

Redfern Legal Centre



Assistant Secretary
Business Law Branch
Attorney-General's Department
Robert Garran Offices
3-5 National Circuit
BARTON ACT 2600

Email: contractlaw@ag.gov.au

Attention: The Hon. Nicola Roxon MP

20 July 2012

Dear Attorney-General,

Re: Improving Australia's Law and Justice Framework: Review of Australian Contract Law

Thank you for the opportunity to provide comments on the March 2012 Discussion Paper to explore the scope for reforming Australian contract law.

Please find our Submission attached.

Yours faithfully,

Redfern Legal Centre

Jacqui Swinburne
Acting Chief Executive Officer

Redfern Legal Centre



SUBMISSION:

In response to the Discussion Paper – to explore the scope for reforming Australian contract law.

AUTHOR: Elizabeth Morley, Megan Cameron and Natalie Ross

DATE: 19 July 2012

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1. Introduction: Redfern Legal Centre

Redfern Legal Centre (RLC) is an independent, non-profit, community-based legal organisation with a prominent profile in the Redfern area.

RLC has a particular focus on human rights and social justice. Our specialist areas of work are domestic violence, tenancy, credit and debt, employment, discrimination and complaints about police and other governmental agencies. By working collaboratively with key partners, RLC specialist lawyers and advocates provide free advice, conduct case work, deliver community legal education and write publications and submissions. RLC works towards reforming our legal system for the benefit of the community.

2. RLC's work in Contract Law

Redfern Legal Centre provides specialist legal services in the areas of discrimination, credit and debt, employment, international students, police powers, domestic violence, and tenancy. In addition to these specialist services, Redfern Legal Centre provides advice and assistance in other areas of law when a person is considered to be vulnerable or disadvantaged.

It is self evident that most of our specialist areas involve the application of contract law. Many credit and debt problems arise from the terms and application of a contract between a lender and borrower for instance. Tenancy arrangements will almost always contain contractual terms between a landlord and tenant. Working conditions and the terms of employment are contained in an employment contract.

3. RLC's view in summary

Changes to contract law as a whole would have a significant impact on our client group. Any discussion of contract reform to make it easier for business causes concern that the reforms will result in consumer protections and standards to be lowered.

The legislative reforms resulting in the *Australian Consumer Law*, the *National Consumer Credit Protection Act 2009* and the 2011 amendments to the *Australian Securities and Investments Commission Act 2001* illustrate how complex changing the law around consumer transactions can be.

Any proposals that do not take into account the realities of the market place, point of sale conduct and the imbalance of information between the trader and consumer, and between other contracting parties, will fail consumers and vulnerable individuals. Any efficiencies for business, which may otherwise result in lower costs and prices, will be outweighed by the adverse outcomes for consumers and vulnerable individuals. This is particularly so for the disadvantaged and vulnerable consumers for whom the impact is not merely a poor choice from which to learn.

It is not clear from the *Discussion Paper - to explore the scope for reforming Australian*

contract law (Discussion Paper) to what extent it is anticipated any reforms will also affect existing laws such as the *Residential Tenancies Act NSW 2010* and the *consumer protection laws referred to above*.

4. RLC's general comments

Contract law affects almost all commercial transactions. Without more detailed information of the possible proposed changes and amendments to the area of contract law, it is difficult for Redfern Legal Centre to comment specifically on the impact of legislative reform to contract law as it applies to our clients. Closer inspection of the detail of changes would need to be achieved before we could anticipate the potential consequences of these changes for our clients.

We have not sought to answer the questions as formulated but merely to draw attention to the experience of consumers and vulnerable individuals in contractual dealings and the challenges they face in enforcing their rights. Again we have not sought to address every situation but to illustrate some themes.

Often the problem for consumers in dealing with contracts for goods and services is the conduct and context of the sale. The contract will bear little resemblance to what the consumer was given to understand. In our practice we see instances where consumers are:

- Taken advantage of,
- Do not know what terms and conditions they are signed up for,
- Do not have bargaining power, or
- Are sold inadequate products, and so on.

An example of the lengths to which business will go to is the practices of payday lenders, apparently seeking to avoid the cap on interest allowed on such a loan. One practice that has arisen is the lender requiring the consumer to buy a DVD about managing their money. The DVD may cost as much again as the amount of the loan. The cost of the DVD purchase is added to the amount of the loan to which the capped interest then applies. Should the person return to borrow again the same DVD must be purchased again. Payday borrowers by definition are people with such constraints on their income that they cannot afford to pay outright or by a serviced credit card. Put simply, these are people already at desperation point.

Direct marketing practices also continue to be highly questionable even where done on the part of reputable companies. Direct marketing works because consumers are caught off guard and are not in a position to do a comparative analysis of the product. It also plays strongly on the innate courtesy and hospitality of consumers. Our experience in this area includes:

- Marketers who remain in the client's home or on the telephone until the consumer agrees to the deal. One of our clients took the view that the only way to get the electricity company representative out of his unit was to say yes.
- Another client who reported similar behaviour by a maths tutoring program marketer.

- One of our workers reported an energy salesperson stepping forward in a manner that she would be expected to step back and let him into her house. This was without invitation. As knowledgeable as she is, she felt intimidated.
- Clients who report marketers that actively disguise the true identity of the company behind the marketing,
- Marketers who aggressively challenge the client who does not want to hear them, and
- Most seriously, clients have reported instances in which the marketer provides information about the benefits and terms of the contract that subsequently turn out to be incorrect or insufficient.

Outright scams appear to be on the increase with the use of electronic communication. These scams range from the widely distributed mobile phone and email wins and offers, to the more targeted deals. For example, some of our clients were caught up in a scam of cheap airfares for international students. In that instance, some transactions proceeded as expected until word-of-mouth referral brought in more customers. Later consumers found that the tickets had been cancelled and the money taken. As in that case remedies under law are of little use as the scammers cannot readily be identified, are not within the jurisdiction and, if found, often have no money to compensate victims. Either vulnerable consumers continue to be caught up in these scams, or their lack of trust in internet dealings undermines reputable commercial activities on-line. Neither is economically desirable.

Security of identity and personal information is an issue. Consumers simply do not have the time and resources to constantly update their technology and electronic communication usage to protect their identity and personal information from determined unwanted access and use, whether for commercial or illegal purposes.

In everyday dealings contracts may often be unwritten, for instance the purchase of fruit and vegetables from the greengrocer. Where a written contract exists it will mostly be a standard form contract prepared for the maximum benefit of the business and without regard to ensuring the consumer's beneficial outcome from the dealing.

At point of sale, whether the parties are physically present or dealing by telephone or by internet, the consumer has no real opportunity to read often long and complex terms and conditions. This can be the case even if the contract is in the law of (for us) New South Wales, the consumer speaks English fluently, and the consumer has good functional literacy. There is no scope to negotiate those terms even if the consumer understands the terms or has an idea about how to frame alternative ones. In a number of areas such as motor vehicle insurance, credit contracts or residential tenancies, it has been accepted that there is need to have regulated contracts and/or limitations on the ability to contract out of certain contractual terms in order to protect consumers.

Consumer contracts are not the only contracts which our clients enter into. Redfern Legal Centre gives a lot of advice in relation to employment contracts. Such contracts are governed by the common law of contract, as well as the more specialist common law of employment, and also various statutes (most significantly the *Fair Work Act 2009*). There

are real challenges in determining the explicit, implicit, and statutory terms and conditions which apply to any given employment contract. It is our overwhelming experience that workers (both employees and nominally independent contractors) do not have the bargaining power to negotiate the terms of their employment contract with their employer. In some rare cases the worker may be able to negotiate some terms (such as their level of pay), but employment contracts are never negotiated as between equal parties. It would be most disadvantageous if the law were to presume that a worker who had entered into a contract had done so after a robust and equitable negotiation of the terms and conditions of their employment. It is our submission that the law of contract ought to recognise the inherent vulnerability of workers when negotiating and performing employment contracts.

Complaint resolution is often difficult. The days when a trader dealt responsibly in the market place because the consumer would not buy from their stall next market day are long gone. Large corporations operate through call centres, often not local, and where the operators work from scripts and have little scope for flexible and sensitive dispute resolution. Problems also involve long waits on the telephone and dealing with different people each time. Being able to, for instance, escalate the complaint to an ombudsman scheme, will raise the complaint process to a level within the corporation where someone more skilled and responsive will engage with the dispute.

The costs of enforcing contractual terms through litigation are a significant factor in the market place meeting consumer needs. Equitable and statutory remedies are available for an aggrieved party. However, the high cost of litigation to obtain these remedies means that they are largely not available to disadvantaged or vulnerable people in the community. The inability to achieve effective remedies can have ongoing personal and financial consequences. In light of this, our clients benefit from alternative dispute resolution processes such as the Financial Ombudsman Service and the Telecommunications Industry Ombudsman. While industry specific ombudsman schemes have their own issues to be monitored, they have been of significant advantage to our clients in getting some resolution of disputes arising from consumer contracts.

A report published this month by Community Law Australia titled '*Unaffordable and Out of reach: The problem of access to the Australian Legal System*' supports this view.¹ The report has discussed that over the years, simplicity of Australian laws and accessibility to legal remedy has been at the forefront of proposed reforms, yet this has not eventuated.

The law in relation to formation of contracts, the enforcement of them, the remedies available where the contracts or the circumstances are unjust, and the enforcement of contracts, is complex, but this might be seen to be for good reason. Each time a set of rules to regulate behaviour is put in place, it is found that unscrupulous dealers will use these rules to the disadvantage of those they seek to exploit. In more innocent situations, the rules can still operate harshly. For instance, in the process of negotiation the parties may have recorded some things in writing but not all encompassing terms. The common law, equity, and consumer protection legislation, all attempt to provide mechanisms, to balance certainty and rules, with safety valves where those rules themselves become

¹ Community Law Australia, *Unaffordable and Out of reach: The problem of access to the Australian Legal System*, July 2012, pp4.

unjust.

The question of codification of the law of contract has been raised. Academic analysis into the codification of contract law suggests that contract laws that purport to be just and fair have no meaning if they are not accessible.² Careful consideration would need to be given to whether this would in fact assist or merely itself become part of the problem in achieving an adequately safe market for consumers.

This enquiry is focused on efficiencies for business. The enquiry needs to also keep in the mind the efficiencies for consumers, who enter into new contracts on a daily basis, do not travel with a contract lawyer standing by their side, and also need to have time for their employment and their family life.

Redfern Legal Centre notes that any discussion about improving Australia's law and justice framework in relation to contracts will require careful consideration of the detail of any proposed changes and hence further consultation. Contract law affects the daily activities of most people, and therefore any changes to contract law are far reaching. Any contemplated reforms to contract law would need to take into consideration the impact of these changes on domestic consumers, and in particular the effect of these changes on disadvantaged members of the community.

² Svantesson, D. (2008) 'Codifying Australia's Contract Law - Time for a Stocktake in the Common Law Factory', *Bond Law Review*, Vol. 20, Iss. 2. Article 5, pp6.