Chapter 6

The issues of 'detriment' and 'transparency'

6.1 This chapter looks at two issues that the courts must take into account in determining whether a consumer contract is unfair: the extent to which a term would cause 'detriment'; and the extent to which a term is 'transparent'.

Factors that the court must take into account

6.2 Subsection 3(2) of the bill provides that while a Court may take into account any matters it considers relevant in finding that a consumer contract is unfair, the Court must take into account:

(a) the extent to which it would cause detriment, or a substantial likelihood of detriment (whether financial or otherwise) to a party if the term was to be applied or relied on;

(b) the extent to which a term is transparent; and

(c) the contract as a whole.

6.3 Subsection 3(3) of the bill states that a term is transparent if the term is:

(a) expressed in reasonably plain language; and

(b) legible; and

(c) presented clearly; and

(d) readily available to any party affected by the term.

Detriment (financial or otherwise), or a substantial likelihood of detriment

6.4 On the issue of 'detriment' (subsection 3(2a)), the Explanatory Memorandum (EM) states that the court is required to have regard to whether the term subject to challenge has caused detriment to consumers (individually or as a class), or a substantial likelihood thereof.

6.5 In terms of the bill's reference to 'a substantial likelihood of detriment', the EM states:

> By requiring evidence of a 'substantial likelihood of detriment', the provision requires more than a hypothetical case to be made out by the claimant. In this context, a claimant does not need to have proof of having suffered actual detriment, but that there is a substantial likelihood of detriment relating to the application of or reliance on the term.
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> In this regard, a term does not need to be enforced in order to be unfair, although the possibility of such enforcement may impact on the decisions

> made by the party that would be disadvantaged by the term's practical effect, to that party's detriment.[1]

6.6 Subsection 3(2a) also states that detriment is not limited to financial detriment. The EM notes: 'This is designed to allow the Court to consider situations where there may be other forms of detriment that have affected or may affect the party disadvantaged by the practical effect of the term'.

6.7 If a court finds that a term is unfair and there is only a substantial likelihood of detriment arising from the application of or reliance on that term, then it is likely that the remedies available would be limited to a declaration that the term is an unfair term and an injunction preventing the party advantaged by it applying or relying on it, or purporting to do so.[2]

Views

6.8 Recall from chapter 2 that the Productivity Commission had recommended a provision referring to 'material detriment' to consumers. Several submitters were critical of subsection 3(2a) of the bill on the basis that its broader definition of 'detriment' will create considerable uncertainty for all parties.

A substantial likelihood of detriment

6.9 The Law Council of Australia was among several submitters expressing concern at the bill's reference to 'a substantial likelihood of detriment'. It noted, and concurred with, the Productivity Commission's finding that if a term is unfair, usually there is no detriment caused by it; it is only when the term is going to be implemented and relied on.[3]

6.10 The National Australia Bank (NAB) also criticised the bill for straying from the Productivity Commission Review's yardstick of 'material detriment'. It argued that the bill's reference to 'a substantial likelihood of detriment' creates 'an unacceptable degree of risk and uncertainty for business and consumers'. The NAB recommended that the definition be amended to require proof of material detriment.[4]

6.11 The Australian Bankers' Association (ABA) has expressed its concern that 'there is no requirement that a claimant suffer detriment in order for a term to be found to be unfair or for redress to be available'. It also argued that a term should only be unfair where it causes actual material detriment.[5]

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1 *Explanatory Memorandum*, p. 20. See also Dr Steven Kennedy, *Proof Committee Hansard*, 21 August 2009, pp. 8–9.

2 *Explanatory Memorandum*, p. 20.

3 Ms Amanda Bodger, *Proof Committee Hansard*, 21 August 2009, p. 33.

4 National Australia Bank, *Submission 30*, p. 4.

5 Australian Bankers' Association, *Submission 32*, p. 5.

6.12 The Association of Building Societies and Credit Unions (ABACUS) argued in both its submission and in verbal evidence to the committee that the concept of detriment should play a greater role in the meaning and the test of unfairness than the bill would have. To this end, one suggestion it made was that the courts should be required to take into account the consumer benefit from a contract term in determining whether or not it is unfair.[6]

6.13 Mr Mark Degotardi, Head of Public Affairs at ABACUS, argued that if the bill's test is not refined to actual consumer detriment:

> The risk that we face and the uncertainty that we must consider as a risk is that under the proposed regime anyone can bring an unfairness claim, and that means that anyone can simply say, 'I think there is a substantial likelihood of detriment.' Whether that case is subsequently proved or not, the cost for us in either defending or dealing with those claims on the uncertainty around our contracts, many of which actually have consumer benefits—we use standard form contracts.[7]

6.14 A different view was put by Associate Professor Frank Zumbo. He argued that as 'detriment' is a possible consequence of unfairness, it is only relevant to questions of damages or compensation that may flow from an unfair contract term. It is not relevant to considering whether or not the contract term is unfair.[8]

6.15 Significantly, this distinction has been acknowledged by Treasury. Mr Writer explained that the concept of detriment in the bill:

> …is purely a remedy. It does not determine unfairness. It goes to the question of what redress might be provided. The definition of 'unfair' does not refer to the question of detriment or make the existence of detriment determinative of that unfairness.[9]

Non financial detriment

6.16 The committee also discussed the issue of non-financial detriment. Treasury told the committee that the concept of non-financial detriment is 'not a particularly difficult concept to define'. Treasury provided the following example:

> If I as a consumer…have a contract with somebody to deliver a sofa to my house and I expect and am given the reasonable expectation that that might be delivered in two weeks and it takes eight, the detriment I might have suffered there is the lack of a sofa for six weeks. I am not necessarily going to quantify that in a financial sense with the business concerned, but the detriment is there still in that I have been compelled to sit on the floor or on

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6 ABACUS, *Submission 33*, p. 4.

7 Mr Mark Degotardi, *Proof Committee Hansard*, 21 August 2009, p. 25.

8 Associate Professor Frank Zumbo, *Submission 12*, p. 8.

9 Mr Simon Writer, Manager, Consumer Policy Framework Unit, *Proof Committee Hansard*, 21 August 2009, p. 6.

> my broken sofa. The provisions are simply designed to give recognition to the fact that a consumer may not want a payment. They may want recognition of that detriment. They may want an apology. They may want to some other form of recompense.[10]

6.17 Treasury explained that:

> …the point of the legislation is to require courts not to arbitrate that question but simply to have regard to the fact that I may have been inconvenienced in a way that is not necessarily easy to place a cost on…[11]

6.18 Treasury told the committee that there will be occasions when, although the customer is not paying a price when they are inconvenienced, it clearly has a value. He added:

> So when we say it is 'non-financial' we are simply saying it is not an amount of money that can be transferred, but certainly your time is valuable and if you lost time by being inconvenienced that would probably be regarded as non-financial detriment.[12]

6.19 The Association of Building Societies and Credit Unions (ABACUS) has argued that the list of matters that the court must take into account 'should be broadened and made more balanced'. Specifically, it claimed that the court should be required to consider the extent of any benefits associated with the use of the term to either the claimant or to other parties to contracts including similar terms. The court must weigh these benefits against consumer protection considerations.[13]

The issue of transparency

6.20 As noted earlier, subsection 3(2b) of the bill states that in determining whether a consumer contract term is 'unfair', a court must take into account 'the extent to which the term is transparent'. The EM notes that a lack of transparency in the terms of a consumer contract 'may be a strong indication of the existence of a significant imbalance in the rights and obligations of the parties under the contract'. It adds, however, that the extent to which a term is not transparent 'is not, of itself, determinative of the unfairness of a term in a consumer contract and the nature and effect of the term will continue to be relevant'.[14] Further, Treasury confirmed to the committee that a contract term can be transparent, but still unfair.[15]

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10 Mr Simon Writer, *Proof Committee Hansard*, 21 August 2009, p. 6.

11 Mr Simon Writer, *Proof Committee Hansard*, 21 August 2009, p. 8.

12 Dr Steven Kennedy, General Manager, Competition and Consumer Policy Division, *Proof Committee Hansard*, 21 August 2009, pp. 7–8.

13 ABACUS, *Submission 33*, p. 5.

14 *Explanatory Memorandum*, p. 21.

15 Mr Simon Writer, *Proof Committee Hansard*, 21 August 2009, p. 6.

Views

6.21 The committee's feedback on the bill's 'transparency' provision was mixed. The ABA supported the inclusion of the clause on transparency. It emphasised the importance of the courts considering 'a range of circumstances specific to each individual contract and parties to that contract'. The Association noted that the bill 'appears to support this view' given the proposed provisions specify that a court may take into account 'such matters as it thinks relevant', and must take into account the extent to which the term is transparent.[16]

6.22 The Consumer Action Law Centre argued that the transparency clause is 'the only part of the Bill's definition of "unfair" that was not in the MCCA-agreed model for UCT provisions and was not foreshadowed in the consultation information paper of February 2009'. The two other matters in subsection 3(2) of the bill—detriment and the contract as a whole—are both 'reasonable and in accord with the MCCA model'.[17]

6.23 The Centre explained that the unfair contract laws are a negotiation problem (a substantive issue), not a disclosure problem (a procedural issue). In this context, the availability, legibility and presentation of contract terms is irrelevant: the key obstacle is the inability of consumers to negotiate the terms of standard form contracts proposed by suppliers.[18]

6.24 The Centre feared that despite the government's good intentions in introducing the 'transparency' test, the test may substantially undermine the operation of the provisions. It could mean that the courts will regard a term as:

> …"less unfair", and thus possibly not unfair at all, if it has been clearly typed out in the contract, regardless of whether it is realistic to expect the consumer to have read, understood or negotiated over that contract term, and regardless of the extent of the unfairness of the content and effect of that term. Despite the EM's statements, the provision is not drafted in terms of a court being required to take into account the extent to which a term is not transparent but the extent to which it is.[19]

6.25 Associate Professor Zumbo has also argued that the bill's reference to whether or not a contract term is transparent in section 3(3) should be deleted. As with the 'detriment' provision, he argued that the test for transparency should be distinct from whether or not the contract term is unfair. Indeed, he argued that a contract term may be transparent but drafted by the larger party in a way that represents a significant

16 Australian Bankers' Association, *Submission 32*, p. 3.

17 Consumer Action Law Centre, *Submission 19*, p. 5.

18 Consumer Action Law Centre, *Submission 19*, p. 6.

19 Consumer Action Law Centre, *Submission 19*, p. 6.

imbalance in contractual rights of that party and which goes beyond what is reasonably necessary to protect its legitimate interests.[20]

The contract as a whole

6.26 In terms of proposed section 3(2)(c) concerning 'the contract as a whole', the Consumer Action Law Centre told the committee that:

> …one of the strengths of this law from the point of view of business, based on the concerns that they are expressing about uncertainty and flexibility, is it requires consideration of the contract as a whole. It is difficult to see how a process that looked at a clause could do that without then looking at the entirety of the contract.[21]

6.27 The Law Council of Australia has similarly emphasised the need for an approach which requires an assessment of all the relevant circumstances in every case. It noted that other regulators have taken the view that a term may be fair in one context but unfair in another.[22]

6.28 Significantly, the Law Council made these observations in the context of its concerns with the bill's provisions to prohibit certain contract terms (see chapter 7). While recognising these concerns, the committee highlights that section 3(2)(c) does provide for flexibility in the courts' interpretation of unfair contract terms.

Safeguards and safe harbours

6.29 The committee recognises it is important that this legislation minimises any uncertainty that may arise for businesses in setting standard form contracts. By and large, it believes that the bill does provide adequate safeguards to ensure that consumers do not challenge contract terms indiscriminately.

6.30 For example, this chapter has noted that some witnesses have argued that the 'detriment' provision should be made more central to the unfairness test and should be sharpened to focus on material detriment: others consider it irrelevant to a test of unfairness. The committee believes the bill strikes the right balance. The Productivity Commission argued that 'there are sound economic and ethical rationales for proscribing unfair contract terms that cause consumer detriment'.[23] The committee agrees with the Ministerial Council on Consumer Affairs that the courts should be allowed to take into account non-financial forms of detriment such as inconvenience, delay or emotional distress.

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20 Associate Professor Frank Zumbo, *Submission 12*, p. 9.

21 Ms Nicole Rich, *Proof Committee Hansard*, 26 August 2009, p. 65.

22 Law Council of Australia, *Introductory Statement to Senate Economics Committee*, 21 August 2009.

23 Cited in Treasury, *The Australian Consumer Law—Consultations on draft provisions on unfair contract terms*, 11 May 2009, p. 2.

6.31 On the issue of 'transparency', some submitters supported the clause on the basis that the courts must consider the range of circumstances specific to each individual contract and parties to that contract. Others considered transparency a matter of procedural (rather than substantive) unfairness, and therefore irrelevant to the test of an unfair contract term. Again, the committee believes the transparency of a contract is a matter that the courts should take into account given that unfairness may be exacerbated by the lack of transparency in a term.[24]

6.32 Notwithstanding these and other checks, the committee is interested to pursue the proposal of a 'safe harbour'.[25] A safe harbour would operate by allowing a business to gain authorisation from the regulator to ensure that a term is beyond challenge. The Consumer Action Law Centre has cautioned that a safe harbour may have limited impact in that a court must take into account a contract as a whole when considering a particular term. It noted that any change to other terms of the contract would probably require the business to go back and seek approval for the new contract.[26]

Committee view

6.33 The committee believes the idea of a safe harbour could be considered and suggests that the ACCC and ASIC consider the merit of a safe harbour for certain contract terms.

24 Treasury, *The Australian Consumer Law—Consultations on draft provisions on unfair contract terms*, 11 May 2009, p. 11.

25 See ABACUS, *Proof Committee Hansard*, 21 August 2009, pp. 25–26; Associate Professor Frank Zumbo, *Proof Committee Hansard*, 26 August 2009, pp. 27–28.

26 Ms Nicole Rich, *Proof Committee Hansard*, 26 August 2009, p. 65.