

REVIEW OF AUSTRALIA'S CONSUMER POLICY FRAMEWORK

RESPONSE TO PRODUCTIVITY COMMISSION DRAFT REPORT

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Introductory comments

I appreciate the opportunity to make a further submission to this important review being undertaken by the Productivity Commission (**the Commission**).

I currently hold the position of Western Australian Ombudsman. I also hold Adjunct Professorial appointments in the Centre for Advanced Consumer Research at the University of Western Australia and the law faculty of La Trobe University. The views expressed in this submission, however, are my private views alone and do not necessarily represent the views of the office of the Western Australian Ombudsman or the Western Australian Government.

In my submission to the Commission's Issues Paper I addressed the following matters:

1. The overall approach of the Commission;
2. Removing red-tape, unnecessary regulatory duplication and achieving uniformity;
3. Behavioural economics;
4. Disadvantaged and vulnerable consumers;
5. Self and non-regulatory approaches;
6. General v industry specific regulation;
7. Consumer advocacy; and
8. Unfair contracts legislation.

In my view, the Draft Report represents a comprehensive analysis of Australia's consumer policy framework and the Commission should be commended for both the approach it has taken and the draft report it has delivered. I support the overall approach the Commission has taken and, in relation to matters (1) through (7) above in particular, I do not propose to make further comment. I will, therefore, limit my comments to the issue of possible unfair contracts legislation.

Unfair contracts legislation

Our approach to regulatory intervention has developed considerably in the last few years as the costs of that intervention have been better understood. Key national studies, particular, the Red Tape Task Force Report¹, and a number of regulatory principles and processes that have flowed from it, have ensured that we pay close attention to understanding the opportunities and limitations of regulation, its economic costs and benefits and its social effects.

¹ Regulation Taskforce, Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business (January 2006)

In my view, unfair contracts legislation should be treated as any other regulatory intervention. Consistent with modern understanding of regulation in enhancing the long-term interests of consumers, regulation should generally not be introduced unless:

1. there is a market failure that demonstrates the need for the regulation;
2. there are no existing regulations which adequately address the identified failure and/or there are no alternative (less intrusive) regulatory strategies that may be preferred;
3. the proposed regulation, if introduced, will actually remedy the failure (while, through regulatory design, unintended or perverse consequences are eliminated, or at least, minimised); and
4. that the costs imposed by the regulation are outweighed by the benefits of the regulation.

In my view, the essence of these regulatory pre-conditions is that we undertake evidence-based analysis of proposed regulation that reveals net benefits to the community as a whole prior to undertaking that regulation. It follows that it is absolutely proper - indeed, it is demonstrably desirable - to intervene in markets where a set of pre-conditions for regulatory intervention has been met.

The issue in relation to unfair contract terms regulation, therefore, is whether there is an evidence-based demonstration that reveals net benefits to consumers in the long-term from the introduction of the proposed regulation. Critically on this point, the Commission has noted that the “evidence that there is significant detriment to consumers is patchy”.² In these circumstances, a question does arise as to whether this is sufficient to justify regulatory intervention.

It is important to state that the Commission does qualify its observation in two ways. First, it notes that the submission from Consumer Affairs Victoria to the Commission’s Issues Paper “has improved that information base somewhat”.³ The Consumer Affairs Victoria study provides a collection of very useful data and observations about the operation and effect of unfair contract terms. It does not appear, however, to provide a significant assessment (particularly quantitatively) of the level of actual consumer detriment that arises from unfair contract terms. Second, the Commission observes that “equally, there is no significant evidence of detriment for business (and therefore consumers at large) from implementing unfair contracts legislation”.⁴ Whilst this is true, our tests for regulatory intervention are premised on the fact that our default position is the economic-efficiency producing (and welfare-enhancing effects) of freely operating markets. These tests require that we demonstrate consumer detriment prior to regulatory intervention in markets, not proving the absence of detriment to business (as the detrimental effect on business, and thus to consumers, through unnecessary regulatory intervention is largely assumed).

I believe that the Commission may wish to give further consideration as to whether the minimum requirements for new national, whole of economy laws have been made out through its review.

Indeed, in my view, there is a need for greater research to be undertaken in relation to the issue of unfair contract terms prior to the possible introduction of these laws. In particular, research might be directed at:

1. The extent of material consumer detriment (both quantitatively and qualitatively) that arises from businesses exercising terms said to be unfair;

² Productivity Commission, *Review of Australia’s Consumer Policy Framework*, Draft Report (2007). .

³ Ibid 134.

⁴ Ibid.

2. The alternative regulatory mechanisms available for remedying detriment that arises from unfair contract terms and the costs and benefits of these alternatives. This may include the present regulatory mechanisms to address terms said to be unfair, but would not be limited to the present regulatory methods of dealing with these terms;⁵ and
3. The costs and benefits that arise to consumers as a whole, and in the long-term, from retrospective interference by courts and regulators with consumer contracts.

The importance of this last point in terms of any proposed law should not be underestimated. As Professor Ross Parish has observed:

In my view, the major error in the legal approach to consumer protection is the tendency of lawyers, judges and legislators to denounce particular terms or aspects of contracts as being patently unfair, without considering them in relation to the contract as a whole and without analysing carefully their purpose, or the consequences of failing to enforce them, or of outlawing them.⁶

Although the contracts that derive from the operation of markets can correctly be assumed to result in a net beneficial impact on consumer welfare, we know with certainty that markets will operate imperfectly. We also know with certainty that contracts in modern markets contain terms that appear on their face to be unfair, and in actual effect, will cause a level of detriment to some individual consumers. Presently, however, what is not known is the extent of this detriment, both quantitatively and qualitatively, and this creates significant risk in creating effective regulatory responses.⁷

⁵ For example, the Australian Competition and Consumer Commission has set out a number of alternative regulatory strategies in its submission to the Commission's Issues Paper at 80-84.

⁶ Ross Parish, 'Consumer protection and the ideology of consumer protectionists', *Consumer Protection Law and Theory*, (1980) Edited by A J Duggan and L W Darvall, LBC, at 238.

⁷ Even when we have greater certainty about consumer detriment, we also know with certainty that courts (and regulators) will make mistakes in assessing the operation of contractual terms and may well remove efficient terms in contracts as they endeavour to address suggested harsh terms: Richard Craswell "Freedom of Contract", Coase Lecture Series, http://www.law.uchicago.edu/Lawecon/WkngPprs_26-50/33.Craswell.FrdmCtrct.pdf (viewed 29 February 2008). Ultimately, we should never ignore the fact that laws prohibiting unfair contract terms involve making choices between the operation of imperfect markets on the one hand and an imperfect legal system on the other: Ibid at 21.