

Agreement in Principle

Ms VIRGINIA JUDGE (Strathfield—Minister for Fair Trading, Minister for the Arts) [10.14 a.m.]: I move:

That this bill be now agreed to in principle.

I am pleased to introduce the Fair Trading Amendment (Unfair Contract Terms) Bill 2010, the first step in giving effect to far reaching reforms of consumer protection legislation in this State and throughout Australia. On 2 October 2008, the Council of Australian Governments agreed to a new consumer policy framework in the context of its broader agenda for regulatory reform and commitment to a seamless national economy. The Ministerial Council on Consumer Affairs developed the new framework, drawing on recommendations made by the Productivity Commission. Central to this plan is a single national consumer law designed to enhance individual consumer well-being, further assist in the development of a single national economy, reduce burdens on business and facilitate well-functioning markets.

Australian Consumer Law is based on the existing consumer protections in the Trade Practices Act and draws on best practice in State and Territory laws, including unfair contract terms. The law has been developed with the agreement of all Australian jurisdictions. The Commonwealth is lead legislator and States and Territories will apply the national law as part of their own laws. Enforcement and administration of the Australian Consumer Law will be shared between the Australian Competition and Consumer Commission, the Australian Securities and Investments Commission and State and Territory fair trading agencies. The intergovernmental agreement that underpins these arrangements was signed by the Council of Australian Governments on 2 July 2009.

Implementation of the law will be in two stages. The first stage sees the introduction of the unfair contract terms provisions. The second stage must commence by 1 January 2011 in accordance with the national partnership agreement to deliver a seamless national economy. The second stage comprises the remainder of the Australian Consumer Law, including national product safety provisions and new consumer guarantees. To satisfy its obligations in this process, the Australian Parliament passed the Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010 on 17 March 2010. It amends the Trade Practices Act to establish and apply the unfair contract terms provisions of the Australian Consumer Law and to introduce new penalties, enforcement powers and consumer redress options. The bill also amends the consumer protection provisions of the Australian Securities and Investments Commission Act 2001 making the provisions dealing with financial products and services in that Act consistent with the Trade Practices Act and Australian Consumer Law.

The unfair contract terms provisions will commence nationally on 1 July 2010. Victoria is the only jurisdiction in Australia that regulates unfair contract terms and it amended its legislation on 27 May 2010, passing the Victorian Fair Trading Amendment (Unfair Contract Terms) Bill 2010 to align its provisions with the national unfair contract terms provisions. Our intention is to apply the provisions of unfair contract terms in this State at the same time they commence at the Commonwealth level by amending the Fair Trading Act 1987. The New South Wales Parliament has a history of empowering the courts to intervene in contracts governing consumer transactions. Three decades ago it enacted the Contracts Review Act 1980. Under this Act the manner in which a court may intervene is far broader than under the common law, allowing judicial discretion to select the most appropriate relief for the specific case at hand. The focus tends to be on procedural unfairness, and looking at the circumstances surrounding the formation of a contract that may have involved unfairness.

By contrast, the current bill focuses on substantive unfairness—circumstances where unfairness results from the actual wording of contract terms unduly favouring the supplier or disadvantaging the consumer. There has been bipartisan support for unfair contract terms legislation. In August 2006 the Legislative Council Standing Committee on Law and Justice was asked to inquire into the incidence and impact of unfair terms in consumer contracts. The committee recommended that New South Wales enact laws modelled on those introduced in Victoria in 2003. At the time the committee noted that inquiry participants expressed a preference for a national scheme. A subsequent Productivity Commission report on Australia's consumer policy framework strongly supported the inclusion of an unfair contract terms provision in a new national consumer law.

This bill is the fulfilment of years of work and consultation to develop a law that protects consumers from contract terms that harm and exploit them. Both the Fair Trading Act and the Trade Practices Act prohibit misleading, deceptive and unconscionable conduct in trade or commerce. These generic consumer protection provisions will be at the core of the Australian Consumer Law. They are concerned with ensuring that market transactions are based on truthful information and ethical conduct, and that businesses do not unfairly exploit an imbalance in bargaining power. With the enactment of this bill, the law will also meet a third objective of promoting fairness in contractual obligations.

I turn now to the provisions of the bill. The bill inserts into the Fair Trading Act a new part 5G, which contains provisions drawn from the Australian Consumer Law relating to unfair terms in consumer contracts that are standard form contracts. An unfair contract term in a standard form consumer contract is void, although the contract continues to bind the parties if it is capable of operating without the unfair term. A consumer contract is

defined as a contract for the supply of goods or services or for a sale or grant of an interest in land to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption. The bill makes it clear that the provisions only apply where the sale or grant of an interest in land is in trade or commerce.

A standard form contract is not defined. If a party to a contract alleges it is a standard form contract, it is presumed to be so unless the other party proves otherwise. The bill lists a number of factors a court or the Consumer, Trader and Tenancy Tribunal must take into account when determining whether a contract is standard form. These include matters such as the relative bargaining power of the parties, and the extent to which the consumer was required to accept, without opportunity to negotiate, contract terms drawn up by the trader before the transaction occurred.

A term is unfair if it causes a significant imbalance in the parties' rights and obligations under the contract, is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term, and would cause detriment, whether financial or otherwise, to a party if it were to be applied or relied upon. The second limb of the unfairness test requires that the party advantaged by the term provide evidence to the court or tribunal to demonstrate why it is necessary for the contract to include the term. Such evidence might include material relating to the business's costs and business structure, the need for the mitigation of risks, or particular industry practices to the extent that that material is necessary. Detriment is not limited to financial detriment. It could also include other forms, such as delay or distress suffered by the consumer as a result of the unfair term.

There are two factors a court or tribunal must take into account when determining whether a term is unfair. The first is the transparency of the term and the second is the contract as a whole. The bill defines transparency as being expressed in reasonably plain language, legible, clearly presented and readily available. Examples of terms that may not be transparent include terms buried in fine print or couched in technical jargon or legalese. However, a term that is not transparent is not necessarily unfair and, conversely, transparency will not necessarily overcome underlying unfairness in a contract term. A court or tribunal must also have regard to the contract as a whole. A contract represents a balance of interests and considerations and no term can be considered in isolation. Some terms which initially appear quite unfair may be found to be reasonable when considered in context.

The bill sets out a non-exhaustive, indicative list of the types of terms that may be considered unfair. These examples, commonly referred to as a "grey list", provide statutory guidance but are not conclusive of unfairness. Such terms are not prohibited and may be justified in some circumstances. Some examples are terms that allow one party to make unilateral changes to the contract; terms that permit one party to assign the contract to the detriment of the other party without their consent or to limit one party's vicarious liability for its agents; and terms that permit one party to unilaterally determine whether a contract has been breached or to interpret the contract's meaning. Other types of contract terms can be added to the list by regulation, but only after the Minister has considered the detriment a term of that kind would cause to consumers, the impact on business generally of prescribing the term, and the public interest.

The bill provides that the law does not apply to three types of contract terms. First, it does not apply to terms that define the main subject matter of the contract, that is, the goods, services or land that the consumer has agreed to buy. Secondly, it does not apply to terms that set the upfront price payable under the contract, provided the price is disclosed before the contract is entered into. The concept of "upfront price" is important, because some contracts also include terms that impose fees and charges levied as a consequence of something happening or not happening at some point over the life of the contract. These are not payments that are necessary for the provision of the supply, sale or grant under the contract, but are additional to the upfront price and are covered by the unfair contract terms provisions. Thirdly, it does not apply to terms that are required or expressly permitted by a law of the Commonwealth, a State or Territory.

For the sake of national consistency the bill also provides for part 5G not to apply to certain kinds of marine contracts, or to the constitutions of companies and other bodies or of managed investment schemes. The bill amends the enforcement and remedies provisions of the Fair Trading Act to enable the Director General of Fair Trading to seek a declaration from the Supreme Court that a term is unfair. A party to a standard form consumer contract may also seek a declaration, with the leave of the court. A declaration that a particular term of a standard form consumer contract is unfair binds all parties to consumer contracts of that kind, unless the Supreme Court orders otherwise. Section 64B (4) (b) makes explicit that the declaratory powers granted to the Supreme Court in clauses 64B (1) to (3) do not prevent a consumer from bringing action relating to a standard form contract in any other competent court or tribunal for relief in respect of a term of a consumer contract that is void because it is unfair.

Once a term is declared unfair it is void and the trader must not rely on it. This means that the trader must not attempt to enforce the term, attempt to exercise a right conferred by the term, or assert the existence of a right conferred by the term. A trader who seeks to apply or rely on a declared unfair term is in contravention of the Act. It is not a criminal offence, but a civil contravention. The bill provides that the Director General of Fair Trading will be able to apply to the Supreme Court for one of the existing remedies available under the Fair Trading Act, including an injunction to restrain conduct and other orders such as specific performance or

payment of compensation. The bill also amends the public warning power under the Fair Trading Act to make it clear that the Director General of Fair Trading may issue warnings in relation to business practices involving the use of terms in standard form consumer contracts that are or may be unfair.

The bill also makes transitional and consequential amendments. Part 5G applies to new consumer contracts entered into on or after the date the law commences, which has been set at 1 July 2010. Part 5G is not retrospective. It does not apply to existing contracts, unless such a contract is renewed on or after 1 July or a term of the contract is varied on or after 1 July. The provisions will then apply to the renewed contract from the date of renewal and to the varied term of the contract from the date of variation. The bill amends the Contracts Review Act to make it clear that both the unfair contract terms provisions and the Contracts Review Act 1980 will operate without one limiting or restricting the operation of the other. The unfair contract terms law is designed to address the detriment that can arise in circumstances where consumers are offered contracts on a "take it or leave it" basis and those contracts contain terms that are unfair.

I am delighted to join my Commonwealth and Victorian counterparts in introducing this landmark law. Not only does it herald a new era in consumer protection, but it is the start of a truly national approach to the administration and enforcement of consumer laws. I thank my ministerial staff and the hardworking staff in the Office of Fair Trading for all their efforts in bringing this bill to the House. I commend the bill to the House.