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

31 July 2009

Dear Sir/Madam,

RE: Trade Practices Amendment (Australian Consumer Law) Bill 2OO9

Thank you for this opportunity to comment on the above bill

The Federal Minister for Competition Policy and Consumer Affairs introduced the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (the Bill) into Parliament on 24 June 2009, to amend the Trade Practices Act 1974 (Cth) (TPA) and the Australian Securities and Investment Commission Act 2001 (Cth) (ASIC Act)

The purpose of the Bill was to introduce a national unfair contract terms law with a new civil penalty provisions and empower the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investment Commission (ASIC) to enforce this new law.

It is noted that prior to the introduction of this Bill the Government released a Discussion Paper 'An Australian Consumer Law: Fair Markets – Confident Consumers' on 17 February 2009. The new national consumer law, titled Australian Consumer Law, will be incorporated within the existing consumer protection provisions of the Trade Practices Act 1974 (Cth) (TPA). The new laws will regulate unfair terms in contracts, enforcement powers with new redress options for consumers, and a new national legislative and regulatory regime for product safety.

This submission focuses on the unfair terms requirement that will impact commercial agreements.

Background

It should be noted that the idea that commercial terms may be unfair is not new. The common law has dealt with this issue for almost two centuries. Fundamentally, the common law was more concern with the freedom to contract and unconscionable behaviour rather than unfair terms. Essentially, the courts have been reluctant to interfere in the area of unfair terms, as the terms often mirror the competitive behaviour in the market place; some players will be more influential than others and would use their power to strike a bargain which the counter party is often not in a position to reject. Perhaps the new law is less about unfair terms and more about party who abuse their market power to strike terms that appear unfair.

There is little doubt that transactions within the commercial world have become more sophisticated.

The Australian market is characterised by the dominance of larger suppliers whether it is in the utilities, property, finance, retail, media, food and beverage manufacturing. This has meant that many suppliers are confined as to the opportunity to contract with third parties.

In short, key sections of the Australian economy are dominant by oligopolies of some form, which are more likely to govern and give the price and terms of contract rather than the reverse.

Traditionally the basis of commercial transactions was founded on the *caveat emptor* principle. This principle was based on the assumption that those in business had the ability to take care of their own interests. Until the mid 1800s commercial agreements were not protected by the law other than in the event the agreement was either induced by way of trickery or unconscionable conduct of some form. This policy of non interference is perhaps a hall mark of English 9th century law, which the proposed law may extinguish.

No business wishes to have their affairs scrutinised let alone interfered by outsiders.
In the perfect world those in commerce are wise enough and have the requisite skills and knowledge to know what is best for them. In short they should be free to contract regardless. The law has not protected business from itself, this is in contrast to the traditional consumer law model. The proposed law will change this philosophical basis.

The Challenge
As noted by the Productivity Commission, the structure of the Australian economy the dominance of various suppliers in their respective market amongst other competitive circumstances may lead to unfair terms in business to business contracts.

As a consequence there is a distortion of market power which is often translated in contract terms which are acceptable in many instances on a take it or leave it basis

Small and medium size businesses have been at the receiving end of unfair terms.

In its current form, the Bill will create more regulation, perhaps increase the cost of over all compliance, but it is uncertain whether business will adopt a more fair terms approach to commercial agreements.

Bargaining Power
Terms often reflect the bargain power of the parties to the contract. Perhaps these terms could be seen as unfair but in many instances it may be he best they can strike at that time. Should the law intervene in the private affairs of business?

Then there is the issue of acting for the benefit of the business stake holders not the community or counter party. A company officer has primarily their duties in law to the company, and would be expected to use their bargaining power to induce the best terms for his company not the fairest terms. What this proposed Bill is doing is attempting to change the behaviour contract.

There is ample opportunity for an aggrieved counter party to seek the intervention of the courts on common law grounds of unde influence, unconscionability or even duress. At issue is when were these terms unfair when they were made or after, should the party who benefits from these terms have to now be the subject of this law, for perhaps circumstances that emerged in a contract. Is the Bill proposing to be the first stage to compel fair terms as the dominant thinking behind commercial agreements? Why would more powerful suppliers choose another way to flex their muscle than through formal agreements and price structures?

In a sophisticated economy such as Australia, there are more ways to achieve an outcome which this law proposes to discourage. If any terms are unfair, does the aggrieved party have the resources to enforce their rights? Should the ACCC be doing the bidding for business, should the tax payer fund the ACCC to protect business from such behaviour, is this legitimate function of a competition regulator?

Then there is the issue of ensuring the right balance of court cases and negotiation with the codified principle of unfair terms.

The larger suppliers in the market would oppose any such codification of the law. Larger suppliers rely on their bargaining power, otherwise there would not be any need for the current range of competition laws and common laws dealing with factors at set aside contracts.

Cost of Law Enforcement

Perhaps a more pressing issue than interfering with the freedom to contract and interfering with commercial bargain power of parties is the access to the legal system.

Whatever law is passed, regardless of whether the public policy objective is to protect small and medium size business strike fair terms, as many economist would argue should have a positive efficient and price multiplier effect that would reach the customer, this exercise may ultimately be meaningless if the aggrieved party cannot afford to enforce such rights due to the complex and expensive nature of the legal system.

Ultimately, what will occur is that the larger suppliers will engage the resources to force a settlement with the aggrieved party and send a single to others that the law is available to all but enforceable by the few.

Legal and Judicial Costs

The proposed law will do nothing to redress perhaps the greatest of hindrance to the encouragement of fair terms within commerce, the cost of enforcement. Although many State governments have encouraged an alternative dispute resolution model, the bulk of all commercial contracts disputes find there way to the court system.

The courts acting as a clearing house do not provide an efficient or effective means of helping either party especially the party aggrieved by the unfair terms.

The weaker party, may not have the resources to challenge the unfair terms. The cost of litigation whether as a plaintiff or defendant is tilted towards the party with the resources. Settlements are often brought about due to “commercial “realities which is code for one party running out of money or not having the money to pursue their argument. Ether way it’s cheaper to settle than not

Market Structure: A need for Reform
It would appear that the issue of competition law reform is supported by all political parties. The importance of efficient and fair market place is critical to the welfare of the community and the national interest.

The recent new laws dealing with cartels is an example of a new proactive approach to this issue. There is concern that there is no over all strategy to deal with the state of restricted competition in the market place.

Unfair contract provisions
The unfair contract provisions should apply to business to business contracts, to argue in the alternative is to expose business to unfair contract provisions. It's perhaps unfortunate that such a concept should be legislated; however there is ample case law to suggest that small to medium size business has been adversely affected by contract terms which are unfair.

It is true that the common law currently provides some relief, however the cost litigation and the complex nature of conducting proceedings in Australia makes it prohibitive.

Often the detriment cannot be measured but it's real.

It has the ability to link the business into a detrimental relationship, demanding attention and resources bleeding the business from expanding and adding to the national wealth. Although uncertainty in the law should be avoided there needs to be suitable grounds to protect such businesses therefore a possible action on the basis of a 'substantial likelihood of detriment'; should be promoted by the law.

There is a concern that the Bill could catch those who acted in good faith and for legitimate commercial interests. It is essential that the definition of an unfair contract should refer to an element of 'good faith', and such a concept although existing in common law should be clearly defined so that it does not impinge on commercial interests.

Where there is existing industry based statutory protection and regulation, then this Bill should only apply where the industry based statutes are inconsistent with this Bill

Recommendations:

1. New Business Practices Commissioner
Slotting the new laws into an already over burden regulator may lose the objectives of the new laws.

2. Business Practices Tribunal
The laws require efficient enforcement. The current legal system, and procedure is simple too expensive, less than efficient and tends to favour those who have the resources to dictate the outcome. A Business Practices Tribunal (ABT) should be established to provide a level playing field to enforce these new laws

3. Statistics and Monitoring
There is currently a poor pool of statistics in this area. Whatever body is given the task of enforcing the new laws there is an urgent need to collect data in the area of contract terms and discharge of contracts.

4. Education Training and Public Affairs
All business should be aware that the competitive forces reflect market power. There is an acceptable use of that power thereafter it becomes an abuse of power. Unfair terms should be considered as an abuse of power. An education and information programme should be undertaken to inform that entire unfair terms means less competition, less diversity, more costs, and less productivity.

5. Impact Statement
A commercial regulatory impact statement should be prepared and tabled before this Bill is introduced into Parliament

6. Penalties
The seriousness of unfair terms should not be under stated. In serious cases criminal sanctions or disqualification should be considered

7. Cost Monitor
The impact this law will have on various industries should be monitored and published annually.

The writer is a lecturer in Business Law, School of Business Law and Taxation Australian School of Business University of New South Wales admitted as a solicitor and barrister of the Supreme Court of New South Wales, High Court of Australia, Arbitrator to the Local Court of NSW (Civil Claims) 2003-007, member Law Society of New South Wales Arbitration President Arbitration Panel, author of a number of commercial law texts, chapters, articles, conference and discussion papers.

Yours sincerely,

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