



The Law Society
of New South Wales

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The Hon Chris Bowen MP
SCOCA Australian Consumer Law Consultation
Competition and Consumer Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

14 April 2009

Dear Mr Bowen,

**Re: An Australian Consumer Law: Fair Markets – Confident Consumers –
Consultation Paper**

The Law Society's Business Law Committee (the Committee) has reviewed the An Australian Consumer Law: Fair Markets – Confident Consumers – Consultation Paper.

The Committee has commented on a number of the issues raised in the consultation paper in the attached submission.

Should any further information be required in regard to this submission, please contact Andrew Wilson, Manager Practice Department, on (02) 9926 0256.

Yours sincerely,

Joseph Catanzariti
President



The Law Society of
New South Wales is a
constituent body of the
Law Council
of Australia



**Australian Consumer Law
Submission by the Business Law Committee
of the
Law Society of New South Wales
9 April 2009**

1. **Question:**
Should the TPA be renamed? If so, what name should it have, if not the Competition and Consumer Act?

Answer:

The committee is of the view that it is not necessary to change the name of the TPA after removing the sections relating to consumer protection as outlined in the Consultation Paper. The remaining sections relate to trade and commerce and more specifically to trade practices. To rename the Act the Competition and Consumer Act would overlap with the proposed new Australian Consumer Law.

2. **Question:**
What sort of contract terms might be covered by the unfair contract terms provisions?

Answer:

The Committee endorses the introduction of new unfair contract terms in the new Australian Consumer Law.

In its 2006 report, the Standing Committee on Law and Justice reported on its findings after receiving submissions from various interest groups including the NSW Legal Aid Commission, the NSW Office of Fair Trading, the Redfern Legal Centre, Consumer Credit Legal Centre, CHOICE, NSW Consumer Trader & Tenancy Tribunal and many others. The Committee found¹ that

"It is clear from the views expressed in submissions during oral evidence that there is strong support for specific purpose legislation to be introduced into NSW to protect consumers against unfair contract terms. The submissions presented from the NSW Legal Aid commission, community legal centres and several academics describe the inadequacies of the existing legal avenues for redress.

It was impressed upon the Committee that the existing laws, with their focus on procedural fairness, cannot adequately assist consumers who are parties to contracts with unfair terms. Issues regarding unfair contract terms relate mainly to substantive terms of contracts rather than the process through which the contract was formed. This procedural focus, coupled with the expense of bringing cases to trial, represents a significant barrier to consumers who are seeking to rectify the situation they are in due to an unfair contract.

In addition, it was made clear that the existing laws, developed as they have in a piecemeal way and without specific focus on unfair terms in consumer contracts, cannot provide the kind of systematic guidance and preventative measures that specific unfair legislation, an appropriately resourced regulatory body to implement it, can."

¹ Standing Committee on Law and Justice Report 32 November 2006 p59

The Standing Committee also noted that unfair terms in contracts have been addressed in the UK Unfair Contract Terms Act 1977 (**UCT Act**) and Part 2B of the Victorian Fair Trading Act 1999 (**VFTA**), which was introduced in 2003 and that in April 1993 the Council of the European Communities adopted a directive on *Unfair Terms in Consumer Contracts*². It appears from this that there is widespread recognition that the use of unfair terms in contracts is or was widespread and that regulators have taken action to address this problem.

The unfair contract terms provisions arise out of the many standard non-negotiated contracts between providers of services and consumers, where the consumer wishing to avail him/herself of the service effectively has no choice but to accept the unfair terms if he/she wishes the service, whether it be a bank loan, insurance policy or travel product, etc. The committee submits that it is largely illusory to claim that the consumer can choose a different supplier of the service, if he/she does not like the terms of the contract, because in practice most if not all suppliers of similar services have contracts containing the same unfair term(s).

COAG proposed definition of "unfair" term has two elements:

1. It must be a term causing significant imbalance in the parties rights and obligations; and
2. It is not reasonably necessary to protect the legitimate interests of the supplier.

The committee submits that in most standard type of contract a significant imbalance in bargaining power between the parties exists before they enter into contractual relationships, and that this imbalance is increased by the unfair term, because most standard form contracts are drafted in favour of the supplier who prepared them. The only remedy available to the consumer at the moment is to take the supplier to court. This course of action is extremely expensive and any judgment will apply only to the parties to the specific legislation and not to the whole industry across the board. In any such contest, the supplier is usually at a great financial advantage to the consumer.

3. **Question**

What types of contracts would be covered by unfair contract terms regulation?

Answer:

In addition to the list on p 33 of the Consultation Paper Consumer Affairs Victoria has identified unfair terms in the following contracts:

- Ticketing condition in sporting events; and
- Contracts in relation to installation of curtains and carpets³

Insurance contracts should also be included.

4. **Question:**

Please set out any views on whether the types of terms described in this chapter should be banned in the initial text of the Australian Consumer Law.

Answer:

- i. *Terms retaining title for suppliers in goods that cannot be removed from consumers' premises without damage; terms allowing suppliers to repossess such terms;*

² Ibid p61

³ Annual Report Consumer Affairs Victoria 2005-2006 p94

Such a term is unfair because it can cause substantial damage to the consumer's property (eg removal of a carpet), and at the same time leave the supplier with goods of little value.

ii. Terms denying the existence or validity of pre or post contractual representations.

These should be banned as the representations of the seller or the agent can play a major part in the choice of the consumer.

iii. Terms under which consumers acknowledge they have read and understood the contract.

These should be banned for the reasons stated in the consultation paper that it is a matter of fact if a person has understood the contract or not.

iv. Conclusive evidence terms

These should be banned as hearings in NSW are often conducted by consumers themselves in the Consumer Trader and Tenancy Tribunal and having conclusive evidence terms can create an artificial and unfair interpretation of the contract.

v. Flat/fixe early termination fees and those requiring the paying out of the contract.

Early termination fees should contain a formula for calculating a genuine pre-estimate of loss to the supplier for early termination, eg in the case of a car lease etc

vi. Terms requiring consumers to pay more than suppliers' reasonable enforcement costs reasonably incurred.

Requiring consumers to pay all costs is unfair and should be banned. The costs which a consumer should be liable to pay, should in all circumstances be reasonable.

vii. Terms requiring consumers to pay deposits or pre-payments that do not leave a substantial amount of the price to be paid on delivery/installation/performance.

The unfairness arises for consumers, since it limits their remedies in the event that the supplier does not deliver the goods contracted for without recourse to litigation. It also leaves the consumer vulnerable in the event that the supplier becomes insolvent prior to completion of the contract.

viii. Term allowing suppliers to retain, debit or set off disputed amounts.

Such a term is unfair if it does not make allowance for debts genuinely in dispute, or for disputes about the adequacy of the performance of the contract.

- ix. Terms mandating arbitration of disputes or otherwise inhibiting access to courts or tribunals.

Attempting to settle disputes outside the legal process is supported. However terms that prevent the consumer litigating the matter in a tribunal or court if the dispute cannot be resolved is unfair and places the provider in a greater position of power than a contract should allow.

5. **Question:**

How can the interests of a business be safeguarded in the formal requirements for a national public warning power?

Answer:

The criteria as set out in the discussion paper that Victoria has to satisfy is appropriate with the exception of the alleged offender having been the subject of previous enforcement action and has established a similar business. This requirement prevents the consumers being warned about a 'new player' or somebody who has previously had enforcement action taken against them in another type of business.

The requirement of NSW OFT Guidelines where the warning must be made in accordance with the principals of natural justice should be included. That is the person must be given the opportunity to respond and state their case prior to the warning being made due to the detrimental effect such a warning can have upon a business.

6. **Question**

Should the scope of the TPA's existing definition of 'consumer' be expanded to cover a wider range of circumstances, such as goods used in business contexts?

Answer:

The definition should be expanded to cover goods used in business contexts as there is no good policy reason why a good is covered when purchased by an individual consumer but the same good is not covered when the consumer is a business.

7. **Question:**

Should a new definition of 'consumer' specifically deal with small businesses and farming undertakings?

Answer:

Yes as set out above.

8. **Question:**

Should a new definition of 'consumer' cover commercial vehicles or vehicles purchased for a predominantly commercial purpose?

Answer:

Yes it should as it would include self employed tradespeople who purchase vehicles for their businesses are the same person who purchases a vehicle for domestic purposes, even when operating through a company. The monetary limit (which is dealt with below) would exclude large purchases for large commercial vehicles.

9. **Question:**
Should a new definition of 'consumer' retain the monetary limit of \$40,000 or should the limit be increased? If it were increased, what would be an appropriate amount?

Answer:

The monetary limit should be increased. It is submitted it should be about \$75 000 is the appropriate amount due to inflation since the amount was initially set.

10. **Question:**
- a) *Do businesses operating in multiple jurisdictions incur additional compliance costs as a result of different door-to-door sales regulation? If so, please provide evidence of this.*
 - b) *Should the Australian Consumer Law include a provision regulating door-to-door sales? If so, having regard to the principles of best practice regulation, what aspects of current regulation should this provision reflect? What other approaches might be used?*

Answer:

- b) Provisions relating to door-to-door sales should be included in the Australian Consumer Law but as approached by NSW by including telemarketing.

The time limitations provided for in the Victorian Fair Trading Act and the resulting cancellation period should be included as this provides a self enforcing mechanism to ensure sellers comply with the legislation.

11. **Question:**
- a) *Do businesses operating in multiple jurisdictions incur additional compliance costs as a result of different telemarketing regulation? If so, please provide evidence of this.*
 - b) *Should the Australian Consumer Law include a provision regulating telemarketing? If so, which aspects of current regulation should this provision reflect? What other approaches might be used?*

Answer:

- b) To simplify the operation of the law for both businesses and consumers the law as it operates with door-to-door sales should be the same for telemarketers.

12. **Question:**
- a) *Bearing in mind the principle that the Australian Consumer Law should apply to transactions in any sector of the economy, is there a need to augment the current scope of sections 53, 53A and 53B of the TPA with regard to the approaches outlined above?*
 - b) *Is the scope of sections 53, 53A and 53B of the TPA sufficiently broad to cover these issues?*

Answer:

Augmenting the Australian Consumer Law as set out in the discussion paper makes a clear and easily interpreted set of laws. As these areas have been included in some jurisdictions their removal may raise the argument they are no longer covered by the new legislation.

13. **Question:**
*Is section 64 of the TPA effective in its current form?
How could it be improved for inclusion in the Australian Consumer Law by reference to existing state and territory approaches or otherwise?*

Answer:

To make section 64 more effective it should be modified to that of the NSW Fair Trading Act. The provisions added in 2006 provide better consumer protection and aid the enforcement by regulatory agencies.

14. **Question:**
Should the Australian Consumer Law include a provision regulating third-party trading schemes? If so, should this provision reflect the current regulatory approaches used in state and territory laws and, if so, how?

Answer:

The Australian Consumer Law should include a provision regulating third party trading scheme. The law should reflect the approach in South Australia due to the ease in operation and the manner in which consumers are protected.

15. **Question:**
- a) *Do businesses operating across Australia use different terms and conditions for lay-by sales depending on whether there is regulation? If so, please provide examples of these terms and conditions.*
 - b) *Does the level of complaints about lay-by sales received by such businesses vary across jurisdictions depending on the existence of regulation?*
 - c) *Should the Australian Consumer Law include a provision regulating lay-by sales? If so, should this provision reflect the current regulatory approaches used in NSW, Victoria and/or the ACT?*

Answer:

There should be a single provision relating to lay-by sales across Australia to enable all businesses that operate interstate to comply with a single law.

16. **Question:**
- a) *Should the Australian Consumer Law modify the existing form of section 54 of the TPA along similar lines to section 16 of the Victorian FTA?*
 - b) *If an approach like that in section 16 of the Victorian FTA were adopted, should a 'reasonable time' be defined? If so, what would a reasonable time be?*

Answer:

- a) Yes the Australian Consumer Law should be modified along the lines of section 16 of the Victorian FTA. Such a modification would free up resources of the Commission and court time in pursuing breaches of the legislation. It would also provide certainty to the consumer of when the gift or prize would be delivered and guidance to businesses as to when they would need to deliver the gift or prize.
- b) Yes the time should be defined. The period of time would need to allow for the global nature of the economy and the fact goods are delivered from across Australia and the world. If businesses are offering gifts, prizes or other free items the business should have made arrangements, prior to the offer being made and have ready access to such items. Therefore it would be appropriate to define a reasonable time in weeks rather than months.

17. **Question:**
Should the provisions in section 51A of the TPA be extended to include presumptions in relation to 'false', 'misleading', or 'deceptive' representations for inclusion in the Australian Consumer Law?

Answer:

The provisions in section 51A of the TPA should be extended to include presumptions in relation to 'false', 'misleading' or 'deceptive' representations for inclusion in the Australian Consumer Law.

18. **Question:**
Should the provisions of section 51A of the TPA be amended to further clarify their relationship with the accessory liability provisions of the TPA?

Answer:

Yes as it is appropriate to have the same deeming provisions applicable for all conduct including accessory liability.

19. **Question:**
Are the current pyramid selling provisions in the TPA effective? How could they be improved?

Answer:

As set out in the Consultation Paper the Victorian provisions deal with pyramid selling differently to the TPA.

The TPA should be modified along the lines of the Victorian Act including placing the onus upon the defendant to establish the exception, ie the scheme involves the payment for goods or services if the payment bears a reasonable relationship to the value of the product.

Whilst this places the onus upon the defendant and relieves the prosecution of the burden of proving such facts it aids in the protection of consumers. It does not appear the burden placed on a defendant would be too onerous for a company operating legitimately as they are the ones who hold the knowledge. This would free up the Commission's resources and court time in conducting cases.

For the schemes that are in breach of the legislation it is appropriate the burden lies with the scheme to attempt to establish their legitimacy.

20. **Question:**
- a) *Should the claimant in an action relating to accepting payment without intending to supply be required only to prove that the supplier failed to supply the goods after accepting payment?*
 - b) *Should a maximum limit be imposed on the amount or percentage of the purchase price that may be taken as a deposit for goods that have been ordered, but not yet delivered?*

Answer:

- a) The legislations should provide that a supplier of goods must specify the time in which the goods are to be delivered. Then the offence should be failing to supply the goods after accepting payment within this time. This would prevent suppliers accepting money when they have the intention to only provide the goods after a certain number of payments/orders are made regardless of how long it takes to make

such payments. In such circumstances consumers are left vulnerable if suppliers fail to provide the goods and/or go into liquidation.

A reasonable excuse exception could be included if the goods were not supplied within the required time with the onus on the supplier. For example a dispute on the docks has prevented goods arriving in Australia as opposed to the goods have not been ordered as there have not been enough payments made yet.

- b) Under section 8 of the Home Building Act (NSW) consumers are protected by limiting the amount of deposit required to be paid. Whilst building a home is generally more expensive than purchasing goods where the contract price is less than \$20 000 the section limits a deposit to 10% regardless of the price.

To protect consumers it is appropriate to restrict the maximum amount of deposit that can be required to be paid to 10%, when the goods are ordered prior to them being delivered.

21. **Question:**

Is there a need to introduce a specific provision into the Australian Consumer Law to provide that a supplier must not sell goods to which more than one price is appended at a price that is greater than the lower or lowest of the prices?

Answer:

Yes a specific provision should be introduced into the Australian Consumer Law. There is no legitimate business reason for having two prices on a product. However having two prices can mislead consumers or staff at a checkout resulting in the overpayment for the goods.

The Consultation Paper states the NSW law appear to function effectively so these laws should be adopted.

22. **Question:**

Should the Australian Consumer Law include a provision providing for minimum standards for consumer documents? If so, what should these standards be?

Answer:

There should be a minimum standard for consumer documents. The reason is the proper functioning of the market and consumer protection only works when consumers are properly informed. The provision of minimum standards is one way in which information is provided and the example used in the Consultation Paper show why they are required.

The Victorian law seems appropriate in this case.

23. **Question:**

Should the Australian Consumer Law include a provision relating to the disclosure of a supplier's address in documents, statements or advertisements?

Answer:

The Australian Consumer Law must include a provision relating to the disclosure of a suppliers address in documents, statements and advertisements. The inclusion of this information allows consumers to pursue the supplier if the need arises.

The Australian Consumer Law should be drafted to ensure the provision covers statements and advertisements in internet advertisements and businesses that are

conducted solely on line to ensure any goods that have been purchased over the internet and are faulty or any claims made in statements on the internet have a physical address.

24. **Question:**
Should the Australian Consumer Law include a provision relating to the provision of an itemised bill on request?

Answer:

An itemised bill should be available upon request for goods or services.

25. **Question:**
Should the Australian Consumer Law include a provision requiring a supplier to return replaced parts along the lines of section 162 of the Victorian FTA?

Answer:

The Australian Consumer Law should include a provision similar to section 162 of the Victorian FTA. Returning replaced parts to the consumer may provide some protection to consumers from fraudulent businesses who might say the part has been replaced when it has not. It also provides some comfort to the consumer in knowing they are paying for a part and the replaced part is available if they wish.

26. **Question:**
Should the Australian Consumer Law extend the current application of section 65 of the TPA to services?

Answer:

Yes the Australian Consumer Law should extend the current application to services