

Reforms of Australian Consumer Law - targeting standard form contracts

Overview

On 2 October 2008 the Council of Australian Governments (COAG) agreed to introduce a national consumer protection law to implement the recommendations made in the Productivity Commission's *Review of Australia's Consumer Policy Framework* of May 2008.

Generic consumer protection laws are directed at protecting a consumer from potentially harmful or exploitative conduct by a supplier and either prohibit specific forms of conduct or provide a consumer with a right to take legal action in respect of harm he or she suffers. These generic consumer protections for Australian consumers are currently found in 12 separate laws, the *Trade Practices Act 1974* (TPA), the *Australian Securities and Investments Commission Act 2001*, and in 10 State and Territory Fair Trading Acts.

The Standing Committee of Officials of Consumer Affairs (the Committee) has prepared a Consultation Paper entitled *An Australian Consumer Law Fair Market – Confident Consumers* (Consultation Paper). This explains how the National Consumer Law will be developed, and the nature and scope of the Council of Australian Government (COAG) agreed reforms to create the National Consumer Law based on best practice in existing State and Territory laws.

"The proposed Australian National Consumer Law targets organisations that provide standard form contracts to consumers on a 'take it or leave it' basis. Contracts containing unfair terms will be targeted by the national consumer law."

According to the consultation paper the purpose of an Australian consumer law is to *"significantly enhance consumer protection, reduce regulatory complexity for businesses and encourage the development of a seamless national economy"*.

To whom will the Australian Consumer Law apply to?

The proposed Australian National Consumer Law targets organisations that provide standard form contracts to consumers on a 'take it or leave it' basis. Contracts containing unfair terms will be targeted by the national consumer law.

Why the changes?

While many of the state consumer protection laws are broadly consistent there are some small differences and it is these differences that the Committee believes a National Consumer Law will alleviate. These differences include:

- The various additional categories of false and misleading representations prohibited in State and Territories Fair Trading Acts over the years;
- The ACT's provisions on the regulation of credit card limit increases;
- Victoria's provisions dealing with unfair contract terms and NSW, Victoria and South Australia's similar but differing rules concerning telemarketing.

These differences in consumer laws have been found to have significant implications for the consistency of those laws. The Committee identified the major inconsistencies as follows:

- *The definition of consumer* – consumer is defined differently in the different jurisdictions. The 2 main qualities used to define categories of consumers between jurisdictions are whether the goods or services are acquired for personal, domestic or business use, and the value of the goods or services purchased.
- *Objects of the TPA and Fair Trading Acts* – The object provisions can influence judicial outcomes for consumers seeking to utilise a particular consumer provision.

...continued from page 1

- *Implied conditions and warranties:* Only the Trade Practices Act and the Fair Trading Act of NSW and the Northern Territory extend implied conditions and warranties to consumers who have not had a contractual relationship with the supplier.
- *Industry specific regulation:* The Committee recognised that significant differences in industry specific consumer regulation and changes to industry specific regulation often occur. This creates ongoing complexity and costs to businesses as they attempt to maintain compliance across the different jurisdictions. COAG has agreed to a process for reviewing industry specific regulation across all the Australian jurisdictions with a view to removing differences where possible. This area of work falls outside the scope of the development of the Australian Consumer Law.
- *Occupational licensing:* The Committee found that out of approximately 100 consumer related occupations licensed by the States and Territories, more than 30 are licensed in only 1 or 2 jurisdictions. This raised questions as to the necessity of such licensing schemes and their ongoing economic impacts.
- *Product standards:* Product safety standard provisions modelled on those in the TPA are included in NSW, the Northern Territory, Western Australia, Queensland and Victorian Fair Trading Acts. Victoria, Queensland and South Australia also have legislation that allows the mandatory standards to be applied to services.
- *Enforcement and remedy:* Enforcement of consumer laws is split between the State and Territory Fair Trading Offices and the National Regulators for the ACCC and ASIC. State and Territory Regulators generally focused on issues that affect consumers within their jurisdiction and the National Regulators generally have a wider focus on issues with an interstate or national dimension.

The trend towards national consumer markets means that current consumers will, despite purchasing the same products from the same businesses, receive different levels of protection dependent upon their state jurisdiction. Furthermore, the burden imposed by divergent and complex regulatory requirements will grow for businesses, and by acting now to reduce complexity and divergence, it said these reforms will make a significant contribution to the development of a seamless national economy;

What is the Australian National Consumer Law intended to address?

COAG has agreed that the Australian Consumer Law should be based on the existing generic consumer protection provisions of the *Trade Practices Act 1974 (Cth)* (TPA). COAG has agreed to 3 specific proposals to augment the current provisions of the TPA.

These are as follows:

1. the inclusion of a provision regulating unfair contract terms;
2. the inclusion of a range of additional penalties, enforcement powers and consumer remedies; and
3. the implementation of a new national product safety regulatory system.

In relation to these changes the Standing Committee of Officials of Consumer Affairs seeks the views of stakeholders on the current effectiveness of the provisions of the TPA that concern consumer protection issues or are otherwise relevant to them and how they may be improved.

".....Furthermore, the burden imposed by divergent and complex regulatory requirements will grow for businesses, and by acting now to reduce complexity and divergence, it said these reforms will make a significant contribution to the development of a seamless national economy."

Unfair contract terms

COAG has agreed to the inclusion of a provision regulating unfair contract terms in the Australian Consumer Law. Unfair contract terms are terms that cause a significant imbalance in the party's rights and obligations arising under a contract and are not reasonably necessary to protect legitimate business interests of a supplier. Unfair terms are more likely to be found in standard form contracts, presented to consumers as a 'take it or leave it' offer. These contracts have become more widespread as they lower the cost of doing business with large numbers of consumers, and those savings are in part passed on to consumers as lower prices.

On 2 October 2008 COAG agreed to a legislative model including the following features:

- A term is unfair when it causes a significant imbalance in the party's rights and obligations arising under the contract and it is not reasonably necessary to protect the legitimate interests of the supplier. The inclusion of the phrase 'it is not

...continued from page 2

reasonably necessary to protect the legitimate interests of the supplier' is designed to ensure that, when applying the test the business's reasons for including a provision in a contract is addressed.

- Remedies will be available only where the claimant (an individual or a class) shows detriment to the consumer (individually or as a class) or a substantial likelihood of detriment, not limited to financial detriment. This provision requires more than a theoretical case of potential detriment to be made out - it requires proof of either actual detriment or a substantial likelihood of it. The scope of the provision will extend to standard form contracts entered into by businesses, including small businesses, and would not be confined to individual consumers. This recognises that many businesses are required to use standard form agreements in the same way as individual consumers, and their interests are essentially the same in respect of the potential for unfair contract terms.
- The provision will relate only to standard form, non negotiated contracts. Should a supplier allege that the contract at issue is not a standard form contract then the onus will be on the supplier to prove that it is not.
- The provision will exclude the upfront price of the good or service because it would be contrary to general contractual and economic principles to allow consumers to challenge easily

understood upfront prices at a later time on the basis that they are unfair.

Will a National Consumer Law be effective?

COAG's agreement to develop national generic consumer laws provides Australian governments with an opportunity to streamline policy making procedures, and overcome issues that may have served to delay effective responses to issues in the past. As Chris Bowen, The Minister for Competition Policy & Consumer Affairs, said in his speech on 17/2/2009 "The aim of the new Australian Consumer Law is to ensure that business compliance is minimised while consumer benefit is maximised".

Effective implementation of an Australian Consumer Law will necessitate national, state and territory enforcement agencies to cooperation. These arrangements aim to harmonise and to improve upon the cooperation mechanism already in place between enforcement agencies. Hopefully this will lead to more effective regulation and consumer protection and ensure that the goals of a national consumer law will be achieved.

The penalties, enforcement powers and other forms of redress that the national scheme would introduce should "give regulators the teeth they need to enforce the law". The consumer laws will confer on the ACCC a range of enforcement powers that

...continued on page 4



...continued from page 3

previously belonged to State and Territory Agencies “leading to more effective implementation of these powers. These powers include civil pecuniary penalties that avoid resource-intensive criminal prosecutions where such an action may fail, disqualification orders for company managers incapable of considering the welfare of consumers as well as naming and shaming powers to provide incentive to business to do the right thing.

Conclusion

If you are a business that relies on standard form contracts (e.g. internet based transactions), you will need to ensure that you comply with the obligations set out in the Australian National Consumer Law when it comes into force. In particular, the inclusion of any clause or term must be to protect the legitimate interests of the supplier and must not cause detriment or a substantial likelihood of it to the consumer.

These reforms do not preclude the use of standard form contracts, however, it is clear that such contracts must be worded carefully and must not be non-negotiable or drafted in a ‘take it or leave it manner’. Finally, although uniformity will be financially beneficial to businesses trading

interstate, they will have to be more vigilant in ensuring their business practices do not contravene consumer protection so that they are not exposed to the greater powers conferred on regulatory bodies.

The success of the new pricing regime will depend greatly on the ACCC monitoring the new price advertising practices with diligence, and to consistently and transparently enforce its interpretation of the legislation. It will also be incumbent on the ACCC to appreciate the specific complications for the motor vehicle industry and therefore it must engage with the motor vehicle industry to address these unresolved issues.

This article was published in the June 2009 edition of *'Keeping Good Companies'* the Journal of Chartered Secretaries Australia Ltd.



Ron Heinrich - Partner
Sydney
Phone: +61 2 9228 9209
Ron_Heinrich@tresscox.com.au



Micheal Bracken - Partner
Sydney
Phone: +61 2 9228 9231
Michael_Bracken@tresscox.com.au

TressCox Team Contacts

Michael Bracken
Partner
Phone +61 2 9228 9231
Michael_Bracken@tresscox.com.au

Ron Heinrich
Partner
Phone +61 2 9228 9209
Ron_Heinrich@tresscox.com.au

Trevor Lloyd
Partner
Phone +61 3 9602 9721
Trevor_Lloyd@tresscox.com.au

Andrew Bruton
Partner
Phone +61 7 3004 3527
Andrew_Bruton@tresscox.com.au

Adrian Fong
Partner
Phone +61 2 9228 9297
Adrian_Fong@tresscox.com.au

www.tresscox.com.au

Sydney
Level 20 135 King Street
Sydney NSW 2000
Phone 61 2 9228 9200
Fax 61 2 9228 9299

Melbourne
Level 9 469 La Trobe Street
Melbourne VIC 3000
Phone 61 3 9602 9444
Fax 61 3 9642 0382

Brisbane
Level 40 Central Plaza 1
345 Queen Street
Brisbane QLD 4000
Phone 61 7 3004 3500
Fax 61 7 3004 3599

Global Affiliations - ALFA International

In order to provide legal services around the globe, TressCox maintains strong international affiliations with other law firms through our membership of ALFA International. Founded in the USA in 1980, ALFA International is the premier association of law firms in the world and is currently comprised of 120 independent member firms throughout North America, Latin America, Asia / Australasia and Europe.

There is only one ALFA International member firm in each major jurisdiction in Australia, with TressCox being the member firm for New South Wales and Queensland. ALFA International's basic objective, through its member firms, is to improve the quality and efficiency of legal services and to provide those services to clients at a reasonable cost.

Timeline

The timeline for the implementation of these reforms is as follows:

- By 30 June 2009 finalisation of the intergovernmental agreement (covering the Australian Consumer Law and including product safety) will be finalised.
- By 30 June 2010, the text of the legislation for the Australian Consumer Law, including the product safety reforms, including the product safety reforms will be agreed and finalised.
- By 31 December 2010 the Australian Parliament is to have passed the legislation for the Australian Consumer Law (including product safety) and amend the Trade Practices Act (TPA). The Parliaments of the States and Territories are to have passed application acts to apply the Australian Consumer Law (including product safety) in their own jurisdictions.