

Commercial Update

Winter 2009

An end to unfair contracts? – new Australian Consumer Law

by Nelson Trieu, Lawyer

New Consumer Law consultation paper

On 17 February 2009, the Federal Government released a consultation paper in relation to the proposed new Australian Consumer Law. It follows an earlier Productivity Commission report which recommended sweeping changes to consumer laws in Australia.

Currently, each state and territory has its own consumer protection legislation. This legislation is consistent with the generic consumer protection provisions in the *Commonwealth Trade Practices Act*. However, specific consumer protection laws vary widely between the states and territories. This can create difficulties for businesses, particularly those which operate across several states or which use "standard form" contracts.

The proposed Australian Consumer Law is intended to establish a uniform national consumer protection system. The national approach has been agreed by all Australian governments. According to the Federal Government, it will be modelled on the "best practice" consumer protection provisions in each state. It remains to be seen whether this aim will be achieved by the legislation, which is yet to be finalised.

The reforms are limited to standard form, non-negotiated consumer contracts. They will not apply to contracts between businesses or those negotiated between the parties.

Unfair contracts

One of the key aims of the Australian Consumer Law is to "crack down" on unfair contracts.

Unfair contracts are contracts which contain terms which "cause a significant imbalance in the parties' rights and

obligations... and are not reasonably necessary to protect the legitimate interests of the supplier", according to the consultation paper.

Examples of the types of terms which may be considered "unfair" include:

- where the supplier can vary the terms of the contract without reference to the customer;
- where the supplier can assign the contract to the customer's detriment, without the customer's consent; and
- where the customer is prevented from cancelling the contract.

It may also include the following types of terms, where they cause a significant imbalance to the customer's detriment:

- an acknowledgement that the customer has read or understood the contract;
- "entire agreement" clauses that deny the existence of oral representations; and
- clauses which require early termination fees to be paid, where such fees are not genuine pre-estimates of the supplier's costs.

Unfair terms would be banned under the proposed Australian Consumer Law, and additional enforcement powers given to the regulators to ensure compliance.

The proposed powers include:

- civil pecuniary penalties, which may be up to \$1.1 million for corporations and \$220,000 for individuals depending on the final form of the legislation;
- substantiation notices, which would require businesses to provide

evidence to support their claims regarding their goods or services;

- disqualification orders, banning individuals from managing corporations and also specific forms of conduct; and
- an expanded "public warning" (naming and shaming) power.

Other changes

A number of other changes proposed include:

- changing the name of the *Trade Practices Act* to the "*Competition and Consumer Act*";
- introducing a consistent definition of a "consumer"; and
- specific changes in relation to door to door marketing, lay-by sales, telemarketing, and minimum standards for font size and disclaimers.

When will it come into effect?

Initially, it was expected that the form of legislation would be finalised and passed by the Commonwealth and all states and territories by 31 December 2010.

However, on the date of the release of the consultation paper, the Federal Government announced that it would introduce the unfair contract terms and enforcement provisions of the Australian Consumer Law into Parliament in the first half of 2009 with a view to having these key elements of the Australian Consumer Law fast-tracked into law by 1 January 2010. The remainder of the changes proposed are expected to be fully implemented by the end of 2010.

The Carbon Pollution Reduction Scheme

by Brendan Sheehan, Lawyer

On 10 March 2009, the Federal Government released the exposure draft of the legislation for its proposed emissions trading scheme, the Carbon Pollution Reduction Scheme ("**Scheme**"). The Scheme is a "cap and trade" methodology aimed at reducing Australia's greenhouse gas emissions.

The draft legislation has been released following the Government's 2 policy papers (the Green Paper and the White Paper) and comprises 6 bills, including the Carbon Pollution Reduction Scheme Bill. However, many of the important details of the Scheme will be contained in yet to be drafted regulations.

The Government initially intended for the Scheme to commence on 1 July 2010 but has now delayed the Scheme by one year.

What is the Scheme?

The Scheme is a national emissions trading scheme that will require liable entities to monitor, report, and audit their greenhouse gas emissions on an annual (financial year) basis. It has been estimated that this will broadly cover Australia's top 1,000 greenhouse gas emitters. The Scheme will cover all 6 greenhouse gases included in the Kyoto Protocol.



Liable entities will be required to surrender an eligible emissions unit for every tonne of greenhouse gas emissions that they are responsible for each year.

Eligible emissions units will include Australian emissions units issued by the Australian Climate Change Regulatory Authority ("**Authority**") and eligible international emissions units. The number of Australian emissions units issued each year will be limited by a cap. Eligible emissions units will be tradeable and can be "banked" for the next year.

The Scheme will have some transitional assistance measures, including providing Australian emissions units to certain sectors.

Liable entities

In general, the Scheme will apply to entities that emit 25,000 or more tonnes of carbon dioxide equivalence in a year and to entities that supply certain fuels and synthetic greenhouse gases.

If you are unsure whether your business is a liable entity, we recommend that you seek professional advice as there may be some complexity in determining issues such as:

- whether certain activities constitute a facility; and
- whether the facility is under your business's operational control.

The Scheme also allows liable entities, subject to approval from the Authority, to transfer their liability for a particular facility to one of its subsidiaries or from the entity with operational control over a facility to the entity with financial control over the facility.

Obligations and indirect impacts

All liable entities will be required by the *National Greenhouse and Energy Reporting Act 2007* (Cth) to report their emissions to the Authority by 31 October following the relevant financial year.

Liable entities will be required to surrender an eligible emissions unit for every tonne of greenhouse gases that they are responsible for in that year, in addition to any emissions units that they failed to surrender the previous year, less any emissions units that the entity surrendered the previous year in excess of its obligations for that year.

Despite the estimate that the Scheme will apply to less than 1,000 liable entities, it is clear that the Scheme will indirectly affect countless others. The Scheme will cause liable entities to incur significant costs in obtaining eligible emissions units, administrative expenses associated with reporting and other Scheme costs. These costs will be passed on down the supply chain and will affect many entities not directly subject to the Scheme.

The Scheme will raise many legal issues. For instance, it is likely that liable entities will include terms in their sub-contracts requiring sub-contractors to report any emissions that the liable entity might be responsible for under the Scheme. Liable entities might also seek indemnities from sub-contractors if their action results in the liable entity failing to comply.

The Scheme may well impact your business and it is important that you are prepared.

What steps should your business take?

The draft legislation contains a large amount of complex detail and many of the important details of the Scheme will be contained in yet to be drafted regulations. At this stage, we recommend that you:

1. identify whether your business is a liable entity; and
2. if your business is a liable entity, ensure that you understand your obligations under the Scheme; and
3. if you have an issue in relation to the Scheme, seek legal advice.

The Clarity in Pricing Act

by Brendan Sheehan, Lawyer

Single price to be stated in the sale of goods and services

From 25 May 2009, corporations will be required to specify, in a prominent way and as a single figure, the single price for goods or services that they are supplying or promoting to consumers.

The Clarity in Pricing Act

The Trade Practices Amendment (Clarity in Pricing) Act 2008 (Cth) ("Clarity in Pricing Act"), assented to on 25 November 2008, repeals the existing section 53C of the Trade Practices Act 1974 (Cth) ("TPA") and substitutes a new section 53C into the TPA which is due to commence on Proclamation or on 25 May 2009 if not proclaimed prior to that date.

The new section 53C

The new section 53C of the TPA will prohibit corporations that are supplying or promoting goods or services from making a representation to a person about the price of goods or services unless the corporation specifies a single price for the goods or services.

The purpose of the new section is to prevent corporations misleading consumers through the use of component pricing, which is the practice of pricing goods and services as the sum of multiple parts (e.g. \$50 plus GST). Corporations will still be permitted to use component pricing provided that the single price is also featured at least as prominently as the component prices (e.g. \$50 plus \$5 GST for a total price of \$55).

The prohibition is limited to goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption. It is intended to apply to representations made to consumers and will not apply if the representation is made exclusively to corporations and businesses recognised at law as being a separate legal entity. However, as a practical issue, you might find that your company inadvertently promotes its

goods or services to consumers. You may not have any control over who looks at a price list on your website.

The single price must be "at least as prominent" as the most prominently displayed component of the price. For example, the single price should be printed in a font size which is at least as large as the component prices and be positioned so that it is at least as visible.

The "at least as prominent" requirement does not apply to service contracts where the consumer makes periodic payments for services supplied to him or her for the term of the contract, including contracts for the supply of goods that are directly related to the supply of the services. For instance, telecommunications companies will be able to continue the practice of displaying their "per month price" more prominently than the single price, including contracts which include the supply of a mobile phone.

What does single price mean?

The single price is the "minimum quantifiable consideration for the supply concerned at the time of the representation concerned". In other words, the minimum price that can be calculated at the time that the goods or services are promoted, quoted, offered or supplied by the corporation to the consumer.

In the single price, the corporation must include:

- charges of any description payable by the consumer to the corporation (excluding optional charges); and
- any tax, duty, fee, levy or charge in relation to the supply;

but is not required to include:

- optional charges, for example, a credit card surcharge will not need to be included in the single price where there are alternative payment options but must be included in the single price where there is no other method for payment; and



- charges that are payable in relation to sending the goods from the corporation to the consumer (e.g. postage, courier fees), however, where such charges must be paid by a consumer and the amount of these charges is known, the corporation must disclose the minimum of those charges as a separate component of price (e.g. \$55 plus \$20 freight).

The Explanatory Memorandum for the Clarity in Pricing Act states that, where a total price is not quantifiable but a minimum total price is known, that minimum price must be disclosed as a single figure.

What you need to do?

1. consider whether you are supplying or promoting your goods and services to consumers;
2. consider any taxes, duties, fees, levies or charges that are payable by your consumers;
3. review your price lists, advertisements, quotes, invoices and any other documents which display your prices;
4. seek legal advice if you are unsure whether a charge should be included in the single price; and
5. ensure that the single price is displayed at least as prominently as any component prices.

Australia and New Zealand sign FTA with ASEAN Nations

by Andrew Hudson, Partner

In August 2008, there were announcements that Australia and New Zealand had struck a deal to establish a Free Trade Agreement with the ASEAN nations ("AANZFTA").

In the ensuing period, there were additional negotiations to try and resolve outstanding issues and finalise the AANZFTA. From media reports, it seems most of those negotiations surrounded Australia's efforts to secure additional tariff reductions for those in the Australian automotive industry. Unfortunately, those negotiations were not entirely successful and will now be pursued through separate negotiations with Malaysia and Indonesia.

However, the deal has now been completed and the AANZFTA was signed in Thailand on 27 February 2009.

The AANZFTA is a huge document and we have yet to review it in detail. However, according to material provided by DFAT, the AANZFTA will include the following.

- "MFN" status for Australia across ASEAN. If the ASEAN countries provide better treatment to another country than that provided to

Australia under AANZFTA, then Australia can insist on that better treatment;

- the ability for Australian pharmaceutical companies across the region to export to ASEAN countries with an almost total reduction in tariffs;
- significant reductions in tariffs on Australian beef, live cattle exports, sheep and goat meat to countries such as the Philippines, Indonesia and Vietnam;
- lower tariffs on Australian aluminium exports to Indonesia and reduction of Malaysian tariffs on aluminium tanks, vats, nails and screws (over the next four years);
- a dispute resolution provision so that Australian firms investing in ASEAN countries will have access to arbitration against ASEAN countries if their investments are adversely affected by action by those countries in breach of AANZFTA commitments. This will expand current protection currently available in Indonesia, Laos, the Philippines and Vietnam;
- a general commitment to certainty and transparency for Australian

service providers. In addition, a number of Australian service industries have received specific commitments to improve their market access in ASEAN including benefits for lawyers;

- rules of origin generally constructed on "co-equal" access to rules based on either "Change in Tariff Classification" ("CTC") or a "Regional Value Content" ("RVC") tests. For most goods, there will be the option of using either test although some goods will need to fit one test;
- the use of a "Certificate of Origin" regime for those wishing to claim preference. These Certificates will be issued by relevant approved bodies (as in our Thai Free Trade Agreement);
- a recognition by Australia that Vietnam has achieved "Market Economy Status". This has consequences for dumping and countervailing investigations;
- a Chapter on Customs Procedures where the parties commit to adopt WTO procedures and work together to facilitate trade in the region.

Contact us

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