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SCOCA Australian Consumer Law Consultation
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Dear Sir/Madam,

An Australian Consumer Law: Fair Markets - Confident consumers

The strong view of the Australian Bankers' Association (ABA) is that the Government Consultation Paper in proposing an unfair contract terms regime for Australia presents a deeply flawed proposal which will: reduce the amount of capital for banks to lend, increase the costs of borrowing for consumers and increase (literally) the amount of paperwork that that customers will have to deal with. This is precisely the sort of legislation that Australia does not need in these difficult economic times.

The Australian Bankers' Association (ABA) is the peak national body representing banks authorised by the Australian Prudential Regulation Authority to carry on banking business in Australia.

The ABA's members are generally nationally operating financial institutions and support the principle for nationally consistent laws to apply to their activities. Support for the principle of national consistency does not mean support for poor nationally consistent laws.

The ABA's focus in this submission is primarily with Chapter 6 of the Consultation Paper concerned with unfair contract terms.

This submission will cover this and other more technical aspects of the Consultation Paper.

In passing we observe the very limited time frame, one month from the public release of the Consultation Paper to provide a response on some very difficult questions raised in the Consultation Paper, for example, the request for views on the current effectiveness of the provisions of the TPA that concern consumer

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protection issues. Further, with the prospect that there may be no further opportunity to review the proposals that are to be accelerated into legislation within a matter of several months for now, before they are introduced into the Parliament the timing is very short indeed, bordering on unreasonably short.

1. PART 1

1.1 Chapters 1 – 4 Comments on the Regulatory Objective and Regulatory Model

The Consultation Paper describes the principal objective for the Australian Consumer Law (Law) in terms of the PC's¹ desire to see national consistency in consumer protection laws which the PC described as in a number of respects "sound" but in need of "significant improvements to overcome existing inconsistencies, gaps and duplication in content and enforcement.

On the other hand the proposed Law is seen by the Minister as delivering a "truly world class" Law.

The ABA is cautious of an objective to establish a world class system of consumer protection as it is not clear that this Law is intended to compete with other countries' consumer protection laws. Overly onerous consumer protection laws could be potential disincentives for new entrants into the Australian consumer market with a resulting impact on competition that would need to be considered but this is not addressed in the Consultation Paper. The entire focus on the Law is to be on increasing consumer confidence in Australian markets.

It is proposed the Law based on the application of laws model will replace a patchwork of inconsistent State and Territory consumer protection laws. This is supported. So too we support that the Law cannot be changed without agreement of all jurisdictions. However, this is no guarantee that national consistency will be preserved. This is clear from page 25 of the Consultation Paper where it states that States and Territories will retain their FTAs which regulate sector-specific issues and that these will remain part of the laws of the States and Territories. Despite the promise of a COAG review of these laws there remains the risk of significant disuniformity in consumer protection laws.

Experience with the Uniform Consumer Credit Laws Agreement in relation to the development of the UCCC is an example where some jurisdictions used other laws that impacted on what was intended to be nationally consistent consumer credit law. Two examples are the 2002 amendments to the ACT FTA relating to credit card facilities that the PC made special mention of in its report and the current Bill to amend the Victorian FTA to extend its unfair contract terms provisions to consumer credit contracts. In the latter case the Commonwealth Government considered it was powerless to act to avert this breach in the national consistency of consumer credit laws even though the Bill would precede the development of the Law dealing with the very same matter.

¹ In this submission the ABA adopts the acronyms used in the Consultation Paper without further explanation

The application of laws model also opens up the potential for inconsistent application of the Law because individual States and Territory regulators will retain a regulatory role that is likely to lead to a dilution of the objective of national consistency.

Further, not only is consumer credit law currently under reform but also Chapter 7 of the Corporations Act is under continuing review. Both the Code of banking Practice and ASIC's Electronic Funds Transfer Code of Conduct (EFT Code) are under review. It is unclear how the Law will remain consistent with the provisions of these provisions in the financial services sector and to what extent the Law will override and potentially make redundant certain of their provisions.

The ABA believes a single national Commonwealth law as originally proposed and is proposed for the regulation of consumer credit is preferable with a single national regulator for financial services and another for non-financial services.

With respect to the effectiveness of the consumer protection provisions of the TPA, the ABA would expect to see widespread agreement that the provisions of section 52 and other provisions dealing with specific forms of deceptive or misleading practices have been very effective. Member banks view the TPA as an effective consumer protection law over many years and have taken steps to ensure that their staff are trained sufficiently in those matters.

Further there have been successive enlargements of the unconscionable provisions beyond what exists under the common law first in relation to consumers and then small business. These provisions have been replicated in the ASIC Act relating to financial services. The monetary limits on the application of these provisions have recently been trebled to \$10m.

1.2 Chapter 5 – Re-naming the TPA

The proposal to re-name the TPA is appealing in theory but in practice will mean that every contract or other document that a bank or other organisation has produced or training program that refers to the TPA will have to be amended to refer to the new title to the Act. The cost and magnitude of doing this would be substantial.

There should be scope for transitional provisions to permit documents to be updated as they are reviewed in the normal course of an organisation's need to update documents to deal with other regulatory changes. Documents include internal training course materials, brochures for staff and the public and bank policies. The task of re-naming the legislation in documents will be very substantial.

Please note the comment under 1.1 on the potential for continued inconsistency in consumer protection laws arising from the retention by the States and Territories of sector specific laws.

2. PART II

2.1 Chapter 6 – Unfair Contract Terms

The ABA's primary submission is that the proposed unfair contract terms regime should not apply to credit contracts regulated under the Consumer Credit Code (UCCC) or under the Commonwealth law that will replace the UCCC and to credit contracts for business purposes. Credit contracts include documents that secure the performance of credit contracts. The basis for this submission is that the proposed regime would:

- (1) duplicate the coverage of the UCCC in many instances;
- (2) increase legal risk for banks with consequential capital adequacy implications;
- (3) create uncertainty in revenue streams for banks with consequential capital adequacy implications;
- (4) potentially disadvantage consumers; and
- (5) impose unnecessary costs and uncertainty for banks.

These factors emerge from the comments the ABA makes in response to this section of the Consultation Paper.

The Minister's decision to accelerate these proposed laws as a *fait accompli* decision is of serious concern to the ABA and its members.

There was no prior consultation with the ABA before the introduction of unfair contract terms legislation under Victoria's FTA on the merits or otherwise of that decision.

The source of this proposal is the EC Directive 93/13/EEC on unfair terms in consumer contracts. Its application to Australia overlooks the rationale underpinning the Directive. The member states of the EU are diverse with a mixture of cultures, languages and legal systems where the consumer is acquiring products or services under contracts governed by the laws of Member States other than the laws of the consumer's jurisdiction. This suggests that the UK Unfair Terms in Consumer Contracts Regulations 1999 were principally to give effect to the Directive in the UK to provide certainty for UK consumers. The Victorian FTA unfair contract terms provisions are based on the UK Regulations but it cannot be said they were enacted for the same reason as in the UK.

Given the far reaching implications of these laws for banks ranging from certainty of contract giving rise to potential legal risk and consequential capital adequacy implications (see Australian Prudential Regulation Authority Prudential Standard APS 115) through to price control and uncertainty over revenue streams with similar adverse capital implications, it seems to the ABA to be counter productive to the Government's aim of re-establishing credit markets and industry confidence in participating in those markets. Additional regulatory capital that banks would be required to hold would result in a direct withdrawal of funds that

would otherwise be available to flow back into the consumer and business credit markets and the need for banks to review lending margins.

Coupled with proposed expansion of the scope of consumer credit laws by the Commonwealth the proposed unfair contract terms proposals will leave banks uncertain about the validity of their contracts with consumers and ultimately this will be to the detriment of consumers. A confident market and a robust economy need both confident businesses and consumers; one won't work without the other.

Further, there is the additional issue that the proposed legislation will place an increased regulatory burden on business. For instance, it is likely to increase the cost of undertaking a due diligence for the purchaser of a business. The purchaser will need to investigate whether existing contractual terms of the vendor business might become void as a result of unfairness.

This is also relevant for financiers of a business. If the business provides its products and services on the basis of standard form contracts, a financier would need to be confident that certain terms of those contracts are not vulnerable to being set aside on the ground of unfairness. A financier may well decide to conduct a due diligence on a business' contractual terms particularly where there may be unilateral variation or early termination clauses that are significant to the business. The costs of conducting this due diligence and the additional time required to do this militate against a free flowing credit assessment process.

The ABA submits that there are strong reasons why the Government should excise credit contracts for both consumers and business from the proposed regime.

The ABA wishes to make the following supplementary points before examining the proposals in detail:

- (1) Any perceived decline in consumer confidence and demand is not due to contractual terms in standard form consumer contracts.
- (2) During periods of strong consumer demand consumers have not been deterred by the fact that some standard form contracts contain what some perceive as unfair terms.
- (3) There is little doubt that unfair contract terms regulation, as in the UK, will be used to create uncertainty for banks revenue streams. This will stem from challenges to standard form contracts if fees and charges are claimed to be unfair. Similarly, this will occur in regard to banks' reliance on certain terms that may apply, for example, on enforcement. This is already evident from the Consultation Paper and more recently in a letter from the Treasurer to the ABA indicating his view that unfair contract terms legislation would be available to address banks charging certain fees for ATM use.
- (4) The likelihood that the proposed regulation will contribute to increased legal risk and resulting capital implications for banks will lead to increased uncertainty on the part of Chief Financial Officers whose obligation it is to

sign off on financial accounts. In this respect the law would conflict directly with prudential standards.

- (5) Options for managing risk under standard form contracts could see businesses moving to negotiated contracts away from standard form or require customers to seek independent legal advice at their cost before the bank will enter into the standard form contract, which is a common practice for people asked to provide guarantees.
- (6) Inevitably, these consequences would increase the costs of banking services and protract the contract formation process with resulting consumer dissatisfaction and increased cost to them.
- (7) There will be costs to industry to review standard form consumer contracts at a time when standard form contracts will require review to deal with Commonwealth consumer credit legislation that is due to commence on 1 July 2009, six months before the proposed unfair contract terms legislation is to commence. In the ensuing 12 months there is the expectation that the Privacy Act will be amended based on recommendations of the Australian Law Reform Commission, the Commonwealth's personal property securities regime will have commenced (1 May 2010), the reviews of the Code of Banking Practice and the Electronic Funds Transfer Code of Conduct will have been completed. Consequential changes to standard form contracts will be inevitable but these changes may not be able to be conveniently and cost effectively sequenced despite proposed transitional arrangements for businesses to modify their contracts. The ABA strongly believes that given the time required to review, re-write and publish either in physical or electronic form standard form contracts up to at least 12 months would be needed. For this reason the Government should sequence its regulatory reform projects accordingly with the first step being to bring together the commencement of the personal property securities reform legislation, the consumer credit reforms and the Law.
- (8) What skills will consumer regulators have to understand the context and import behind certain contract terms?
- (9) The unfair contract terms regulation will be counter productive to work on financial literacy, simplified disclosures and other simplification projects where consumers are being encouraged to read their contracts. Protecting consumers from the consequences of not reading disclosure material including contract terms contradicts these initiatives. It would be far more productive and consistent with the objectives of improving financial literacy for regulation to require that standard form contracts are written and presented in a way that makes them easier to read and understand.
- (10) Of course, one of the contributing problems for the draftsman is the extent of Commonwealth and State and Territory legislation that impacts on the provision of financial services. With unfair contract terms regulation the ABA expects standard form contracts to become longer because shorthand expressions will run the risk of being banned (there are examples in the

Consultation Paper) so a longer explanation of the reach of a particular term will be necessary to avoid this result.

- (11) The Consultation Paper invites comments on the effectiveness of the consumer protection provisions of the TPA (and inferentially the ASIC Act after the announcement that there is to be unfair contract terms regulation
- (12) Business must expect an increase in litigation and disputation and the resulting increased cost of doing business.

2.1.1 The proposed unfair contract term definition and scope.

Until now there has been no consultation with banks or industry about this definition. It is noted that COAG approved this definition at its meeting on 2 October 2008 but the definition was not made public.

The decision for the definition to not include a reference to "good faith" is also noted.

The resulting definition is neither the definition recommended by the PC nor the definition contained in the Victorian FTA. It also will differ from the UK definition. Therefore, it is entirely untested and liable to create uncertainty.

The definition as described in the Consultation Paper on page 30 is:

"A term is 'unfair' when it causes a significant imbalance in the parties' rights and obligations arising under the contract, and it is not reasonably necessary to protect the legitimate interests of the supplier".

The definition does not refer to detriment. The discussion relating to detriment appears on page 32. Detriment is not an ingredient of the definition of "unfair". Detriment it seems is only an ingredient for redress by the other contracting party or enforcement. There is nothing in the definition that would prevent a regulator from requiring a business to change a contractual term in a standard form contract on the theoretical basis of unfairness.

This should be placed beyond doubt that the sole basis for intervention by the regulator or action for redress by the other contracting party is on proof of actual detriment or proof of evidence of a substantial likelihood of detriment. In the latter case where proof is required of the substantial likelihood of detriment (from apprehended reliance on the term) it is unclear whether the regulator would be able to act independently of the court or whether the regulator would have to seek the order of the court to restrain the supplier relying on the relevant term. The ABA submits that a court order should be required preventing a supplier from relying on a relevant term rather than the regulator having power to do so administratively.

The proposed new enforcement powers and in particular the substantiation notices which appear to allow the regulator to go on fishing expeditions point to this problem.

It is noted that the proposed scope of the law would see unfair contract terms regulation applying in favour of "businesses, including small businesses would not be confined to individual consumers" (Consultation Paper p32).

It is difficult to find in the PC report a recommendation that these proposals should apply to small businesses let alone larger businesses. The ABA queries the source of any evidentiary basis upon which this policy is based. It is common for businesses large and small to have advisors, such as accountants, retained to assist with their banking and finance arrangements.

For businesses having to deal with the unfair contract terms regime, smaller businesses are more likely to utilise standard form contracts as doing business. Challenges to these contracts may result in increased costs of doing business adding to the difficulties businesses are experiencing now and in the uncertain times in the current economic situation.

By comparison, the UK Unfair Terms in Contracts Regulations apply only to contracts with individuals where they are acting outside their normal business, trade or profession.

Further, the Consultation Paper is silent on the key aspect of existing standard form contracts. The ABA queries whether the proposed law is to operate retrospectively or only to changes to existing contracts or only to new contracts made after the commencement date. This must be explained.

Further there is no clear statement of what is a "standard form contract". Is a contract that contains some but not all of the same clauses of a bank's contracts a standard form contract? How will variations between individual contracts relating to some of the financial aspects of the contract be dealt with? Will the law single out terms within a contract that are considered to be "standard form" terms or will the contract as a whole be judged as a "standard form contract"? Or will, for example, banking and financial services contracts be deemed to be "standard form contracts" with the reverse onus of proof to apply? Without a workable definition of what is a "standard form contract" this reverse onus would place a supplier in an extremely uncertain position and lead to unnecessary litigation.

Standardisation of contract terms is an important aspect of managing legal risk for banks and –

- (1) helps to provide consistent protection for customers, and are a critical component of a bank's compliance with relevant legislation - notably the CCC and the financial services reform regime in Chapter 7 of the Corporations Act 2001 (FSR).
- (2) is important to ensure there is compliance with applicable codes of conduct, notably the Code of Banking Practice and the Electronic Funds Transfer Code of Conduct.
- (3) helps with staff training and provide consistency for customers who are accustomed to dealing with their bank and for those who advise customers on their banking contracts.

- (4) reduces the risk of bank staff amending the form of a contract that could lead to a breach of a law or code.
- (5) is important under the UCCC because terms and conditions are supported with financial disclosure (Schumer box/financial table) and terms and conditions must be easily legible, clear and in conformity with prescribed print size.
- (6) is important under the FSR because the product disclosure requirements mandate certain disclosures including information about fees and charges, other costs, risk and benefits associated with the product. Further disclosure documents must be clear concise and effective. Licensees are under an obligation to "do all things necessary to ensure that financial services covered by the(ir) licence are provided efficiently, honestly and fairly" (section 912A (1) (a)).
- (7) Is important under the Code of Banking Practice because terms and conditions must be effective disclosure, in plain language and distinguishable from marketing material. Bank must act fairly and reasonably and in a consistent and ethical manner. This would preclude unfair reliance on a contractual term.

The proposed exclusion of the price of upfront goods and services based on the UK UTCCR (regulation 6(2)) is noted. The analysis of this provision in the recent UK Court of Appeal case is instructive but is now on appeal to the House of Lords.

What is an upfront price? Does it include all costs disclosed upfront or does it include only those amounts which are actually charged upfront?

Australian banks have introduced significant changes to the application and structure of banking facilities and in fees charged. Since early 2000 banks have developed, in a competitive environment, basic bank accounts for customers who seek low or no fee accounts. More recently, banks have developed accounts on which customers cannot incur exception fees, that is fees that may otherwise be payable when a cheque is dishonoured or the account becomes overdrawn. While not explicitly stated in the Consultation Paper, a law that would allow a regulator to question a bank's fees on the basis that they may exceed cost recovery (whatever that may mean) as appears to be the case in the UK, fee free banking services would seem not to fit within the spirit of this regulatory framework.

Upfront fees and charges should include all fees and charges disclosed as part of mandatory pre-contractual disclosures under relevant laws. If during the life of a financial product or service a fee or charge is to be made prior disclosure is generally required under legislation and the customer has the choice whether to continue with the product or service or switch to an alternative provider. The ability for customers to more easily switch bank accounts has recently been increased as part of a Government initiative. To replace a customer's choice to switch accounts with a law that permits the customer to stay with the provider and challenge a provider's fees and charges rather than switch is a questionable outcome.

2.1.2 Banning certain types of unfair contract terms

The ABA does not support the proposed Law which bans outright certain contract terms in standard form contracts. The Consultation Paper that lists these clauses indicates the relevant clauses can be fair in some circumstances and not in others which leads to the conclusion that a term cannot be adjudged unfair *per se* but must be considered in context. Therefore, the relevant clauses ought not to be included on such a list. The examples of supposed unfair contract terms provided in the Consultation Paper appear to have been considered out of their context and appear to have been judged unfair *per se*. That regulatory agencies are to have the ability make these judgments in the same way is a major cause of concern for banks where certainty of contract and capital adequacy considerations arising from increased legal risk are paramount.

There is further cause for concern that with the somewhat pre-emptive assumption of unfairness particularly in light of the comment on page 34 that all of the circumstances of the contract term have been considered.

It is noted that the material in this selection of examples is stated to have drawn heavily on CAV policy development work. A similar approach was taken in Victoria in July 2008 when CAV issued a consultation paper on the application of Victoria's unfair contract terms legislation to credit cards. It was clear that the contextual consideration of many of the terms had not been undertaken.

This raises a real concern of how this proposed legislation will be applied by the regulator. Will the regulator have sufficient knowledge and expertise to apply the law properly? How can the Government guarantee this will be the case as ministers would not be disposed to advise a regulator about how to go about its functions?

The types of terms specifically identified are:

- clauses limiting the consumer's right to take legal action;
- clauses limiting the evidence the consumer is permitted to use; and
- clauses imposing the evidential burden on the consumer in legal proceedings.

An example of where a limitation of the right to take action can be found in ASIC's Electronic Funds Transfer Code of Conduct (EFT Code). The EFT Code permits the incorporation into account terms and conditions and card conditions of use limitation of liability where consumers have not properly disguised PINs or taken adequate precautions to secure devices.

Limitation of the evidence consumers can use are necessary to minimise the risk of fraud, particularly with cash counts from ATM and night safe deposits and the amounts shown on sales (card transactions with merchants) and cash withdrawal vouchers.

Clauses imposing the evidential burden on consumers are necessary as without these clauses electronic transactions could not be made without human validation.

It should be noted that the PC has recommended that in introducing new legislation suitable cost and benefit analysis should take place first and care should be exercised that new legislation does not overlap, duplicate or contradict existing legislation. In the Consultation Paper at page 29 under Chapter 6 it states under the heading "Why will the new law regulate unfair terms?" -

"Unfair contract terms appear to be widespread in contracts, particularly in standard form contracts, and the PC concluded that the consumer detriment flowing from them is likely to be non-trivial"

However, the footnote to the section reads *"The PC concluded that there is only limited evidence of the extent of their use and consumer detriment arising from them. However, the PC found that improved methods of assessing consumer detriment suggest this detriment is likely to be non-trivial"*

It is of concern to the ABA that these important observations use words such as "appear", "likely", "limited evidence". This indicates that there has not been an adequate consideration of either the need for this legislation or the impact of any proposed changes. Indeed, the amount of overlap that is apparent between this proposal and existing financial services legislation (as well as the proposed changes to the consumer credit legislation) clearly indicates that this important work has been not been done.

In the light of these preliminary points a closer examination of some of the examples should further illustrate these concerns.

(1) Retention of title clauses

Under new personal property security laws retention of title clause will become security interests that will require registration to be enforceable.

The law will deal with the right of the secured party to recover possession of the goods and this is already dealt with under the Consumer Credit Code.

(2) Terms denying pre contractual/post contractual representations and entire agreement terms.

Inclusion of a clause stating that the contract is the whole agreement is intended to avoid uncertainty and these terms are common. These terms are particularly important in standard form contracts where there have been various options, the subject of discussion, before the deal has been concluded. While those matters remain specifically agreed terms of the contract, as is the case for example with a consumer credit contract that sets out the key financial aspects of the deal, the standard form terms of the contract provide through an "entire agreement" clause certainty for the consumer and the supplier. These clauses should not be banned as the context will differ from case to case. Where a pre-contractual representation by the supplier is proven to be deceptive or misleading the consumer has a remedy without the need to rely on unfair contract terms regulation.

(3) Terms acknowledging the customer has read and understood the contract

Under the UCCC warning must appear directly above where a debtor is to sign the contract urging the debtor to read the contract and the prescribed information statement that must be given to the debtor, obtain a copy of the contract and to not sign the contract if the debtor does not understand anything. Why would it be unreasonable for a credit provider to seek this acknowledgment that the debtor read the contract as this is the regulatory objective in the Code? A clause that the debtor reads to this effect is a further incentive for the debtor to read the contract. These clauses are commonly used for lending facilities and documentation. For this reason, these clauses can be helpful from a consumer viewpoint. A potential side effect of a banning could result in it becoming standard practice for all customers to be required to seek legal advice before contracts are signed or accepted. This would increase the costs to the customer, as well as cause delays in loan draw-downs. This would also severely impact on consumers in remote locations as they may not have ready access to legal advice. Overall, it is unclear, on balance how wholesale banning of such a term would protect the customer. To suggest all these clauses should be banned automatically would ignore the direction in the proposed legislation to consider all the circumstances. This example is yet a further example of how a theoretical approach to this matter is likely to lead to uncertainty and error.

(4) Conclusive evidence terms

For long term contracts, like home loans, these clauses are important for certainty. Courts apply the rule that if there is a manifest error, the certificate can be challenged. So, as a matter of practice, these terms are only really prima facie evidence in which case they do not cause a significant imbalance in a debtor's rights and liabilities arising under the contract.

(5) Terms that unlawfully limit a supplier's liability or unlawfully exclude an implied term

These clauses are of no effect as they constitute a breach of the law. Existing legislation already makes it clear the extent to which statutorily implied terms may be excluded and the extent to which liability can be limited and cannot be contracted out of. We wouldn't have thought additional protections were required. If an exclusion or limitation is lawful, it should not be banned.

How in these circumstances can such a clause be judged unfair as it does not or cannot cause any imbalance in the rights of the parties arising under the contract.

This appears to be a fundamental misunderstanding of what the law is intended to regulate. A regulator cannot approach a particular contractual term with a pre-judged bias against such a term when applying unfair contract terms legislation.

The appropriate response by the regulator is to deal with the issue here on the ground of misleading or deceptive conduct or an unlawful attempt to contract out of a legislated consumer right.

(6) Flat/fixed early termination fees

Early termination fees are dealt with under the UCCC and at common law. Under the UCCC these fees can be reviewed by a court.

The ABA does not agree that a flat early termination fee cannot represent a genuine pre estimate of the loss. The fee, for instance, may be less than the actual loss or may be calculated to represent the least loss for the relevant period, for example. To know whether the fee is an appropriate estimate of the loss, the underlying calculation is the relevant factor. It is this that determines the fairness of the fee not the fact that it is a flat or some other type of fee. For contracts that operate over a period of many years it is almost impossible to calculate a genuine pre-estimate of loss for an event that may happen many years into the future.

There is a consumer benefit if these fees are disclosed as flat/fixed because the consumer knows the amount in the first place at the contracting stage, rather than providing the consumer with a complex formula, that they then need to interpret to determine the anticipated fee.

(7) Terms requiring consumers to pay more than suppliers' reasonable enforcement costs reasonably incurred

Again, the UCCC currently sets out provisions for the recovery of enforcement expenses that can be charged or passed on to customers. Further, a credit provider must not recover for its debtor more than a charge the credit provider has paid to a third party. Where this issue extends to other contractual terms the ABA does not believe that this provision is required in this proposed Law. Further, the tag "reasonable" is unclear and therefore may not necessarily provide that much comfort. Courts will provide the consumer with the protection required in any case. The court will not allow for the recovery of excessive enforcement expenses.

(8) Terms allowing suppliers to retain, debit or set off disputed amounts

There are a series of contextual considerations in clauses of these types.

For example, in a securitisation program debtors should not be able to set off claims they may have against the credit provider as this would disrupt the orderly mortgage repayment program to the detriment of the investors that hold the relevant mortgage backed securities.

In certain banking contracts particularly for deposit accounts the bank discloses the effect of the banker's right of combination of accounts. At common law it is the banker's right and not the depositor's right to combine the accounts to set off amounts in credit on the one account against amounts overdrawn on the other account or to meet an amount that would otherwise overdraw the account e.g. a cheque issued without sufficient funds. If these clauses are banned they do not affect the common law right of combination but the consumer is disadvantaged because the existence and operation of the right will not be disclosed in the contract.

Set off is mandatory in bankruptcy and company winding-up where they have been mutual dealings between the bank and the insolvent entity. Also, set off and the banker's right to combine accounts are essential tools in netting obligations for regulatory capital purposes or net mutual debts.

A flawed premise behind the suggested banning of a clause disentitling a consumer to exercise a right to set off an amount in dispute (as distinct from an amount that is erroneous) is that the amount is in dispute and no amount may be found available to set off. A set off may only be effective where the amount to be set off is correctly owing.

(9) Terms mandating arbitration/mediation

Mandatory arbitration or mediation is intended to try to ensure matters are resolved quickly and cheaply. If arbitration fails, the parties can litigate at that point. In many industries, suppliers are required to belong to EDR schemes specifically to ensure that there is an inexpensive way to resolve disputes. It seems counterproductive, to side step these arrangements which are specifically set up to help consumers.

For banks, they are subject to mandatory membership of an EDR scheme under Chapter 7 of the Corporations Act and the Code of Banking Practice. It would be breach for a bank to otherwise mandate arbitration or mediation for its consumer and small business customers. Under new Commonwealth credit laws that will replace the UCCC all credit providers will be required to belong to an EDR scheme.

In commercial dealings commonly arbitration and mediation are recognised as being relatively cheap and effective ways of resolving disputes as alternatives to the courts.

2.1.3 Unilateral variation clauses

It is assumed but not explicit in The Consultation Paper that such clauses would not be entirely banned because they are needed to amend standard form contracts particularly contracts that operate over the longer term such as loan contracts and deposit account which are generally terminable at the option of the customer.

Changes such as updating contracts to deal with changes to the law or codes and varying fees and charges in ongoing banking services contracts that may operate over many years can only be achieved efficiently through the use of unilateral variation clauses. The costs to consumers of separately negotiating these changes and seeking their positive written agreement to the changes would be extremely high and would be accompanied by significant customer dissatisfaction.

Unilateral change clauses or any other clause of the type described below are not necessarily unfair *per se*. As already stated what is an unfair term needs to be considered with due regard for the operating context of financial services contracts, particularly credit contracts. Unilateral change clauses –

- (1) are applied by banks fairly and reasonably (the Code of Banking Practice requires this) and are necessary for the efficient administration of credit contracts and other banking services contracts including bank accounts.
- (2) are required to ensure that ongoing contracts are kept up to date to align with market and regulatory developments and the cost of maintaining a banking service. This means, for example, that a bank can ensure the banking services contract continues to comply with applicable laws and codes that might be amended from time to time.
- (3) Are contemplated under the FSR and the FSR imposes a positive obligation upon the person responsible for a product disclosure statement (PDS) for a financial product to notify the holder of the financial product of any material change to any of the matters specified in the PDS or any significant event that affects matters specified in the PDS (which is itself a standard form contract). The legislation sets out the time for giving notice of change or event to the holder of the financial product. This is can only be achieved efficiently and consistently where standard form contracts exist.
- (4) under the UCCC are contemplated and the UCCC makes specific provision for unilateral variations of consumer credit contracts with appropriate notification requirements.
- (5) where notice of any change is required informs the consumer of the change in advance, it also affords the consumer the opportunity to terminate the contract and engage another provider before the change becomes effective.
- (6) If inappropriate restrictions are imposed on the application of unilateral change clauses in credit contracts could lead to an increase in the cost of credit or reduced credit product flexibility such as short term, fixed price contracts. As mentioned above, this would have more general application across the broader range of banking services contracts.
- (7) Takeovers of one authorised deposit taking institution by another whether orderly or because of a financial crisis, involving the merging of their businesses under the *Financial Sector (Business Transfer and Group Restructure) Act*, require the acquiring entity to be able to migrate the accounts and products of the acquired entity to its own platforms. This may be because the systems of the acquiring entity cannot support the accounts and products under the old platform or to satisfy regulatory capital adequacy, or other prudential, regulatory, market or technological requirements. As an acquiring entity a bank needs to be able to quarantine certain accounts and products to meet changing prudential, or other prudential, regulatory, market or technological requirements. The bank needs to be able to enhance existing accounts and products by introducing new or varied services to satisfy changing prudential, regulatory, market or technological requirements. These cannot be achieved without the existence of unilateral variation clauses.

Schedule 2 to the UK regulations sets out an indicative and non-exhaustive list (sometimes called the grey list) of terms regarded as unfair. This list

includes paragraph (j) viz terms enabling the supplier to alter the terms of the contract unilaterally without valid reason which is specified in the contract.

This paragraph is expressed to be without hindrance to terms:

- under which the supplier reserves the right to alter the rate of interest or other charges payable by the consumer without notice where there is a valid reason (subject to informing the consumer at the earliest opportunity and the consumer is free to dissolve the contract immediately);
- under which the supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration (subject to informing the consumer with reasonable notice and the consumer is free to dissolve the contract); and
- incorporating price indexation clauses (subject to the method by which prices vary being explicitly described) or transactions relating to foreign exchange, travellers' cheques or international money transfers denominated in foreign currency.

These changes need to be achieved by unilateral variation for possibly millions of accounts without the uncertainty of invalidity

The ABA submits that consideration of unilateral variation clauses under unfair contract terms legislation requires special consideration of the context in financial services legislation. They should not be approached from a literal *per se* bias of unfairness.

2.2 Chapter 7 Agreed reforms to consumer law enforcement powers.

Coupled with uncertainty in relation to proposed unfair contract terms regulation that is an imprecise exercise in itself, the ABA is concerned that enhanced enforcement powers will add to uncertainty for businesses.

In answer to the question:

2.2.1 How can the interests of a business be safeguarded in the formal requirements for a national public warning power?

The ABA submits that a public warning should not be issued in the following circumstances –

- The business has resolved the problem and adequately compensated affected consumers (where applicable) or has undertaken to do so; or
- The business is in the process of working through a resolution of the matter with the regulator.

The ABA does not agree that it is appropriate for immunity to be provided from legal action where inaccurate statements are made about a company in public warnings. While we appreciate the importance of warning consumers as soon as

possible, our concern is that businesses would not be adequately able to clear their names if such reports are subsequently determined to be unfounded. A government should adopt the principle that what renders a business accountable so should that principle apply to government.

2.2.2 Substantiation notices

The use of proposed substantiation notices should be regulated to ensure that the issue of a notice is founded on a material, serious cause identified by the issuing authority. The issue of a substantiation notice will put a business to considerable time and expense in gathering and providing information requested in the notice and associated legal advice to comply with the notice. The ABA believes that before a regulator issues a substantiation notice the regulator should approach the business less formally to discuss the concern(s). Otherwise, where the response of the business to the substantiation notice satisfies the concern of the regulator there should be the opportunity for the business to seek compensation for the costs it has incurred.

2.3 Chapter 8 - A national regulatory regime for product safety

This chapter has the potential to apply to financiers that utilise a goods lease or hire purchase form of financing where the financier is the "owner" of the goods.

The ABA assumes that this chapter is not intended to apply in a financing situation but if so requests an immediate separate consultation.

3. PART III

3.1 Chapter 9 - Suggested reforms based on best practice in state and territory laws

3.1.1 Question: Are there reforms other than those covered in Chapters 10 and 11 that could be included in the Australian Consumer Law, based on existing best practice in existing state and territory laws?

The ABA supports the Government's position that the proposals in Chapters 10 and 11 should be subject to a proper regulatory impact assessment.

The following matters should be considered in drafting the legislation.

- (1) Where there is already legislation which recognises and makes specific provision for the exercise of a contractual right to unilaterally change the terms of a contract it seems at odds with these laws to take issue with the right to unilaterally change the terms of a contract on the ground of unfairness *per se* if the supplier complies with the specific requirements. If the conduct has been regarded as lawful and appropriate under one legislative scheme, the conduct should not be seen as unfair under another otherwise there would be a major conflict in the consistency of laws.
- (2) We agree that the state and territory fair trading laws need to be harmonised with the new law and according to best practice regulatory

impact assessments. The Victorian amendments to its unfair contracts terms provisions (which we understand will be passed in March 09) would need to be repealed. Subject to any amendment to the proposed Victorian FTA amending Bill, the proposed extension of the FTA to consumer credit contracts conflicts with the proposed model under the Law. It is somewhat difficult to reconcile a decision of COAG to legislate nationally and consistently to regulate unfair contract terms while at the same time for Victoria to proceed with its amendment that also impacts on COAG's for national legislation regulating consumer credit.

- (3) Any legislation will need to guide regulators to the need to be practical and fair with suppliers in the time they set for things to be fixed. Most standard form contracts, for instance, are dependant on computer systems which take time to change. In proposing any action under the legislation, regulators will need to consider the business impact. Increased costs are likely to be passed onto consumers. And in some cases, restrictions on commercial discretions will make the activity impractical. For example, if lenders are required to notify consumers before an assignment, it may not be possible to securitise or factor debts.

3.2 Chapter 10 Suggested Reforms to Definitions

3.2.1 Question: Should the scope of the TPA's existing definition of 'consumer' be expanded to cover a wider range of circumstances, such as goods used in business contexts?

The objective of the Law is to empower and protect consumers where ever they live in Australia. Therefore the ABA submits that the Law should apply only to individuals who acquire goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption and which are going to be used for those purposes. This is the Victorian FTA model and it is consistent with other comparable consumer protection laws like the UCCC and the Privacy Act.

3.2.2 Question: Should a new definition of 'consumer' specifically deal with small businesses and farming undertakings?

Consistently with the objective of the Law, it should apply only to individuals as described in 3.1.1 above. In the TPA there are discrete contextual provisions that provide protection to small business. The ABA believes that this is the appropriate approach and in its generality the Law should not extend beyond "consumers". Defining what is a "small business" is complex. For example, using a test based on the number of employees test is problematical. There are very sophisticated entities that may have only one or two employees (a special purpose vehicle that is part of a mortgage securitisation scheme or property development structure) that would be captures under this type of definition. There has been ample evidence of difficulty in defining in the FSR what is a "retail client" where a business is concerned. Reaching a workable definition is under continual discussion.

3.2.3 Question: Should a new definition of 'consumer' cover commercial vehicles or vehicles purchased for a predominately commercial purpose?

The approach should be simple, according to the identity of the consumer and the generic consumer purpose that the goods or services are of a kind ordinarily acquired for personal domestic or household purposes and intended to be used as such.

3.2.4 Question: Should a new definition of 'consumer' retain the monetary limit of \$40,000 or should the limit be increased?

It is important to keep the focus on purpose and that if an indexed monetary limit allows the Law to keep pace with the cost of living for consumers that should be done. Monetary value should not be a factor to determine consumer use to commercial use.

3.2.5 Question: If it were increased, what would be an appropriate amount?

See above.

3.2.6 Question: Should a new definition of 'consumer' exclude any purchases for business purposes, regardless of the existence of monetary limits? Question: Alternatively, should business consumers be entitled to protections available under the Australian Consumer Law, such as implied conditions and warranties? Question: Should a new definition retain the exclusion in relation to 'resupply'? Question: Are there other approaches to the way that 'consumer' can be defined?

The ABA re-states its preferred approach that who is a consumer should be defined by reference to purpose that would automatically exclude business purposes.

The approach to further protections for "business consumers" (this is a confusing expression if the approach to defining "consumer" is purposive) should be based on identified market failure, consideration of all options, regulatory and non-regulatory and a rigorous costs and benefits analysis according to best practice regulatory policy development.

See also above comments 3.2.1 to 3.2.5.

3.2.7 Question: Are there any other definitions currently used in the TPA in relation to consumer protection issues that require modification to improve their operation?

None in the limited time available that have been identified by the ABA.

3.3 Chapter 11 - Suggested Reforms to Provisions Dealing with Unfair Practices

The ABA comments only on those questions where they may be relevant to banks activities.

3.3.1 Question: Do businesses operating in multiple jurisdictions incur additional compliance costs as a result of different telemarketing regulation? If so, please provide evidence of this.

Inconsistent provisions have increased the regulatory burden, necessitating an awkward process which covers off both sets of requirements. Inconsistent legislation results in increase costs to the business of staff training and audit requirements. The PC based its justification for recommending the Law on a range of shortcomings in the approaches by governments to consumer protection law a key aspect of which was inefficiency and cost.

The telemarketing laws of Victoria and New South Wales differ. Both jurisdictions have acknowledged the costs and compliance differences for businesses operating in both States and agreed to conduct a harmonisation of their respective laws.

In addition to all States and Territories regulating telemarketing the Commonwealth has telemarketing regulated under the FSR, the Do Not Call Register Act, the Spam Act and the Privacy Act.

3.3.2 Question: Should the Australian Consumer Law include a provision regulating telemarketing? If so, which aspects of current regulation should this provision reflect? What other approaches might be used?

The regulation of contacting consumers in a direct marketing sense is more akin to privacy protection – the right to be left alone – than generic consumer protection law. Proposals for the Privacy Act to move to a system of Unified Privacy Principles include a generic direct marketing principle that would cover telemarketing in relation to the contacting of consumers.

The Australian Law Reform Commission has recommended (Report 108 Vol 3) that the Spam Act and Do Not Call Register Act should remain as discrete channel specific legislation.

However, a distinction needs to be drawn between the contact of consumers' activity that the Privacy Act, Spam Act and Do Not Call Register Act are concerned with and the formation of legal relations at a distance. The FSR section 992A regulates an unsolicited telephone offer to issue or sell a financial product to a consumer. The section contains elements of both the activity of contacting the consumer and of creating a contractual relationship. The ABA submits that this model should mirror this section in the Law in replacing the more prescriptive States and Territory laws.

3.3.3 Question: Bearing in mind the principle that the Australian Consumer Law should apply to transactions in any sector of the economy, is there a need to augment the current scope of sections 53, 53A and 53B of the TPA with regard to the approaches outlined?

No. The protections provided by these provisions are adequate.

3.3.4 Question: Is the scope of sections 53, 53A and 53B of the TPA sufficiently broad to cover these issues?

It is unclear why section 52 would not be available to cover these issues where there may be gaps in the sections mentioned. Further is there sufficient evidence of market failure to warrant such as extension? Would not individual State and Territory laws that cover the additional circumstances be part of the COAG review of best practice and await completion of that process including a regulatory impact assessment of State and Territory FTAs before moving to adopt those laws into the Law now?

3.3.5 Question: Is section 64 of the TPA effective in its current form?

The ABA refers to its comment in 3.3.4 and submits that consideration of these matters awaits the completion of COAG's best practice review.

3.3.6 Question: How could it be improved for inclusion in the Australian Consumer Law by reference to existing state and territory approaches or otherwise?

Refer to ABA's submissions above.

3.3.7 Question: Should the Australian Consumer Law include a provision regulating third-party trading schemes?

Many of such schemes are national in their operation and where the principles of best practice regulation satisfy the inclusion of such schemes in the Law this should be done in substitution for individual jurisdiction's regulation. Further, this is a matter that COAG should deal with in its best practice regulatory impact assessment of State and Territory FTAs.

3.3.8 Question: If so, should this provision reflect the current regulatory approaches used in state and territory laws and, if so, how?

To form a view of this matter, it would be helpful to have more information about the effectiveness of the current state provisions. It is noted that the relevant provisions referred to in the Consultation Paper either confer a discretion on the Minister to ban a scheme or for this to be done through a regulation-making power. However, consideration of these matters should await the completion of COAG's best practice review and best practice regulatory impact assessment of State and Territory FTAs.

3.3.9 Question: Should the Australian Consumer Law modify the existing form of section 54 of the TPA along similar lines to section 16 of the Victorian FTA?

The ABA supports centralising current regulations and to harmonise the State and Territory provisions with the TPA. In particular, having to apply for competition permits in each state is particularly onerous. The additional Victorian provision appears to be helpful. However, consideration of these matters should await the completion of COAG's best practice review regulatory impact assessment of State and Territory FTAs.

3.3.10 Question: If an approach like that in section 16 of the Victorian FTA were adopted, should a 'reasonable time' be defined? If so, what would a reasonable time be?

The ABA refers to its comment in 3.3.9 and notes that the time for providing a prize can vary greatly depending on the prize being awarded and the size a geographical spread of the group involved. A strict (prescriptive) timeframe would not be supported by the ABA. What is reasonable in the circumstances should suffice. It will be clear from the circumstances when the time within which a prize is awarded is unreasonable.

3.3.11 Question: Should the provisions in section 51A of the TPA be extended to include presumptions in relation to 'false', 'misleading' or 'deceptive' representations for inclusion in the Australian Consumer Law?

If a representation is actually false or misleading it would be a breach of section 53 (which does not set up any exclusion where there are reasonable grounds, such as the supplier acting under an innocent misapprehension rather than intentionally) and probably section 52. As there is already consumer protection for this sort of wrong doing, it is considered unnecessary to extend the application of s51A.

If the extension of section 51A is intended to proceed, a fuller consultative process should be undertaken with a further consultation paper setting out why the extension is necessary, the interrelationship with other provisions of the TPA and the anticipated consequences of such an extension. The treatment of this issue in this Consultation Paper is too limited.

3.3.12 Question: Should the provisions of section 51A of the TPA be amended to further clarify their relationship with the accessory liability provisions of the TPA?

The legislation should provide remedies against the perpetrator of the wrong doing, not accessories. However, a fuller consultative process should be undertaken with a further consultation paper setting out why the extension is necessary and the anticipated consequences of such an extension. The treatment of this issue in this Consultation Paper is too limited.

There are many third parties that might be unwittingly involved as accessories to a representation by a corporation, such as advertising agencies and newspapers.

3.3.13 Question: Should the claimant in an action relating to accepting payment without intending to supply be required only to prove that the supplier failed to supply the goods after accepting payment?

This is a matter that COAG should deal with in its best practice regulatory impact assessment of State and Territory FTAs. The TPA approach is realistic. There may be a number of legitimate reasons why goods are not supplied after accepting payment. The legislation should follow the contract so that where failure to supply was unintentional the matter is resolved by the contract rather than setting up a statutory offence as is the case with section 19 of the Victorian FTA.

3.3.14 Question: Should a maximum limit be imposed on the amount or percentage of the purchase price that may be taken as a deposit for goods that have been ordered, but not yet delivered?

In the main these matters have been dealt with by the courts things should be resolved commercially.

3.3.15 Question: Is there a need to introduce a specific provision into the Australian Consumer Law to provide that a supplier must not sell goods to which more than one price is appended at a price that is greater than the lower or lowest of the prices?

The ABA submits that further evidence of this conduct and consequential consumer detriment is needed. Further, this is a matter that COAG should deal with in its best practice regulatory impact assessment of State and Territory FTAs.

3.3.16 Question: Should the Australian Consumer Law include a provision providing for minimum standards for consumer documents?

Where specific legislation or codes provide for legibility and comprehension requirements these should remain outside any such requirement under the Law.

The UCCC sets out the information that must be provided to consumer debtors, including the font size that must be used. The Code of Banking Practice requires information that is provided to customers to be effective disclosure, in plain language and distinguishable from marketing or promotional material.

3.3.17 Question: If so, what should these standards be?

See 3.3.16 above.

3.3.18 Question: Should the Australian Consumer Law include a provision relating to the disclosure of a supplier's address in documents, statements or advertisements?

As a general proposition, the ABA disagrees.

Virtually all mandatory documentation required to be provided to consumers by banks contains some means for the consumer to contact the bank. Banks are highly visible entities even where a bank operates an e-commerce interface with its customers.

Statements of account provided to a bank's customers provide a convenient means of contacting the bank as necessary although the address is not provided. More often than not a customer is given a range of contact options including contacting a branch of the bank without needing to provide the addresses of its entire branch.

Advertisements should have the flexibility to provide contact details without necessarily prescribing addresses that would take up extra space in the advertisement.

3.3.19 Question: Should the Australian Consumer Law include a provision relating to the provision of an itemised bill on request?

This is a matter that is dealt with in both the FSR and the UCCC. If this is proposed to be included in the Law product or conduct specific legislation should be recognised and exempt from the Law in this respect.

3.3.20 Question: Should the Australian Consumer Law extend the current application of section 65 of the TPA to services?

This is a matter that COAG should deal with in its best practice regulatory impact assessment of State and Territory FTAs. The main focus of section 65 is damage to the unsolicited goods supplied that does not really apply in the services context. There is no corresponding provision in the ASIC Act with respect to financial services. If there is a proposal to include such a provision in the Law or the ASIC Act a fuller consultation process would be necessary.

4. Part IV

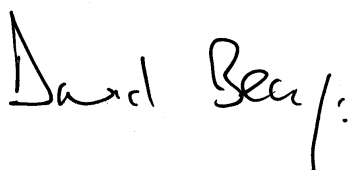
4.1 Chapter 12 Implementing the National Consumer Law

The proposal that enforcement agencies would develop guidance on the enforcement of the new unfair contract terms provisions should require those agencies to consult with the private sector in the formation of that guidance. ASIC has adopted the consistent and commendable practice of consulting with the financial services sector on regulatory guidance in relation to the FSR and other financial markets regulation. This practice should continue with the development of guidance with the Law.

4.2 Chapter 14 – Review of Enforcement Powers

The ABA agrees that the proposed review is undertaken but not after 7 years. The unfair contract terms provisions of the Law are to be reviewed within 5 years of commencement. This would be the appropriate time to review the enforcement powers as the two reviews would be related.

Yours sincerely



David Bell