Coalition Senators' Additional Comments

Introduction

Coalition senators welcome this new national consumer law stemming, as it has, from the vision and action of the former Coalition government to whom due acknowledgement should be accorded.

We strongly support the aims of the legislation to enhance and harmonise consumer protection laws and protect consumers' interests by creating a more equitable legal framework.

Coalition senators support the broad principles-based approach to the regulation of contract terms, and recognise that the bill seeks a major shift in business mindset to transacting with consumers.

In making the following additional comments, we are mindful of the extensive consultations that have delivered the national framework of consumer law. We are also conscious that the Australian Consumer Law (ACL) provisions draw heavily from the UK and Victorian approaches to unfair terms in consumer contracts and that this bill draws likewise on the collective experience of similar consumer protection measures in those jurisdictions.

Design of the Australian Consumer Law

Like the Unfair Terms in Consumer Contracts Regulations 1999 in the UK, Schedule 2 of the bill aims to regulate unfair terms rather than unfair contracts. This is an important feature of the ACL.

United Kingdom legislation

The UK Regulations were initially instituted in 1994 in response to an EU directive; they were repealed and replaced in 1999. The other major legislation in the area in the UK is the *Unfair Contract Terms Act 1977*. Given the provenance of the laws it is not surprising that there is some overlap between the two, although, the Act applies to business-to-business contracts whereas the Regulations are confined to natural persons.

Core terms and grey list

Like in the proposed ACL, the core terms—the main subject matter and price—of a UK standard contract do not come within the UK Regulations. There is also a common "non-exhaustive, indicative" "grey list" in the UK Regulations.

Matters to which a court must have regard

In relation to questions of "detriment" and whether a term is "transparent" in the context of matters to which a court must have regard in deciding whether a term is unfair, Coalition senators are attracted to the arguments of the Consumer Action Law Centre and Professor Frank Zumbo that the "transparent" element is superfluous in this clause and should be removed.

We note that the concept of detriment to the consumer is also relevant in the UK Regulations.

Coalition senators recognise that difficulty and unease these concepts have caused from the evidence of a number of witnesses. We are however satisfied, based on the UK and Victorian experience and Treasury and other evidence, that these elements, in their context of "matters to which a court must have regard," are not impassable.

Coalition senators note with satisfaction that the experience in the UK is that the key role in enforcement of the UK Regulations has been with the regulator and not the courts.

Presumptions

Coalition senators have considered the two key presumptions in the ACL: that a contract is a standard form contract where alleged by a party, with the burden on the other party to rebut that presumption; and that a term is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term, with the burden on the party advantaged to prove otherwise.

We recognise the policy reasoning behind these presumptions.

Consumer definition

Insofar as the design of the ACL is concerned, coalition senators are attracted to the argument of the Trade Practices Committee of the Law Council of Australia in relation to the definition of "consumer contracts" in the ACL.

The Law Council gave evidence that consumer contracts "should be defined using the existing [consumer] definition in section 4B of the Trade Practices Act 1974 (TPA). This will enable the regime to provide protection to small businesses, where those businesses are purchasing goods and services under standard form "consumer type" contracts, while preserving consistency and certainty for the overall business community."

The Law Council also reasoned that, contrary to the definition of consumer contract in the ACL which has the element of subjectivity about the intent of the consumer entering into a contract, which the suppler or seller cannot know, the TPA definition on the other hand "has been around a long time, businesses are used to it and it will then be consistent."

Furthermore, coalition senators argue that the definition of consumer contracts under section 4B of should be amended to include all contracts up to an amount of $1million, an increase from the current limit of $40,000.

Coalition senators are also alert to the potential for further harmonisation that the Law Council's suggestion presents, by paving the way for a unified regime applying to unfair contract terms in business -to- consumer and business-to-business transactions.

Business-to-business contracts

The proposed definition of "consumer contract" in the ACL, however, contemplates a transaction of supplying or selling to an individual and does not have application beyond the sole trader business activity.

Coalition senators have noted the Minister's stated intention that regulation in the business-to-business sphere should await the outcome of reviews into the Franchising Code of Conduct and the Unconscionable Conduct Provisions of the TPA.

Under the current regime for business-to-business, the threshold test applicable under both sections 51AB and 51AC delivers a clear nexus to the ability to deliver a fair outcome, however, the statement of offending "the conscience" is nebulous and could be one of the reasons for the inability to pursue a case. This threshold test should be amended to a more definitive term. The malady which must be addressed is the clear and apparent utilisation of bargaining power to exert onerous terms that would not be accepted or considered if bargaining power was comparable.

Coalition senators are divided on the question of the application of the ACL to business-to-business contracts, whether they should be covered by this bill without delay, or pending the outcome of the reviews above, or not at all.

Senator Eggleston observes that Western Australia voiced its opposition to the Minister's decision to remove business-to-business contracts without consulting with the states which would appear to suggest that the government may not have engaged in adequate consultation with the states through the COAG process.

Business' concerns

Coalition senators have considered the concerns of business in relation to uncertainty and compliance costs and the short time frame remaining until the proposed start date of this legislation.

We are of the opinion that costs to business in moving to the new regime will be balanced by the gains from harmonisation of consumer laws to a single national regime.

Safe harbours

Coalition senators are divided on the merits of introducing arrangements into the ACL for safe harbours for business as a means to get the security of regulator sign-off on a contract term.

There is the view that safe harbours will give business the certainty that they are seeking.

On the other hand, there is support for the view expressed by the Consumer Action Law Centre that, because a court must consider the whole contract in deciding whether a term is unfair, it would not be sound for a regulator to give business a safe harbour in relation to a particular term.

Coalition senators recognise the principles-based approach of the consumer law aims to encourage compliance. We note with satisfaction the suggestion that the decision by banks to withdraw penalty fees on retail accounts may have been an anticipatory response to the ACL's focus on unfair contract terms.

An alternative course would be for the regulator to assist business sectors to develop industry specific standard form contracts. One witness to the inquiry observed that new standards had been the outcome in the Victorian experience of unfair terms legislation in telecommunications contracts.

In our view, no contract should contain terms that go beyond the legitimate business interest of the parties if there is a clear and apparent difference in bargaining strength as noted by size or financial strength.

Insurance

Coalition senators are divided on the question whether the ACL should cover unfair terms in insurance contracts.

We note that a number of consumer groups who gave evidence to the inquiry were surprised and disappointed to discover from the bill's EM that insurance contracts would be effectively excluded by section 15 in the Insurance Contracts Act 1984.

The Insurance Council of Australia argued in evidence to the committee that insurance contracts are separately regulated. However, consumer groups expressed despair with the present situation, in relation to both the frequency of consumer disputes in the insurance area and the difficulties consumer advocates encounter in disputing decisions that insurers make on claims. They argued that the absence of access to a suitable low-cost tribunal or dispute resolution service with jurisdiction to hear insureds' claims is a significant hurdle.

In that regard, coalition senators are reminded of the stated intent of the consumer legislation:

> The new policy framework will improve consumer law enforcement powers, reduce compliance costs for business and increase access to information regarding dispute resolution and consumer issues.

The benefit to consumers in the ACL missing from the ICA is the capacity for the regulators to review a term across a class of consumers.

Although divided on the issue of whether the ACL should be the means to address unfair contract terms in insurance, or whether the ICA should be reviewed to deliver the same result, coalition senators are agreed that unfair terms in insurance contracts exist and the problem should be addressed in the public interest.

It is apparent from the evidence of Minter Ellison to the committee that the issue of the ACL and insurance contracts will remain alive where there is the possibility that insurance contracts may be caught by the ACL in any case.

Coalition senators note with interest the recent media reports that Australia Post and Coles plan to enter the general insurance market. It is open to conclude that with two new potentially mass market entrants at this time, the insurance sector industry should be reviewed for some additional protection of consumer interests.

Financial services

Coalition senators are divided on the application of the ACL to financial services contracts as provided for in Schedule 3 of the bill.

The financial services industry presented cogent arguments to the inquiry that the AFS licensing regime under which they are regulated is more than adequate protection for the interests of the consumer.

There is also the view held among coalition senators that the consumer law framework which includes financial products and services which the committee has before it in this bill, is the considered view of extensive consultation, including sign-off by the states.

Enforcement

The bill contains amendments to the TPA to give enhanced powers to the regulator to compel businesses to provide information and to penalise businesses for unconscionable conduct and other breaches. There are sound public policy reasons for strengthening the capacity of the regulators to investigate possible breaches of the ACL and the TPA and to deal with contraventions expeditiously.

The proposed capacity for the regulators to issue public warning notices relating to consumer protection in certain circumstances is a powerful message to business in a language business understands. The incentive to business to manage this reputation risk will be a potent legislative driver to usher in a new era of consumer best practice.

With reference to the example on bank fees earlier, we reiterate that the community may already be reaping the rewards of that consumer fairness focus.

Conclusion

Coalition senators recognise that this bill represents the first phase of reforms to the consumer regime and that the measures represent in large part a catch up with consumer regimes that have existed in the EU for more than a decade.

We acknowledge the evidence and the disappointment from some presenters and submitters to this inquiry that the bill does not go far enough – particular mention is made of the cases put to us for the ACL to apply to business-to-business, insurance and body corporate unfair contract terms. Coalition senators record their view that concerns relating to these areas should be reviewed with a view to addressing these concerns in an appropriate manner.

Coalition senators record our broad support for the bill.

Senator Alan Eggleston
Deputy Chair

Senator Barnaby Joyce