Compliance with these standards requires an IDS operator to:

- maintain the IDS in a fair and efficient manner, which includes:
  - (i) having the ability to identify people making or altering postings, and withdrawing posting rights if necessary;
  - (ii) having the ability to review content in postings on a regular basis, and removing any postings that are illegal or likely to be misleading or deceptive; and
  - (iii) displaying warnings that postings will be archived for at least 2 years, that copies of postings may be provided to the ASIC, and that serious penalties apply for posting material that is misleading or deceptive;
- have good record-keeping practices, which includes keeping records of:
  - (i) information about the identity of people making or altering the postings for at least 2 years; and
  - (ii) actual postings and session information for at least 2 years; and
- display appropriate warnings and disclosures, which include:
  - (i) for IDS operators which do not require an AFS licence: a warning to users that the IDS operator does not endorse or vouch for the accuracy or authenticity of the postings on the site and that readers should not rely on advice contained in the postings alone; and
  - (ii) for IDS operators which do require an AFS licence: an additional warning to users that any advice given is general advice only, and that the advice does not take into account the user's personal circumstances.

CP104 sends a clear message that ASIC intends to regulate the provision of financial product advice through social media and the self-publishing capabilities of the internet

What do the proposals mean for IDS operators?

CP104 sends a clear message that ASIC intends to regulate the provision of financial product advice through social media and the self-publishing capabilities of the internet in the same way it regulates other means of giving advice.

Under the proposed reforms, current unlicensed operators of an IDS will need to check whether they:

- fall into any of the exemptions; or
- are required to obtain an AFS licence in order to continue to operate the IDS.

In any case, all IDS operators, whether licensed or unlicensed, will need to ensure that they comply with the new minimum standards set out in CP104.

ASIC is currently seeking the views of IDS operators and users on the proposals. Submissions on the proposals closed on 27 April 2009.

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(Endnotes)

1 Australian Securities & Investment Commission, March 2009, Consultation Paper 104: Internet discussion sites, page 6.

Government Focuses on Consumer Law Changes

Nick Abrahams and Kylie Howard provide an update on recent proposals to reform Australian Consumer Protection Laws.

February and March has been busy reading for those interested and affected by consumer protection law – and ultimately, that is everyone. Not all of us sell products and services to the consumer market however, all of us at some point, are consumers. As to whether the changes are good or bad, it really depends on which hat you are wearing – one thing is for sure, there are likely to be some noticeable changes to the current state of play.

On 17 February 2009, the Minister for Competition Policy & Consumer Affairs released an information and consultation paper, *An Australian Consumer Law: Fair market – Confident consumers.* Only two weeks later, the Minister announced a review of the adequacy of statutory conditions and warranties. This article will provide an update on both of these initiatives and help you make an assessment on how these changes might impact you.

Australian Consumer Law – Reforms and Consultation Paper

The information and consultation paper, *An Australian Consumer Law: Fair market – Confident consumers* (**Consultation Paper**) is a step toward the reform process to develop a new national consumer law for Australia. The Consultation Paper, prepared by the Standing Committee of Officials of Consumer Affairs, shares the Council of Australian Governments' agreed consumer reforms and seeks to obtain public and stakeholder comment on further suggestions for reform (however, the deadline for responses was by 17 March 2009). The Minister is looking to fast track these amendments with legislation to go before Parliament mid-year and be in operation by 1 January 2010.

There are some key themes in the Consultation Paper – enhancing consumer protection, reducing regulatory complexity and having a consistent national approach to facilitate a seamless national economy. The key components of the framework involve a new national consumer law, to be called the *Australian Consumer Law*, based on the existing consumer protection provisions of the *Trade Practices Act* (**TPA**). In addition, there will be some new consumer laws including:

- a new national product safety regulatory system;
- provisions which regulate unfair terms in consumer contracts; and
- new penalties, enforcement powers and redress options for consumers (ultimately, what every supplier *doesn't* want to hear).

There are strong reasons to have a national approach to consumer protection in Australia. The obvious reason is to ensure a consistent approach for both suppliers and consumers. Many organisations that supply consumer products and services, supply to consumers nationally and this is an increasing trend. It can become a logistical nightmare to manage different regimes in different states, not to mention the compliance costs associated. In

it is likely that there will be uncertainty on what is and is not an unfair contract term

addition, there is no rational explanation for why consumers are offered different levels of protection just because they live in a certain state or territory.

Unfair contract terms can be quite common, particularly in standard form contracts (often made available to customers through click-wrap agreements). Customers simply click "I accept" and are not provided with the opportunity to negotiate the terms. Given that standard form contracts are prevalent in the information, communications and technology industry, these reforms should be of particular interest to this space.

According to the Council of Australian Governments (**COAG**), an "unfair contract term" is one which causes significant imbalance in parties' rights and obligations arising under a contract and are not reasonably necessary to protect the legitimate business interests of the supplier. In getting up to speed on this change, it will be important for organisations to assess the meaning of an "unfair contract term" – the Consultation Paper provides some examples but in practice, it is likely that there will be uncertainty on what is and is not an unfair contract term. Some examples that have been provided in the Consultation Paper include:

- clauses which permit the supplier to unilaterally vary the terms of the contract;
- clauses that prevent the consumer from cancelling the terms of the contract;
- clauses that require the payment of fees when the service is not being provided;
- clauses that permit the supplier to change the price of goods or services contracted for without allowing the consumer to terminate the contract;
- clauses that deem something as a fact or that something will be a fact, such as acknowledgement that certain information has been provided to the consumer prior to the agreement being made, regardless of whether or not it was.

Despite these examples being given, organisations supplying to consumers will need to make a judgement call on whether terms would be considered as "unfair contract terms". The Consultation Paper recognises that in determining whether a term is an "unfair contract term", all of the circumstances of the contract are to be considered, taking into account the broader interest of consumers as well as particular consumers affected. One thing is for sure - it won't always be black and white and it is likely that suppliers will be prepared to take on some risk. Reviewing and amending contracts (as well as forming a risk analysis as to which terms could be considered as "unfair contract terms") is likely to be a timeline exercise – as we all know, time is money. But that initial spend might just keep you out of trouble, particularly given the enhanced enforcement powers proposed in the Consultation Paper.

The good news for suppliers (well, at least in comparison to the potential compliance costs), is that COAG proposes that remedies will only be available where the claimant (an individual or a class) shows detriment to the consumer (individually or as a class) or a substantial likelihood of detriment, not limited to financial detriment. This means that more than a theoretical case of potential detriment would need to be made out. It seems that there is a difference between potential detriment, substantial likelihood of detriment and actual detriment – the first two categories of detriment (potential and substantial likelihood) may be a shade of grey that suppliers have to work through to really understand risk of including particular clauses in their agreements. In addition, the provisions on "unfair contract terms" will only relate to standard form, non-negotiated contracts. If a supplier alleges that the contract at issue is not a standard form contract, then the onus will be on the supplier to prove that it is not. There is some guidance in the Consultation Paper as to what is a standard form contract.

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Review of Statutory Conditions and Warranties

In addition to the release of the Consultation Paper, the Minister announced that The Commonwealth Consumer Affairs Advisory Council (**CCAAC**) will review the adequacy of existing laws on conditions and warranties that are implied into consumer contracts under the TPA.

It seems the review has been brought about because of concerns that:

- suppliers are misleading consumers in their terms and conditions as to what the consumers' entitlements are under law; and
- the rise in the "extended warranty" business has led to some retailers charging consumers for "extended warranties" that offer no more than what the consumer has under the TPA anyway. Let us ask you - did you agree to purchase an extended warranty on that new plasma you just bought? If yes, perhaps this initiative will help you save a bit of cash next time – something to put towards the upgraded model.

The TPA implies into contracts for the supply of goods and services to consumers certain conditions and warranties. Some of these implied terms are non-excludable and others are non-excludable but are able to be limited. Some examples are:

In relation to goods:

- an implied condition that goods supplied by description will correspond with the description;
- an implied condition that the goods are of merchantable quality; and
- an implied condition that, where the purpose for which the goods are being acquired is made known to the corporation, the goods are reasonably fit for that purpose.

In relation to services:

- an implied warranty that the services will be rendered with due care and skill; and
- an implied warranty that, where the purpose for which the services are required is made known to the corporation, the services supplied and any material supplied in connection with those services will be reasonably fit for that purpose.

CCAAC will review the adequacy of the current laws and determine whether there is a need for any amendments and, more generally, it will consider how the operation of the statutory implied terms can be improved. CCAAC will also consider if there is a need in Australia for 'lemon laws' in order to protect consumers against goods that repeatedly fail to meet expected standards in relation to performance and quality. These laws could apply to specific goods such as motor vehicles.

CCAAC is set to consult with specific industry stakeholders and is scheduled to provide its report to the Minister by 31 July 2009.

Conclusion

It seems that change is well on its way with various proposals and reviews which are likely to significantly change consumer protection law in Australia. Our main comment is that suppliers of products and services should stay on top of these changes – we think this will be a real focus, which is in line with the proposed enhancement of enforcement powers. It may take some initial investment of time and money at first, but we say, better than the wooden spoon.

Nick Abrahams is a Partner and Sydney Chairman and Kylie Howard a Senior Associate at Deacons in Sydney