Private Bag 89 Hobart
Tasmania 7001 Australia
Phone (03) 6226 7573 Fax (03) 6226 7623
Email: Lynden.Griggs@utas.edu.au

Faculty of Law

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Senate Economics Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia
by email: economics.sen@aph.gov.au

Dear Committee Members,

Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010

There is no doubt that this Bill, if enacted, will improve the protection given to consumers. However, given the depth of changes (particularly remedial and through the introduction of unfair contract terms), the opportunity should not be lost to consider some further reforms to this area. It would be disappointing to see incremental modifications made when the possibility exists to make truly transformative and innovative alterations to our current consumer protection norms.

A General Prohibition against Unfairness

Section 52 of the *Trade Practices Act 1974* currently prohibits conduct that is misleading or deceptive. Misleading and deceptive have been treated as synonymous - nothing is added by having both terms. The suggestion made here is whether the norm of conduct established by this section should be altered so that the prohibited conduct is that which is ***misleading or unfair***. An obvious retort is that this latter term is too vague, too imprecise, and too nebulous to become a legal standard. The riposte to this is that similar claims were made in respect of misleading at the time of its inception. Furthermore, reference can be had to s 51AC of the *Trade Practices Act 1974* and the court's legislated capacity to consider 'unfair tactics'; similarly, we see the proposal to introduce legislation dealing with 'unfair terms' in contracts. The proposed amendments to unconscionability in the previously mentioned Bill (s 22(3)(j)) also refer to the conduct of the parties in complying with the terms of the contract, and in connection with their commercial relationship. Part 3-1 of the proposed legislation is also headed 'Unfair Practices'. In summary, we should not fear the use of the term unfair in the context proposed. Evidence from overseas also supports such a move. For example the European Unfair Commercial Practices Directive (2005/29/EC) indicates that a practice is misleading if it is likely to cause a person to 'take a transactional decision that [that person] would not have taken otherwise'. There is a further prohibition on a commercial practice that is contrary to requirements of 'professional diligence' and is likely to distort the 'economic behaviour with the regard to the product of the average consumer whom it reaches or to whom it is addressed'. 'Professional diligence' is defined to include honest market practices and good faith. A transaction will distort economic behaviour if the impairs the consumer's ability to make an informed decision. As can be seen from this, the point at which intervention can occur

is more easily reached in Europe than in Australia. Similarly in the United States of America, and with this jurisdiction arguably more reliant on empowerment of the consumer and the operation of the market (like Australia), a number of States currently have a broad prohibition against unfair practices (for a current overview of the United States position, see National Consumer Law Center, *Consumer Protection in the States,* February 2009).

A Greater Focus on ADR

As readers would be aware, the biggest practical barrier to effective consumer protection is accessibility to alternative dispute resolution options. The proposed legislation does little to improve this. Improvements to the substantive law will do little if access to justice is not improved. The Parliament is encouraged to undertake the research necessary to develop national models of access that will serve and support the improvements made by the substantive law (see generally Luke Nottage, 'The New Australian Consumer Law: What about Consumer ADR', (2009) 9(2) *Queensland University of Technology Law Journal* 176). Something akin to the Victorian Civil and Administrative Tribunal working at the national level may well be worth exploring.

Consumer Guarantees

The changes mooted in Part 3-2 represent a considerable improvement on the current regime. Whilst an argument could be made that the rejection of lemon laws is unfortunate, the introduction of the term 'acceptable quality', the extinction of the antiquated phrase 'merchantable quality' and the statutory definition associated with acceptable quality to include appearance, finish, safety, and durability, should lead, at the substantive level to a level of legal protection that consumers would reasonably expect. These reforms which share similarity to what has previously been adopted in New Zealand, should result in both retailers and consumers having a better understanding of what is and can legitimately be expected by each side to the transaction (see generally Stephen Corones, 'Consumer Guarantees in Australia: Putting an End to the Blame Game', (2009) 9(2) *Queensland University of Technology Law Journal* 137). It is also hoped that display notices (s 66 of proposed legislation) become standard, and should this not be the case, that the legislation be altered to make them mandatory.

The proposed legislation incorporating remedies relating to guarantees has the distinct advantage of including these within the legislation. However, the distinction that is drawn between major and minor repairs may well add a layer of complexity that is not warranted. In this sense, a prescriptive set of best practice standards for consumables that would indicate when something was awry may have assisted the consumer more. Given the small economic value associated with many consumer disputes, the consumer is likely to be unwilling to engage legal counsel, yet many lay people would be unable to determine whether the problem associated with the good is major or minor. For example United States of America lemon laws (depending on the jurisdiction) will provide that a motor vehicle is a lemon if, for example, the manufacturer is unable to correct the defects within a reasonable period. This will often be defined to mean three to four repair attempts, or between 20-30 cumulative days out of service – in essence a clearly understood set of parameters which the reasonable consumer could interpret. Lemon laws undoubtedly attract very significant opposition from business groups. These entities routinely point to the cost of compliance, tracking, and administration associated with these sorts of laws. They note that consumers will bear the costs of this intervention. Whilst no doubt legitimate concerns, one would hope that should the proposed legislation be introduced that the ACCC monitor and undertake a detailed analysis (after say two years) of the effectiveness of the major/minor distinction in remedial relief. Evidence at

that time may well support a more interventionist approach to this problem. The less that formal legal action is required by consumers, the greater the benefit.

A further matter to be raised is the drafting associated with auction sales. These are excluded from the operation of ss 54-59. Sale by auction is defined as follows (s 2): '***sale by auction,*** in relation to the supply of goods by a person, means a sale by auction that is conducted by an agent of the person, (whether that person acts in person or by electronic means).' It is clear from the explanatory memorandum that the intent is that the guarantees do not apply where an auctioneer acts as an agent for a person to sell goods. 'They do apply to sales made by businesses on the internet by way of an online 'auction' websites when the website operate does not act as an agent for the seller.' (Explanatory Memorandum, [7.16]). Today, there is no doubt that guarantees should apply to online auctions – nevertheless, the manner in which this is expressed seems a little clumsy. A further matter in relation to online purchases are mechanisms by which consumers can easily obtain security of funds transfer and have the right to recover monies should the goods not arrive. Consumers, for example, would rarely be aware of the availability of chargeback provisions through Visa and MasterCard.

It can also be noted that whilst CCAAC considered that improved awareness of statutory consumer guarantees would enhance the ability of consumers to make informed decisions regarding extended warranties (Explanatory Memorandum [7.7), the adequacy of this depends very much on that awareness. Again, the preferred position is that a more interventionist approach be taken as regards extended warranties, but short of this, the ACCC must undertake a detailed comprehensive study of behavioural awareness by consumers two years after introduction to ensure that consumers' knowledge of their rights has indeed increased. Again, if this has not occurred, a more interventionist may then be justified.

Thank you for the opportunity to comment.

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Lynden Griggs
Senior Lecturer in Law, University of Tasmania.