

## Chapter 3

### The need for a national consumer law

3.1 This chapter examines the rationale for introducing national unfair contract terms provisions and submitters' views on the need for, and likely impact of, the legislation.

#### Rationale for the bill

3.2 In the Second Reading Speech, the Minister for Competition Policy and Consumer Affairs, the Hon. Dr Craig Emerson MP, explained the bill's purpose in the following terms:

Australians are facing serious economic challenges. In confronting those challenges, we have to deal with complex, sophisticated markets. Marketing is becoming cleverer. Consumers can now shop online and through their mobile phones. They have access to money through new and sophisticated payment systems. And, the range of goods and services available today is enormous. We need national laws that can keep pace with these changes.

This bill will introduce changes that will make life easier for all consumers—through clearer, fairer standard-form contracts and more effective enforcement of our consumer laws. A single national law, supported by better policy development and decision-making processes, is the best means of achieving better results for consumers and business. Rather than relying on nine parliaments to make changes, this new framework will ensure responsive consumer laws with a truly national reach.<sup>1</sup>

3.3 The Minister explained the need to rationalise the 13 generic consumer laws currently operating in Australia in the following terms:

As we move towards a single, national market—a seamless national economy as called for by the Business Council of Australia and the 2020 Summit—this tangle of consumer laws must be rationalised. We must reduce confusion and complexity for consumers and provide consistency of consumer protection. We must reduce compliance burdens for business.<sup>2</sup>

3.4 In its submission to this inquiry, the Consumer Action Law Centre explained the rationale for national unfair contract terms laws by reciting the 2004 views of the Standing Committee of Officials of Consumer Affairs:

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1 The Hon. Dr Craig Emerson, Second Reading Speech, *House of Representatives Hansard*, 24 June 2009, p. 6981.

2 The Hon. Dr Craig Emerson, Second Reading Speech, *House of Representatives Hansard*, 24 June 2009, p. 6981.

Standard form contracts can have advantages to both supplier and purchaser provided that a fair balance is achieved between both parties to the contract. They reduce transaction costs for the supplier which would otherwise be passed on to the purchaser. They allow for lengthy and detailed contracts to be finalised with the minimum of time and by lay persons who only need to negotiate the specifics such as price, description of goods and services and delivery times. Over a period of time, people become familiar with the contracts because they are standard and may encourage a general understanding of trading practice.

However, standard form contracts do pose problems. These types of contracts will usually have been drafted by professionals on behalf of the supplier. Generally, the purchaser has no time or opportunity to read the contract before signing, let alone obtain the same standard of advice as the supplier. If there is time to read it, it is doubtful whether the purchaser will understand the meaning and impact of each term in the light of the whole contract...

It has become increasingly clear that many such standard form contracts contain clauses which are unfair or unnecessarily one-sided to the detriment of the purchaser. One reason that these have become so prevalent is that there is little, if any, competition in this regard. Purchasers do not usually "shop around" on the basis of the best contract terms: it would be too impractical an exercise for the vast majority of people to decide, for example, which hire-car company to use based on the best contract terms. Purchasers predominantly focus on price and the quality or characteristics of the product. They may not appreciate that a "good" price has been achieved through the imposition of onerous terms. As a result, terms may well be standard across an industry and even if the purchaser went elsewhere, they would be faced with a similar situation.<sup>3</sup>

3.5 In its April 2008 report into Australia's consumer policy framework, the Productivity Commission argued that there is no need for variation in either the content or enforcement intensity of generic consumer law. It noted that variations between jurisdictions can:

...lead to divergent requirements for businesses (and variable outcomes for consumers)...[T]he cumulative costs of even individually small differences can be material. And because many of them are seemingly needless, they can also be a source of significant frustration for businesses. More importantly, a continuation of the recent regulatory 'break-outs' will see the compliance burden increase in the future. It will also (inimically) increase as unnecessary specific consumer regulation is repealed (see below) and the generic law becomes the sole means of protecting consumers in a wider range of areas.

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3 Standing Committee of Officials of Consumer Affairs Unfair Contract Terms Working Party, *Unfair Contract Terms: A Discussion Paper*, January 2004, pp. 16–17. See Consumer Action Law Centre, *Submission 19*, pp. 4–5.

[T]here is little reason for any variation in the content of the generic consumer law. The generic law reflects broad notions of efficiency, fairness and equity, which the vast majority of consumers and businesses would regard as appropriate and reasonable irrespective of where they live or trade. The broad, principles-based, nature of the generic law allows for its application to a wide variety of particular circumstances. This largely removes any case for variations in the law itself to account for specific local requirements.<sup>4</sup>

## **Broad views on the bill**

### ***Support for harmonised consumer laws***

3.6 Several submitters to this inquiry have expressed their support for the government's intention to protect consumers through the introduction of a national unfair contract terms regime.

3.7 The Chair of the Law Council of Australia's Trade Practices Committee told the committee that it is:

...supportive of the government's desire to nationally reform Australia's consumer protection laws to ensure that laws across all states and territories are harmonised and to ensure businesses are not burdened by unnecessary regulation and inconsistent laws.<sup>5</sup>

3.8 The Association of Building Societies and Credit Unions (ABACUS) emphasised that it is 'strongly supportive' of a single, national approach to regulation in this area.<sup>6</sup> It told the committee: 'I guess we have to provide some kudos to this approach; a single consumer law across all jurisdictions is a really fantastic idea'.<sup>7</sup>

3.9 The Business Council of Australia (BCA) stated in its submission to this inquiry, and in correspondence to the Minister on the exposure draft of the bill, that it 'supports the proposed reform of consumer protection laws in Australia, and in particular the development of a nationally consistent approach in this area'.<sup>8</sup>

3.10 The law firm, Minter Ellison, has highlighted the likely compliance and commercial benefits of the legislation:

...we welcome the Government's proposal to implement uniform and consistent consumer protection laws in Australia. Any measure which simplifies the compliance regime for business will produce significant

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4 Productivity Commission, *Review of Australia's Consumer Framework*, Volume 1, April 2008, p. 19.

5 Mr Dave Poddar, *Proof Committee Hansard*, 21 August 2009, p. 31.

6 ABACUS, *Submission 33*, p. 1.

7 Mr Mark Degotardi, *Proof Committee Hansard*, 21 August 2009, p. 28.

8 Business Council of Australia, *Submission 20*, p. 1.

benefits for Australia both in terms of reducing the costs of doing business here and therefore increasing Australia's attractiveness for local and foreign investment, but also for reducing the likelihood of non-compliance which will benefit consumers and businesses alike.<sup>9</sup>

3.11 The Consumer Action Law Centre has noted that national unfair contract terms laws will not only benefit individual consumers but have the potential to provide wider competition benefits by 'increasing consumer confidence in market transactions'. It noted in its submission that:

Consumer Action has advocated for effective regulation of the use of unfair terms in consumer contracts to be introduced nationally for a number of years and we therefore strongly support the Bill's introduction of national UCT laws. Australia currently lags behind world's best practice in consumer policy, and the lack of national UCT laws is one of the principal reasons that this is the case.<sup>10</sup>

3.12 The Motor Trades Association of Australia told the committee:

We are great supporters of the COAG agenda and harmonisation. If you sell as much as we do across as wide a sample of goods in a national multiplicity of consumer laws, it is really difficult. We think having a single harmonised law is very attractive. We support it and believe there would likely be savings for the economy, consumers and business. It will be good to have circumstances where we will be able to address compliance by our businesses in a single unified law. I think it is a welcome advance, and it is not one that we are frightened of. We do not think it extends the jurisdiction in a way that is injurious to business at all.<sup>11</sup>

3.13 Associate Professor Frank Zumbo told the committee:

I welcome the unfair contract term proposals and, having been involved in the area—I have researched it for almost 15 years, I have seen it work firsthand in the UK, I have visited the UK Office of Fair Trading, I have had discussions with Consumer Affairs Victoria—and having looked at the practice in the United Kingdom, in Victoria and in Europe, there is no doubt in my mind that we do need an unfair contract term regime.<sup>12</sup>

### ***Too much regulation and uncertainty***

3.14 On the other hand, a key theme of many witnesses' evidence to this inquiry is the uncertainty that the bill's provisions would cause in commercial contracts and, therefore, in commercial transactions. The claim is that the legislation will force businesses to reconsider all their standard form contracts and operate in an

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9 Minter Ellison, *Submission 45*, p. 1.

10 Consumer Action Law Centre, *Submission 19*, p. 2.

11 Mr Michael Delaney, *Proof Committee Hansard*, 21 August 2009, p. 23.

12 Associate Professor Frank Zumbo, *Proof Committee Hansard*, 26 August, p. 26.

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environment where they cannot be sure what terms the courts, and the Minister, will declare 'unfair'.<sup>13</sup>

3.15 The Australian Institute of Company Directors (AICD) highlighted the uncertainty that the bill would create:

We note the explanatory memorandum aims to provide clarity and certainty in relation to consumer law to protect consumers and to reduce prices for goods and services. Respectfully, we anticipate the bill may in some cases have the opposite effect. We anticipate the bill may cause uncertainty with question marks to be placed over the enforceability of standard form contracts, and that consumers—the people it is designed to protect—may be burdened by possibly higher prices for goods and services.

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If there is a risk that terms in a contract could be unenforceable for unfairness or for any other reason, the flow-on effects could be significant. Companies may be required to reconsider product structuring, risk allocation, insurance, prices and even the actual supply of some goods and services. It is the uncertainty that is the issue here, perhaps, rather than the general concepts. We anticipate that the lack of clarity in the bill's drafting and the subjective nature of unfairness will also lead to an increase in litigation and costs for companies.<sup>14</sup>

3.16 Colonial First State Property Management argued that the retail leasing industry already has rigorous legislation covering all aspects of retail lease transactions, ensuring that tenants are protected from 'unfair' contracts. It added that imposing further regulation on the industry is 'unnecessary, counter-productive and not conducive to effective business practice'.<sup>15</sup>

3.17 The banking sector has also criticised the bill's impact on business certainty and business costs. The Australian Bankers' Association told the committee:

Central to our concerns is that the regime will create uncertainty for banks...In practice the operation of this legislation is likely to see customers agreeing on the terms and conditions for their banking services before the customer accepts a financial product, only to later seek to avoid their obligations by claiming a particular term is unfair.<sup>16</sup>

3.18 Not everyone was convinced by this argument that the banks will be hurt by the 'uncertainty' created by the bill's provisions. The Motor Trades Association of Australia, notably, dismissed these fears in the following terms:

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13 See Mr David Bell, *Proof Committee Hansard*, 26 August 2009, p. 35.

14 Mr John Colvin, *Proof Committee Hansard*, 26 August 2009, p. 10.

15 *Submission 11*, p. 3.

16 Mr David Bell, *Proof Committee Hansard*, 26 August 2006, p. 34.

I am familiar, having been in my position for a long time, with the fact that every amendment to the Trade Practices Act in the way of addressing issues for small business that has been proposed during my long service has involved a Chicken Little recitation from big business that the sky will fall in, that we will suddenly be overwhelmed by a tsunami of lack of confidence, that no bank will lend to anyone—and, strangely, the sun keeps coming up, the money keeps being lent, and business and life go on. So even in the wake, one hopes, of a global financial crisis, I am not convinced that much was going to happen to uncertainty. The fact of the matter is that every banker lives with the uncertainty on every loan always.<sup>17</sup>

3.19 The Insurance Law Service was also dismissive of the 'uncertainty' argument. Ms Katherine Lane, a principal solicitor with the service, told the committee:

This uncertainty thing again is a furphy. First of all, the legislation has been brought in in the UK. The whole world did not collapse. The UK did not go into receivership...It has been brought in in Victoria and again it did not fall apart. It has made some really useful changes to certain contracts with telecommunication companies that were completely unfair...Regarding this uncertainty thing, I have uncertainty from a consumer movement point of view, too. I do not know whether this is going to achieve its outcomes, and how can we know? We do not have crystal balls. But what we do is put in the best effort we can to make sure that the legislation makes sense. If there is a precedent overseas, that helps; that is great. We want to achieve a certain goal, which is making sure standard form contracts are fair. What is the uncertainty in that?<sup>18</sup>

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17 Mr Michael Delaney, *Proof Committee Hansard*, 21 August 2009, p. 19.

18 Ms Katherine Lane, *Proof Committee Hansard*, 26 August 2009, p. 48.