



Trade Practices Alert March 2009

We're on the road to nationally consistent consumer protection laws – but there will be bumps for business along the way

The Federal Government has released an Information and Consultation Paper regarding proposed changes to the Trade Practices Act and the introduction of a national Australian Consumer Law.

The Government is seeking comments on a number of aspects of the proposed reforms. Interested parties have until 17 March 2009 to respond to the Information Paper.

The proposed reforms to the Trade Practices Act have the potential to change the way businesses contract with their customers, especially in relation to “unfair contract terms”.

The amendments in a snapshot

On 17 February 2009 the Federal Government released an Information and Consultation Paper entitled “An Australian Consumer Law: Fair Markets – Confident Consumers” (**Paper**). The Paper’s key proposals include:

- > changing the name of the Trade Practices Act 1974 (Cth) (**TPA**) to the Competition and Consumer Act;
- > the introduction of an Australian Consumer Law to be applied nationally and in each State and Territory, based largely on the existing consumer protection provisions of the TPA however also including:
 - new provisions to regulate unfair contract terms;
 - regulation of consumer transactions, including financial services;
 - provisions from State and Territory Fair Trading Acts where the TPA is inadequate;
- > the implementation of a new national product safety regulatory and enforcement framework;

- > the development of enhanced enforcement powers, cooperation and information sharing mechanisms between national and state and territory regulatory agencies.

The Federal Government aims to have finalised the text of the new legislation by 30 June 2010 and the new legislation in force by 31 December 2010. Some changes such as the increased powers for the ACCC and the “unfair contract terms” provisions are expected to be in place later this year.

Submissions on the proposed amendments will be accepted **until 5pm on 17 March 2009**.

Background to the changes

Australia’s consumer protection laws are currently enshrined in the TPA together with 11 different State and Territory based Fair Trading Acts and Consumer Affairs/ Transactions Acts (together the **FTAs**).

A 2008 Productivity Commission report revealed a large number of inconsistencies between the different jurisdictions and estimated the economic benefits of a uniform framework at between \$1.5 billion and \$4.5 billion per year.



Unfair contract terms

The most radical change to the current law concerns the treatment of unfair contract terms. It is proposed that some types of contractual terms may be banned outright, while other terms may be voidable if found to be “unfair” to a consumer.

A term will be considered unfair “*when it causes a significant imbalance in the parties’ rights and obligations arising under the contract, and it is not reasonably necessary to protect the interests of the supplier.*” The reference to the “interests of the supplier” is designed to ensure that, when applying the test, the supplier’s reasons for including the provision in the contract are assessed.

Remedies will only be available where the consumer (or a class of consumers) can show that they have suffered detriment, or there is a substantial likelihood of detriment (not limited to financial detriment).

It is intended that the unfair contract terms provisions will only apply to standard-form, non-negotiated contracts. The onus will be on the supplier to demonstrate that a contract is not a standard form contract and/or that it has in fact been negotiated. Examples of goods and services sold using standard form contracts that may potentially be affected include:

- > utility services (electricity, gas and water);
- > communications services (telephony and internet);
- > banking and financial services, including credit agreements;
- > software end-user licences, e-commerce transactions and online auctions;

- > transport services, including airline, bus and rail tickets, as well as freight and courier services;
- > professional services; and
- > residential and retail tenancies.

The unfair contract terms provisions will also provide for the banning of certain types of terms outright on the basis that they are considered, in all circumstances, to be unfair. The Government is still considering which terms should be banned, but possible candidates discussed in the Paper include (to name but a few):

- > “entire agreement” clauses;
- > terms under which consumers acknowledge that they have read and understood the contract;
- > certain types of limitation of liability clauses;
- > certain types of early termination fee clauses;
- > terms requiring consumers to pay unreasonably large deposits or pre-payments; and
- > terms allowing suppliers to retain, debit or set-off disputed amounts.

Possible effect on businesses

The reforms outlined in the Paper have the potential to impose considerable adjustment and ongoing costs on businesses that rely on standard form contracts. The use of standard form contracts can provide significant cost savings, and a review of these contracts to ensure the fairness of all terms may be a costly and time consuming process.

In order to avoid the unfair contract provisions, businesses may be forced to genuinely renegotiate certain terms where previously they would have had the ability to make unilateral variations, for example, changes to a monthly fee for a mobile phone plan.

A national regulatory regime for product safety

The Paper proposes a national product safety legislative regime to be enforced by the Australian Competition & Consumer Commission (ACCC) and the State and Territory offices of fair trading (or equivalent). The ACCC will have powers to make permanent bans, while State and Territory governments will be able to impose temporary bans on products within their own jurisdiction for no more than 60 days. Those bans may in some circumstances be extended.

Any jurisdiction may refer a proposal for a permanent ban or a new product safety standard to the ACCC and there will be requirements for the ACCC to communicate its assessment to the Commonwealth Minister

The new product safety regime will require the unanimous approval of all Australian governments.

Agreed reforms to consumer law enforcement powers

It is proposed that enforcement of the new consumer law will be shared between the ACCC and the State and Territory offices of unfair trading. Enforcement powers under the new consumer law will be extended and there will be provisions covering:

- > civil pecuniary penalties and disqualification orders;
- > substantiation notices;



- > availability of redress for non-parties to proceedings;
- > public warning powers; and
- > infringement notices.

Civil pecuniary penalties and disqualification orders

The Paper suggests that while criminal sanctions deter the most serious misconduct and civil remedies can achieve outcomes for consumers, a range of conduct may be more appropriately penalised through civil penalties. The civil penalties will carry a lower standard of proof and therefore will more likely result in successful prosecutions when compared to prosecutions under the criminal sanctions (which will be retained).

Disqualification orders will ban or restrict individuals from participating in specific activities for specific periods of time, e.g., managing corporations. Disqualification orders will be available where a civil penalty or criminal sanctions are imposed.

Disqualification orders at the Commonwealth level will apply to corporations, but may be more expansive at the state level to cover unincorporated associations and individuals.

Substantiation notices

While the ACCC currently has investigative powers in relation to suspected breaches of the TPA, it must have some factual basis for forming that opinion. Under the new consumer law, consumer regulators (such as the ACCC) will be able to issue substantiation notices requiring recipients to explain their representations made in relation to the supply of goods and services.

The recipient of a substantiation notice will need to respond within a specified time and the notice will include specific requirements as to what information must be provided. The final form of the power and appropriate penalties are yet to be determined.

It is important that business ensure that they have a sound basis for any claims that they wish to make about their products. Recent cases brought by the ACCC for “green” claims illustrate the need for such substantiation (refer to our previous alert entitled “Saab’s Green Ads Declared Misleading” dated 29 September 2008 and available at our website: www.thomsonplayfordcutlers.com.au).

Who is a consumer?

There is currently no single consistent definition of a consumer across the jurisdictions. Due to the inconsistencies, it is unclear at this time what class of people may be captured in the new definition of “consumer”.

The good

A single national approach to consumer law will provide national businesses (and local businesses with national aspirations) with a single consistent framework to determine their rights and obligations. This should reduce the ongoing compliance costs to businesses and ultimately benefit consumers.

The bad

There will likely be significant initial costs to businesses in reviewing practices and contracts for compliance with the new consumer laws, particularly for businesses operating in jurisdictions that do not currently have an unfair contracts regime in place.

The time to act is now

The Honourable Chris Bowen, Minister for Competition and Consumer Affairs, launched the Paper in a speech on 17 February 2009. In that speech, Minister Bowen indicated that certain reforms, in particular the national unfair contract terms and enhanced enforcement powers, would be included in a legislative package to be introduced to Federal Parliament before July this year.

Businesses should be aware of these reforms and be in a position to review their practices and contracts before the initial legislative package comes into effect.

Where do I find a copy of the Paper?

A copy of the Paper can be downloaded from: http://www.treasury.gov.au/documents/1484/PDF/An_Australian_Consumer_Law.pdf

Request for Submissions

The Government has requested submissions on various aspects of the proposed reforms. Interested parties have until **5pm on 17 March 2009** to lodge a submission. If you think that your business might be adversely affected by the proposed changes to the consumer law, it may be worthwhile lodging a response to the Paper detailing possible adverse consequences for your business.

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