill and that therefore that to the extent any definition is required, the current definition in section 4B of the TPA will apply.

Unfair Contract Terms

The Legislation provides that a term of a consumer contract is **unfair** if “. . . *it would cause a significant imbalance in the parties’ rights and obligations under the contract. . .*” and later, that the courts must take into account “. . . *the extent to which it would cause, or there is a substantial likelihood that it would cause, detriment. . .*”

MTAA is concerned that the thresholds of ‘significant’ and ‘substantial’ set the bar too high and may well act to preclude many parties from accessing this new provision and thus preventing them from accessing the remedies available for unfairness. MTAA submits that the term ‘reasonable’ should be substituted instead.

Civil Pecuniary Penalties

MTAA supports in principle the provision of civil pecuniary penalties for breaches of specified consumer protection provisions. However, MTAA believes that the issuing of guidelines, by both the ACCC and ASIC, on the operation of the provisions would assist parties in understanding their respective access rights and obligations under the new laws, as well as mitigating any vexatious or frivolous claims and actions in abuse of the provisions.

Public Warning Notices

The Bill amends the TPA and ASIC Act to enable the ACCC or ASIC to issue public warning notices relating to consumer protection in certain circumstances.

MTAA recognises that such powers (‘name and shame’ arrangements) can be quite effective in securing behaviour change. However, reputation is extremely important to every business and should the basis for a regulator ‘naming and shaming’ a business ultimately be shown to be incorrect, then the agency concerned should be liable for damages to that small business (in the way that any other person could be for making false statements about a business). That is, governments should not be able to claim immunity from such damage claims, where the regulator is shown to have acted on incorrect or unsubstantiated information.

As a matter of course, MTAA believes it is important that the ACCC or ASIC inform any party being investigated of any imminent public warning/shaming notice against them, a reasonable period of time prior to the event.

Other matters

MTAA recommends that where the ACCC or ASIC finds a term of a contract 'unfair', they must make publicly available that information so other businesses can change their contracts where necessary. This would over time have the effect of 'building' a 'register' of contract terms which are considered to be unfair and would assist in educating all parties (both businesses and consumers) about unfairness in dealings between the parties.

In relation to the transition to the new unfair contract terms provisions, and the proposed commencement date of 1 January 2010, MTAA is concerned that there may be pressure on parties to enter into standard form contracts between now and 31 December 2009; thus avoiding the effect of the legislation until such time as the contract (which may run for several years) is renewed or varied. MTAA suggests that to overcome that issue, the legislation apply to contracts entered into, renewed or varied from the date of the tabling of the legislation – but that remedies not be available until on or after 1 January 2010.

As always, MTAA believes that the issuing of guidelines, by both the ACCC and ASIC, on the operation of the provision would assist all parties in understanding their respective rights and obligations under the new regime.

I trust these comments are of assistance to you. If you require any further information, please do not hesitate to contact me.

Yours faithfully



MICHAEL DELANEY
Executive Director

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