Senator Bushby's Additional Comments

Introduction

I acknowledge the additional comments provided by the Coalition Senators who are voting members of the Economics Legislation Committee and other than as noted below, fully endorse them.

As a participating member, I attended the hearings into these bills and agree that there is scope in circumstances where two parties to a contract have unequal bargaining power for one party to include terms in a standard form contract which may prove to be unfair to the party holding little power. Further, this imbalance of bargaining power has been employed and continues to be employed, by unscrupulous businesses to the unfair detriment of consumers and, at times, small businesses.

Clearly, in my view, the consequences of such action by the unscrupulous, justifies intervention by legislators to protect an unfairly impacted party from the consequences of having to comply with such an unfair term or terms.

In an overall sense, I am persuaded by the arguments of the Law Council of Tasmania and others, that the circumstances as to what constitutes ‘unequal bargaining power’ and ‘unfair’ will vary depending on the circumstances surrounding each set of parties, their reasons for entering the contract and their level of understanding and ability to consider and accept the consequences of the terms to which they are agreeing. As such, I am of the view that the 'principles based approach' to addressing the very real mischief that needs to be addressed, may prove to be unsophisticated in practice, may lead to the creation of unnecessary uncertainty for both business and consumers, may actually preclude many terms in contracts that are in the circumstances fair and may even allow the inclusion as fair of some terms, that, were the circumstances to be examined, would be unfair.

I welcome the move to nationalise the approach to consumer protection in the area of consumer trade law and recognise that the rationalisation of jurisdictions dealing with this issue will result in some savings for businesses that operate across state borders.

However, I am persuaded by the argument that the problems in compliance and certainty introduced as part of this legislation will add to the costs of many of the goods and services provided under the standard forms contracts affected. Ultimately, this cost will be passed onto all consumers of such goods and services as a cost of addressing actual detriment to a sub-set of such consumers, and, more pointedly in the context of the legislation as written, as a cost of addressing the possibility of detriment arising from the mere presence of an unfair term in such a contract.

Specific Issues

A number of specific matters were put forward by submitters that raise issues in my mind with respect to the effect of the proposed legislation.

Uncertainty

The issue raised by all business submitters was that of uncertainty.

On the basis of the evidence received, it is arguable that anyone who signs up to a standard form contract will be able to allege that its terms were unfair if they find later that they don't like the contract, find their circumstances have changed, or for any reason choose that they no longer wish to remain a party to it.

Once they have alleged that such a contract contains unfair terms, the onus of proof shifts entirely to the business to prove otherwise.

The clear impact of this will be the removal of any degree of certainty a business might assume would apply upon such a contract being entered – and effectively rendering many, if not all forms of standard form contracts unenforceable.

If, in fact, the legislation turns out to have this impact, the advantage of standard form contracts in clarifying rights of parties for common goods and services, eliminating negotiation costs and, hence, reducing prices, would evaporate. The only possible outcomes then would be a revision of the manner and terms on which parties to such transactions contract, or higher prices for those goods and services.

Uncertainty resulting from this legislation is exacerbated by the lack of a clear definition for ‘standard form contract’ and ‘company’s legitimate interests’.

This lack of certainty also increases the personal risk to Directors of companies who will no longer be able to rely on the enforceability or even legality of standard form contracts drafted by their employees.

Lead-in time for the legislation

Issues were also raised regarding the start dates of the obligations under the proposed legislation. If business as a whole is to ensure its that its standard form contracts are fully reviewed and brought into line with what they understand to be required, longer lead in times will be required – particularly given the uncertainty surrounding definitions and what needs to be included to ensure that such contracts comply.

It seems to me that a longer transition period – maybe 12 months – would be more workable. In this regard it is worth noting evidence that it took some 12 months for the disruption caused by the introduction of equivalent provisions in both the UK and Victorian legislation, to work through the consequent confusion caused by the lack of clarity in the definition of what constituted an unfair term.

It is worth noting that the Government's reasoning for removal of business to business from the effect of this legislation was that it was too vague and likely to lead to uncertainty. Surely, if this is the case between businesses, it could be said to apply to standard form contracts between businesses and consumers.

Duplication of Regulatory Regimes

Many industry sectors are already very heavily regulated, including, but not limited to, the insurance industry (which has long been regulated in reflection of the potential for insureds to be treated unfairly) and more recently the financial services sector.

The insurance sector has been exempted from the effect of this legislation.

Although I acknowledge there remain many issues of unfairness in the way some insurance contracts are applied, I do not consider this proposed legislation to be the best way of addressing those issues. In many cases it is the application of the terms that is unfair, not necessarily the terms themselves and it is this that needs to be better addressed in the context of the regulation of the insurance industry.

It is worth noting evidence from the Insurance Council of Australia that over 98% of insurance claims are paid out without question and only 0.065% of claims go to the insurance ombudsman.

In terms of the financial services industry, they made a strong case that their current and very recent regulation requires them already, through their fiduciary and common law obligations, to treat their clients fairly and, indeed, to prefer the rights of investors over those of their shareholders.

It is their view that extending this legislation to cover their industry will not add to existing consumer protection but will add to the cost of the services they provide to consumers.

These two examples highlight my preferred approach to addressing the issue of unscrupulous exploitation of unequal bargaining power in standard form contracts. That is, in those industries that are already regulated, I am persuaded that it would be preferable to use that regulation to ensure that consumers are treated fairly.

Where industries are not regulated, it would be appropriate to apply such a law as proposed as a 'catch all' to ensure all remaining consumers are protected from unfair provisions, subject, of course, to fixing the issues highlighted above.

Safe Harbours

Professor Zumbo suggested that one way to improve certainty is to provide what he described as ‘safe harbours’. As the legislation currently stands, there is scope for grey lists to be compiled with terms that may or may not be unfair. This fails to provide any certainty and, in fact, will probably add to the uncertainty.

As I understand it, Professor Zumbo suggests that if a business were able to get their standard form contract signed off as compliant with the ACL by an appropriate regulator, with such a sign off providing them with protection against an unfair term allegation, it would vastly improve business certainty.

Despite my view that what is actually unfair depends on the specific circumstances of a case, I am attracted to Professor Zumbo's suggestion as it would significantly improve certainty of the enforceability of contracts if a general test of unfairness could be applied to standard form contracts prior to their being entered into.

Business to Business

Evidence was also received that there is a need for the ACL to cover business to business transactions.

It is clear to me that there are also situations where small businesses lack bargaining power, are effectively 'consumers', and are just as subject as individuals to unscrupulous activities when entering into standard form contracts.

Indeed, in many circumstances, small businesses can be easier prey for the unscrupulous than well informed consumers.

As such, there is clearly a need for a legislative framework that provides equivalent relief for small business from inappropriate and unfair contract terms in situations where there is clearly unequal bargaining power.

The ACL as proposed, however, may not deliver that relief in a way that will be of net benefit to either of the parties involved (for the reasons discussed above in respect of individual consumers) and, in that sense, the removal of business to business contracts from the scope of the proposed legislation was the correct decision.

Consideration should be given to what mechanisms exist, or may be able to be introduced, that will assist in this context.

Greater ease of access to existing remedies

Treasury was asked about the extent to which existing remedies contained in the Trade Practices Act already provided protection against unscrupulous conduct of the sort the proposed legislation is intended to curb, such as that provided under Section 51AB.

Treasury's view was that the proposed unfair contracts aspect of the ACL would provide additional avenues of redress for consumers.

Other witnesses stated that the section 51AB remedies were rarely used, in part because of cost, and also, in evidence suggested to me, because they possibly are not fully tested in terms of their ability to offer remedies for matters such as unscrupulous behaviour by a party with unequal bargaining power in a standard form contract.

Of interest is the evidence by Treasury that all remedies available to be pursued under the ACL can be pursued in state based forums:

> Mr Writer—The unconscionable conduct provisions will also form part of the Australian Consumer Law, which will be applied as a law of the states and territories.
>
> Senator BUSHBY—So people would be able to go to a small claims court and bring an unconscionable conduct action.
>
> Mr Writer—Potentially, although that may be subject to the limitations imposed on the nature of actions brought in those forums.
>
> Senator BUSHBY—But local dispute resolution methods are provided.
>
> Mr Writer—Yes. That is available.

As such, one of the major benefits that I see in this legislation is that it has the potential to reduce to a significant extent one of the major barriers to justice, that being the cost and ease of access to it!

In many ways, this is a more important development, in ensuring that consumers (individuals and small businesses) who are the victims of unscrupulous dealings, have access to remedies, than the introduction of the proposed new unfair contracts protections.

If state jurisdictions ensure there are appropriate low cost dispute resolution forums in place that offer consumers access to all remedies available under the ACL, it may well be the case that remedies such as those in section 51AB may prove far more effective than they have so far proven to be.

Conclusion

The proposed ACL is in itself a significant step forward in terms of consumer protection. However, with respect to the unfair contracts section of the proposed ACL, it is my view that the specifics of that proposal do not provide the best way to address the very real and serious issues that do occur between parties of unequal bargaining power, as the uncertainty and other consequences appear likely to be to the benefit of neither party.

Many industry sectors are already regulated. To the extent that the regulation fails to fully address unfair contract issues within each of those sectors, consideration should be given to amendments to those regulations to provide a fairer balance.

Where no industry specific regulation exists, consideration of general protection, such as that contained in this proposed legislation, should be considered. However, the potential costs, uncertainty and other consequences highlighted by the submissions should be addressed.

If the Government does proceed with unfair contract provisions as currently proposed, consideration should be given to the introduction of 'safe harbour' provisions along the lines suggested by Professor Zumbo.

Sitting above issues surrounding the specific application of the proposed unfair contract provisions is the benefit that will flow from other aspects of the introduction of the ACL, notably including the greater access to remedies that can flow from low cost state based dispute resolution forums – forums that will be able to hear cases based on remedies previously only able to be used in expensive court based actions. To some extent, this may off-set the need for specific action on unfair contracts, as remedies previously not utilised for this purpose, may become available through greater use and judicial development.

Senator David Bushby