

20th May 2009

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

Dear Sirs,

The Service Station Association represents the interests of service station business owners, principally in New South Wales. In addition, a number of our members conduct businesses in other States. However, the issues canvassed in this submission are relevant to the many thousands of small businesses operating service stations in Australia. In the main, the stakeholders we represent own and operate the business taking place on a service station site, but may not own the premises. Typically, they can be described as franchisees, commission agents, lessees and/or owner operators.

In almost all cases, there exist in the businesses numerous contracts. Some are contracts that grant tenure and specify the minimum conditions for that tenure. Others prescribe the terms and conditions governing the supply of goods and/or services; the main one being the supply of petroleum products, particularly where the use of brand is involved. In almost cases, the key elements that determine a service station's profitability are governed by a contract. Furthermore, in terms of the industry participants that we represent, the significant contracts are between the business operators and large businesses such as an oil company or large wholesale supplier/landlord where there is a significant imbalance in market power and financial resources.

The initiatives proposed in these draft provisions are therefore extremely welcome to us, and we appreciate being afforded the opportunity to make this submission.

At the outset, we express our opinion that there is nothing in the draft provisions that we oppose or object to. However, there are a number of aspects in the draft provisions that we believe would be improved by further explanation or by extending a courts' powers to make a ruling. They are as follows:

1. Remedy

We note the authority of a court to render void a term or provision in a contract if it is deemed to be “unfair”. We welcome this, but believe there needs to be consideration given to further amending the affected contract to allow it to proceed in a fair manner. There may be situations where a provision deemed to be “unfair” prescribes a key element of the conduct of the parties within a contract and its removal would leave a void. We believe that a court should be provided with clearer guidelines as to how to render such an amended contract workable. Section 106 of the New South Wales Industrial Relations Act has such provisions, as does the Independent Contractors Act. We believe there is a need for the proposed Consumer Law Provisions to also incorporate some of these principles.

2. Professional Advice

In many business to business contracts, there is a recommendation, and sometimes a requirement, that the party proposing to take up a standard form contract obtain professional advice. The SSA is concerned that the provision of such advice recommending against entering into the contract would invalidate a court’s power to subsequently deem a provision to be unfair. That is, a court could be persuaded that the time to determine whether a contract was unfair was before it was signed and not after. We therefore believe that there needs to be a clarifying comment that entering into a standard form contract and ignoring professional advice does not in itself reduce the application of these provisions to that contract.

3. Representation

There can be a great benefit derived from a group or class of consumers, or businesses (we refer to them as “contract takers”) joining together to bring an action to affect change in standard form contracts. In fact, the provisions contemplate such events. However, we have often been confronted with individual “contract takers” being unwilling to initiate or participate in such a “class action” as there is a belief that such action will damage the ongoing relationship and could affect such issues as renewal. The SSA therefore recommends that, to ensure maximum benefit is gained from these proposed provisions, industry associations should be able to initiate action on behalf of their members. We urge that consideration be given to this concept.

4. Tribunals

Many State Fair Trading jurisdictions include the provisions of tribunals where relatively minor matters can be adjudicated upon in a relatively inexpensive and expeditious manner. The SSA believes that consideration should be given to the formation of similar tribunals in these amendments. We believe that, following the intended abolition of the Federal Magistrates Court, the applicable court for commencing an action, at least in the

Federal arena, represents a somewhat cumbersome and costly mechanism that in many cases will deter action being commenced. In such circumstances, the full intentions of these amendments will not be realised.

5. Coverage

We note the definitions that describe the type of contracts that are intended to be covered by these provisions. However, for the sake of clarity and to remove the possibility of future legal argument, the SSA believes that, where an industry code exists, such contracts covered by those Codes should be deemed to be covered by these amendments. The Franchising Code and the Oilcode are two such industry codes that have relevance to the petrol retailing industry. Such a declaration would provide clarity, remove uncertainty and facilitate the behavioural change contemplated by these provisions.

In conclusion, the Service Station Association commends the Minister for Competition Policy and Consumer Affairs for launching this initiative and we believe that these provisions, combined with due consideration of the issues raised above, will result in a much fairer landscape for businesses and their customers in this country.

As always, we are available for consultation on these issues any time at your convenience.

Yours faithfully,

Ron Bowden
Chief Executive Officer