



**Submission by CHOICE
in response to Treasury Discussion Paper**

**An Australian Consumer Law: Fair markets -
Confident consumers**

24 March 2009



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CHOICE is a not-for-profit, non-government, non-party-political organisation established in 1959. CHOICE works to improve the lives of consumers by taking on the issues that matter to them. We arm consumers with the information to make confident choices and campaign for change when markets or regulation fails consumers.



Part 1 - Context

CHOICE welcomes the COAG decision to proceed with a nationally uniform consumer protection regime that will include unfair contracts provisions and improved enforcement powers for regulators. We are pleased to respond to the Ministerial Council's consultation on the proposed Australia Consumer Law. We trust this submission will be a useful contribution to the development of laws that will enhance the quality of consumers' experiences in the marketplace and deliver financial benefits to the entire community.

Title of the Act

The Discussion Paper proposes to change the title of the Trade Practices Act, and suggests the title 'Competition and Consumers Act'. CHOICE agrees that the title of the Act should be changed to more properly reflect its purpose. CHOICE believes the proposed title conveys the purpose and scope of the Act effectively. We would also like to suggest for consideration an alternative title, the 'Fair Markets Act'. Once enacted, the new Australian consumer law will represent the third tranche of consumer protection laws in Australia. The original trade practices legislation enacted in 1974 moved away from the notion of 'buyers beware' and created new legal obligations against misleading or deceptive behaviour. The second tranche of laws created the legal framework for competition as a means to protecting the interests of consumers. We believe the critical feature of the new national consumer law will be the legal expression of fairness in markets, in the form of unfair contract terms provisions. We suggest that the title of 'Fair Markets Act' accurately reflects the direction of consumer law in the 21st century.

Part 2 - COAG Agreed Reforms

The Discussion Paper describes in detail and seeks feedback on the key elements of reform agreed by COAG in response to the Productivity Commission's extensive review of Australian Consumer Policy completed in April 2008.

As noted above CHOICE strongly supports both the decision to include unfair contracts law provisions in the Australian consumer law and to standardize and improve the enforcement powers available to each regulator. We provide detailed comments on the Unfair Contract Terms proposals below.

2.1 Agreed Reforms to Consumer Law Enforcement Powers

CHOICE supports the additional powers proposed for the reasons given by the Productivity Commission in its April 2008 report.

Extension of Enhanced Enforcement Powers to Other Consumer Protection Regulators

The enforcement powers are proposed to be made available to ASIC and the ACCC. But these two agencies are not the only important consumer protection regulators. Consideration should be given to reviewing the powers of other agencies including



ACMA, the TGA, the AEMC and agencies responsible at State and Commonwealth level for food regulation to adopt those of the new powers that are relevant to their work.

2.2 Product Safety

CHOICE also supports the harmonization of product safety law but believes that the agreed compromise should be reviewed as to its effectiveness after two years. We are however concerned that the harmonized model may not bring the full benefits of a uniform approach as recommended by the Productivity Commission (PC) in its report of 2006. We also believe that we will not have truly adequate consumer protection for consumers against the risk of avoidable product safety related injury without a *general safety provision* as recommended in Choice's submission to the PC, a copy of which is available at www.choice.com.au.

2.3 Unfair Contract Terms

General principles

The idea of 'freedom of contract' is substantially undermined by the widespread use of standard form contracts. This has been recognised since at least the 1960s.

It is sometimes suggested that, because consumers have freedom *to* contract, we should assume they have freedom of contract. This argument cannot be sustained. Many consumer contracts that include potentially or actually unfair terms occur in industries where the product offered is an essential or near essential services (energy, telecommunications). In these markets, there are a small number of operators operating largely similar business models and often *not* competing on price. Consumers in these situations have no real choice as to whether to purchase the products offered by one or more suppliers in the industry, and little or no choice of contract terms.

The argument also misses the point that consumers are unlikely in practice to have an opportunity to read, understand and consider the terms. *Moreover if they were required to do so, business costs would significantly increase and the time each sale required would also increase.* An argument in favour of permitting unfair contracts is an argument in favour either of widespread unfairness or significant economic inefficiency.

In response it might be argued that consumers can rely on the unconscionable conduct provisions through TPA s52A and equivalents). Because it is based on case by case evidence, this is an inefficient approach to the creation of the confident consumer markets required to underpin business efficiency.

Similarly, it may be argued that traders require the freedom to structure contracts to produce the benefits of innovation. However, this ignores the far more obvious and likely larger benefits associated with a market where consumers can confidently make choices without fear of being tricked or exploited by the fine print. The removal of demonstrably unfair terms is very unlikely to inhibit worthwhile innovation in product design. However, it will inhibit the valueless innovation in tricky marketing.



CHOICE believes that consumers should be able to assume standard consumer contracts are fair. Ultimately CHOICE would like to see a system developed where contracts for particular types of goods and services could be endorsed as complying with fair standards, perhaps supported by a trust mark. Traders could then choose to offer the endorsed contract unamended or to deviate from them only with the specific agreement of the consumer to the particular terms that are inconsistent with the agreed standard contract for that type of service.

But in the meantime a legal regime such as that proposed in the Discussion Paper which enables the trader to know in advance which clauses of a contract have been banned as unfair will promote both business certainty and confident consumers.

CHOICE notes the three potential costs identified by the Productivity Commission of Unfair Contract Terms laws. We believe these costs will not outweigh the benefits of the laws.

- The first, updating contracts, is one off cost that will quickly be outweighed by the benefits from increased consumer confidence.
- The second cost relates to terms that allow the price of a variable price contract to be altered. These should not be subject to the unfair contracts regime so long as the mechanism for varying the price remains fair. One way for such a mechanism to remain fair is where the variation in price (e.g. an interest rate) is constrained by competitive markets. However the law should provide that where such a mechanism no longer exists the variation term may be challenged.
- The third suggested cost relates to bad faith consumers. It seems likely that clauses could in fact be drafted which applied only to consumers in bad faith. While there would be some costs in identifying such consumers, the current situation is that clauses ostensibly designed to impose costs on consumers who act in bad faith harm the interests of a much larger class of consumers.

Furthermore, we note that more stringent unfair contracts regime has been in place in other jurisdictions for some time without any evidence of substantial costs on business.

Limitation to cases of detriment or substantial likelihood of detriment

COAG has decided that for a contract term to be considered unfair it must be shown that there is an actual or 'substantial likelihood' of detriment to a consumer or class of consumers. CHOICE does not support the requirement.

Unfair contract terms laws should increase consumer confidence in dealing with a range of traders in all consumer markets. The provision will mean that contracts are permitted to include terms which are unfair but which *may* nevertheless cause harm for some consumers. To the extent that this is so the consumer remains at risk of harm. The goal of providing the consumer confidence that he or she will be treated fairly will not be met. Nor will the law achieve the goal of reducing transaction costs by removing from the



consumer the need to check if a contract is fair. We believe the test for unfair contract terms should be reduced to ‘likelihood’ of detriment

We note, however, that this limitation is part of the COAG resolution. This problem could be somewhat alleviated by the inclusion of effective and responsive regulatory powers to outlaw particular contract terms beyond those identified in the initial text of the Australian Consumer Law (see below). It will also assist if the second reading speech notes that the intention is to exclude only those terms where the risk of detriment is merely theoretical.

Limitation of the remedy available to the court to the affected class of consumers

The paper proposes (p 34) that where the conditions for an unfair contract are made out ‘the unfair term would be voided only for the contracts of those consumers or class of consumers subject to the detriment (or a substantial likelihood of thereof) ...’

We think that this limitation will be completely unworkable in practice. It will also create further uncertainty and unnecessary cost for traders. It will require a court (or, in the case of a settlement, the parties) to specify the class of consumers to whom the order voiding the term applies. It will then require the trader to interpret the order in practice and apply it to some but not all of the consumers with whom it has contracted. This may require the trader to seek evidence from consumers that they fall within the class before making whatever changes are required by voiding the term (e.g. providing notices that the term does not apply, altering billing systems). The trader may be tempted to provide a too narrow application of the term. Consumers may disagree and seek to take further action themselves or through the regulator.

As noted above, we do not support the limitation of the finding of unfairness to cases where a substantial likelihood of detriment can be shown. In determining whether a term is substantially likely to cause detriment the court is not required to define a class of consumers. However, it does need to do so when it makes an order.

We strongly urge government to not include this limitation on the remedy available to the court. It may be appropriate to *permit* the court to limit its remedy to a class of contracts that include the impugned term (which it would do where there was a clear distinction in detriment to a class that could be efficiently identified) as opposed to *require* it to do so.

Limitation to non negotiated contracts

CHOICE supports the policy intention to exclude genuinely negotiated contracts from the reach of the unfair contracts law. Where there is unfairness then the existing law of unconscionable conduct and appropriate laws on unfair practices are likely to provide adequate consumer protection (although as noted below we believe there needs to be further development of the law in relation to unfair trade practices.)

The provision needs to be drafted so that negotiation of some aspects of the contract (including but not limited to price, time of delivery and applicability of contingent

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charges or risk of liability) does not mean that the contract is considered to have been negotiated for the purpose of exclusion.

Some examples of contracts which should not be excluded include:

- car hire contracts where the consumer elects to reduce (or not) the collision damage waiver,
- real estate contracts where the landlord includes special conditions in addition to a Real Estate Institute or equivalent standard form contract, and
- contracts where a consumer with a particular concern about certain types of clauses (e.g. privacy terms or terms limiting liability) crosses them out in a standard document but the trader or their agent nevertheless goes ahead with the contract. Just because a consumer negotiates some aspect of the deal does not necessarily mean that they have the opportunity or skills to negotiate other clauses.

Before agreeing that a contract is not a standard form contract the Court should be required to look at the whole circumstances of the contract and the way in which the contract is used by the trader in relation to all its customers, including the extent to which the contract as a whole is or was offered on a 'take it or leave' it basis. It should also consider whether the consumer and trader negotiated the particular clause that is alleged to be unfair or consciously took it into account in negotiating the contract as a whole.

In sum, the Discussion Paper's attention to 'trivial' negotiated terms does not go far enough to capture the potential situations where there is some negotiation but not such that the contract should be excluded from the ambit of the unfair contracts laws.

Exclusion of the upfront price

In general CHOICE supports the COAG decision that the upfront price of goods or services provided for in a contract should not be subject to unfair contracts terms provisions. The policy rationale is that it is most efficient for an *informed* market to set the price for goods and services. The limitation also recognises, in the words of the UK Court of Appeal interpreting the UK Unfair Contracts Legislation "the fact that the parties would be likely to (or might well) negotiate the main subject matter of the contract and the essential price but not the detail."¹

The Discussion Paper proposes that this policy position be implemented by adopting the terms of Regulation 6 of the UK Unfair Terms in Consumer Contracts Regulation 1999 ("the UK Regulation"), which states:

"In so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate-

- a) to the definition of the main subject of the contract, or
- b) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange."

¹ *Abbey National v Office of Fair Trading* (Court of Appeal 2009) paragraph 59.



There are two issues that arise.

The first is that it is not clear that the qualification ‘in so far as it is in plain intelligible language’ completely meets the policy rationale as we have described it.

A contract term that provides the price or remuneration may be in plain intelligible language but may in combination with other terms be so unclear to the consumer that it falls outside the scope of the policy rationale for protecting the operation of the informed market.

This is particularly likely to be so where:

- the product is an ongoing service with a range of different charges for different services or defaults and/or
- the pricing structure is particularly complex.

As the recently decided UK Court of Appeal case *Abbey National vs Office of Fair Trading* (“*Abbey*”) demonstrates, it is not always easy to distinguish a default charge from one that is more correctly described as a charge for a service which the consumer may or may not take up as part of the contract.

A contract term containing the upfront price may be in ‘plain intelligible language’ but nevertheless rarely communicated to consumers in advance of contract formation. If contracts are entered into without being read and understood, as the evidence suggests, the quality of the expression of a term is irrelevant to the question of whether this component of the price has been set by the market.

The real question should be whether the term or its substance *was actually communicated* to the consumer in a plain and intelligible way before it can form part of the price.

There are two approaches that could assist. First, rather than using the words ‘in so far as it is in plain intelligible language’ the exclusion could be limited to a term ‘the effect of which is likely to be adequately communicated to a potential purchaser’ and could entitle the court to consider how the term has actually been communicated and the interrelationship of the term impugned with other terms.

Second, the regulator’s capacity to black list terms must include contract terms and conditions relating to fees and charges other than the upfront price.

We believe that both suggestions should be adopted.

The second problem with the proposed provision is that paragraph 6 of the UK Regulation may not end up having the same meaning in Australia law as it does in the UK. The relevant provisions must be interpreted in a UK court in light of the European Directive on Unfair Contracts. For example, in interpreting paragraph 6 of the UK regulation the Court of Appeal in *Abbey* stated at page 49 of the judgement “it [paragraph



6] *cannot* have a different purpose or meaning from the [European] Directive” (emphasis added).

A second difference between UK and Australian circumstances is that the UK law does but the proposed Australian law does not include provision for a ‘grey list’. The Court of Appeal considered the existence in the UK of a ‘grey list’ of prima facie unfair terms as relevant to its application of paragraph 6 of the UK regulation to the term of the contract at issue in the *Abbey* case. The proposal for Australia is only to have a ‘black list’ of unfair terms. This may also affect the Court’s approach.

See further Appendix 2 which includes a more detailed discussion and further relevant material from *Abbey*.

There may not be a perfect solution to the interpretation problem, however we think it important at least that the second reading speech for the Bill to introduce the unfair contracts terms provisions into Australian law should make detailed reference to the intention to model the Australian provision not just on the UK Regulations but the underlying EU directive.

The Australian law through the black list or otherwise should also cover specific problem areas that can now be predicted. We recommend that the following terms to be specified as unfair (or prima facie unfair) in the Australian law:

- a) those which impose a charge in excess of the reasonable direct costs an item where that item is incidental to the main subject of the contract, and
- b) those which require the consumer in breach of the terms of a contract to pay a charge which is in excess of the reasonable costs incurred by the supplier directly attributable to the breach and not otherwise covered in the contract price.

Application of the Unfair Contracts Laws to Financial Services

The National Consumer Credit Law is intended to come into operation on 30 June 2009 as a law of the Commonwealth. Decisions about the content of that law are being made now. The Minister for Competition Policy and Consumer Affairs has announced that the unfair contract terms provisions and the proposed changes to consumer enforcement powers will come into effect as part of Commonwealth law more rapidly than the rest of the Australian Consumer Law and probably in 2009. It is unfortunate that the introduction of unfair contract terms laws at least in relation to financial services does not coincide with the introduction of the National Consumer Credit Law as there is risk in design of the credit laws of either redundancy from when the unfair contract laws come into force or inadequacy from 1 July 2009 until such time as they do come into force.

Banning Certain Types of Unfair Contract Terms

The Discussion Paper states that the Unfair Contracts Terms legislation will provide for the banning of certain terms which are considered to be unfair.



The Discussion Paper anticipates that certain terms will be banned ‘in the initial text of the Australian Consumer Law’. It does not specify how any terms which may in the future be considered to be unfair will be banned.

CHOICE believes that some thought (and public consultation) should be given to how this process will work. We do not think that merely enabling future regulation to ban certain terms will be sufficient. We believe that the regulator (or regulators – ACCC and ASIC) should be given power to ban terms, probably in the form of a disallowable instrument. The Telecommunications Act provides for the Australian Communications and Media to make a service provider determination in the form of a disallowable instrument. Empowering ACCC and ASIC in this way may need to be governed by rules around consultation with interested parties prior to making an order and perhaps criteria which must be satisfied before a term can be banned.

As to the particular terms that should be specified as unfair, we note that the list contained on pages 35 – 42 is somewhat less extensive than the (non exhaustive) list of potentially unfair terms on page 31. We also note that some terms included on the UK ‘grey list’ are not in the proposed list. We are particularly concerned about terms which would be subject to paragraph 1 (e) of the UK grey list i.e.:

1. Terms which have the object or effect of –

... (e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;

Above we suggested that the following terms should be banned:

- a) terms which impose a charge in excess of the reasonable direct costs an item where that item is incidental to the main subject of the contract
- b) terms which require the consumer in breach of the terms of a contract to pay a charge which is in excess of the reasonable costs incurred by the supplier directly attributable to the breach and not otherwise covered in the contract price.

While we prefer our formulation to the UK formulation, some attention needs to be provided to the limitation of exploitation of consumers through fees and charges which are not by definition and certainly not in practice subject to market forces.

Part 3 - Best practice reforms

The Discussion Paper raises the possibility of harmonizing a range of provisions dealing with unfair practices in consumer markets. The mooted provisions are drawn from existing state fair trading laws and including the following aspects of consumer protection;

- Door-to-door trading
- Telemarketing
- False and misleading representations

The logo for CHOICE, featuring the word "choice" in a blue, lowercase, sans-serif font, enclosed within a light green square frame with rounded corners.

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- Payment for unsolicited goods
- Third-party trading schemes
- Mock Auctions
- Lay-by sales
- Offering gifts and prizes
- Pyramid selling
- Accepting payment without intending to supply
- Dual Pricing
- Mandatory Disclosures
- Receipts for itemized bills
- Return replaced parts

CHOICE supports the inclusion of these provisions in the Australian Consumer Law. We believe these provisions are in line with the dual objectives of facilitating a seamless national economy and increasing the level of consumer protection. A broad coverage of unfair practices in the new law will be critical to ensure that consumers do not lose protections in the shift towards national consistency and will promote consumer confidence in markets.

Some may be concerned that these provision or some of them are unnecessary if the general legal powers of the regulators are made as effective as possible and that there is a risk of specific provisions a) causing definitional problems or b) becoming out of date and thus imposing regulatory burden with no gain to consumers. These arguments are in principle attractive and suggest that in the near further consideration should be given to introduction of a generic unfair trade practices law of which some of most of the specific unfair practices may be subsumed.

In the meantime we do not believe that the consumer problems which these provisions were designed to fix have gone away; indeed arguably some of these provisions need strengthening. In this context we note and endorse the submission made by the Brotherhood of St Laurence in relation to some of these measures.

The Ministerial Council will no doubt find it challenging to determine the specific detail of these unfair practices provisions. We believe it is appropriate to cherry pick the best aspects of existing fair trading laws to form the new national law. We therefore suggest the Ministerial Council adopt a principle based approach to determine the policy settings for these provisions in the new law. We recommend the Ministerial Council adopt the highest level of protection currently afforded in state-based fair trading laws unless it can be demonstrated that the provisions has unintended consequences, does not in fact protect consumers or imposes a burden on traders which demonstrably outweighs the direct consumer benefit. Further, where a provision is designed to protect vulnerable and disadvantaged consumers (for example the door to door trading provisions) the policy position should be prepared to accept some loss of efficiency in the interests of equity.

We note that adopting the highest level of protection is not necessarily synonymous with a best-practice approach. It may be the case that the current level of protection afforded in

state fair trading legislation, even the highest level in any single jurisdiction, is defective in some way or below international best practice. However, we are confident that a principle based approach, which commits to the highest level of protection with the qualifications noted above, reasonably balances the interests of consumers and traders.

Part 4 - Response to questions posed in the Discussion Paper

Chapter 5 — Implications for national, state and territory consumer laws

A new name for the TPA

Question

Should the TPA be renamed? If so, what name should it have, if not the *Competition and Consumer Act*?

It should be renamed. Government should consider *Competition and Consumer Act* or the *Fair Markets Act*

Chapter 6 — Unfair contract terms

Banning certain types of unfair contract terms

Question

Please set out any views on whether the types of terms described in this chapter should be banned in the initial text of the Australian Consumer Law.

The terms listed should be banned. In addition

The paper does not set out a mechanism for the banning of terms that are in the future considered to be unfair. Commonwealth regulators both ASIC and the ACCC) should have the power to ban such terms (in the form of a disallowable instrument) provided they have followed a transparent consultation and inquiry process.

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

Best practice regulation

Questions

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? In making a suggestion, please address the following questions:

- What is the nature of the problem facing consumers that the suggested reform will address?
- What is the appropriate policy response to address these consumer issues, including non-regulatory approaches?
- What benefits would result from this change and can these be quantified?
- Is the suggested change appropriate for inclusion in a law which applies generic consumer protections on an economy-wide basis?

Chapter 11 — Suggested reforms to provisions dealing with unfair practices

Door-to-door trading and telemarketing

Questions

Should the Australian Consumer Law include a provision regulating door-to-door sales? If so, having regard to the principles of best practice regulation, what aspects of current regulation should this provision reflect? What other approaches might be used?

Yes. See comments above in relation to resolving different approaches.

Questions

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?

Yes. See comments above in relation to resolving different approaches.

False and misleading representations

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 above?

Yes. It is important that provisions relating to misleading representations apply to all

situations where a consumer may be exposed to those representations.

Approving or banning third-party trading schemes

Question

Should the Australian Consumer Law include a provision regulating third-party trading schemes? If so, should this provision reflect the current regulatory approaches used in state and territory laws and, if so, how?

Yes. See comments above in relation to resolving different approaches.

Mock auctions

Question

Should mock auctions continue to be prohibited?

If so, should the Australian Consumer Law include a provision prohibiting mock auctions? If so, should this provision reflect the current regulatory approaches used in state and territory laws and, if so, how?

Yes. See comments above in relation to resolving different approaches.

Lay by sales

Questions

Does the level of complaints about lay-by sales received by such businesses vary across jurisdictions depending on the existence of regulation?

Should the Australian Consumer Law include a provision regulating lay-by sales? If so, should this provision reflect the current regulatory approaches used in NSW, Victoria and/or the ACT?

Yes. See comments above in relation to resolving different approaches.

Offering gifts and prizes

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?

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?

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Yes. See comments above in relation to resolving different approaches.

Further consideration should be given to regulation that would discourage traders from offering gifts which are not quite what they seem but where the advertising is short of misleading - for example where considerable trouble or expenditure is required to claim the gift. See Appendix A for an example.

An evidentiary provision regarding representations as to future matters

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?

Yes

Accepting payment without intending to supply

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?

Yes.

Dual Pricing

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?

Yes.

Provisions relating to mandatory disclosure

Question

Should the Australian Consumer Law include a provision providing for minimum standards for consumer documents? If so, what should these standards be?

Yes. Those in the Victorian FTA are appropriate.

Question

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

Yes

Question

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

Yes

Requirement to return replaced parts

Question

Should the Australian Consumer Law include a provision requiring a supplier to return replaced parts along the lines of section 162 of the Victorian FTA?

Yes

Liability of recipient of unsolicited services

Question

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

Yes

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Appendix A: Example of troublesome use of gifts in marketing.

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Appendix B: Discussion of relevant excerpts from *Abbey National*

At [31] the Court of Appeals states: “the Directive is of considerable importance in this appeal.” See also discussion of the idea of giving the words of the Directive an autonomous meaning [44-45] which it seems to virtually substitute for the meaning of the words in Regulation 6 (similar as they are). Also at [48] discussing an earlier House of Lords decisions the Court states: “In any event, as a central part of its reasoning in construing the Directive, the House identified and relied upon its view of the underlying purpose of the Directive.” And at [49] “As already indicated, once the autonomous meaning of the Directive was established by the House of Lords, we must apply that meaning to paragraph 6(2)(b) of the 1999 Regulations because *it cannot have a different purpose or meaning from the Directive.*”

The Court interprets clause 6(2) within the broader framework of the regulation and its provenance – i.e. that it is adopted by the UK in compliance with the EU directive.

The UK Regulation includes a ‘grey list’ of terms likely to be unfair set out in the Schedule to the regulation; the court of Appeal states:

[30] So far as potentially relevant, paragraph 1 of the Schedule defines the terms on the grey list as follows:

“1. Terms which have the object or effect of –

... (e) requiring any consumer who fails to fulfill his obligation to pay a disproportionately high sum in compensation;

The wording of this term assists the court come to the view that charges for *inter alia* rejecting or making payments where the account does not have sufficient funds are not part of the price for the services as per Clause 6(2).

The Australian Unfair Contract Terms provisions will not have a grey list. Instead it will provide for the banning of certain terms [ACL DP p35]. The draft list of terms to be banned does not include a term similar to UK Regs Schedule 1 (e) as set out above. Such a term in somewhat different form to the UK provision does appear as an *example* of a contract term that might be covered by the UCT provisions [ACL DP p 31].

Question: Does the absence of an EU directive underlying the law together with the generally different structure of the Act and/or a different structure in relation to the grey/black list and/or different content of the grey/black list mean that the equivalent of clause 6(2) may be interpreted differently in Australia?

If so, what changes should be made to ensure that the price/remuneration for services is limited to what the average consumer understands to be the price for the goods/services?