Submission to the Trade Practices Act Review

The Communications Law Centre (CLC) is an independent, non-profit, public interest organisation specialising in media, communications, and online law and policy. Its core activities include research, teaching and public education. The Centre was established in Sydney in 1988 and in Melbourne in 1990. It is affiliated with the University of New South Wales and with Victoria University.

The CLC welcomes the opportunity to contribute to this Review.

The CLC wishes to express its support for the submission of the Australian Consumers' Association (ACA), and in particular for the following proposed changes to the TPA:

- the insertion of an effects test into s 46;
- the introduction of cease and desist orders;
- the introduction of cy-pres options for distributions of pecuniary penalties; and
- a new division on unjust contracts.

The CLC also supports the retention of the following aspects of the TPA:

- the role of the ACCC in informing the public of developments in the competition/consumer protection arena which are of public interest; and
- the enablement of public input in the authorisation process.

The CLC opposes claims that a strong competition regime impedes the ability of Australian firms to compete internationally and the resulting argument that competition regulation should be wound back.

Effects Test in section 46 (Terms of Reference 1b, 1c, 1e, 2)

The purpose test in s 46 raises serious evidential problems. The CLC notes the difficulties experienced by the ACCC in:

- obtaining evidence of improper purpose; and
- rebutting evidential 'paper trails' laid by firms purporting to establish a legitimate purpose.

We submit that s 46 should be amended so as to cover conduct by a corporation that has a substantial degree of market power and takes advantage of that power "*for the purpose of* ***or with the effect or likely effect of***" damaging or deterring competitors. The purpose test should be retained so that, where anti-competitive purpose has been established, there is no need to wait for the anti-competitive effect to occur or to establish that it is likely to occur. This amendment would bring the provision into line with the position in the US and the EU.

The CLC does not agree with arguments that an effects based test would blur the line between vigorous competition and anti-competitive behaviour. We note the ACCC's analysis of recent case law on the section, to the effect that the wording of s 46, and in particular the phrase "take advantage of", filters out legitimate competitive conduct.

Cease and Desist Orders (Terms of Reference 1b, 1c, 1f)

Obtaining judicial determination of alleged anti-competitive conduct may take several years. In this time, market entrants may be rendered bankrupt and market structures irreversibly damaged. This is particularly the case in the emerging and dynamic networked markets. For these reasons, the CLC supports the introduction of cease and desist powers, with the safeguards suggested by the ACCC in its submission, namely:

- the requirement for the ACCC to be satisfied that a corporation has used its substantial market power to engage in anti-competitive conduct which is likely to cause loss or damage and that there is an urgent need to prevent continuation of the conduct in the public interest;
- prior to the issue of an order the corporation would have an opportunity to make submissions to the ACCC;
- orders would operate for a limited period;
- orders would lapse at the earlier of the expiration of the specified period and the commencement of court proceedings by the ACCC; and
- the issue of an order would be subject to a statutory right of review (pending determination of which it would remain on foot).

Where the recipient of an order continued to engage in the specified conduct, the ACCC could apply for court-imposed penalties and injunctions.

The CLC notes that the ACCC has been cautious in its application of the competition notice regime in Part XIB of the TPA, with three notices having been issued in the five years since the regime's introduction.

Cy-pres Options for Distributions of Pecuniary Penalties (Terms of Reference 2, 3)

Cy-pres settlements provide a practical solution to the problem of identifying consumers wronged by the anti-competitive conduct of a particular firm. In most cases, numerous consumers will have suffered reasonably small individual damages. By directing damages to consumer advocacy and public interest groups, cy-pres settlements facilitate the following:

- disgorging illegitimate profits from firms found to have engaged in anti-competitive conduct; and
- enhancing consumer welfare in a broad sense.

The CLC supports proposals by the ACA and the Consumer Law Centre Victoria (CLCV) for the express incorporation of the cy-pres doctrine in the TPA. Specifically, we draw the Committee's attention to the detailed analysis provided in the submission of the ACA.

Unjust Contracts (Terms of Reference 1c, 2, 3)

Consumer transactions commonly involve standardised contracts which are offered to consumers on a non-negotiable basis. Consumer organisations have noted a growing trend towards the insertion of onerous, asymmetric terms in these pro-forma contracts. This is particularly so in the context of internet and telecommunications services where:

- consumer expectations are relatively unformed;
- consumers are often unaware of their rights;
- contracts may be entered with ease and apparent informality (and without the need for a signature);
- consumers are often locked into a contract for 18 months to two years, with substantial fees charged for early termination or disconnection; and
- heavy imbalances in bargaining power exist between service providers and consumers.

We refer to the report *Unfair Practices and Telecommunications Consumers* (January 2001) in which our analysis of ACCC and Telecommunications Industry Ombudsman (TIO) statistics and review of 12 standard form agreements highlighted the prevalence of unfair terms in telecommunications contracts. A common problem was the use of terms enabling service

providers to unilaterally vary contractual terms without a corresponding right for consumers to terminate the contract. The very terms of a mobile phone plan, for example, which attracted the consumer to the supplier may change at any time, yet the consumer is locked into the contract and unable to seek another supplier who offers those terms.

At present, avenues of redress for unfair contract terms available to consumers include:

- the common law doctrine of unconscionable dealing;
- unconscionable conduct under s 51AB of the TPA; and
- unjust contracts under the *Contracts Review Act* 1980 (NSW) (CRA).

In practice, these options are of limited relevance in addressing the widespread use of onerous, asymmetric contractual terms. The common law doctrine is concerned with procedural rather than substantive unconscionability. Although the wording of section 51AB of the TPA encompasses instances of substantive unconscionability, judicial interpretation has limited the section's applicability to instances where at least some procedural unconscionability is involved. The CRA is more clearly directed at unjust contractual terms per se, however we are unaware of any case law in which a contract was overturned on substantive grounds alone. In addition, the CRA is a NSW statute with no equivalents in other Australian jurisdictions.

Moreover, the effectiveness of litigation as a means of address will be limited where consumers are unaware of their rights or it is not commercially viable to pursue them. Even where consumers are successful in having unfair contractual terms overturned, traders may continue to use the same provisions in their standard contracts where they assess the risk of a future challenge as being outweighed by the commercial benefits of continued use of the terms.

There is therefore a need for regulatory intervention at a general or systematic level. A regulatory framework for addressing conduct leading to the future formation of unjust contracts by a particular person with consumers in general is contained in s 10 of the CRA. However, the provision sets a high threshold and has been used only once over the two decades since its enactment. In any case, as mentioned above, the legislation is NSW-specific.

Mechanisms available to consumers in the telecommunications arena are also of limited assistance in addressing the widespread use of unfair contractual terms:

- Service providers can determine standard form agreements for certain services which the ACA registers (but has no general power to approve or reject provisions) and which are not open for negotiation;
- Industry codes and standards have the potential to (but in fact do not) address unfair terms; and
- The authority of the Telecommunications Industry Ombudsman (TIO) to resolve disputes between consumers and service providers, with the power to make Determinations of up to $10,000 and Recommendations of up to $50,000, is directed towards individual complaints; the TIO has also tended to limit the exercise of its powers to instances involving contractual breaches.

In short, existing mechanisms have fallen short in addressing the growing use of unfair terms in consumer contracts. For this reason, the CLC supports the insertion of a new division in the *TPA* facilitating the systematic regulation of the use of unfair contractual terms in pro forma consumer contracts.

A useful model is provided by the UK *Unfair Terms in Consumer Contracts Regulations* 1999. The Regulations were originally enacted in 1994 pursuant to European Community Directive 93/13/EE and subsequently amended in 1999.

The UK regulatory scheme applies to subsidiary terms in consumer contracts which have not been individually negotiated. Core terms defining the main subject matter of the contract or the adequacy of remuneration are excluded, provided they are drafted in plain, intelligible language. Essentially, a term will be regarded as unfair if it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer. An indicative non-exhaustive list of unfair contractual terms is annexed to the regulations.

Under the scheme, the Director General of Fair Trading (DGFT) is required to consider complaints about unfair contractual terms. If the DGFT elects to pursue the complaint, it may seek an injunction from the courts, restraining use of the particular term drawn up for general use (and any similar term). There is also provision for the DGFT to accept court enforceable undertakings from the trader. The DGFT is required to provide reasons for decision and is encouraged to keep the public informed of its activities. The scheme also enables other qualifying bodies to seek injunctions restraining the general use of unfair terms. The regulations specify examples of unfair contractual terms.

The main benefits of the scheme are to:

- promote business and consumer certainty by clarifying the concept of unfair terms;
- encourage a pro-active approach in relation to the regulation of unfair contracts;
- facilitate effective regulation of widespread use of unfair contract terms; and
- promote transparency and public education.

The CLC strongly supports the insertion of a new division in the TPA along the lines of the UK Regulations. In particular the new division should:

- declare that unfair contract terms do not bind consumers;
- impose a positive duty on the ACCC to consider complaints;
- be enforceable via court imposed injunctions and court enforceable undertakings;
- specify a non-exhaustive list of examples of unfair contractual terms for general consumer contracts;
- specify industry specific non-exhaustive lists of unfair contractual terms (a model checklist for the telecommunications industry has been jointly prepared by the CLC, the ACCC, the CLCV and the Consumers' Telecommunications Network).

Public Presence of the ACCC (Terms of Reference 1d, 1e)

The CLC strongly supports the ACCC's use of publicity under s 28, for the following reasons:

- it is a cost-effective compliance strategy;
- it improves transparency of the regulatory regime;
- it educates consumers and business on their rights and responsibilities;
- it raises consumer awareness of developments in the market which are of public interest; and
- it bolsters consumer confidence in regulators, a factor which has become increasingly important in light of the recent spate of corporate collapses.

Calls to hamstring the ACCC's use of publicity impinge upon the open conduct of justice and should be regarded with caution. It is submitted that such calls are not justified by general experience. In particular the ACCC has demonstrated adequate caution in issuing media releases. It is unusual for the ACCC to formally name a company under investigation unless details of the investigation are divulged by a complainant, a Minister or the company itself. The CLC notes that there are presently 200 unnamed companies under investigation. The ACCC will however name a firm under investigation where this is in the public benefit. The CLC is of the view that the public is capable of appreciating the distinction between a company being investigated for infringing conduct and being found guilty of such conduct.

The accuracy of the ACCC's media releases is confirmed by the relative lack of judicial criticism. The CLC is aware of only one case in which the ACCC's use of publicity was criticised.

The effective use of the publicity by the ACCC is an important means of promoting consumer welfare and reining in anti-competitive conduct. It is submitted that proposals to curb this power are based on self-interest rather than general experience.

Enablement of Public Input in the Authorisation Process (Terms of Reference 1e)

The TPA provides that where a proposed merger would significantly lessen competition, and where the problem cannot be overcome though undertakings by the applicant, the merger may still proceed if its public benefits are shown to outweigh its competitive disadvantage. The ACCC's assessment of this balance is conducted in public, with members of the public able to examine the proposal and comment on its merits. The CLC does not support calls for amendments to ss 50 (mergers) and 87B (authorisations) which would have the effect of excluding the public from this process. It is appropriate that members of the public and public interest groups have the opportunity to comment on whether a proposed, anti-competitive merger is in the public interest.

Similarly, proposals that initial decision-making about mergers be transferred to the quasi-judicial forum of the Australian Competition Tribunal, would also tend to exclude public input and would remove the right to appeal a decision to permit a merger which currently attached to decisions of the ACCC.

Ability of Australian Industry to Compete Internationally (Terms of Reference 1a)

The CLC opposes the suggestions that the power of the ACCC should be wound back for the purported reason that protecting firms from competitive constraints in the domestic market will improve their international competitiveness. Critical mass alone does not guarantee international competitiveness, and conversely is not essential to international competitiveness, as demonstrated by the fact that 50% of Australian exports are produced by small to medium sized firms. In addition, international considerations are taken into account by the ACCC in determining market boundaries and in assessing public benefits of a merger under the authorisation provision.

Moreover, the CLC does not agree that domestic consumers should subsidise the performance of domestic firms in international markets.