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Business Council of Australia

The Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

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

Dear Sir / Madam

NATIONAL UNFAIR CONTRACTS TERMS

The Business Council of Australia (BCA) welcomes the opportunity to make a submission to the Senate Economics Legislation Committee's review of the *Trade Practices Amendment (Australian Consumer Law) Bill 2009* dealing with national unfair contracts provisions.

The BCA supports the proposed reform of consumer protection laws in Australia, and in particular the development of a nationally consistent approach in this area. This position was outlined in our previous submission to the government which is attached.

As noted in that submission, however, it will be important to ensure that legislative changes do not work to undermine fundamental principles of contract law.

Business-to-business Standard Form Contracts

The initial proposals in relation to national unfair contracts laws sought to capture standard form contractual arrangements not only in relation to individual consumers, but also standard form contracts between all businesses (including large businesses) in all sectors of the economy.

The BCA strongly supports the exclusion of business-to-business standard form contracts from the operation of these provisions.

The aim of the unfair contract laws is to protect those consumers who are less able to bargain in relation to 'take it or leave it' contracts, 'whether they are ordinary people, institutions or businesses.'[1] There is no evidence that large businesses party to standard form business-to-business contracts require such protection. Businesses are generally sufficiently resourced and should have little need to argue that terms of their contractual arrangements are void on the basis of unfairness.

[1] The Treasury, *The Australian Consumer Law*, Consultation Paper, 11 May 2009, p iii

It is also important to recognise that small businesses would also be adversely affected if business-to-business standard form contractual arrangements were included in this regime. Many large businesses deal with hundreds of small businesses and use standard form contracts to minimise the cost of those transactions. Should business to business standard form contracts be included it will likely require contracts to be individually negotiated, and in many cases the cost of such negotiations will not be justified for some smaller contracts. This will effectively eliminate some smaller business-to-business standard form contracts from the market.

To re-introduce business-to-business standard form contracts into the regime would have the effect of extending the proposed laws well beyond models introduced in any countries overseas. For example, unfair contracts terms that exist in the UK and the EU are generally limited – for example to people not acting in a business or professional capacity.

Costs

Another feature of good regulatory process is that proposed reforms should achieve the purpose for which they are intended and should not be disproportionate or stifle ordinary and legitimate business behaviour.

Standard form contracts are essential to business operations, through the cost savings and efficiencies they provide. However, the current provisions are likely to result in substantial uncertainty for all standard form contractual arrangements, and to significantly increase the costs and risks associated with many transactions.

For example, several BCA Members operating in the financial sector have indicated that under the proposed arrangements it is likely that a substantial number of contracts – numbering in the thousands for each company - will need to be reviewed. Indeed it has been suggested that all aspects of their business would be impacted by the proposed change as the fundamental relationship between these types of businesses and their customers is generally established by way of a standard form of contract in all but the largest of corporate transactions.

Examples of different types of standard-form contracts these businesses will have to review include, inter alia:

- Product Disclosure Statements for deposit products
- Loan contracts
- Security documentation
- Service Agreements
- Broker Agreements
- Alliance and Partnership agreements
- Marketing and advertising contracts
- Various International Swaps and Derivatives Association (ISDA) agreements including master agreements, swap confirmations and credit support annexures

- Public Securities Association – International Securities Management (PSA ISMA) repo agreements
- Standard form foreign exchange contracts
- International Currency Options Master Agreement (ICOM) currency option agreements
- Insurance contracts and re-insurance agreements
- Standard form branch leases and ATM licence agreements.

In addition to a likely requirement to review and possibly prepare new documents on existing standard form contractual arrangements, further reviews will be needed every time a new term is 'deemed' unfair through these provisions.

The government claims that many contractual arrangements would not fall within the ambit of the new unfair contract provisions if they are in fact negotiated. The effect of the new unfair contract laws will therefore compel parties to undertake direct negotiation which will be costly and potentially drawn-out.

If the new provisions require businesses to re-allocate contract risks it is likely that they will also be required to reprice their goods and services. This will ultimately translate into higher prices for consumers. This concern has been expressed by a broad range of stakeholders in the community including business, academics and lawyers. For example one lawyer commented:[2]

> *The whole notion of big corporates being able to rely on their contractual terms with certainty is no more, and they've got to factor in the cost of that risk – and that will inevitably flow through to prices. In these economic times, when we're supposed to be assisting businesses and boosting productivity, to have this sort of business cost imposed across the board is outrageous.*

It is essential to strike a balance between assisting or protecting consumers and ensuring that undue burdens are not imposed on business and the economy. As the Productivity Commission stated in its review of the consumer policy framework:[3]

> *"…..consumer policies that help consumers in one facet of their dealings with business, may create compliance burdens or dull incentives for productivity improvement, which then rebound on consumers through increased prices or as reduced incomes…"*

Small business

Additionally, small businesses also deal with consumers under standard form contracts, and will use standard form contracts to minimise unnecessary and inefficient transactions costs. They too will be subject to the same costs and penalties if they breach the provisions.

[2] Ashley Midalia, 'Contract terms a B2B hazard', *The Australian Financial Review*, 18 May 2009, page 9

[3] Productivity Commission 2008, *Review of Australia's Consumer Policy Framework*, Final Report, Canberra, page 4

A thorough cost-benefit analysis on the impacts of these proposed new laws on standard form contracts across the Australian economy is required.

Specific issues

The BCA raised a number of specific concerns with the draft provisions in its 29 May 2009 submission. These concerns remain relevant and the BCA re-iterates those concerns.

In addition to those specific areas of concern outlined in the previous submission, the BCA highlights some additional continuing concerns:

- The proposals will apply to overseas suppliers contracting with Australian customers (for example the telecommunications industry). These draft provisions are therefore likely to discourage investment not only domestically but also from overseas.
- The draft proposals reverse the onus of proof. This represents a significant departure from traditional standards of proof in contractual proceedings and therefore requires further consideration, including cost-benefit analysis. A cost-benefit analysis should take into account experiences with the operation of a reverse onus of proof such as that in the UK. One commentator has suggested it "*has been an area that has created uncertainty in the UK and will be repeated in Australia"*. [4]
- The inclusion of a list of examples of unfair contract terms is considered by the BCA to be inappropriate as each of the examples can be interpreted differently and may themselves create a host of new uncertainties. Additionally, as one commentator states, the result of a list approach *"is that normal provisions, appropriate in many circumstances, are at risk of being held to be unfair"*.[5]

Given the significance of these laws for the operation of business across the economy and their implications for Australia's overall international competitiveness, it is important that the detail and full impact of the laws be properly considered.

Comprehensive consultation and collection of evidence

The BCA considers that the short timeframe for consultation and implementation of this significant change in existing law fundamentally undermines effective regulation making processes. Such a significant proposal is one which deserves considered attention and warrants a cautious approach to its introduction.

The BCA is also concerned that only nine business days (less than two weeks) were allowed for the initial round of consultation prior to the introduction of the Bill into Parliament and that less than a month has been provided for responses to the Committee's review of the Bill.

[4] George Raitt, 'Unfair contracts bill repeats UK problems', *The Australian Financial Review*, 23 July 2009, p. 63

[5] ibid

Way forward

The BCA considers that caution is needed to avoid the introduction of unnecessary new laws that will have the effect of imposing significant costs and uncertainty on business. Further work is required on the proposals to create a national consumer law, both to assess practical implications and the expected economic impact more broadly.

In light of the issues and concerns outlined above, the BCA considers that the further refinements be made to the final legislation to ensure it is proportionate, targeted and workable, including:

- business-to-business standard form contracts should continue to be excluded from the provisions;
- additional time and consultation should be given to drafting the proposals, with a thorough cost-benefit analysis undertaken; and
- timeframes for passing the legislation through Parliament and for implementation should be extended.

Please feel free to contact me or Leanne Edwards, Assistant Director – Regulatory Affairs on (03) 8664 2614 or leanne.edwards@bca.com.au, should you require any additional information or input.

Yours sincerely

Peter Crone
Director Policy