29 July 2009

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

Dear Sir/Madam,

Trade Practices Amendment (Australian Consumer Law) Bill 2009

1. Summary

We note that the Minister for Competition Policy and Consumer Affairs, Dr Emerson MP, when introducing into Parliament the *Trade Practices Amendment (Australian Consumer Law) Bill 2009* ("the Bill"), observed that the Bill would be referred to a Senate Committee and that the issue of whether the Bill should be extended to also regulate business-to-business contracts "will, no doubt, be further considered as part of that process."

This submission is made in anticipation of arguments to the Senate Committee that business-to-business contracts should be included in the regulation of unfair contract terms in the Bill. The Shopping Centre Council of Australia (SCCA) strongly opposes such arguments for the reasons set out in sections 2 and 3 of this submission.

Contrary to misleading statements by some groups:

- COAG did *not* recommend business-to-business contracts be included in the national consumer protection law;
- the Productivity Commission did *not* recommend business-to-business contracts be included in unfair contract terms regulation;
- the United Kingdom does *not* regulate business-to-business contracts in this way – the *Unfair Terms in Consumer Contracts Regulations* specifically exclude terms in business-to-business agreements.

The first indication that the Government was considering including business-to-business contracts was in the consultation paper released in February 2009. No evidence of market failure or case for action was established, or even attempted, in either of the consultation papers issued by Mr Bowen. This is the very antithesis of best practice regulation.

The inclusion of business-to-business contracts in this Bill would be the most radical and far-reaching amendment to the Trade Practices Act in thirty five years. To our knowledge very few western countries have regulated business-to-business contracts in this manner. Australia would be blazing a trail without any consideration of the costs and benefits of such regulation and without any evidence of a market failure that warrants such intervention.

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2. Reasons why the Bill should not include business-to-business contracts in the regulation of unfair contract terms

There are many reasons why the Bill should not regulate business-to-business contracts.

First, there is no suggestion in the *Joint Communiqué of the Ministerial Council on Consumer Affairs Meeting of 15 August 2008* (which is the initiative for this Bill) or in COAG's Communiqué of 2 October 2008, that the national consumer law would be extended to business-to-business contracts. Further, there was no recommendation by the Productivity Commission in the report of its comprehensive *Review of Australia's Consumer Policy Framework* in 2008 that the proposed legislation would extend to business-to-business transactions. Nor does it appear that the Productivity Commission envisaged or examined the application of this framework to business-to-business contracts. (We have addressed this issue in more detail in section 3 of this submission below.)

Second, although the Bill purports to be based on the United Kingdom's *Unfair Terms in Consumer Contracts Regulations 1999,* these Regulations specifically exclude terms in business-to-business agreements. Whilst the UK's *Unfair Contracts Act* does apply to business-to-business contracts, its application is confined to terms in such contracts that exclude or limit liability. There is no general application to business-to-business contracts.

Third, no Australian State or Territory (not even Victoria, which is the only State to have passed an unfair contracts law in its *Fair Trading Act 1999*) regulates business-to-business contracts in the manner proposed by the draft legislation.

Fourth, extending the scope of the Bill to regulate business-to-business contracts would directly contradict the Government's commitment to reduce unnecessary business red tape and adopt best-practice regulation. The first principle of the Government's *Principles of Good Regulatory Process* requires that the Government "should not act to address 'problems' until a case for action has been clearly established." No such case for action has been established in either consultation paper. No evidence of a market failure that warrants intervention has been presented. This is the very antithesis of 'evidence-based policy making' to which the Prime Minister has committed the Government. The first inkling that most people would have had that a national consumer law might be expanded to include business-to-business contracts was in the consultation paper released in February 2009. That consultation paper did not include any evidence that this was a policy issue that needed to be addressed. It simply posed it as a theoretical question. Rarely has such a significant matter of public policy been advanced on the basis of so little evidence and with such minimal public consultation and consideration.

Fifth, an expanded Bill would confer immense power on the Australian Competition and Consumer Commission. It is likely to require a significant increase in the resources available to the ACCC and, in consequence, be a significant cost to the taxpayer. This will occur at a time when the Federal Government has spoken of the need to restrain the growth of government spending.

Sixth, an expanded Bill would impose significant costs on Australian businesses. One law firm[1] observed, following the release of draft legislation in May 2009 (which included business-to-business contracts): ". . . the new provisions, if introduced, are likely to quickly become among the most litigated provisions in the *Trade Practices Act*." It would seem highly likely, if the Bill were expanded to include business-to-business contracts and became law, that the courts would be choked with claims by business litigants, relying on the new law, seeking to be relieved of their contractual commitments. The transactional cost of doing business in Australia would therefore increase and these costs would inevitably be reflected in the prices of goods and services.

Another law firm noted[2] that if the draft legislation of May 2009 were passed "all businesses will need to review their standard form contracts, and quickly." This would be a very costly task, particularly since businesses would have to consider all contracts, for the purposes of the legislation, to be *prima facie* standard form contracts.

The only part of the business sector where there is identifiably and self evidently a clear benefit arising from the extension of the Bill to business-to-business transactions is the legal profession. Indeed an expanded Bill would provide lawyers with an obvious commercial incentive to foster and promote litigation (including class actions) against particular businesses on the basis that commonly used provisions of business-to-business contracts in regular use are unfair. The benefit would be enjoyed by litigators at the expense of the rest of the business community and, ultimately, of consumers generally.

Seventh, an expanded Bill would be a direct assault on long established principles and conventions that underpin the efficient conduct of commercial intercourse in a market economy and that have stood the test of time. It has long been accepted that governments and courts should not restrict commercial enterprise and freedom of contract, nor interfere with the sanctity of contracts, unless a compelling case for intervention has been established and unless there is a clear net benefit to the community. No such compelling case has been made that the Bill should apply to business-to-business transactions. This is despite the fact that a key principle of best practice regulation is to impose regulation only where there is evidence that a problem requiring regulatory intervention actually exists. No such evidence has been presented in justification of the proposed legislation.

Eighth, there are good reasons why Australian governments and State governments – and most other democratic national governments – do not legislate for judicial intervention in business-to-business transactions, other than in exceptional and clearly warranted circumstances. It is vital for the efficient operation of a market economy that business relationships are able to be formed, and to operate within a legal framework that provides certainty and instils confidence among market participants. It is also vital that bargains that are struck will stand up and be enforceable.

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[1] *HWL Ebsworth Lawyers e'News: New unfair contract laws: An Exocet for consumers, franchisees and independent contractors 12 May 2009*

[2] *Mallesons Stephen Jaques Alert 'Exposure Draft on unfair terms released' 12 May 2009*

Further, businesses, unlike consumers, already have sufficient knowledge of the subject matter in respect of which they are contracting; have access to legal and other specialist advice; and have sufficient bargaining power to resolve such matters through negotiation without intervention by government. The business-to-business contract, unlike the business-to-consumer contract, is obviously commercial in nature and one on which both parties could reasonably be expected to seek legal advice before concluding. Even if legal advice is not obtained, businesses (including small businesses) have greater knowledge of the impact and effect of contractual terms than ordinary consumers and have greater resources to enforce other legal and contractual remedies than ordinary consumers.

Ninth, the Bill focuses on the individual terms of a contract in isolation. In a business-to-consumer transaction that may be justified but, if expanded to include business-to-business transactions, it would not take into account the context of the contract negotiations between businesses - the complexities and subtleties of commercial negotiations - and does not take into account circumstances where a business compromises and consciously accepts less favourable terms in one area in exchange for more favourable terms in another area. This is particularly important since the Bill carries a presumption that a contract is a standard form contract and does not give any guidance on how much negotiation over terms must take place to enable a contract not to be considered a standard form contract.

Tenth, standard form contracts in business-to-business transactions should actually be encouraged by governments, not discouraged. For small businesses, in particular, standard form contracts minimise legal costs and risks and encourage consistency of treatment. They enable businesses to prepare their business plans with some certainty. Many small retail property owners, for example, use 'standard leases' prepared by the Real Estate Institute or the Law Society in order to minimise their legal costs. If the Bill were expanded and became law, however, such standard form contracts would now expose lessors to considerable legal risks and add uncertainty and costs for both lessors and lessees.

3. The Productivity Commission's *Review of Australia's Consumer Policy Framework* does not provide justification for the extension of the unfair contract terms law to business-to-business transactions.

We have noted comments that the proposed legislation reflects recommendations by the Productivity Commission in its *Review of Australia's Consumer Policy Framework* (Productivity Commission Inquiry Report No 45 April 2008.) A spokesman for the Australian Newsagents Federation was recently quoted as saying: "The Productivity Commission recommended that small business be regarded as consumers and protections for small businesses be in there. It is now up to the Senate to vote the Bill down until those protections are reinstated."[3]

The Productivity Commission's Recommendations are listed on pages 65-76 of Volume 1 of the Report. Not one of these recommendations refers to, or even infers, that they would apply to business-to-business transactions. In particular, the recommendation relating to unfair contracts (Recommendation 7.1 on page 71, which is considered in more detail in chapter 7.5 of Volume 2 of the Report) makes no mention of business-to-business contracts. Nowhere in the Productivity Commission's extensive discussion of 'Unfair contract terms legislation' (Volume 2, chapter 7.5, pp. 149-169) and in its further discussion on 'Unfair contract terms' (Volume 2, Appendix D pp. 404-441) does the Commission mention the extension of this concept to business-to-business contracts.

[3] *The Australian Financial Review 30 June 2009*

In the *Terms of Reference* of the Inquiry (replicated on pages vi to viii of Volume 1) there are no references to 'business' in the sections 'Scope of Inquiry' and 'Considerations.' Moreover the only references to 'business' in the section 'Key Considerations' are in the context of ensuring that "businesses, including small businesses, are not burdened by unnecessary regulation or complexity"; "the need to avoid unnecessary increases in regulation [for businesses]" and the "importance of promoting certainty and consistency for businesses." An expanded Bill, by including business-to-business contracts, would fail all these tests of "unnecessary regulation or complexity", "unnecessary increases in regulation" and "promoting uncertainty and consistency."

Obviously if the terms of reference had suggested the inclusion of business-to-business contracts the Productivity Commission would have received numerous submissions addressing the significant economic consequences of such action. Consequently the Productivity Commission would have examined this aspect in considerable detail and with considerable rigour. No doubt private modelling would have been provided in submissions to assess the economic costs of such regulation. In this context it is noted that in the letter of 14 August 2007 from the then Parliamentary Secretary to the Treasurer to the Chairman of the Productivity Commission (p.ix), approving an extension of reporting time, the Productivity Commission is specifically requested to "include information on the costs and benefits of recommended options" and advised that these "should be quantified as much as possible as it assists governments to undertake regulatory impact assessments." There is no cost/benefit analysis in the report of the inclusion of business-to-business contracts; nor has the Government produced a regulatory impact assessment of such regulation.

It should also be noted that the ACCC's discussion of 'unfair contract terms', in its submission to the Productivity Commission Inquiry (pp. 72-84), is exclusively in the context of business-to-consumer contracts. Indeed, in its nearly 200-page submission to the Inquiry, the ACCC does not once raise the issue of the business-to-business contracts being included in a national consumer policy framework.

Finally we note that the Productivity Commission, in a separate inquiry, has considered the notion of 'unfairness' in business-to-business transactions. In its inquiry into *The Market for Retail Tenancy Leases in Australia* in 2008, the Productivity Commission said[4]: "Attempting to legislate what constitutes a 'fair transaction', and what does not, is inherently difficult and is likely to add further uncertainty to the meaning of unconscionability and potentially constrain the efficient operation of the market as returns to superior bargaining skills are eroded, costs of disputation are increased and the efficiency of investment is diminished by increasing uncertainty." The Productivity Commission also concluded that introducing regulations relating to 'fairness' in business-to-business transactions could lead to 'moral hazard': "Businesses would be afforded greater protection when undertaking negotiations or in a business transaction, increasing the likelihood of bad decision making through the reduced negative consequences of such decisions." These comments by the Productivity Commission were made only one month prior to releasing its report on *The Review of Australia's Consumer Policy Framework*. It is inconceivable that the Productivity Commission would have made such comments if, in another context, it was recommending such extensive regulation of business-to-business contracts on the grounds of whether or not those contracts contained 'unfair' terms.

For all of the reasons outlined in sections 2 and 3 we **strongly recommend** that the Bill should not be expanded to regulate business-to-business contracts.

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[4] *Productivity Commission Inquiry into the Market for Retail Tenancy Leases in Australia Report No.43, 31 March 2008, p.212.*

4. The Government has not 'done a back flip' on this Bill

We have also noted comments that the Government has 'done a back flip' in introducing this Bill because, unlike the draft provisions on unfair contract terms released in May 2009, the Bill does not extend regulation to business-to-business contracts. This is not correct. It was the intention of the former Minister for Competition Policy and Consumer Affairs, Mr Bowen, to introduce the Bill – he belatedly imposed a threshold of $2 million on such contracts – and to then have this aspect considered by a Senate Committee. This would have been a case of 'putting the cart before the horse'. Such a 'legislate first, examine second' approach directly contradicted the first principle of the Government's *Principles of Good Regulatory Process* which requires that the Government "should not act to address 'problems' until a case for action has been clearly established." As outlined earlier (section 2) no such case for action was established, or even attempted, in either consultation paper issued by Mr Bowen. Nor did any submission in response to either consultation paper provide cogent or compelling evidence of the need for such regulation. Nor was such regulation recommended by COAG or by the Productivity Commission.

4. The Shopping Centre Council of Australia

The Shopping Centre Council of Australia represents investors in and managers of shopping centres. As such we also represent the interests of around nine million Australians who have an interest in retail property through their superannuation, life insurance, managed funds, real estate investment trusts, syndicates and shareholdings.

Our members are AMP Capital Investors, Brookfield Multiplex, Centro Properties Group, Colonial First State Property, Dexus Property Group, Eureka Funds Management, GPT Group, ISPT, Jen Retail Properties, Jones Lang LaSalle, Lend Lease Retail, Macquarie CountryWide Trust, McConaghy Group, McConaghy Properties, Mirvac, Perron Group, Precision Group, QIC, Savills, Stockland and Westfield Group.

We would be happy to discuss any aspect of this submission.

Yours sincerely,

Milton Cockburn
Executive Director