

Minority Report by Senator Xenophon

Introduction

1.1 The Trade Practices Amendment (Australian Consumer Law) Bill 2009 amends the Trade Practices Act 1974 to implement a national consumer law regime (the Australian Consumer Law) which will address unfair contract terms and include penalties, enforcement powers and consumer redress options.

1.2 The intent of the Bill is positive in that it will give consumers greater opportunity to challenge unfair contract terms, and in that regard I broadly support the Bill. However, in order to strengthen the unfair contract terms framework and give greater certainty to businesses and to consumers alike, there are a number of matters which should be considered and the Bill amended accordingly.

Background

1.3 The introduction of a national law to deal with unfair contract terms is long overdue. Internationally, the European Union adopted its Directive on unfair terms in consumer contracts in 1993, and was followed by the United Kingdom the following year. These overseas laws are tried and tested and have been positive for consumers and could be similarly positive for Australian consumers.

1.4 Victoria is currently the only state to have unfair contract laws, which were introduced in 2003 and have been the impetus behind the current national proposals to deal with unfair contract terms.

1.5 There are currently 13 generic consumer laws operating around the country and this national legislation will reduce confusion and complexity for consumers and give greater certainty to businesses and reduce compliance costs.

1.6 However, the Bill does not include business-to-business contracts and therefore small businesses cannot access the laws in circumstances where they may be similarly affected by unfair contract terms. Until as recently as June 2009, the draft legislation included an upfront price cap of \$2 million on the size of transactions that would be subject to the unfair contract terms. However, this was removed in late June 2009 to standard form business-to-consumer contracts only.

1.7 Standard form contracts are generic contracts that have been drawn up for use in a particular industry, such as mobile phone providers, fitness centres, franchising and shopping centres. Essentially, they are template contracts where there is no negotiation on the part of the consumer or small business.

1.8 However, the unfair contract laws in this Bill do not apply to all contracts. For example, insurance contracts will be exempt pursuant to section 15 of the Insurance Contracts Act.

Provision of 'Safe Harbours' and the removal of exemption for insurance contracts

1.9 To give greater business certainty, provisions for 'safe harbours' should be considered, whereby businesses and business associations can choose to approach the ACCC to seek approval or authorisation of particular contracts or contract terms.

1.10 In his submission to the Committee, Associate Professor Frank Zumbo from the University of New South Wales proposed this mechanism that would create 'model contracts' or 'model contract terms' and, as a result, facilitate the development of fairer contracts or contract terms which can apply to whole industries and contract groups.

1.11 It would be in the public interest to allow contracts to be reviewed under the safe harbour mechanism before an exemption is granted to the contract under the laws. Accordingly, by including 'safe harbours', there would be no need for outright exemptions in the Bill.

1.12 In this way, the unfair contract laws in the Bill would apply to insurance contracts which are currently exempt from this Bill pursuant to section 15 of the Insurance Contracts Act. Under that Act, insurance contracts are excluded from the operation of any Act (Commonwealth, State or Territory) that provides relief in the form of judicial review of harsh or unfair contracts".

1.13 The Consumer Action Law Centre states in its submission:

"...there are no reasons why any particular industry need be exempt from coverage under unfair contract terms regulation. The policy reasons for introducing unfair contract term laws apply to consumer contracts generally, regardless of the specific product or service provided."

1.14 To leave insurance contracts exempt from this Bill would undermine its intent, which is to provide safeguards for consumers against unfair contract terms. Insurance contracts can be incredibly confusing, lengthy and jargon-filled and in most cases is not clearly understood by consumers.

1.15 While the Insurance Contracts Act includes provisions against unfair or unconscionable conduct, National Legal Aid provides a number of case examples of breaches of the Insurance Contracts Act with regard to unfair terms. In its submission to the Committee, it stated:

There has been considerable public reporting over the last two decades on what might be described, in one form or another, as examples of systemic unfairness in the drafting of terms in insurance policies.

The Insurance Council of Australia as recently as this year has acknowledged the existence of unfair terms in insurance contracts, referring to two particular examples of unfair terms that are specifically permitted by the Insurance Contracts Act...

1.16 Given this, insurance contracts should not be exempt. Alternatively, to maintain its exemption, insurance contracts should be subject to independent rigorous review against legislative criteria to assess whether it should remain exempt from this new national legislation. The proposed safe harbour mechanism allows for such independent rigorous review.

Courts' consideration of 'detriment' and 'transparency'

1.17 The inclusion of 'detriment' and 'transparency' was a key issue among the majority of submissions to the Committee inquiry.

1.18 As it stands, courts have the discretion to consider all aspects of cases before them, and should not be constrained to focus on 'transparency' and 'detriment' specifically when it comes to determining whether or not a contract is unfair. The mandatory requirement for the Court to focus on transparency and detriment will require the court to address these specific questions and will effectively turn these mandatory requirements into tests in themselves and in a manner that negatively impacts on the consumer.

1.19 National Legal Aid argues that the concept of 'transparency' implies that consumers are able to make informed choices about contract terms, however it stated in its submission that their case work would suggest the opposite.

... because most consumers do not read contracts – most rely on a notion that traders will act in a fair and reasonable way when it comes to enforcing their rights. Even when they read contracts, consumers do not often understand how a particular clause will operate in practice. And, even when a contract is read and understood, standard clause contracts are non-negotiable – it is a falsity to think that consumers can somehow bargain their way through amending or deleting a clause in a contract that is unfair but transparent.

1.20 Associate Professor Frank Zumbo also argued in his submission that a term can be considered 'transparent' but may still be 'unfair'.

...on the simple, but objective basis that the larger party's bargaining power allows the larger party to draft and impose a contract term in such a way as to (i) represent a significant imbalance in the contractual rights and obligations in the larger party's favour; and (ii) in a manner that goes beyond what is reasonably necessary in order to protect the legitimate interest of the larger party.

Unfair Terms

1.21 One example of an unfair term is the charging of fees to customers paying bills by cash.

1.22 In July 2009, Telstra announced that it would be introducing a range of fees that would reduce face-to-face customer service and drive more customers towards

online bill payments. It follows similar moves by its competitors, Optus, Vodafone and 3.

1.23 Under this policy, customers will be charged a \$2.20 administration fee for bills paid by mail, in person or at an Australia Post retail outlet.

1.24 It is understood the move will cost as much as 2 percent of every bill and is set to save the company "several hundred million dollars" a year in administration costs.

1.25 While it is understood that customers who are able to demonstrate financial hardship will not be penalised (eg. Telstra will exempt those with a pensioner or disability card from paying the new fees and other additional credit card charges), it is still an unfair term as it is penalising those who choose not to use or do not have access to the internet to pay their bills.

Exclusion of small businesses

1.26 The exclusion of small businesses from the Bill is arbitrary, given there are sufficient safeguards in the proposed framework to maintain business certainty for big business.

1.27 Further, the inclusion of 'safe harbours' would also justify the reinstatement of small businesses, as the 'safe harbours' would also be available to provide for complete certainty in relation to the business-to-business contracts involving small businesses.

1.28 In its submission, the Pharmacy Guild of Australia called for business-to-business contracts to be included under the legislation to protect small businesses. It notes occasions when "large pharmaceutical companies can impose strenuous terms of supply on pharmacists that may be regarded as objectively unfair".

1.29 One example the Pharmacy Guild of Australia provided to the Committee was:

For example, some drug companies may not supply product to pharmacists at a particular price unless they commit to a particular sales growth target and a requirement to hold particular levels of stock. On occasion, this can be objectively unfair because it is an exercise of inequality of bargaining power.

1.30 This view is echoed by the Motor Trades Association of Australia, which stated in its submission to the Committee:

In many of their business relationships, retail motor traders have fewer rights of redress against larger stakeholders (such as franchisors, acquirers, 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 little and often 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 are in excess of what is required to protect the normal commercial rights of the larger party.

1.31 This argument was also supported by Associate Professor Frank Zumbo who provided this case example to the Committee:

... for example, a mobile phone contract that relates to consumers and then you have a mobile phone contract that relates to small businesses. The small business mobile phone contract would not be included in these proposals. But a mobile phone for a small business person could have equally unfair contract terms in the same way that a mobile phone contract for consumers can.

1.32 As such, Associate Professor Zumbo calls for the definition of "consumer contract" to be reverted back to the original drafting of the legislation, where "small business would have been included in the unfair contracts proposals if the standard form contract was for \$2 million or less".

Conclusion

1.33 The introduction of a national consumer law is a positive measure for upholding consumer rights and will consolidate the numerous and varying legislations around the country. It will also reduce time and costs for businesses and provide greater certainty to consumers and business. However, these positives should not be confined to just business-to-consumer contracts, but should be extended to business-to-business contracts involving small businesses.

1.34 On the whole, I support the Bill's intent, however, I believe it can go further to protect not only consumers, but big and small business.

Recommendation 1

1.35 That the Bill not be passed in its current form.

Recommendation 2

1.36 That the Bill include provisions for 'safe harbours'.

Recommendation 3

1.37 That insurance contracts not be exempt from the legislation.

Recommendation 4

1.38 That the Bill be amended so that the terms 'detriment' and 'transparency' may be used as guides-only for courts, not as mandatory considerations.

Recommendation 5

1.39 That the Bill be amended to deal with the unfair contract term of customer fees for paying bills with cash.

Recommendation 6

1.40 That the Bill be amended to include business-to-business contracts involving small businesses where the upfront price payable for the services, goods or land supplied under the contract is below \$2 million.



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