Submission to Inquiry by the Senate Standing Committee on Economics into the Trade Practices Amendment (Australian Consumer Law) Bill 2009

6 August 2009

1 Background

1.1 The Business Software Alliance (www.bsa.org) is the foremost organization dedicated to promoting a safe and legal digital world. BSA is the voice of the world's commercial software industry and its hardware partners before governments and in the international marketplace. Its members represent one of the fastest growing industries in the world. BSA programs foster technology innovation through education and policy initiatives that promote copyright protection, cyber security, trade and e-commerce. BSA members include Adobe, Agilent Technologies, Altium, Apple, Autodesk, Bentley Systems, CA, Cadence Design Systems, Cisco Systems, Corel, CyberLink, Dassault Systèmes SolidWorks Corporation, Dell, Embarcadero, Frontline PCB Solutions - An Orbotech Valor Company, HP, IBM, Intel, Intuit, McAfee, Microsoft, Mindjet, Minitab, NedGraphics, PTC, Quark, Quest Software, Rosetta Stone, SAP, Scalable Software, Siemens, Sybase, Symantec, Synopsys, Tekla, and The MathWorks.

2 Overall position on unfair contract terms legislation

2.1 BSA believes that consumers are best served by a marketplace that encourages innovation and competition. BSA members have experience with unfair contract terms legislation in other jurisdiction, and it is the BSA's view that such legislation does not necessarily impede innovation and competition, provided that such legislation is proportionate and can be applied with certainty. However, it is inevitable that legislation of this kind will involve a balancing of the competing interests, and an assessment of the compliance costs and additional risks that are imposed on business versus the actual benefits to consumers. If this balance is not struck correctly, or if the legislation is not expressed clearly, then the risk is that the market will ultimately be distorted to the detriment of both businesses and consumers.

3 BSA comments on the proposed legislation

3.1 The Trade Practices Amendment (Australian Consumer Law) Bill 2009 (**ACL Bill**) introduces a national law voiding unfair terms of standard-form consumer contracts. BSA's comments on the form of the ACL Bill are set out below, and draw upon the experience of BSA members, who operate across many jurisdictions (including where similar legal regimes are already in place).

Presumption of "unfairness"

3.2 The ACL Bill would insert an Australian Consumer Law (**ACL**) as a new Schedule 2 to the *Trade Practices Act* 1974 (Cwlth) (**TPA**). Section 3 of the ACL sets out a two-limbed test for the meaning of "unfair" for the purposes of a term of a consumer contract: whether the term would create a significant imbalance in the parties' right; and, whether the term is reasonably necessary to protect the legitimate interests of the advantaged party. Sub-section 3(4) then states that a term of a consumer contract is presumed not to be reasonably necessary to protect the legitimate interests of the advantaged party, unless that party proves otherwise.

3.3 In its ACL consultation paper,[1] the Government listed a number of issues that the rebuttable presumption in sub-section 3(4) is intended to overcome, including the lack of

[1] The Treasury, *The Australian Consumer Law: Consultation on draft provisions on unfair contract terms* (11 May 2009). See pages 9-10 in relation to sub-section 3(4).

evidence likely to be available to a claimant, and the fact that the advantaged party is likely to have drafted the term (and hence be able to explain why the term is necessary).

3.4 BSA does not regard these justifications as convincing, and believes that the presumption is not necessary to augment what is already a robust and wide-reaching mechanism. This presumption is not present in other jurisdictions that have implemented similar schemes, such as the United Kingdom and Singapore, and this therefore represents an additional and inconsistent obligation that is imposed on businesses that operate across multiple jurisdictions. In addition, the ACL is just one part of a broader package of reforms, which include additional enforcement powers for the ACCC (a body with broad powers to obtain evidence prior to deciding to take enforcement action on behalf of consumers), which in BSA's opinion go a long way towards ensuring that the ACL will result in actual benefits to consumers.

3.5 At a more practical level, BSA is concerned that its members will be obliged to demonstrate a "legitimate interest", when there is very little guidance as to what this term means. In the context of software agreements, for example, the need to protect intellectual property and other proprietary rights is paramount, however it is by no means clear that such protective provisions would meet the "legitimate interest" test in the ACL.

3.6 BSA believes that sub-section 3(4) should be deleted from the ACL. If this were not possible, then BSA would strongly recommend defining the "legitimate interest" concept with greater precision, and including a non-exhaustive list of terms that would meet this condition.

Definition of "consumer contracts"

3.7 The ACL defines "consumer contracts" as meaning a contract where an individual has acquired goods or services wholly or predominantly for personal, domestic or household use (s 2(3)). This definition is inconsistent with the comparable Victorian legislation, as well as other provisions of the TPA (see, eg, s 4B and 51AB(5)), which link consumer contracts to goods or services that are "ordinarily acquired" for personal, domestic or household use.

3.8 The distinction is important, because the Victorian and TPA definitions assume an objective process, and allow a business to market a product or service with certainty as to whether it will be caught by the definition. By contrast, the ACL definition looks at the subjective intentions of the consumer, rather than to the nature of the good or service, which means that a business cannot have any certainty that a contract with two separate consumers for the same product or service will be treated in the same manner by the ACL. In addition, BSA believes that the internal inconsistency introduced into the TPA by two separate definitions will cause confusion to both business and consumers, and increase the regulatory burden on business without any corresponding benefit to consumers.

Unfair and prohibited terms rendered void

3.9 As currently drafted, ACL s 2(1) potentially applies to an entire "term" even if only part of the term was unfair or prohibited, which leads to significant drafting and interpretation uncertainty for consumer contracts. The ACL contains a survival clause (s 2(2)), but this clause uses different language from, and potentially operates inconsistently to, the general TPA survival clause that is currently set out in section 4L. Again, for the purposes of consistency and certainty, BSA recommends that there be a single uniform test for severance and survival, and that ACL s 2(2) be amended accordingly.

Threshold for detriment to consumer

3.10 When determining whether a term is unfair, the ACL requires a court to take into account whether a term would or is likely to cause a detriment to a party. This is a lower threshold then the "material detriment" threshold that was recommended by the Productivity Commission,[2] and given the importance of this threshold in the overall process of determining whether a term is "unfair", the BSA is concerned that the omission of "material" will unjustifiably cause a broader range of terms to be deemed "unfair" by the ACL. BSA believes that the concept of materiality should be reinstated, as this is an important limiting factor on the ability of claimants to assert unfairness in relation to a contractual term, given the public resources (as well as costs to business) that will inevitably be consumed by such a claim.

Mechanics of ACL Bill

3.11 BSA is concerned that the ACL Bill does not include any transitional provisions or "grace period". Specifically, BSA members commonly ship products which then reside in a warehouse until they are ultimately purchased by customers. These products are normally shipped with "shrink-wrap" terms, and the relevant contract is created once the product is purchased. For this type of product, it would be extremely onerous for BSA members to implement new (ACL-compliant) terms and conditions as at a specific date, since inevitably there would be unsold inventory which would contain pre-ACL terms. BSA therefore suggests a transitional arrangement that would allow products that have been sold prior to the ACL effective date to continue being sold subject to the same terms and conditions for a further period of time. This further period would allow BSA members to manage their inventories to more efficiently align with the implementation of the ACL, and avoid unnecessary product transportation and modification costs.

4 Further consultation

4.1 BSA welcomes the opportunity to further discuss the points made in this submission. To do so, please contact me.

Yours faithfully

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[2] Productivity Commission, *Review of Australia's Consumer Policy Framework* Inquiry Report No. 45 (30 April 2008), Recommendation 7.1. BSA also notes that the Treasury Consultation Report stated that the Government intended to "reflect" this recommendation (p 11), although the exposure draft of the ACL legislation in that Report did not use the word "material".