

Chapter 5

The scope of the bill: business-to-consumer unfair contract terms

5.1 One of the key areas of conjecture in this legislation is the exemption of business-to-business unfair contract terms. This chapter details the arguments for and against this exclusion.

The scope of the bill

5.2 The scope of the bill's unfair contract terms provisions is restricted to business-to-consumer transactions. The bill applies only to consumer contracts in which at least one of the parties is an individual. Contracts between businesses are therefore excluded from the provisions, except in respect of 'sole traders'.¹

5.3 The Minister for Competition Policy and Consumer Affairs, the Hon. Dr Craig Emerson, explained in the Second Reading Speech that the government is currently reviewing both the unconscionable conduct provisions of the *Trade Practices Act* and the Franchising Code of Conduct. This follows the tabling of two parliamentary committee reports in December 2008: one by this committee into the 'need, scope and content' of a statutory definition of unconscionable conduct in section 51AC of the TPA; the other by the Parliamentary Joint Committee on Corporations and Financial Services into the Franchising Code of Conduct.²

Opposition to the exemption of business-to-business contracts

5.4 Several submitters expressed their disappointment at the bill's omission of business-to-business contracts from the unfair contract terms provisions.

5.5 The Association of Consulting Engineers Australia asked that this committee recommend that the government reinstate the bill's application to business-to-business contracts.³ The Pharmacy Guild of Australia also recommended that business-to-business contracts be covered in the ACL as proposed in the government's May 2009 Discussion Paper.⁴

1 *Explanatory Memorandum*, p. 17.

2 http://www.aph.gov.au/Senate/committee/economics_ctte/tpa_unconscionable_08/report/report.pdf
http://www.aph.gov.au/Senate/committee/corporations_ctte/franchising/report/index.htm
See also, Dr Kennedy, *Proof Committee Hansard*, 21 August 2009, p. 5.

3 Association of Consulting Engineers Australia, *Submission 31*, p. 2.

4 Pharmacy Guild of Australia, *Submission 42*, p. 10.

5.6 The Queensland Newsagents' Federation and the Newsagents Association of New South Wales and the ACT expressed in separate submissions to this inquiry their disappointment that business-to-business contracts were excluded from the legislation. They both noted that small business has long campaigned for action on the use of standard form contracts which may be unfair to small business. They asked the committee to recommend that business-to-business contracts 'be put back into the bill or an associated bill'.⁵ The Australian Newsagents' Federation was a little more circumspect:

Whilst the ANF was initially disappointed with the removal of the business-to-business provisions from the amendment, we are greatly encouraged by the Government's announcement to consider the unfair contract terms business-to-business provisions pending current inquiries into the Franchising Code of Conduct and Unconscionable Conduct provisions of the TPA.⁶

5.7 The Motor Trades Association of Australia (MTAA) has noted that the majority of retail motor traders operate under agreements which contain 'certain assignment clauses', such as are listed in section 4 of the bill (see below).⁷ The MTAA's Executive Director, Mr Michael Delaney, told the committee that the Association has:

...for years has argued that legislation should intervene to set a minimum standard of conduct to protect parties to franchise agreements. The inclusion of a business-to-business unfair contract terms of provision would go some way to introducing a behavioural standard. In many of their business relationships retail motor traders have fewer rights of redress against larger stakeholders, such as franchisors, acquirers of goods and services, other suppliers and so on for harsh and unfair behaviour than do consumers against retailers and manufacturers. That is, contracts are presented as take it or leave it standard form agreements. There is often little or no negotiation on the terms of the contract without which the business can often not operate and many contain terms which are detrimental to the small business and which are in excess of what is required to protect the normal commercial rights of the larger party.⁸

5.8 The Council of Small Business of Australia (COSBOA) accepted the removal of business-to-business contracts from the bill provided that section 50 of the TPA is amended to include these contracts. COSBOA also recommended that all government

5 Queensland Newsagents Federation, *Submission 5*, pp. 1–2; Newsagents Association of NSW and the ACT, *Submission 41*, p. 2.

6 Australian Newsagents' Federation, *Submission 17*, p. 2.

7 Motor Trades Association of Australia, *Submission 15*, p. 3.

8 Mr Michael Delaney, *Proof Committee Hansard*, 21 August 2009, p. 18.

procurement and general contracting should allow their suppliers to negotiate contract terms without this being viewed as a non-conforming contract.⁹

5.9 Associate Professor Frank Zumbo also expressed disappointment with the bill's exclusion of small businesses from the unfair contracts proposals. He gave in his submission a brief chronology of the government's position in the lead-up to the bill's introduction. The draft legislation had included protections for small businesses. As late as June 2009, the then Minister for Competition Policy, the Hon. Chris Bowen, announced that there would be a upfront price cap of \$2 million on the size of transactions that would be subject to the unfair contract terms ban. Later that month, however, the new Minister narrowed the provisions to business-to-consumer contracts.¹⁰

Support for the exemption of business-to-business contracts

5.10 Other submitters argued that the government had got it right by omitting business-to-business contracts from the bill. The Shopping Centre Council of Australia (SCCA) gave several reasons why the bill should not include business-to-business contracts in the regulation of unfair contract terms:

- the Joint Communiqué of the Ministerial Council on Consumer Affairs Meeting of 15 August 2008 and COAG's Communiqué of 2 October 2008 made no suggestion that the national consumer law would be extended to business-to-business contracts;
- 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;
- no Australian State or Territory regulates business-to-business contracts in the manner proposed by the draft legislation;
- 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;
- an expanded bill would 'confer immense power' on the ACCC and is likely to require a significant increase in the resources available to the ACCC and, in consequence be a significant cost to the taxpayer;
- an expanded bill would impose 'significant costs' on Australian businesses, making it likely that the courts would be 'choked with claims by business litigants...seeking to be relieved of their contractual commitments';
- an expanded bill would be 'a direct assault' on long established commercial principles such as freedom of contracts;

9 Council of Small Business of Australia, *Submission 34*, p. 2.

10 Associate Professor Frank Zumbo, *Submission 12*, pp. 3–4.

- businesses, unlike consumers, have sufficient knowledge of the contracting subject matter, have access to legal and other specialist advice and have sufficient bargaining power to resolve these matters without intervention by government;
- if expanded to include business-to-business transactions, the bill would not take into account 'the context of the contract negotiations between businesses' and 'the circumstances where a business compromises and consciously accepts less favourable terms in one area in exchange for more favourable terms in another area'; and
- standard form contracts in business-to-business transactions should be encouraged, not discouraged.¹¹

5.11 The Trade Practices Committee of the Law Council of Australia wrote in its submission that it:

...welcomes the Government's recent decision to restrict the regime to consumers. The result is consistent with the recommendations of the Productivity Commission, which focussed on using the regime to address the unfair disadvantage suffered by consumers when they are unable to bargain effectively in relation to "take it or leave it" arrangements.¹²

5.12 The Business Council of Australia (BCA) lent its support to the bill's exclusion of business-to-business contracts in the following terms:

It is also important to recognise that small businesses would also be adversely affected if business-to-business standard form contractual arrangements were included in this regime. Many large businesses deal with hundreds of small businesses and use standard form contracts to minimise the cost of those transactions. Should business to business standard form contracts be included it will likely require contracts to be individually negotiated, and in many cases the cost of such negotiations will not be justified for some smaller contracts. This will effectively eliminate some smaller business-to-business standard form contracts from the market.¹³

5.13 GE has argued that while the bill exempts business-to-business contracts, any future attempt to include them would be 'inappropriate'. It argued that there is no evidence to suggest that unfair contract terms are prevalent in business-to-business contracts to warrant the application of similar legislation.¹⁴

11 Shopping Centre Council of Australia, *Submission 9*, pp. 2–4. See also Colonial First State Property Management, *Submission 11*, p. 4–5

12 Law Council of Australia, *Submission 47*, pp. 1–2.

13 Business Council of Australia, *Submission 20*, p. 2.

14 GE, *Submission 26*, p. 2.

What is a consumer contract?

5.14 Subsection 2(3) of the bill defines a consumer contract as a contract for the supply of goods or services or a sale or grant of an interest in land to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.¹⁵

Views

5.15 The committee received some views critical of the bill's definition of a 'consumer contract'. The National Australia Bank (NAB) argued in its submission that the definition would benefit from a presumption to ensure certainty of whether a standard form contract is regulated or not at the time of contracting. By way of example, it noted that if the subject matter of the agreement was of a commercial nature or the party taking the contract is a business entity, there should be a presumption that it is a business contract and therefore not regulated.¹⁶

5.16 The Australian Bankers' Association (ABA) has criticised section 2(3) of the bill for defining a consumer contract by focussing on the purpose of the actual acquisition. It argues that the focus on 'personal, domestic or household use or consumption' is 'subjective in nature and will be difficult to implement'.¹⁷ The ABA noted that it will often be difficult for a financial institution to be aware of the purpose for which a customer has acquired a product or service. Accordingly, it recommended that the definition of consumer contract should be similar to that used in Victoria, requiring that both the purpose of the acquisition and the nature of the product be taken into account.¹⁸

5.17 The Law Council of Australia argued that the definition of 'consumer' in section 4B of the TPA would offer a more objective test of a 'consumer contract' than the approach adopted in the bill. Section 4B of the TPA focuses on the nature of the good or service being supplied and asking whether it is 'of a kind ordinarily acquired

15 *Explanatory Memorandum*, p. 13. In the ASIC Act, a consumer contract is a contract at least one of the parties to which is an individual whose acquisition of what is supplied under the contract is wholly or predominantly an acquisition for personal, domestic or household use or consumption.

16 National Australia Bank, *Submission 30*, p. 2.

17 Australian Bankers' Association, *Submission 32*, p. 2.

18 Australian Bankers' Association, *Submission 32*, p. 2.

for personal, domestic or household use or consumption'.¹⁹ The bill, on the other hand, inquires into 'the subjective purpose for which an individual acquired the good or service'.²⁰ The Law Council reasoned that:

In dealing with standard form contracts and many consumers, businesses are not going to know the subjective intent of the customer in acquiring the goods. We think that the 4B definition is a better one. It has been around a long time, businesses are used to it and it will then be consistent.²¹

Committee view

5.18 The Minister for Competition Policy and Consumer Affairs flagged in the Second Reading Speech of the bill that the issue of business-to-business unfair contract terms 'will—no doubt—be further considered as part of [this committee's] process'.²² This inquiry has indeed gathered considerable evidence supporting the application of unfair contract terms laws to protect small businesses in their dealings with businesses with greater bargaining power and market power. The committee believes it is important that the government responds to these concerns after completing its reviews of this committee's December 2008 inquiry into section 51AC of the Trade Practices Act and the Joint Committee on Corporations and Financial Services' inquiry into the Franchising Code of Conduct.

19 Section 4B (1a) of the *Trade Practices Act* states that 'a person shall be taken to have acquired particular goods as a consumer if, and only if:(i) the price of the goods did not exceed the prescribed amount (\$40,000); or (ii) where that price exceeded the prescribed amount—the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption or the goods consisted of a commercial road vehicle; and the person did not acquire the goods, or hold himself or herself out as acquiring the goods, for the purpose of re-supply or for the purpose of using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land...'

20 Law Council of Australia, *Submission 37*, p. 2.

21 Ms Amanda Bodger, *Proof Committee Hansard*, 21 August 2009, p. 35.

22 The Hon. Dr Craig Emerson, Second Reading Speech, *House of Representatives Hansard*, 24 June 2009, p. 6983.