



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

Dear Sir/Madam

The Fair Trading Coalition welcomes this opportunity to provide comments on the Australian Consumer Law draft provisions on unfair contract terms.

The FTC is an informal coalition of small business organisations committed to reform of the Trade Practices Act. The Members of the Fair Trading Coalition believe that a vibrant small business sector is important if Australia is to sustain a competitive market. Relevantly in relation to consultation on unfair contract terms, many small businesses operate under standard form agreements; either in the form of franchise arrangements or where their services are acquired by a larger party under a standard form contract.

The fact then, that this proposed new law will apply more broadly than to just consumer contracts is welcomed by the FTC and its members. As the FTC has advised in other fora, franchise agreements are usually presented on a 'take it or leave it' basis and many in our view, which is based on many years experience, contain provisions that are not reasonably necessary to protect the legitimate interests of the other party.

While the FTC raises in this submission a number of matters relating to the proposed unfair contract terms regime, it should be noted that the Fair Trading Coalition fully supports the introduction of legislation to provide redress against unfair contract terms.

members of the Fair Trading Coalition:

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|---|--|--|---|---|
| 1 Apple & Pear Growers Association of SA Inc | 7 Australian Petroleum Agents and Distributors Association | 13 Drycleaning Institute of Australia | 20 The Motor Trades Association of the Australian Capital Territory | 26 The Pharmacy Guild of Australia |
| 2 Australian Automotive Aftermarket Association | 8 Australian Private Hospitals Association | 14 Growcom | 21 The Motor Traders' Association of New South Wales | 27 Service Station Association Limited |
| 3 Australian Automobile Dealers Association | 9 Australian Service Station and Convenience Store Association | 15 The Horticulture Council | 22 The Motor Trades Association of the Northern Territory | 28 Victorian Automobile Chamber of Commerce |
| 4 Australian Hotels Association | 10 Chamber of Women in Business | 16 Independent Liquor Group NSW | 23 The Motor Trade Association of South Australia | 29 Western Australian Dental Implant Society AOS (WA) Inc |
| 5 Australian Motor Body Repairers Association | 11 Civil Contractors Federation | 17 Independent Liquor Stores Association | 24 The Motor Trade Association of Western Australia | |
| 6 Australian Newsagents' Federation | 12 Council of Small Business Organisations of Australia | 18 Liquor Stores Association of Victoria | 25 National Institute of Accountants | |
| | | 19 Motor Trades Association of Australia | | |

The comments set out below then should be read in conjunction with the FTC's support for the introduction of an unfair contract terms provision into the Trade Practices Act. Generally speaking the issues raised below relate to clarification of the intent of the draft legislation rather than proposals for substantive change to the draft legislation.

Contracts Mandated by Legislation/Regulation

The FTC would appreciate confirmation that where the form and content of a contract is mandated by the relevant state or territory regulator are covered (as whole) by the clause 5(1)(c) of the proposed new Schedule 2 of the Trade Practices Act.

Business to Business Transactions – Page Eight, Consultation Paper

At page eight of the consultation paper, the shaded box discusses the issue of the application of the proposed provisions to business to business transactions. As mentioned above the FTC and all its Members vigorously support and welcome the Government's intent that this unfair contract terms provision not be confined to only consumer transactions, but that the provision will apply broadly across the economy; as is the case with the majority of the competition law provisions. That said, the comments in the shaded box suggest that in fact it could be difficult for a business to argue that it has been subject to unfair contract terms. The FTC would not like to see those comments (about matters being 'difficult' to show in many business to business contracts) repeated in the Explanatory Memorandum to the legislation or in the Second Reading Speech or other supporting material as the comments themselves would serve to 'raise the barrier' in respect of access to the provision by businesses. In other parts of the consultation paper it notes that the onus is on the 'respondent' to prove that a contract is not a standard form contract or that a provision was not reasonably necessary to protect the legitimate business interests of the other party. The comments in the shaded box on page eight suggest that a business applicant will need to prove that position. Whether a clause is unfair should not turn on whether the applicant is a consumer or a business; both should be treated equally under the provision.

Remedies and Enforcement

The consultation paper notes that should a term of a contract be found to be unfair, it will be void, but that the contract will continue to bind the parties to the extent that the contract is capable of operating without the unfair term. The FTC is concerned that there may well be circumstances where the voiding of an unfair term actually renders a contract incapable of operating. In that context the FTC would ask that consideration be given to including in this new regime a provision similar to that in section 106(3) of the NSW Industrial Act 1996, (set out below) which allows for the court to, if necessary, rewrite/vary unfair contract terms.

New South Wales Industrial Act 1996

106 Power of Commission to declare contracts void or varied

- (1) The Commission may make an order declaring wholly or partly void, or varying, any contract whereby a person performs work in any industry if the Commission finds that the contract is an unfair contract.
- (2) The Commission may find that it was an unfair contract at the time it was entered into or that it subsequently became an unfair contract because of any conduct of the parties, any variation of the contract or any other reason.
- (2A) A contract that is a related condition or collateral arrangement may be declared void or varied even though it does not relate to the performance by a person of work in an industry, so long as:
 - (a) the contract to which it is related or collateral is a contract whereby the person performs work in an industry, and
 - (b) the performance of work is a significant purpose of the contractual arrangements made by the person.
- (3) A contract may be declared wholly or partly void, or varied, either from the commencement of the contract or from some other time.
- (4) In considering whether a contract is unfair because it is against the public interest, the matters to which the Commission is to have regard must include the effect that the contract, or a series of such contracts, has had, or may have, on any system of apprenticeship and other methods of providing a sufficient and trained labour force.
- (5) In making an order under this section, the Commission may make such order as to the payment of money in connection with any contract declared wholly or partly void, or varied, as the Commission considers just in the circumstances of the case.
- (6) In making an order under this section, the Commission must take into account whether or not the applicant (or person on behalf of whom the application is made) took any action to mitigate loss.

The FTC understands that for this first phase of the introduction of Australian Consumer Law, the relevant jurisdiction is federal and that therefore any legal action under these new Trade Practices Act provisions will be heard in the Federal Court. It is also understood that it could possibly be a further 12 months before the states and territories pass the relevant legislation to introduce the Australian Consumer Law in their jurisdictions. The FTC believes that it is important in considering the range of enforcement options at state and territory level that where there are currently existing rights to have consumer and small business issues heard by properly constituted tribunals (such as the Victorian Civil and Administrative Tribunal) that those avenues remain available under the new regime.

The proposed arrangements are unclear as to the impact on standard form contracts of a finding of unfairness and the voiding of a term of an individual contract. If a term of a particular standard form contract between two parties is voided, does that then void the same term for all other parties with the same standard form contract?

The FTC is also seeking clarification as to whether a representative association (such as a trade association) could take action on behalf of its members in respect of unfairness in a contract? Such action might need to be taken on behalf of either one specific member or a class of members. The FTC would therefore recommend that the following be included in the legislation:

‘Any trade association or consumer association may make an application on behalf of one or more persons identified in the application where the association has the written consent of the person or persons identified.’

What is a negotiated contract?

Section seven of the proposed amendments indicates that in considering what is a 'standard form contract' a court must take into account (among other matters) '(2)(d) *whether another party was given an effective opportunity to negotiate the terms of the contract*'. Notwithstanding the introduction of the Franchising Code of Conduct which contains provisions about franchisees seeking advice on franchise agreements before they enter into them, the vast majority of franchise agreements are presented to franchisees on a take it or leave it basis. Prospective or renewing franchisees may well have obtained professional advice which suggests that some aspects of an agreement should be negotiated (or indeed that the agreement not be signed), but in the main the agreement will be executed without change. That is because the franchisor will not wish to make amendments to the agreement and also because without the agreement, the franchisee has no business to operate. The FTC considers those agreements to be agreements that are not negotiated and thus 'standard form contracts'. If that is not a correct view of matters, the FTC would welcome an opportunity to discuss the issue further with the Government.

However, in some circumstances, franchisors will put before its franchise council a draft franchise agreement prior to it being put to franchisees for execution. In some cases what could be described as negotiations over the agreement will take place between the parties. In all instances of which the FTC is aware there will be terms in draft agreements which are non-negotiable from the perspective of the franchisor. Often it is those terms which are, for the franchisee, the most oppressive. The FTC believes that those contracts should fall within the scope of this legislative change.

The issue arises however, as to whether in providing a copy of a proposed new agreement to a franchisee representative group, the franchisor has 'negotiated' a contract and by default then every term of the agreement is considered to have been negotiated and the contract is therefore not a 'standard form' contract and is thus outside the scope of this proposed legislation. If that were to be the case, it would be an unsatisfactory outcome for small business. The FTC would argue, conversely, that all franchise agreements, are by nature a standard form contract.

The FTC believes that the Government should consider providing more clarity around what in relation to 7(2)(d) '*an effective opportunity to negotiate the terms of the contract*' means.

The FTC also recommends that the proposed legislation contain a 'deeming' clause which would provide for all contracts covered by codes mandated under s51AE of the Trade Practices Act. In those sectors of the economy covered by mandatory codes, a significant imbalance in power in the contractual relationships has already been identified – which is often evidenced by the fact that contracts are presented as 'take it or leave it' documents. In terms of dealing with unfairness in business to business transactions, the sectors covered by mandatory codes should in the FTC's view be automatically covered by the new provisions.

'Threshold' for unfair

The proposed legislation states that a standard form contract term is unfair if it would cause '*a significant imbalance in the parties rights and obligations arising under the contract....*' and later, that the courts must take into account '*the extent to which it would cause, or there is a substantial likelihood that it would cause, detriment....*'. The FTC is concerned that the thresholds of 'significant' and 'substantial' may well act to preclude many parties from accessing this new provision and thus preventing them from accessing the remedies available for unfairness. The FTC believes that the term 'reasonable' should be substituted instead.

Examples of unfair terms

The Fair Trading Coalition submits that some additional matters should be included in the proposed clause four of the amendments to the Trade Practices Act. They are:

- a term which requires payment of the total contract price up –front;
- a term which provides for the supplier to supply additional product other than what the other party requires and the charging for that additional product;
- where there is third-line forcing or full-line forcing which does not have the express consent of the other party;
- a term that allows a party to demand to see the business accounts of the other party; and
- a term that demands access to a party's bank account for the deduction of monies claimed to be owed.

The FTC is also uncertain as to why the main subject of a contract is to be excluded from the provision. Such exclusion may provide an opportunity for parties to 'bundle' additional goods and/or services (which might otherwise be optional) into the main subject of a contract. For example, a mobile phone contract which now provides for an optional internet connection may well post 1 January 2010 be amended so that the internet connection in fact becomes part of the 'main subject' whether or not it was the intention of the buyer of the phone to acquire that service. Equally it is not clear what impact the exclusion will have on franchise agreements – where it could be argued by some that the main subject is the franchise and that therefore no elements of the agreement could come within the unfair contract terms provision.

Other matters

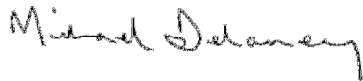
In relation to the transition to the new unfair contract terms provisions, and the proposed commencement date of 1 January 2010, the FTC is concerned that there may be pressure on parties to enter into standard form contracts between now and 31 December 2009; thus avoiding the effect of the legislation until such time as the contract (which may run for several years) is renewed or varied. The FTC suggests that to overcome that issue, the legislation apply to contracts entered into, renewed or varied from the date of the tabling of the legislation – but that remedies not be available until on or after 1 January 2010.

As always, the FTC believes that the issuing of guidelines, by both the ACCC and ASIC, on the operation of the provision would assist all parties in understanding their respective rights and obligations under the new regime.

I trust that the issues outlined above are of assistance to you in considering further the introduction of an unfair contract terms regime.

Should you wish to discuss these matters further please do not hesitate to contact me.

Yours faithfully

A handwritten signature in black ink that reads "Michael Delaney". The signature is written in a cursive style with a long, sweeping tail on the letter 'y'.

MICHAEL DELANEY
Executive Director of the Motor Trades Association of Australia
Convenor and Chairman of the Fair Trading Coalition

22 May 2009