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Brambles

31 July 2009

The Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600
By email: economics.sen@aph.gov.au

Dear Sir/Madam

Brambles Limited ("**Brambles**") welcomes the opportunity to make this submission to the Senate Economics Legislation Committee ("**Committee**") in relation to its inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill 2009 ("**Proposed Bill**"). Brambles has previously made a submission in relation to the Exposure Draft on 22 May 2009.

Brambles is a leading global provider of supply chain and information management solutions with operations in over 45 countries and employing over 12,000 people. Brambles is listed on the Australian Stock Exchange with a secondary listing on the London Stock Exchange, and its global headquarters is located in Sydney, Australia. Brambles' businesses are:

- CHEP, the global leader in pallet and container pooling services; and
- Recall, a global leader in the management of information throughout its life cycle.

In Australia, CHEP has more than 1,000 employees and over 11,900 active customer accounts. Recall's Australian business has more than 600 employees and over 17,000 customers. Virtually all of CHEP's and Recall's customers are businesses.

1 SUMMARY OF SUBMISSION

Brambles supports the introduction of a more effective and nationally consistent consumer policy framework. Brambles welcomes the improvements that have been made to the proposed unfair terms regime by limiting the application of the regime to "consumer contracts" and by excluding "business to business" ("**BTB**") standard form agreements from its scope. This element of the Proposed Bill marks a commercially and economically sensible policy shift from the terms of the Exposure Draft released in May 2009 which proposed that all contracts, including BTB contracts, would be subject to the proposed unfair terms regime. This shift avoids significant adverse implications such as uncertainty in commercial transactions, increasing risk and costs to business and, ultimately, higher costs to consumers. It is also consistent with the Productivity Commission's recommendations and consistent with the unfair contract terms regimes of other jurisdictions, including many of Australia's trading partners. Finally, the changes highlight the importance of a robust public consultation process for achieving improved policy outcomes.

Brambles is aware of the current lobbying efforts by small business to have the unfair terms regime apply to protect small business in BTB transactions, and is of the view that the Proposed Bill should not be amended to apply to small businesses. As stated in our previous submission, the existing laws, including the implied terms provisions and the unconscionable conduct provisions, provide sufficient protection to small businesses.

Moreover, Brambles remains concerned about a number of elements of the Proposed Bill and hopes that these concerns will be addressed through Parliament's response to further public consultation. These concerns relate to:

- the unclear drafting of some terms in the Proposed Bill;
- the intended commencement date of 1 January 2010 for the proposed unfair terms regime; and
- the wide enforcement powers given to the Australian Competition and Consumer Commission ("**ACCC**") and the Australian Securities and Investment Commission ("**ASIC**").

2 DRAFTING ISSUES

As set forth in Brambles' previous submission, we are concerned that many provisions of the Proposed Bill relating to unfair contract terms are unclear and that this will lead to uncertainty and confusion in the scope and application of the regime for consumers, businesses and regulators alike.

2.1 Standard form contracts

The unfair terms regime under the Proposed Bill is expressed as applying to all consumer "standard form contracts", although this term is not defined. There are many instances in which it will be very difficult to determine whether a particular contract is a "standard form" -- and therefore captured by the regime -- particularly where some, but not all, of the terms of a contract have been subject to negotiation. The presumption that every contract is a standard form contract unless proven otherwise places an unduly low threshold for bringing a claim and is likely to result in a significant number of unmeritorious or frivolous claims. At the same time, the presumption places a heavy burden on commercial parties seeking to simply uphold or enforce terms agreed to by the parties.

In our view, the "standard form contract" presumption should be removed and replaced with a series of non-exhaustive factors that a Court may consider in determining if an agreement is in fact a "standard form contract".

2.2 Test for unfairness

The test for unfairness recommended by the Productivity Commission and the Ministerial Council on Consumer Affairs, as agreed by the Council of Australian Governments, provided that a term in a standard form non-negotiated contract will only be unfair if (amongst other things) it causes material detriment or there is a substantial likelihood of material detriment.

Although the Proposed Bill requires a court to take into account "the extent to which it would cause, or there is a substantial likelihood that it would cause, detriment" when determining whether a term of a standard form contract is unfair, this is not a substitute for the element of detriment being part of the definition itself. In addition, there is no materiality threshold in the proposed definition of an unfair contract term. Absent a "materiality" threshold, unmeritorious or frivolous claims are again likely by parties seeking to avoid agreed terms.

Moreover, a term will only be unfair if it is not reasonably necessary to protect the legitimate interests of a party. The phrase "legitimate interest" is unclear at law. Brambles is also concerned about the intention expressed in the Explanatory Memorandum to the Proposed Bill which indicates that a business would need to show that its legitimate interest is "sufficiently compelling" on the balance of probabilities to overcome *any* detriment caused to consumers. This high threshold is of particular concern given the presumption that a term is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term, unless that party can prove otherwise. There is a need for guidance about what factors would be considered "legitimate interests" of a party.

2.3 Upfront Price

Brambles agrees that the Proposed Bill should exclude "upfront price" from any consideration of what constitutes an unfair term. Brambles remains of the view that if fees and charges are disclosed to the customer at the time of contracting, whether or not they are contingent on the occurrence or non occurrence of a subsequent event, and the customer still agrees to proceed with the transaction, there is no justification for a customer to subsequently change their mind and be able to challenge those fees or charges as "unfair". In Brambles' view, it is simply not appropriate for a court or tribunal to decide what monetary consideration is "fair" or "unfair" in relation to any transaction.

2.4 Uncertain application

According to the Proposed Bill, the unfair terms provisions will apply not only to new standard form consumer contracts entered into on and from the 1 January 2010 commencement date, but also to contracts that are renewed or varied after the commencement date. Brambles is concerned about the Proposed Bill's application to contracts entered into before the commencement date. In particular, it is not clear how the Proposed Bill will apply to contracts entered into *before* the commencement date but which contain an automatic renewal right having effect *after* the commencement date. Brambles is also concerned that the regime will apply to the entirety of a contract varied after the commencement date.

Brambles contends that the Proposed Bill should be clarified to make clear that the unfair terms regime does not apply to an automatic renewal of a contract by virtue of a term of that contract agreed to by the parties before the commencement date. In addition, we believe that where a term of a standard form consumer contract is varied after the commencement date, the unfair terms regime should apply only to the clause that has been so varied.

3 COMMENCEMENT DATE

The Explanatory Memorandum to the Proposed Bill states that the Government intends that the Bill commence on 1 January 2010. This timeframe is unreasonable given that businesses still do not know what the final form of the new unfair terms regime will be. Given that the Committee is to report back on 7 September 2009 (which is less than four months before the intended commencement date) and the potential for continued debate on the precise terms of the Proposed Bill after the Committee has returned its report, companies will not have sufficient time to take the requisite steps to prepare and ensure their organisations are ready to comply with the new law on and from the commencement date.

Brambles is of the view that at least six months is required after the date the Bill is passed to allow businesses to educate and train staff and put in place the necessary compliance requirements.

4 NEW ENFORCEMENT POWERS

In addition to issues specifically related to the unfair terms aspects of the Proposed Bill, Brambles is concerned about the suite of new enforcement tools that will be available to the ACCC and ASIC under the Proposed Bill. These include:

- civil pecuniary penalties and disqualification orders;
- substantiation notices;
- public warning powers;
- infringement notices; and
- non party redress.

Brambles believes that these new powers will greatly increase the regulatory burden on companies, including their compliance costs. The new powers provide nearly unfettered discretion to the regulators, putting businesses at substantial risk and adversely impacting the Australian economic landscape at a time when this can least be afforded.

Notably, after extensive investigation and consultation, the Productivity Commission was not supportive of many of the new enforcement powers (such as public warning powers) which are in the Proposed Bill.

4.1 Civil pecuniary penalties and disqualification orders

The Proposed Bill creates new civil pecuniary penalties. Brambles understands that the civil pecuniary penalties are intended to apply to those consumer protection provisions that attract criminal sanctions. At present, no criminal sanctions apply to unconscionable conduct under the Trade Practices Act and none are intended to apply. This is sensible given that the circumstances in which conduct may be considered unconscionable is far from clear. Nonetheless, the Proposed Bill introduces civil pecuniary penalties for breach of the unconscionable conduct provisions. In our view, this is inconsistent with the stated policy for the introduction of civil pecuniary penalties.

For similar reasons, Brambles considers it inappropriate for disqualification orders to apply to contraventions of the unconscionable conduct provisions. The reputational effects and impact on an individual's ability to earn a living that can result from disqualification orders are serious. Brambles believes that disqualification orders should not apply to claims of unconscionable conduct which often involve issues upon which reasonable minds may justifiably differ.

4.2 Substantiation notices

Brambles believes that the new power given to regulators to issue substantiation notices is one of the most potentially damaging for businesses in the Proposed Bill. This new power is unnecessary given the current significant information gathering powers of the regulators.

The power granted is a very broad one, enabling the ACCC or ASIC to issue a substantiation notice "if a person makes claims or representations promoting or apparently intended to promote" goods or services. There is no requirement for the regulator to have any basis for believing that a business is breaching or has breached the law: a regulator will be able to issue a substantiation notice if they are simply unaware of the basis on which claims are made. Once a substantiation notice has been issued, civil pecuniary penalties and infringement notices, as well as public warning notices, may apply to businesses which do not comply with the notice.

This broad power to issue substantiation notices will allow the regulators to embark on fishing expeditions at a high financial and reputational cost to business. Not only will the cost of complying with substantiation notices have adverse impact across the Australian economy, but businesses who have been issued with substantiation notices may, by that very fact, have their reputations damaged when *there are no reasonable grounds for believing that they have engaged in unlawful conduct*.

This is an unpalatable prospect, especially given that the regulators already have significant investigatory tools at their disposal under the current law. These include, for the ACCC, the power to issue notices under section 155, with several hundred of these having been issued in recent years. If the Government considers the power to issue substantiation notices to be necessary, then Brambles submits that such power should only be exercised if the regulator has reasonable grounds to believe a contravention has occurred.

The Proposed Bill also fails to address which documents must be provided in response to a substantiation notice - for example, would documents subject to legal professional privilege be required to be produced?

4.3 Public Warning Powers

Brambles believes that the power to issue public warning notices is, like the power to issue substantiation notices, unnecessary given that regulators already have the ability to make investigations public under current legislation. Each time the ACCC commences action, or agrees an administrative remedy, media releases are made and usually attract much publicity, as well as published section 87B undertakings and other orders. It is also the case that regulators have taken a variety of steps to provide early warnings to consumers, including

SCAM Watch, CAV's "Dob-in-a-Scam" and the Australian Consumer Fraud Taskforce. Such schemes effectively warn the public of suspected breaches of the Trade Practices Act and conduct which could harm consumers.

Although it has been suggested in the Second Reading Speech for the Proposed Bill that the ACCC and ASIC are not immune from defamation actions, and that this will act as a potential constraint on the use of public warning notices by these regulators, defamation actions cannot be brought by corporations with ten or more employees. Accordingly, there is little to deter a regulator from using this power.

Brambles is also concerned that the failure to comply with a substantiation notice is a trigger event for the power to issue a public warning notice. As we have noted, no reasonable grounds are required for the ACCC to issue a substantiation notice. Allowing the ACCC to issue a public warning notice on the back of a failure to comply with a substantiation notice (which does not require reasonable grounds that a contravention has occurred) is a very significant and inappropriate power, and runs a very real risk of regulator error.

If it is decided that such powers are warranted, it is important that the power only be exercised where the regulator has reasonable cause to believe a breach has been committed, rather than giving the regulator power to issue the warning where they merely "suspect" a breach.

4.4 Infringement notices

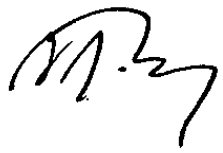
Brambles also has a number of concerns about the proposed infringement notice power. This power is very wide and has been extended to provisions of the Trade Practices Act that have little useful precedent or no precedent at all to guide the regulator's decisions (e.g. the new section 53C). If it is determined that this power is justified, the power should be limited to minor breaches to accord with the rationale for the power as stated by Minister Emerson in the Second Reading Speech.

4.5 Non party redress

Brambles does not support the provisions in the Proposed Bill relating to non party redress. A provision that allows regulators to take actions on behalf of consumers, whether identified or not, is unnecessary and inappropriate. Brambles considers that the current procedures for representative actions are adequate. In particular, there is a danger that consumers who otherwise would not be able to make out the elements for recovery (e.g. where they have not relied upon any misleading representation) will be entitled to the benefit of any proposed orders made by a court.

In addition to the matters set forth in this submission, Brambles would be happy to discuss with the Committee the specific impact of the Proposed Bill as they specifically apply to Brambles and its business model. Please do not hesitate to contact me at (02) 9256 5252 or by e-mail at sean.murphy@brambles.com if you have any questions or would like to set up a meeting to discuss this submission.

Yours sincerely



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