

12 April 2010

By email: unfaircontracts@accg.gov.au

Guide to Unfair Contract Terms
Consumer Strategies
Australian Competition and Consumer Commission
GPO Box 520
Melbourne VIC 3001

Dear Sir/Madam

Submission on draft *Australian Consumer Law: A guide to unfair contract terms*

Thank you for the opportunity to comment on the draft guidance prepared by the Australian Competition and Consumer Commission (**ACCC**), the Australian Securities and Investments Commission (**ASIC**) and the State and Territory consumer protection agencies to assist stakeholders understand the requirements and obligations of businesses under the new unfair contract terms laws (the **Draft Guide**). This submission is also endorsed by the Consumer Credit Legal Centre NSW.

In summary, Consumer Action Law Centre (**Consumer Action**) considers that there is a lot of useful content in the Draft Guide, but it is not currently drafted in a plain English format. In our view, the Draft Guide needs to be substantially redrafted to express its content in straight-forward language, as is the case in other comparable publications of the regulators, for example the October 2005 *Debt collection guideline: for collectors and creditors* published jointly by the ACCC and ASIC and the recent *Credit licensing: Responsible lending conduct* regulatory guide published by ASIC.

Further, it is unclear who the regulators consider is the primary target audience of the guidance. In its present form, we do not believe that it clearly communicates the details of the new laws to lay person stakeholders, whether businesses or consumers. We also consider that some of the content, for example on the arguments or justifications for the new laws, is unneeded in a publication aimed at giving practical guidance either to businesses on how to comply with the new laws or to consumers on what their rights are and how they can enforce them. It may also be that separate business and consumer directed publications are needed.

We are also concerned that, for the large part, the Draft Guide currently merely repeats the content of the legislation almost as if it were an explanatory memorandum to the laws. Consumer Action considers that guidance from a regulator should expand on the bare content of the laws by discussing the regulator's views on how they might apply in practical situations. We

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do acknowledge that there are some exceptions to this in the Draft Guide where, for example, case law is cited or an example is given of how a provision might apply in practice, but this does not occur often and, further, in these cases the discussion is not expressed in plain English nor is the implication of case law translated for a lay person to apply practically. This can be contrasted with other regulator guidance documents, for example, the joint ACCC-ASIC debt collection guideline referred to above or the guidelines published by Consumer Affairs Victoria (**CAV**) on the Victorian unfair contract terms laws (both initially in November 2003 and revised in June 2007).

Some specific examples from the Draft Guide are set out below to illustrate our concerns. However, these concerns relate to much of the document and we would be happy to meet with you to go through the Draft Guide in more detail. We reiterate that it is not a matter of simply addressing the examples listed below as they are illustrations of our overall concerns with the current document.

We also set out below some other concerns with specific aspects of the Draft Guide.

Examples of drafting concerns

Section 1 – How will the law apply and when will it take effect?

The quick answer at the beginning states that the laws will apply to all contracts entered into after commencement but does not indicate the actual commencement date. This information is only given at the bottom of the page.

Further, this introductory section does not set out clearly what the effect of the laws is. A reader must wait until section 6 to find out what the laws do. In our view, the beginning of the guide should set out in plain English the most important point, namely, that the new laws make an unfair term in a standard form consumer contract void, which means that the term has no effect and is treated as if it does not exist in the contract. For example, the current CAV unfair contract terms guideline starts with the basic point that the laws void unfair terms in consumer contracts.

Section 2 – What sort of contracts does the law apply to?

The quick answer at the beginning of this section is wordy and spends more time talking about the exclusion for business to business contracts. It might be clearer if it simply stated in bullet points that the laws apply to contracts that are:

- with consumers; and
- in a standard form.

The section could then go on to explain these concepts in more detail, including when a contract with a sole trader might be included.

At present, the section restates the legislation's definition of a consumer contract as being for goods, services or land interests acquired wholly or predominantly for personal, domestic or household use. This phrase is in "legalese" and a plain English explanation, perhaps

accompanied by examples of what will and will not be a consumer contract, would help lay persons to understand the difference.

This section also currently includes a sub-section on what occurs if there is a dispute about whether a contract is standard form or not. However, this sub-section does not discuss what happens, but instead sets out the reasons why a rebuttable presumption of proof was included in the laws. This merely repeats the reasoning from the Government's earlier issues papers and the explanatory memorandum on this aspect of the laws.

We are not sure that businesses or consumers reading this guide will be interested in knowing why the rebuttable presumption was included. However, in our view it would be of practical use to set out in plain English what the effect of the presumption is. This might include explaining that the effect is that all consumer contracts are considered to be covered, unless the business can prove otherwise. The guide could then explain that if you want to prove that a contract is not in a standard form, the sorts of things that will be considered are the bullet points in the laws. The guide could also include the regulators' views on what sort of practical factors it considers would or would not indicate negotiations took place.

Section 3 – Exempt terms and contracts

The sub-section on terms that define the main subject-matter of a contract is too wordy and does not give any practical examples. Some case law is cited but the passage merely notes the rationale for the laws and does not give any further explanation as to what sorts of terms will be considered to define the main subject-matter of a contract.

Further, the second paragraph in this sub-section states that the consumer cannot challenge the unfairness of a term defining the main subject matter 'because the main subject matter was defined at the time the contract was entered into'. This is inaccurate – other terms could also be said to be 'defined' at the time of entering into the contract; the reason a consumer cannot challenge such terms is because they are explicitly excluded from coverage under the laws.

The sub-section on terms that set the upfront price payable under the contract does give some practical examples of the sorts of terms that would or would not be covered, which we commend. However, this paragraph needs to differentiate more clearly between what the legislation sets out and what is the opinion of the regulators. The current Draft Guide states that the upfront price:

would not include further payments under the contract that are contingent on the occurrence or non-occurrence of a particular event

and

would exclude from the upfront price, for example, provisions that impose fees for additional goods or services that are not identified at the time the contract was made and default penalty fees or exit fees.

However, the first phrase above is clearly stated by the legislation, whereas the second part sets out examples that we agree are likely to be correct, but are not stated in the legislation and therefore should be indicated to be the regulators' views. The distinction could be helped if the examples were set out more clearly in plain English, perhaps as a bullet point list. We also

consider that this is one area in which the regulators could add further value by setting out a fuller list of examples of terms you consider do or do not constitute setting the upfront price payable, for example the role of terms setting delivery fees or fees for using particular payment methods.

Section 4 – When is a term unfair

In our view this section is particularly legalistic in its drafting and would strongly benefit from plain English redrafting and the inclusion of clearly set out practical examples of terms that might be unfair in the view of the regulators. Practical examples from the UK and Victorian experience could be used. We note that the first CAV guideline in 2003 set out practical examples of unfair terms from the UK to illustrate some of the law's stated examples of unfairness.

The list of examples is another area in which the regulators could add much value to stakeholders by setting out their views on particular types of terms. For example, "terms penalising one party for a breach or termination" could be related to mortgage exit fees or direct debit and cheque dishonour fees or overdrawn account fees. "Terms permitting one party to vary the upfront price payable" should include discussion of when changes to mortgage interest rates under variable rate mortgage contracts is and might not be fair. "Terms limiting one party's right to sue" could be related to contract terms purporting to apply a specific jurisdiction's laws to the contract regardless of where the contract was actually made. The discussion on "terms limiting the evidence one party can adduce" makes important points but is too legalistic so that, in our view, it would not be clear to non-lawyers that the regulators are saying here that such terms are unfair because they wrongly give consumers the impression that misleading conduct or misrepresentations before the contract was signed are not relevant.

We are not convinced that the last paragraph discussing the ability of the Minister to prescribe further examples of unfairness is useful to businesses or consumers in a practical sense. If further terms are prescribed at some time in the future, the guide can be updated at that time.

More questions and answers section – Consumer contract definition

The first paragraph in this section states that 'it is important to note that the definition of a consumer under section 4B of the TPA is broader than the definition of a consumer for purposes of a consumer contract under the ACL' but the section does not explain when section 4B applies, why businesses should be concerned that the two definitions are different and what the implications of this difference are – this would be the practical advice looked for on this topic. Further, it is unclear why this section is needed at all in helping businesses or consumers to understand the new laws, especially without the advice noted above.

In the second paragraph of this section, the definition under section 4B is explained and it is noted that this applies provided the price exceeds 'the prescribed amount'. The prescribed amount is a known figure - \$40,000 at present - so it could simply be given, rather than referring to the more obscure 'prescribed amount'.

As a separate matter, we also note that this description of the definition of a consumer under section 4B is inaccurate. The Draft Guide states that section 4B deems a person to be a consumer:

where the goods or services acquired by the consumer were ‘of a kind ordinarily acquired for personal, domestic, or household use or consumption’ (subject to certain exceptions and provided the price of the goods or services exceeds the prescribed amount).

However, section 4B deems a person to be a consumer where **either** the price of the goods or services did not exceed the prescribed amount of \$40,000 **or** if the price was higher, the goods or services were of a kind ordinarily acquired for personal, domestic or household use.

Other matters

Insurance contracts

In a consumer-directed publication, we consider it would be worth explaining that the types of insurance contracts not covered include home and contents, car, travel and life insurance policies. We agree that this would not necessarily be needed in a business-directed publication.

Discussion of ‘detriment’ limb of unfairness test

There is some useful information in this sub-section on page 11 of the Draft Guide about what sort of detriment is relevant, and we consider that it could be set out more clearly, for example using bullet points.

However, the last paragraph of this sub-section is a legal opinion about the similarities between this definition and the definition in the current Victorian laws. First, we question whether a legal discussion of this sort is particularly useful to lay businesses or consumers trying to understand how this aspect of the law applies in practice. It is probably unnecessary to include such a discussion in the final form of the guide. We could, however, see some usefulness to businesses currently complying with the Victorian law in an explanation of the practical difference for them of the new definition.

Secondly, we dispute that the paragraph is correct in its current form. Certainly, the opinion of the regulators on how the ‘detriment’ element works in practice under the Australian Consumer Law (**ACL**) provisions is relevant for inclusion in this guide. However, going on to make claims about how this relates to the current Victorian laws’ treatment of ‘detriment’ is less safe. The wording of the Victorian unfairness test is different to the wording of the ACL unfairness test, thus it is an untried assumption for the Draft Guide to state that they mean the same thing. Further, this paragraph states that the Victorian provision effectively requires a claimant ‘to prove that the relevant term causes a significant imbalance in the parties’ rights which would lead to detriment being suffered by a consumer’. However, this is incorrect as the Victorian provision merely states that the *definition* of unfairness is that the term ‘causes a significant imbalance in the parties’ rights and obligations arising under the contract to the detriment of the consumer’. Detriment is used as part of the phrase ‘to the detriment of’ to indicate to which party a significant imbalance is relevant in determining unfairness; it is not used as a further element that must be proven. In cases under the Victorian laws we are not aware that courts have discussed any requirement for the claimant to prove that a term leads to detriment. On the contrary, ‘to the

detriment of the consumer' in the Victorian definition has been judicially considered as being relevant in defining whose imbalance is relevant, namely the consumer's.¹

In our view, this paragraph does not provide practically useful information for lay stakeholders, but might be read as a further attempt to justify the last-minute amendment to the ACL provisions which inserted this limb into the test for unfairness. The regulators will be aware that this last-minute amendment was controversial and was opposed by consumer organisations. We therefore recommend that the regulators avoid further discussion on the rationale for this aspect of the laws and instead concentrate on providing practical guidance on your views about the actual effect of the laws as now enacted.

Contract as a whole

It is helpful that the Draft Guide explains the fairness of a term cannot be considered in isolation. We suggest that the final version of the guide elaborate on this issue by explaining that even if a particular term was decided by a court in one case to be fair or even if the regulator gave an opinion that a particularly term was fair in once instance, this does not mean it is safe to assume it will always be fair.

Section 6 and section 7 – What is the effect of including an unfair term and who will enforce the law?

As noted earlier, we consider that the effect of the law is central and should be stated at the beginning of the guide. In our view, most of the additional content currently in section 6 of the Draft Guide is relevant to how the laws are enforced, not their effect.

Section 6 also currently states that:

If a court makes a declaration that a term is unfair and a party subsequently seeks to apply or rely upon the unfair term, it is a contravention of the ACL or the ASIC Act, and the court may grant one of the following remedies...

While we agree that the ACL provides for other remedies to be granted if/when a court makes a declaration that a term is unfair, it is less clear whether the ACL requires that a declaration must be obtained ahead of subsequent conduct by a business before further remedies can be sought or whether a declaration can be sought and, if obtained, further remedies sought within one proceeding. We are strongly interested in the regulators' views on this question and consider it is one area in which the guide should provide clarification. Again, we think that this issue would be better discussed in the section on enforcement.

There is only a small discussion in section 7 about whether consumers can take action themselves. It would be clearer to explain that because the effect of the laws is that an unfair term is void, consumers can make use of the laws in claims relating to consumer contracts

¹ *Director of Consumer Affairs v AAPT Ltd* (Civil Claims) [2006] VCAT 1493 (2 August 2006). In *Director of Consumer Affairs Victoria v Backloads.com Pty Ltd* (Civil Claims) [2009] VCAT 754 (11 May 2009), at § 131 Harbison J explicitly states: 'I need to bear in mind in analysing the impugned terms that section 32W clearly focuses on an imbalance which is to the consumer's detriment. The term is not concerned with an imbalance to the detriment of the trader. It is the effect on the consumer which should be uppermost in my mind when considering this definition.'

generally. The sub-section specifically discussing consumer actions does not refer to this effect and consumer contract claims generally. Instead it notes that the legislation provides for 'individual claimants to commence private actions to enforce their rights or to recover losses or damage incurred for specific breaches'. This seems to be referring to legal actions specifically provided for under the legislation, such as for injunctions, actions for damage and other orders, and also does not clearly state if it is referring to consumers or to other parties as well.

Further, this sub-section states:

The ACL and ASIC Act also provides for a party to a standard form consumer contract to apply to the court for a declaration that a term of such a contract is an unfair term. This then renders the term void.

This is incorrect. It is the ACL itself that renders an unfair term void. A *declaration* is a type of remedy, and also one that under these laws once obtained enables other remedies to be sought. However, our view is that it would not be necessary for a consumer to obtain a declaration under the laws before asserting that a term is void for unfairness in a general contract dispute, for example. Further views of the regulators on this point would be welcome.

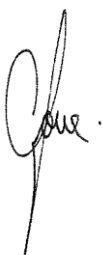
More questions and answers

We are uncertain as to the purpose of including these sections at the end of the Draft Guide. While there is some interesting discussion here, the content is not necessarily particularly useful for ordinary businesses or consumers in a practical sense. The inclusion of this content highlights to us that the current intended audience of the guide remains unclear.

Thank you again for inviting comment on what will be an important publication for all stakeholders regarding the new national unfair contract terms laws. As stated above, we would be happy to meet with representatives of the regulators to discuss the content of the Draft Guide in more detail. Please contact Nicole Rich at the first instance on 03 9670 5088 or at nicole@consumeraction.org.au if you have any questions about this submission.

Yours sincerely

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