



Our Ref: JC:lb:1294249  
Direct Line: 9926 0202

7 July 2009

The Hon. Dr Craig Emerson MP  
Minister for Competition Policy and Consumer Affairs  
PO BOX 6022  
House of Representatives  
Parliament House  
CANBERRA ACT 2600

Dear Minister,

**Unfair contract terms- *Trade Practices Amendment (Australian Consumer Law) Bill 2009***

I am writing to you at the request of the Law Society's Property Law Committee ("Committee").

The Committee is most concerned at the potential application of the proposed unfair contracts terms to the "standard form" contracts currently used in a number of real property transactions in New South Wales.

A number of the proposed provisions would cast doubt on well-settled provisions in a number of the standard contracts, and well-established procedures used in property transactions in New South Wales for decades.

A copy of the Committee's submission to the recent consultation paper published by Treasury is enclosed.

The Committee believes that the use of these standard form contracts is of enormous benefit to New South Wales consumers. Both the parties to transactions and their advisors benefit from their use as such contracts have the advantages of familiarity, comprehensiveness, compliance with legislative provisions, frequent updates, flexibility, efficiency and operate as a risk management tool.


The drafters of those documents over which the Law Society has jurisdiction, including the "Contract for Sale of Land", have long held the view that a standard contract used in a property transaction should provide a fair balance between the rights of the parties to the document. The Contract for Sale of Land, for example, is used by as many vendors as purchasers, and is frequently used in a chain of transactions where the same person may be in the role of vendor of one property and purchaser of another.



The Committee also proposes making a submission to the Senate Inquiry. The purpose of this letter is to draw to your attention the Committee's concerns about the potentially undesirable and unintended consequences of such legislation on the efficient operation of property transactions in New South Wales.

If you wish to discuss these issues further, please contact Ms Liza Booth, Executive Member of the Committee by telephone on (02) 9926 0202 or by email to [liza.booth@lawsociety.com.au](mailto:liza.booth@lawsociety.com.au)

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Joseph Catanzariti', written over a horizontal line.

Joseph Catanzariti  
**President**

Encl.

cc: The Hon. Robert McClelland MP  
Federal Attorney General



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of New South Wales**

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22 May 2009

The Australian Consumer Law:  
Consultation on draft unfair contract terms provisions  
Competition and Consumer Policy Division  
Treasury  
Langton Crescent  
PARKES ACT 2600

[australianconsumerlaw@treasury.gov.au](mailto:australianconsumerlaw@treasury.gov.au)

Dear Sir,

**THE AUSTRALIAN CONSUMER LAW  
Consultation on draft provisions on unfair contract terms**

I am writing to you at the request of the Law Society's Property Law Committee ("Committee").

The Committee has the responsibility of considering and dealing with matters relating to property law and advising the Council of the Law Society on all issues relevant to that area of practice. The members of the Committee are senior property practitioners and experts. Their role as practitioners advising clients in relation to transactions relating to real property encompasses both advice in relation to the parties' respective rights and obligations under relevant legislation and under the terms of the legal documentation which gives effect to the transaction.

**Focus of comments**

The Committee's comments focus on the application of the proposed unfair contracts terms to the "standard form" contracts currently used in a number of real property transactions in New South Wales.

While the proposed provisions clearly do not target contract terms that are not objectively unfair and do not, in fact operate unfairly, the Committee is concerned that the provisions may impact on these contract terms, contrary to the policy objectives of the draft legislation.



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of Australia



## **The applicability of the proposed Law to Standard Form Contracts**

The key difficulty identified by the Committee is the proposal to extend the operation of the unfair contract terms provisions to “standard form contracts” (a term undefined in the draft provisions). The Committee noted Recommendation 7 of the final report of the Productivity Commission Final report proposed that any unfair contracts provision “would relate only to standard-form, non-negotiated contracts”.

The Committee notes that the model proposed by the Ministerial Council on Consumer Affairs (“MCCA”) for unfair contract terms contains a subtle, but significant, change in wording on this point. As quoted at page 4 of the Consultation Paper, the unfair contracts provision “would relate only to standard-form (i.e. non-negotiated) contracts”. The inherent assumption in the MCCA approach is that the terms “standard-form” and “non-negotiated” are synonymous. The Committee’s experience is that this is not the case, and there are certain types of standard-form contracts which are in common use in many commercial situations, and which, rather than adversely affecting the interest of consumers in many respects enhance those interests.

### **Commonly used Standard Form Contracts**

The Committee has experience with the ongoing use (and in some cases, the preparation) of a number of documents frequently used in conveyancing transactions in New South Wales. Those documents include:

- The Contract for Sale of Land, published under the joint copyright of the Law Society of New South Wales and the Real Estate Institute of New South Wales. The current edition was issued in 2005; editions have been published since approximately 1965. This contract is used almost universally for the sale of land in New South Wales.
- The Contract for Sale of Business, published by the same joint copyright holders, with the current edition issued in 2004, and editions dating back to at least the 1980s;
- The Contract for Sale of Water Access Licence, first published in 2004 with the same copyright holders;
- A form of commercial lease in registrable form, first published by the Law Society in 1994 and subject to several revisions since;
- Two forms of non-residential lease for terms not exceeding three years published by the Real Estate Institute.

Many of those documents are described as “standard contracts” in common parlance, in judicial decisions, and in commentary. To take two examples, the leading text on the first-listed document is Butt’s *The Standard Contract for Sale of Land in New South Wales*; another publication (Cocks et al: *1001 Conveyancing Answers (NSW)*) uses the abbreviation “SFC” when referring to the sale of land contract.

The Committee believes that the use of these forms has significant consumer benefits:

#### *Familiarity:*

A standard form contract can be easily referred to by the parties and their advisers. It is well-known what each of the standard contracts says about, for example, deposits, adjustments and other outgoings, and the timing of the granting of possession.

*Comprehensiveness:*

Using a standard contract should make it easier to be sure that all usual important matters have been dealt with in the contract.

*Compliance with legislative provisions:*

A standard contract will refer to, and comply with, the various legislative rules in place at the time it was last revised.

*Frequently updated:*

The standard contract for sale of land has, over the last twenty five years, been reviewed at approximately four-year intervals, to take into account developments in law and practice since the previous revision.

*Flexibility:*

A standard contract is typically drawn widely enough that it can be modified to deal with most sorts of relevant property transactions with only slight modification

*Efficiency:*

If every contract had to be considered as a new and unseen draft by the other party and its advisers there would be a significant additional cost to consumers of property services.

*Risk management:*

The use of a standard document which has been approved by the professional bodies representing the main participants in the process should minimise the risk of a transaction not proceeding as contemplated.

*Balance between the parties to the transaction:*

The drafters of those documents over which the Law Society has jurisdiction have long held the view that a standard contract used in a property transaction should provide a fair balance between the rights of the parties to the document. For example, the sale of land contract is used by as many vendors as purchasers, and is frequently used in a chain of transactions where the same person may be in the role of vendor of one property and purchaser of another.

**Proposed section 3 – meaning of “unfair”**

The proposed definition of what constitutes an “unfair” term is set out in proposed section 3 discussed at Pages 9 to 12 of the Consultation Paper. Subsection (1) provides:

*3 Meaning of unfair*

*(1) A term in a standard form contract is ‘unfair’ if:*

- (a) it would cause a significant imbalance in the parties’ rights and obligations arising under the contract; and*
- (b) it is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the supply.*

The Committee believes this definition is unacceptably broad and will be open to the potential for uncertainty to be resolved ultimately by costly litigation. It will, perhaps inadvertently, catch many well-accepted and commonly used provisions in currently used contracts. The Committee notes that proposed section 4 will give some guidance as to the meaning of the phrase, but believes that section is not without difficulties, for the reasons discussed below.

#### **Proposed section 4 – Examples of unfair terms**

Section 4 sets out a non-exhaustive list of terms that may be unfair within the meaning of proposed section 3:

- (a) a term that permits, or has effect of permitting, one party (but not another party) to avoid or limit performance of the contract;*
- (b) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;*
- (c) a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;*
- (d) a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;*
- (e) a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;*
- (f) a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;*
- (g) a term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied, or the land to be sold or granted, under the contract;*
- (h) a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning;*
- (i) a term that limits, or has the effect of limiting, one party's vicarious liability for its agents;*
- (j) a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent;*
- (k) a term that limits, or has the effect of limiting, one party's right to sue another party;*
- (l) a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract;*
- (m) a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract;*
- (n) a term of a kind, or a term that has an effect of a kind, prescribed by the regulations.*

A number of these provisions would cast doubt on well-settled provisions in a number of the standard contracts, and well-established procedures used in property transactions in New South Wales for decades. To take a few examples:

*Paragraph (b):*

Many of the standard contracts have provisions which specify a consequence for one party (for example, a purchaser or a tenant) which does not operate against the other

party. For example, provisions governing forfeiture of a deposit or bond can only operate unilaterally since only the purchaser or tenant makes such a payment (the Committee noted some tension between the operation of paragraphs (b) and (c)).

*Paragraph (e):*

The majority of commercial leases contain a provision allowing the tenant to exercise an option to renew the lease; the landlord does typically have a reciprocal right.

*Paragraphs (k) and (l):*

Many of the standard contracts preclude objection to a number of listed matters. Typically the list includes matters the substance of which are disclosed in the contract, and other non-controversial matters. The Committee is concerned that these paragraphs may limit the effectiveness of what are well-understood and accepted provisions.

*Paragraph (m):*

The Committee observed that while a provision in a contract which imposes an evidential burden is proposed to be on the list of terms which may be unfair, the thrust of the amendments is to impose an evidential burden by introducing a rebuttable presumption of unfairness.

**Factors relevant to determining whether a contract is a standard form contract**

Proposed clause 7 also caused the Committee some difficulties. That clause provides:

*7 Standard form contracts*

- (1) *If a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise.*
- (2) *In determining whether a contract is a standard form contract, a court may take into account such matters as it thinks relevant, but must take into account the following:*
  - (a) *whether one of the parties has all or most of the bargaining power relating to the transaction;*
  - (b) *whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;*
  - (c) *whether another party was, in effect, required either to accept or reject the terms of the contract (other than the terms referred to in subsection 5(1)) in the form in which they were presented;*
  - (d) *whether another party was given an effective opportunity to negotiate the terms of the contract that were not the terms referred to in subsection 5(1);*
  - (e) *whether the terms of the contract (other than the terms referred to in subsection 5(1)) take into account the specific characteristics of another party or the particular transaction;*
  - (f) *any other matter prescribed by the regulations.*

The Committee notes that in many property transactions, a proposed form of contract is prepared before the identity of one of the contracting parties is known. Sometimes this is done to comply with statutory requirements (e.g. sales of residential property and leases

of premises under the *Retail Leases Act 1994*); on other occasions because of the nature of the transaction (e.g. auctions), and at other times for administrative efficiency (e.g. sales by private treaty of non-residential property). Paragraph (b) may create difficulties in at least some of those circumstances.

Auctions of real estate may be argued to offend paragraphs (c) and (d). Although it is typical for the proposed contract for auction to be available to intending bidders for a period prior to the auction, the Committee is concerned that a successful bidder who developed "cold feet" might seek to rely on paragraphs (b), (c) and / or (d) to escape from the consequences of the contract.

### **The way forward**

The Committee has identified a number of possible approaches to solving the problems identified above. The aim of these suggested approaches is to provide clarity and certainty to the legislative context and to recognise the overall commercial context in which these transactions take place.

The Committee considers that there should be an explicit recognition in the legislation that the terms "standard form contract" and "non-negotiable contract" are not synonymous. It is also necessary to include a more comprehensive identification of what will, and as importantly what will not without more, constitute an unfair contract term.

The introduction of a modified regime prescribed for auctions would also ensure that the regime did not adversely affect commercial transactions which are not the target of the proposed legislation. The Committee notes that some consumer protection statutes already provide different regimes for sales by auction.

An alternative approach would be to adopt an "authorisations" regime for standard contracts, perhaps drawing on the experience of the ACCC with Part VII of the *Trade Practices Act 1974 (Cth)*.

### **Conclusion**

If you wish to discuss the matters raised in this submission, please contact Ms. Liza Booth, Executive Member of the Committee by telephone on (02) 9926 0202 or by email to [ljb@lawsocnsw.ass.au](mailto:ljb@lawsocnsw.ass.au).

Yours faithfully,



**Joseph Catanzariti**  
President