

**NSW Government Response to the
Legislative Council Standing Committee on
Law and Justice Report on Unfair Terms in
Consumer Contracts**

April 2007



Introduction

On 28 August 2006 the Standing Committee on Law and Justice was referred terms of reference by the Minister for Commerce, requiring it to report on the incidence and impact of unfair terms in consumer contracts and the efficacy of specific purpose legislation implemented in other jurisdictions. The full terms of reference are:

That the Standing Committee on Law and Justice inquire into and report on the incidence and impact of unfair contract terms in consumer contracts for the supply of goods and services of a kind ordinarily acquired for personal, domestic or household use or consumption, in particular:

- (a) whether consumer contracts contain terms which cause a significant imbalance in the rights and obligations arising under a contract, to the detriment of the consumer, including the incidence of:
 - (i) terms which allow the supplier to unilaterally vary the price or characteristics of the goods or services without notice to the consumer;
 - (ii) terms which penalise the consumer but not the supplier when there is a breach of the agreement;
 - (iii) terms which allow a supplier to suspend services supplied under the contract while continuing to charge the consumer; or
 - (iv) terms which permit the supplier but not the consumer to terminate the contract.
- (b) whether the use of standard form contracts has increased the prevalence of the above terms in consumer contracts;
- (c) the remedies available under common law and statute with respect to the above terms in consumer contracts;
- (d) the effectiveness of specific purpose legislation such as the UK Unfair Terms in Consumer Contracts Regulations 1999 and the Victorian *Fair Trading Act 1999* (Part 2B – Unfair Terms in Consumer Contracts); and
- (e) any other relevant matter.

The Final Report was tabled in Parliament on 23 November 2006. The Committee makes five unanimous recommendations. The principal recommendation is in support of an amendment to the *Fair Trading Act 1987* to establish a scheme for the protection of consumers in relation to unfair terms in consumer contracts. The four remaining recommendations are conditional on the acceptance of the principal recommendation.

Response to Recommendations

Recommendation 1: That the NSW Government seek an amendment to the *Fair Trading Act 1987 (NSW)* to establish a scheme for the protection of consumers in relation to unfair terms in consumer contracts.

Response

The Office of Fair Trading has been asked to further examine the need for Government intervention to establish a scheme for the protection of consumers in relation to unfair terms in consumer contracts, having regard to the need to demonstrate that the benefits of any regulatory intervention will outweigh the costs and ensure that any legislation complies with the Government's National Competition Policy obligations.

The Government is mindful of the fact that under the current legal and regulatory framework in New South Wales, the common law, equity and various statutes provide some degree of protection and redress for consumers. In particular, the *Contracts Review Act 1980* permits a consumer to apply to a court or tribunal for relief in relation to an unjust consumer contract; section 43 of the *Fair Trading Act 1987* prohibits a supplier from engaging in unconscionable conduct in connection with the supply of goods and services in trade or commerce; and section 70 of the Uniform Consumer Credit Code provides a court or tribunal with the power to re-open a transaction where the credit contract, mortgage or guarantee is considered unjust in the circumstances relating to it at the time it was entered into or amended.

Recommendation 2: That the NSW Government model its amendment to the *Fair Trading Act 1987 (NSW)*, to establish a scheme for the protection of consumers in relation to unfair terms in consumer contracts, on Part 2B of the *Fair Trading Act 1999 (Vic)*.

Response

The Government's response to this recommendation is contingent upon the Government finding that regulatory action is required. In that regard, the Office of Fair Trading will assess the regulatory impact of Part 2B of the Victorian *Fair Trading Act 1999*.

Part 2B empowers individual consumers, the regulatory authority (in this case, the Director of Consumer Affairs) and the government to take action against unfair contract terms. Individual consumers who believe they have entered into a contract containing unfair terms can take civil action in a court or tribunal to void the unfair terms; the Director of Consumer Affairs can apply to the Victorian Civil and Administrative Tribunal for an injunction or declaration in respect of the use of unfair terms and the government, by regulation, can prescribe certain terms as unfair for the purposes of standard form contracts.

The Government notes that, should a need for further regulatory intervention in New South Wales be established, consideration of the approaches in other jurisdictions will be an essential component of best practice regulation. Modelling regulation on the

Victorian legislation would provide consistency of regulation in Australia's two biggest consumer markets.

Recommendation 3: That the NSW Government, when developing the amendment to establish a scheme for the protection of consumers in relation to unfair terms in consumer contracts, consult with the Victorian Government to draw upon its experiences in designing and implementing Part 2B of the *Fair Trading Act 1999* (Vic).

Response

The Government agrees that the Victorian Government should be consulted by the Office of Fair Trading as part of its examination of the need for further regulatory intervention.

Recommendation 4: That the NSW Government, when developing the amendment to establish a scheme for the protection of consumers in relation to unfair terms in consumer contracts, consider the views set out in this report regarding appropriate inclusions in the NSW scheme.

Response

The Government's response to this recommendation is contingent upon the Government finding that regulatory action is required. In that regard, the Office of Fair Trading will consider the views set out in the Committee's report when further examining the need for Government intervention.

The Government notes that in the Inquiry report, the Committee set out views on:

- Scope of the scheme, covering:
 - The benefits of a generic scheme as against an industry specific scheme
 - The inclusion of consumer credit contracts
 - The inclusion of small business as well as consumers;
- The definition of 'unfair terms';
- Role of the regulatory authority and implementation;
- Impact on business; and
- Other issues, namely
 - A statutory requirement that a particularly disadvantageous term be drawn to the consumer's attention
 - Development of model standard contracts
 - Complexity and length of contracts
 - Terms containing cancellation and penalty fees.

Recommendation 5: That the NSW Government, when developing the amendment to establish a scheme for the protection of consumers in relation to unfair terms in consumer contracts, create a taskforce within the NSW Office of Fair Trading to develop the scheme. The taskforce should include industry representatives as well as consumer representatives and other relevant stakeholders and experts.

Response

The Government's response to this recommendation is contingent upon the Government finding that regulatory action is required. In that regard, the Office of Fair Trading will consult industry and consumer representatives and other relevant stakeholders and experts when further examining the need for Government intervention.