



Australian Government  
The Treasury

Contract Date:

Signed:

Witnessed by:

# The Australian Consumer Law

Consultation on draft provisions on  
unfair contract terms

11 May 2009



# **The Australian Consumer Law**

Consultation on draft unfair contract terms provisions

11 May 2009

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## FOREWORD

The introduction of a national unfair contract terms law will be one of the most important consumer reforms in the new Australian Consumer Law.

Unfair contract terms harm and exploit customers, whether they are ordinary people, institutions or businesses. They are common and exist in many contracts for the provision of everyday goods and services. They reduce competition by making contracts difficult to understand, and by limiting a customer's choices and ability to seek out alternative options. They are used by some businesses to transfer all of the risk in a transaction away from themselves and onto the customer. There is no justification for their use in an effective and efficient market.

Unfair contract terms regulation has existed in the United Kingdom since 1977 and was adopted by the European Union in 1993. In 2003, Victoria followed suit and has had considerable success in enforcing this important consumer protection measure. With these examples in mind, the introduction of a national unfair contract terms law in Australia has been a matter of debate for some time.

The legislative implementation of this reform marks the culmination of an extensive policy development process, based on the work of the Productivity Commission in its comprehensive 2008 *Review of Australia's Consumer Policy Framework*. The draft provisions have been developed through the shared effort of the Australian Government and its state and territory counterparts, through the Ministerial Council on Consumer Affairs (MCCA) and the Council of Australian Governments (COAG). In particular, I want to acknowledge the experience and expertise of Consumer Affairs Victoria and its key contributions to this process.

I will introduce a Bill into the Australian Parliament in June of this year to implement this important reform. Having been worked out in detail by MCCA, this reform has been agreed by COAG and there is no further justification for us to delay its implementation.

With this in mind, and given the considerable public interest in this important reform, I want to put the draft unfair contract terms provisions into the public arena as early as possible for public comment, prior to their introduction into the Parliament.

I welcome your views.

A handwritten signature in black ink, reading "Chris Bowen". The signature is written in a cursive, flowing style.

**The Hon Chris Bowen MP**  
**Minister for Competition Policy and Consumer Affairs**



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## REQUEST FOR COMMENTS

The Treasury seeks the views of stakeholders on the draft unfair contract terms provisions of the Australian Consumer Law.

Responses are requested by 5.00 pm on **Friday, 22 May 2009** and can be submitted to:

[australianconsumerlaw@treasury.gov.au](mailto:australianconsumerlaw@treasury.gov.au)

or

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Consultation on draft unfair contract terms provisions

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### **Confidentiality**

It will be assumed that submissions are not confidential and may be made publicly available on the Treasury website ([www.treasury.gov.au](http://www.treasury.gov.au)). If you would like your submission, or any part of it, to be treated as 'confidential', please indicate this clearly. A request made under the *Freedom of Information Act 1982* (Cth) for a submission marked confidential to be made available will be determined in accordance with that Act.

## GLOSSARY OF TERMS

<b>ACCC</b>	Australian Competition and Consumer Commission
<b>ACL</b>	Australian Consumer Law
<b>ASIC</b>	Australian Securities and Investments Commission
<b>ASIC Act</b>	<i>Australian Securities and Investments Commission Act 2001 (Cth)</i>
<b>COAG</b>	Council of Australian Governments
<b>IGA</b>	<i>Intergovernmental Agreement for an Australian Consumer Law, entered into by the Australian, state and territory governments.</i>
<b>MCCA</b>	Ministerial Council on Consumer Affairs, made up of ministers responsible for consumer affairs from the Australian, New Zealand and state and territory governments.
<b>NPA</b>	<i>National Partnership Agreement to Deliver a Seamless National Economy</i>
<b>PC</b>	Productivity Commission
<b>SCOCA</b>	Standing Committee of Officials of Consumer Affairs, composed of senior officers of consumer policy and enforcement bodies in Australia and New Zealand.
<b>TPA</b>	<i>Trade Practices Act 1974 (Cth)</i>
<b>UCCC</b>	<i>Uniform Consumer Credit Code</i>



## THE PURPOSE OF THIS CONSULTATION AND THE WAY AHEAD

The Australian Government seeks comments on draft legislative provisions to give effect to COAG's agreement to implement a national unfair contract terms law. These provisions will form a key element of the Australian Consumer Law (ACL), which is being implemented by the Australian Government and the States and Territories.

The draft provisions attached to this Consultation Paper have been developed by the Treasury in consultation with officials of state and territory consumer policy agencies, through a legislative development process overseen by the Standing Committee of Officials of Consumer Affairs' (SCOCA) ACL Steering Group. The provisions reflect the model agreed by MCCA on 15 August 2008, which was agreed by COAG on 2 October 2008.

The policy issues underpinning unfair contract terms regulation were the subject of consultation by the Productivity Commission (PC) in its 2008 *Review of Australia's Consumer Policy Framework* and many further views were provided on the MCCA model as part of SCOCA's 2009 consultation on the information and consultation paper entitled *An Australian Consumer Law: Fair markets – Confident consumers*.

COAG has agreed that Australia's consumer enforcement agencies will issue common national guidance in relation to the enforcement of the unfair contract terms provisions. This will provide greater clarity for consumers and businesses about the enforcement of the provisions, as well as greater consistency in enforcement approaches by national, state and territory regulators.

National guidance will be available prior to the commencement of the unfair contract terms provisions.

In this consultation process, comments are sought on the text of the draft unfair contract terms provisions, with specific regard to issues that may arise in their practical application.

The unfair contract terms provisions will be included in a Bill which is scheduled to be introduced into the Australian Parliament in the Winter sittings (June 2009).



# **CHAPTER 1**

## **UNFAIR CONTRACT TERMS AND THE AUSTRALIAN CONSUMER LAW**

### **COAG'S CONSUMER REFORMS**

On 2 October 2008, COAG agreed to a new consumer policy framework as proposed by MCCA on 15 August 2008, which will include a single national consumer law with a provision regulating unfair contract terms. The introduction of a national unfair contract terms law will:

- protect consumers by removing unfair terms in standard-form contracts that are used to harm and exploit customers, including business customers, and can reduce competition by limiting customer choice and the ability to exit 'bad' deals; and
- achieve national consistency in the regulation of unfair contract terms. Victoria now has an unfair contract terms law and the other States and Territories are keen to follow its lead. This national approach ensures that there is national consistency in consumer protection and simplifies compliance for Australian businesses.

### **THE DEVELOPMENT OF THE UNFAIR CONTRACT TERMS PROVISIONS**

#### **The Productivity Commission's unfair contract terms recommendation**

In recommending a national consumer law, the PC also recommended that a provision should be incorporated that addresses unfair contract terms. This is set out in Recommendation 7 of its final report.

In conducting the review, the PC consulted widely with public and industry stakeholders, and in doing so received many views on the potential for regulation. The PC:

- held public hearings prior to and following the release of its draft report on 12 December 2007;
- received over 250 submissions from stakeholders; and
- met informally with more than 70 organisations and individuals across Australia.

## Recommendation 7<sup>1</sup>

A provision should be incorporated in the new national generic consumer law that addresses unfair contract terms. The Commission's preferred approach would have the following features:

- a term is established as 'unfair' when, contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract;
- there would need to be material detriment to consumers (individually or as a class);
- it would relate only to standard-form, non-negotiated contracts;
- it would exclude the upfront price of the good or service; and
- it would require all of the circumstances of the contract to be considered, taking into account the broader interests of consumers, as well as the particular consumers affected.

Where these criteria are met, the unfair term would be voided only for the contracts of those consumers or class of consumers subject to detriment, with suppliers also potentially liable to damages for that detriment. The drafting of any new provision should ensure the potential for private (and regulator-led) representative actions for damages by a class of consumers detrimentally affected by unfair contract terms.

Transitional arrangements should be put in place after enactment, which would give businesses the time to modify their contracts.

The operation and effects of the new provision should be reviewed within five years of its introduction.

In relation to the introduction of unfair contract terms regulation, the PC noted that:

- there are sound economic and ethical rationales for proscribing unfair contract terms that cause consumer detriment;
- existing laws, such as the unconscionable conduct provisions of Part IVA of the *Trade Practices Act 1974* (TPA), provide limited scope for addressing the issue of unfair contract terms;
- there is persuasive evidence of the prevalence of unfair contract terms; although, in saying this, the PC acknowledged that there is little information on the extent of consumer detriment associated with them;
- in Victoria and countries that have enacted laws against unfair contract terms, there has been little evidence of adverse unintended commercial consequences or of significant business compliance costs; and

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1 Productivity Commission, *Review of Australia's Consumer Policy Framework* Inquiry Report No.45 (30 April 2008) (PC 2008), Recommendation 7. The remainder of the PC's recommendations are set out in its Final Report, which is available on the PC's website at <http://www.pc.gov.au/projects/inquiry/consumer/docs/finalreport>.

- a strong argument for the inclusion of an unfair contract terms provision in the new consumer law is national consistency. Some state laws and various industry codes prohibit unfair or unjust terms in contracts and there is risk of further inconsistencies developing in the future.<sup>2</sup>

## MCCA's agreed unfair contract terms model

The PC's recommendation for unfair contract terms regulation<sup>3</sup> was considered by MCCA on 15 August 2008. MCCA agreed to recommend the incorporation of an unfair contract terms provision to COAG, for its consideration and agreement, and in doing so also agreed on a proposed model for the provision based on the PC's recommendation.<sup>4</sup>

MCCA's unfair contract terms model reflects the PC's recommendations with some minor clarifying refinements to the model described by the PC. These refinements relate to:

- the use of the term 'good faith' in the definition of an 'unfair term'. The definition will not make reference to good faith, given the uncertain application of the principle at common law in Australia. In its report, the PC noted the potential for differing interpretations of good faith, and considered that other definitions of an unfair term may be equally apt<sup>5</sup>; and
- the inclusion of an express reference to the 'substantial likelihood of detriment'. This is intended to clarify what is meant by 'detriment', and recognises the restrictions that an express requirement limiting the application of the provision to 'actual' detriment would have on the practical effectiveness of the provision. In requiring proof of a 'substantial likelihood of detriment', more than a hypothetical case of unfairness must be made out.

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2 PC 2008 II.139.

3 PC 2008 Rec. 7.1.

4 MCCA Communiqué (15 August 2008) (MCCA 2008), pages 4-5, [http://www.consumer.gov.au/html/download/MCCA\\_Meetings/Meeting\\_20\\_15\\_Aug\\_08.pdf](http://www.consumer.gov.au/html/download/MCCA_Meetings/Meeting_20_15_Aug_08.pdf).

5 PC 2008 II.159. See Law Commission of England and Wales and Law Commission of Scotland (the UK Law Commissions) 2004 *Unfair Terms in Contracts: Report on a reference under section 3(1)(e) of the Law Commissions Act 1965* (LAW COM No 292 and SCOT LAW COM No 199) (<http://www.lawcom.gov.uk> and <http://www.scotlawcom.gov.uk>). The UK Law Commissions recommended that the use of the concept of 'good faith', which is currently used in the definition of an 'unfair term' in regulation 6 of the United Kingdom Unfair Terms in Consumer Contracts Regulations 1999, should be removed (see page 39).

### MCCA's agreed model for unfair contract terms<sup>6</sup>

As part of the proposed national consumer law, the Ministerial Council proposes that it should include a provision that addresses unfair contract terms. The provision should have the following features:

- the 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;
- a remedy could only be applied where the claimant shows detriment, or a substantial likelihood of detriment, to the consumer (individually or as a class). Detriment is not limited to financial detriment;
- it would relate only to standard-form (ie non-negotiated) contracts. Should a supplier allege that the contract at issue is not a standard-form contract, then the onus will be on the supplier to prove that it is not;
- it would exclude the upfront price of the good or service, using the approach currently adopted in regulation 6(2) of the United Kingdom's Unfair Terms in Consumer Contracts Regulations 1999; and
- it would require all of the circumstances of the contract to be considered, taking into account the broader interests of consumers, as well as the particular consumers affected.

Where these criteria are met, the unfair term would be voided only for the contracts of those consumers or class of consumers subject to detriment (or the substantial likelihood thereof), with suppliers also potentially liable to damages for that detriment, along with other remedies available under the *Trade Practices Act 1974*.

The drafting of any new provision should ensure the potential for private (and regulator-led) representative actions for damages by a class of consumers detrimentally affected by unfair contract terms, in keeping with the PC's recommendation that representative actions be improved.

The provision should also permit the prescription of certain terms that are, in all circumstances, considered to be unfair. This regulation making power would rest with the Australian Government Minister, who would prescribe terms in accordance with the national consumer law amendment process set out in the Inter-Governmental Agreement and the requirements of regulatory impact assessment.

The provision should be supported by national guidance on its enforcement, developed by the national and state and territory regulators, in accordance with a process set out in the Inter-Government Agreement.

MCCA's recommendations in relation to the ACL were agreed by COAG at its 2 October 2008 meeting.

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<sup>6</sup> See MCCA 2008, pages 4-5.

## Responses to the SCOCA information and consultation paper

On 17 February 2009, SCOCA released an information and consultation paper entitled *An Australian Consumer Law: Fair markets – Confident consumers*.<sup>7</sup> The paper explains how the ACL will be developed, sets out the detail of the specific reforms agreed by COAG to establish the ACL, and seek views and explore options for augmentations and modifications to existing generic consumer protections, based on best practice in existing state and territory laws.

In response to issues raised in the consultation paper, SCOCA has received 101 submissions (to date) from a wide range of consumer and business stakeholders (of which 87 are public submissions and 14 are confidential submissions). The submissions that do not contain confidential material are available publicly on the Treasury website ([www.treasury.gov.au](http://www.treasury.gov.au)).

A substantial majority of submissions discussed unfair contract terms, with a wide range of views being expressed on the merits of regulatory action in this space and on specific aspects of MCCA's model for an unfair contract terms provision.

## THE AUSTRALIAN CONSUMER LAW IMPLEMENTATION PROCESS

### What will the new regulatory scheme look like?

As agreed by COAG on 2 October 2008, and proposed by MCCA, the ACL:

- will be a national consumer law, which applies as the law of the Commonwealth and of each State and Territory;
- will apply to all sectors of the economy, including financial services and credit. The provisions of the ACL must be mirrored in the investor protection provisions of the *Australian Securities and Investments Commission Act 2001* (ASIC Act), and the Australian Government has committed to maintaining consistency between the ASIC Act and the ACL, as far as is practical; and
- will be administered and enforced under a shared enforcement model, with enforcement responsibility undertaken by national agencies (Australian Securities and Investment Commission (ASIC) and Australian Competition and Consumer Commission (ACCC)) and state and territory agencies (the state and territory offices of fair trading). Formal arrangements will be put in place in relation to cooperation and collaboration between agencies.

### How will the application law scheme work?

The *National Partnership Agreement to Deliver a Seamless National Economy* (NPA) commits all Australian governments to pass legislation to implement a national consumer law by the end of 2010.<sup>8</sup> By implementing the ACL, and completing a range of other reforms, the States and Territories will receive certain payments and will also make a range of savings arising from the consolidation or transfer of certain existing regulatory functions.

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7 SCOCA 2009, *An Australian Consumer Law: Fair markets – Confident consumers*, Canberra, <http://www.treasury.gov.au/contentitem.asp?NavId=014&ContentID=1484>.

8 A copy of the NPA is available on the COAG website at <http://www.coag.gov.au>.

The ACL will be implemented by an application law scheme, with the Australian Government as the lead legislator. Under the NPA, the Australian Government will introduce legislation:

- to amend the TPA to create a schedule, which will include the ACL; and
- to include provisions in the TPA and the ASIC Act which enable the ACL to apply in respect of the Australian Government, and also provide for the jurisdiction of the courts, the modification of the ACL and related matters.

As part of their NPA obligations, the States and Territories have agreed to introduce and enact application legislation to:

- apply the ACL as part of their respective laws; and
- make such modifications as are required to give effect to the ACL, including repealing existing provisions which deal with matters under the ACL.

### **How will the ACL be implemented?**

The Australian Government, in close consultation with the States and Territories, is developing the legislation to implement the key ACL reforms agreed by COAG on 2 October 2008.

The Australian Government intends to introduce a Bill (the First Commonwealth Bill) in the Winter sittings (June 2009) of the Australian Parliament to:

- introduce a national provision regulating unfair contract terms; and
- introduce the new penalties, enforcement powers and consumer redress options, at the national level.

The States and Territories will be able to implement the unfair contract terms provisions of the First Commonwealth Bill from commencement, should they decide to do so.

The Australian Government will then introduce a second Bill (the Second Commonwealth Bill) in early 2010, which will introduce the bulk of the ACL. The Second Commonwealth Bill will include:

- provisions on a new national product safety regulatory framework;
- best-practice reform provisions based on existing state and territory laws (where agreed to by the Australian Government and the States and Territories); and
- the remainder of the ACL provisions drawn from existing consumer protection provisions of the TPA.

## **CHAPTER 2**

# **EXPLANATION OF THE DRAFT UNFAIR CONTRACT TERMS PROVISIONS**

The draft unfair contract terms provisions will be implemented by the ACL and as part of the ASIC Act, which applies to financial services. Accordingly, two sets of draft unfair contract terms provisions are included in the Attachment to this Consultation Paper, which relate to the ACL and to the ASIC Act, respectively. The content of these draft provisions is substantially the same. Where differences exist, these are explained below.

This chapter provides an explanation of the draft unfair contract terms provisions, and is intended to provide additional information and background to assist in understanding the draft provisions. The explanation is given in relation to the draft provisions to be included in the ACL, with appropriate references to the draft provisions in the ASIC Act.

### **PART 1 — PRELIMINARY**

#### **Section ^1 — Definitions (section 12BA, ASIC Act)**

This Part sets out definitions which apply in relation to the draft unfair contract terms provisions. They are explained, where necessary, in relation to the specific provisions to which they apply.

### **PART 2 — UNFAIR AND PROHIBITED CONTRACT TERMS**

#### **Division 1 — Unfair Terms**

This Part provides that an unfair term of a standard-form contract is void, and sets out the test for determining unfairness and the relevant considerations that a court may have regard to in making a determination that a term is unfair.

#### **Section ^2 — Unfair terms of standard-form contracts (section 12BF, ASIC Act)**

Subsection ^2(1) provides that an unfair term of a standard-form contract is void. The new section 12BF of the ASIC Act will apply to unfair terms of a standard-form contract if the contract is a financial product or a contract for the supply, or possible supply, of a financial service.<sup>9</sup>

The test for determining whether a term is unfair is set out in section ^3, along with other considerations to be taken into account by the court. Factors relevant to the nature of a standard-form contract are set out in section ^7.

Subsection ^2(2) provides that a contract containing an unfair term will continue to bind the parties to the extent that the contract is capable of operating without the unfair term.

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<sup>9</sup> See sections 12BAA and 12BAB of the ASIC Act for the definitions of 'financial product' and 'financial service'.

Section ^2 will apply to all standard-form contracts entered into for the supply of goods or services or a transfer of land. Section ^8 provides that 'contracts of service' (that is, employment contracts) are excluded from consideration under these provisions.

The application of section ^2 will not be limited to consumers as defined in section 4B of the TPA, but will cover all persons, including bodies corporate. An action under this provision may be commenced by any person, including bodies corporate, and by the ACCC. In respect of the draft ASIC Act provision, an action may be commenced by any person, including bodies corporate, and by ASIC.

### **Would the unfair contract term provisions apply to business-to-business transactions?**

The draft provisions on unfair contract terms will apply to business-to-business transactions in the same way as other key provisions in the TPA do, such as those dealing with unconscionable conduct and misleading and deceptive conduct.

Standard-form contracts are used by parties irrespective of the legal status or nature of the party to whom the contract is presented, and without any effective opportunity for that party to negotiate the term. In such cases, it would be invidious to suggest that the same term, which may be considered unfair in relation to a contract entered into by a natural person, would not be similarly unfair in relation to a business, where neither of them is in a position to negotiate the term.

In considering the practical application of the unfair contract terms provisions to business-to-business arrangements, key elements of the provisions could, in many cases, serve to limit their effect:

- The provisions only apply in respect of standard-form contracts. Negotiation of terms would remove a transaction from the scope of the provisions.
- The test in subsection ^3(1) requires that there must be a 'significant imbalance in the parties' rights and obligations arising under the contract', which may be difficult to show in many business-to-business arrangements.
- The test in subsection ^3(1) also requires that the term must not be 'reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term'. Again, this may be difficult to show in many business-to-business arrangements.

## Section 12BG — Meaning of ‘unfair’ (section 12BG, ASIC Act)

Subsection 12BG(1) provides that a term in a standard-form contract is ‘unfair’ if:

- it would cause a significant imbalance in the parties’ rights and obligations arising under the contract; and
- the term is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the supply.

### The test

This test reflects the model agreed by MCCA on 15 August 2008, which was later endorsed by COAG on 2 October 2008.

The first element of the test requires the court to consider whether the term has caused a significant imbalance in the parties’ rights and obligations arising under the contract. This would involve a factual assessment of the evidence available to determine whether a ‘significant imbalance’ exists.

The second element of the test requires the consideration of whether the term is reasonably necessary to protect the legitimate interests of the party advantaged by the term. Having regard to the requirements of subsection 12BG(4) (see below), this element of the test would permit the party advantaged by the term to bring before the court evidence of their justifications for using the term, and that the court must take account of that evidence in making a determination of whether the term is unfair.

### Why doesn’t the test refer to a ‘consumer’ or a ‘supplier’?

The test does not refer to a ‘consumer’ or a ‘supplier’ as there are circumstances where it is the ‘consumer’ in a transaction who provides and insists on the use of a standard-form contract.

### The rebuttable presumption

Subsection 12BG(4) establishes a rebuttable presumption that a term is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party can prove otherwise.

The effect of this provision is that, once the issue has been raised by the claimant in proceedings, the respondent must show, on the balance of probabilities, that the use of the term in the standard-form contract was reasonably necessary to protect their legitimate business interests.

### What would a party need to do to rebut this presumption successfully?

While it is ultimately a matter for the court to determine whether a term is reasonably necessary to protect the legitimate interests of the party advantaged by the term, the provision would require that party to establish, at the very least, that its legitimate interest is sufficiently compelling to overcome any detriment caused to the consumer, or a class of consumers, and that in doing so it was ‘reasonably necessary’.

The rebuttable presumption has been included to overcome a number of potential issues in the conduct of proceedings under this provision:

- Without the presumption, a claimant would need to have evidence of a negative proposition prior to the commencement of proceedings, in order to provide particulars in support of their pleadings. An individual or business claimant would find this very difficult on the basis that evidence of the respondent's justifications for including a term would be in the control of the respondent, and there is no reasonable expectation that such evidence could become available to a claimant. An enforcement agency would be in a similar situation and would be compelled to use its coercive information and evidence gathering powers in order to make out a case. The use of such coercive powers would add considerably to the cost and length of proceedings.
- It is inherently difficult for a claimant to prove a negative proposition. This would, in effect, require the claimant to 'second guess' the reasons for the inclusion of a term, in circumstances where this evidence is far more quickly and cost-effectively brought to the court's attention by the respondent.
- The existence of the presumption gives a respondent an early opportunity to explain why they need to use the term in dispute. Furthermore, if the matter progressed to court proceedings, it is left to the respondent to decide which evidence to bring before the court, having regard to what it considers to be most relevant and appropriate to support the contention that the inclusion of the term is reasonably necessary to protect its legitimate interests.

The absence of this presumption would pose considerable obstacles to the enforcement of the unfair contract terms provisions and undermine COAG's policy intention.

### **What type of evidence would a party need to establish that a term is reasonably necessary to protect their legitimate interests?**

A respondent would be able to introduce *any* evidence that could be relevant to establishing that the term was reasonably necessary to protect the respondent's legitimate interest(s). Subsection 3(2) makes it clear that the court may take into account 'such matters which it thinks relevant'. Under the rebuttable presumption described above, it will be a matter for the respondent to decide what evidence to bring before the court, having regard to what it considers to be most relevant and appropriate to support the contention that the inclusion of the term is reasonably necessary to protect its legitimate interests. In a business context, such evidence might include material relating to the business's costs and business structure, the need for, and nature of, risk mitigation and relevant industry practices.

### **Considerations the court may take into account**

In determining whether a term is unfair, the court may take into account such matters which it thinks are relevant (subsection 3(2)). While the court may take into account such matters as it considers relevant, it **must** take into account the following matters:

- the extent to which it would cause, or there is a substantial likelihood that it would cause, detriment (financial or otherwise) to a party if the term were to be relied on;

- the extent to which the term is transparent; and
- the contract as a whole.

### Detriment

The detriment consideration in paragraph ^3(2)(a) reflects the PC’s recommendation that there would need to be material detriment to consumers (individually or as a class) in order for a remedy to be available. However, the draft provision also makes it clear that action may also be undertaken on the basis of a ‘substantial likelihood of detriment’.

#### Why is a ‘substantial likelihood of detriment’ permitted?

‘Substantial likelihood of detriment’ clarifies the meaning of ‘detriment’ in this context, making it clear that in order to take action the claimant does not need to have proof of having suffered actual detriment, but that there is a substantial likelihood of detriment.

A term does not need to be enforced in order to be unfair, although the possibility of such enforcement may impact on the decisions made by the party that would be disadvantaged by the term’s practical effect. An express limitation to actual detriment would place considerable practical limits on the effectiveness of the provision, bearing in mind that many unfair terms, while in existence, may not have been enforced.

By requiring evidence of a ‘substantial likelihood of detriment’, the provision requires more than a hypothetical case to be made out by the claimant.

In accordance with MCCA’s agreed model, paragraph ^3(2)(a) also makes it clear that detriment is not limited to financial detriment. This is designed to allow the court to consider situations where there may be other forms of detriment, such as inconvenience, delay or emotional distress, which may affect the party disadvantaged by the practical effect of the term.

### Transparency

A requirement to consider the transparency of the term has been included expressly to draw the court’s attention to unfairness which is occasioned or exacerbated by a lack of transparency in the form of the contract.

This has been an issue of key concern with the enforcement of the similar provisions which exist in the United Kingdom and Victoria, in that unfairness can be evident by reliance on the way in which the contract terms have been presented to the consumer.

Subsection ^3(3) provides a definition of ‘transparent’ which is made up of four elements. A term is transparent if it is expressed reasonably in plain language, legible, presented clearly and readily available to any party affected by the term.<sup>10</sup>

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10 The definition of ‘transparent’ in the draft unfair contract terms provisions is based on a similar definition used in section 14 of the UK Law Commissions’ draft Unfair Contract Terms Bill 2004. See The UK Law Commissions 2004 *Unfair Terms in Contracts* at Appendix A.

### Is the transparency requirement conclusive of a term's unfairness?

The extent to which a term is transparent is not determinative of the unfairness of a term in a standard-form contract and transparency, on its own account, cannot overcome underlying unfairness in a contract term.

The transparency of a term is simply a consideration that a court **must** take into account when determining whether a term is 'unfair'.

### Section 4 — Examples of unfair terms (section 12BH, ASIC Act)

Section 4 sets out a list of examples of types of terms that may be unfair. This list is not conclusive of unfairness. The non-exhaustive, indicative list of types of terms in section 4 is based on section 32X of the Victorian *Fair Trading Act 1999*.

Section 4 sets out the following examples of terms that may be unfair:

- (a) a term that permits, or has effect of permitting, one party (but not another party) to avoid or limit performance of the contract;
- (b) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;
- (c) a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;
- (d) a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;
- (e) a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;
- (f) a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;
- (g) a term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied, or the land to be sold or granted, under the contract;
- (h) a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning;
- (i) a term that limits, or has the effect of limiting, one party's vicarious liability for its agents;
- (j) a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent;
- (k) a term that limits, or has the effect of limiting, one party's right to sue another party;
- (l) a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract;

(m) a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract;

(n) a term of a kind, or a term that has an effect of a kind, prescribed by the regulations.

Paragraph 4(n) provides that additional terms may be added to this list of examples by way of regulations. This is to permit the expansion of the list in response to changes in markets and the way in which standard-form contracts are constructed and used. These regulations would be made by the minister, having consulted with, and obtained the relevant agreement required from, the States and Territories under the Intergovernmental Agreement (IGA).

#### **Would section ^4 prohibit the use of the types of terms listed?**

No. The examples of unfair terms in section ^4 are indicative only, and are not intended to prohibit the use of those terms.

The examples provide statutory guidance on the types of terms which may be regarded as being of concern. However, they are not intended to limit the application of the 'unfair term' test outlined in section ^3 and there are circumstances in which the use of such a term may be justified. Indeed, in the application of the test in subsection ^3(2), a respondent has the opportunity to show that the use of such a term is reasonably necessary in order to protect its reasonable business interests.

#### **Terms permitting unilateral changes by one party to the contract**

Paragraphs ^4(a), (b), (d), (e), (f), (g) and (h) are examples of types of terms that allow a party to make changes to key elements of a contract, including terminating it, on a unilateral basis.

#### **Will the provisions ban unilateral variation clauses?**

No. With respect to long-term and ongoing standard-form contracts, many businesses have a legitimate need to amend terms in their contracts unilaterally in order to take account of market conditions.

The inclusion of these examples is not intended to suggest or indicate a desire to prohibit unilateral variation terms, nor does the list have this effect. Indeed, the need for the unilateral variation of contract terms is expressly contemplated by legislation in specific contexts, including Division 1 of Part 4 of the *Uniform Consumer Credit Code* (UCCC).<sup>11</sup> While unilateral variation clauses may be justified, such terms must be used in a manner which is reasonably necessary in order to protect the legitimate business interests of the party advantaged by the term.<sup>12</sup>

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11 The UCCC will become a National Consumer Credit Code as part of the National Consumer Credit Protection Bill 2009. See <http://www.treasury.gov.au/consumercredit/content/default.asp>.

12 See, for example, *Director of Consumer Affairs Victoria v AAPT Ltd* (Civil Claims) [2006] VCAT 1493. The Tribunal found that unilateral variation powers cannot be justified solely on the basis that they are required to allow the business to respond to upstream changes in its commercial environment, unless the consumer is given adequate notice of the changes and has the right to exit the contract without penalty where the changes are materially detrimental.

### **Would a contract term giving a lender the power to alter the interest rate unilaterally under a credit agreement be covered by the unfair contract term provisions?**

The provisions are not intended to allow customers to challenge the payment of interest under a credit agreement, or to challenge the interest rate or variations of interest rates, on the basis that they are unfair. In relation to financial products and services, interest forms part of the upfront price of the credit agreement and therefore would be unable to be challenged under the scheme. In this context, the provisions make it clear that the upfront price will include the repayment of both the principal and the interest of a loan (as set out in section 12BI of the ASIC Act).

### **Terms limiting the rights of the other party**

Paragraphs ^4(i), (k), (l) and (m) are examples of types of terms that have the effect of limiting the rights of the party to whom the standard-form contract is presented.

### **Would this impact on limitations of liability permitted by national, state or territory laws?**

There are many instances in which limitations of liability are expressly countenanced by national, state or territory legislation for reasons of public policy; for example, to ensure that markets can function or remain accessible to ordinary consumers.

The draft provisions make express reference to terms which are required, or expressly permitted, by a law of the Commonwealth or a State or Territory. However, this exclusion applies only to the extent that such terms are required or expressly permitted by the legislation.

### **Terms which penalise a party for a breach or termination of the contract**

Paragraph ^4(c) refers to terms that penalise, or have the effect of penalising, one party for a breach or termination of the contract.

### **What is meant by a 'penalty' in this context?**

Subsection ^4(c) reflects the common law concept of 'penalties'. To be valid, a penalty imposed by a contract must be a genuine pre-estimate of the loss likely to be suffered by the party as a result of the breach or early termination, and should not be an arbitrary sum. However, under the unfair contract terms provision the relevant consideration is whether the term is unfair, within the meaning given to that term by the provisions.

### **Terms which permit the assignment of a contract to the detriment of the other party without their consent**

Paragraph ^4(j) refers to terms that allow for a party to assign the contract to the detriment of the other party, without the other party's consent.

### **Would this rule out securitisation arrangements?**

With respect to credit agreements, many lenders have a legitimate interest in assigning contracts under securitisation arrangements. The inclusion of this example is not intended to suggest or indicate a desire to prohibit the securitisation of loans. Indeed, the need for securitisation is contemplated by legislation in specific contexts, including section 166 of the UCCC.

It should also be noted that these examples are intended to apply to the use of such terms in many different commercial and retail contexts, and are not directed at specific sectors.

### **Section 5 — Terms that define the subject matter of standard-form contracts etc are unaffected (section 12BI, ASIC Act)**

Subsection 5(1) excludes certain core terms from the application of the ‘unfair terms’ test. These are terms which:

- concern the main subject matter of a standard-form contract; or
- set the ‘upfront price’ payable under the contract; or
- is a term required, or expressly permitted, by a law of the Commonwealth or a State or Territory.

#### **Main subject matter of the contract**

The exclusion of terms which ‘concern the main subject matter of a standard-form contract’ is intended to exclude the basis for the existence of the contract (that is, that the consumer has decided to purchase the goods, services or land, which are the subject of the contract). This is based on the premise that the customer has the choice not to purchase the particular good, service or land being offered.

### **What is the main subject matter of the contract?**

The main subject matter of the contract could include the decision to purchase a particular type of good or service, and could also encompass terms without which the supply of that good or service could not, or would not, be given effect. For example, a customer could not seek to challenge a term as being unfair on the basis that they selected a particular good, but decided later that they wanted another. Also, a customer under a loan agreement could not challenge the lender’s basic right to enforce the debt as being unfair, since without this right the loan would never have been made. However, a customer may challenge aspects of the powers provided for under the agreement to do so if they have grounds to consider them to be unfair.

#### **Upfront price**

The exclusion of ‘upfront price’ is intended to exclude from consideration the basic price paid for the goods, services or land supplied under the contract. This exclusion is based on the premise that it would not be desirable to permit a consumer to challenge the basic price paid for the goods, services or land at a later time, when this is an issue about which the consumer has a choice (that is, if the price is too high, the consumer can decide not to enter into the contract).

The draft provisions define the 'upfront price' under a standard-form contract in subsection 5(2), as consideration that is:

- provided, or is to be provided, for the supply, sale or grant under the contract; and
- is disclosed at or before the time the contract is entered into by the parties, but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event.

This definition makes it clear that the upfront price covers the amount (the 'consideration') provided, or to be provided, for the supply, sale or grant under the contract. This would cover the cash price of, or a series of payments for, a good or service, an interest rate for credit, or the sale or grant of an interest in land.

The definition also requires that the upfront price must be disclosed at or before the time the contract was entered into by the parties. In the case of most transactions this is reasonably straightforward, as a key pre-condition of the transaction occurring is an understanding of the price to be paid.

In draft subsection 12BI(3) of the ASIC Act, it is made clear that, in the context of credit agreements, the upfront price includes the total amount of principal that is owed under the credit agreement provided that amount is disclosed at or before the time the contract is entered into by the parties.

#### Can an obligation to make ongoing payments be an 'upfront price'?

An upfront price is the consideration provided for the supply of goods, services or land, including payments to be made at a future time. Having regard to the matters set out in subsection 3(2), a key consideration for a court in considering the nature of such payment arrangements would be the transparency of the disclosure of the total price.<sup>13</sup>

#### Is interest or a future payment determined according to a formula an 'upfront price'?

The price may vary over time (in the case of interest payable for credit) or be calculated according to a formula after a specified amount of time has passed or specified conditions have been met. The intention of the provisions is that these would be included in the upfront price, if it is disclosed at or before the time that the contract is made. Having regard to the matters set out in subsection 3(2), a key consideration of a court in considering this issue would be the transparency of such disclosure.

The draft provisions also provide that **other** consideration (that is, further payments which are not part of the upfront price) under the standard-form contract that is contingent on the occurrence or non-occurrence of a particular event, are explicitly excluded from the determination of 'upfront price'.

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<sup>13</sup> Another relevant consideration is the new section 53C of the *Trade Practices Act 1974*, which will commence on 25 May 2009, and which imposes specific obligations in relation to the disclosure of a single price in many cases.

### **Does this mean that the provisions will cover additional fees and charges?**

The unfair contract terms provisions cover terms which impose fees and charges levied as a consequence of something happening or not happening at some point in the life of the contract. These are not payments that are necessary for the provision of the supply, sale or grant under the contract, but are additional to the upfront price.

### **Terms required as a matter of law**

The exclusion of terms 'required, or expressly permitted, by a law of the Commonwealth or a State or Territory', is intended to ensure that a court is not required to determine the fairness of terms which are required to be included in standard-form contracts as a matter of public policy. There are many examples of mandated standard-form contracts or terms that are required to be used in order to ensure the validity of specific transactions, which apply at both the national and state and territory levels.

## **Division 2 — Prohibited Terms**

### **Section 6 — Prohibited terms of standard-form contracts (section 12BJ, ASIC Act)**

A prohibited term of a standard-form contract of a type specified in the regulations is void. The new section 12BJ of the ASIC Act also provides that a prohibited term is void if the contract is a financial product, or a contract for the supply, or possible supply, of services that are financial services.<sup>14</sup>

A party must not include, rely on, purport to include or purport to rely on, a prohibited term in a standard-form contract. The references to 'purport to include' or 'purport to rely on' are included in subsections 6(2) and (3) on the basis that such terms being void as a consequence of subsection 6(1), a party cannot do more than purport to include or rely on such a term, as it has no legal effect.

The meaning of 'rely on' for the purpose of this provision is set out in section 1 and includes any attempt by a party to enforce the unfair term, as well as any attempt by the party to exercise or assert the existence of a right conferred (or purportedly conferred) by the term. This ensures that claims made by a party in respect of the rights conferred on it by the term are also covered by the provision, in addition to attempts by that party to enforce or exercise the rights conferred by the term.

A breach of subsections 6 (2) or (3) would be a 'contravention' for the purposes of the TPA and will be subject to civil pecuniary penalty. A breach of subsections 12BJ(2) or (3) of the ASIC Act will be a 'contravention' for the purposes of the ASIC Act, and will also be subject to a civil pecuniary penalty.

Subsection 6(4) provides a regulation making power for the minister to prohibit terms in a standard-form contract that are considered to be unfair in all circumstances.

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<sup>14</sup> See sections 12BAA and 12BAB of the ASIC Act for the definitions of 'financial product' and 'financial service'.

### **Will any unfair terms be prohibited at this time?**

After the consultation process earlier in 2009, it was decided not to prohibit any terms at this time. The power to proscribe unfair terms in the regulations in section ^6 could be exercised if the enforcement of the provisions shows that there are particular problems with terms which would justify their prohibition.

Any prohibition of terms under section ^6 will be subject to:

- the Australian Government's best-practice regulation requirements; and
- the voting process for amending the ACL set out in the IGA.

## Division 3 — Miscellaneous

### Section 7 — Standard-form contracts (section 12BK, ASIC Act)

Section 7 concerns the nature of a 'standard-form contract'.

'Standard-form contract' is not defined, either directly or by reference to the elements of such a contract.

#### Why is 'standard-form contract' not defined?

'Standard-form contract' has not been defined to avoid opportunities for avoidance which might be occasioned by the use of an express definition. An express definition might provide parties with the opportunity to attempt to structure contractual arrangements to circumvent the application of the provisions. For example, parties could claim that all or a part of the contract was, in fact, negotiated through the use of sham negotiations or through the presentation of a choice of meaningless options.

In adopting this approach the Government recognises that there may be circumstances where the question about whether a contract is in a standard form is the subject of dispute between the two parties.

Subsection 7(1) of the draft provisions provides for a rebuttable presumption that a contract is a standard-form contract in circumstances where it is alleged by the claimant that a contract is in a standard form. The respondent must then show, on the balance of probabilities, that the contract is not in a standard form.

#### Why is it presumed that a contract will be in a standard form?

It is expected that in the vast majority of cases there will be no dispute about the nature of the contract as it will clearly be in a standard form. However, there may be cases where a party wishes to argue that the contract has been negotiated and is not in a standard form. The rebuttable presumption will require the party that presents the contract to show that the contract is not a standard-form contract. This reflects that:

- the claimant will usually only have evidence of the existence of one contract: their own; and
- the respondent is best placed to bring evidence regarding the nature of the contracts it uses with customers and the way in which it deals with them, including whether negotiations have been entered into.

Subsection 7(2) provides that, in determining whether or not a contract is a standard-form contract, a court may take into account all the circumstances of the contract that it thinks relevant. However, the provision also sets out a list of factors that the court must take into account when making this determination. These include whether:

- one of the parties has all or most of the bargaining power relating to the transaction;
- the contract was prepared by one party before any discussion relating to the transaction commenced;

- another party was required to accept or reject the terms (excepting terms covered by subsection ^5(1)) in the contract in the form in which they were presented (that is, on a ‘take-it-or-leave-it’ basis);
- another party was given an effective opportunity to negotiate the terms of the contract (excepting terms covered by subsection ^5(1)); and
- the terms of the contract (excepting terms covered by subsection ^5(1)) take into account the specific characteristics of another party or the particular transaction.

These factors are intended to capture the basic elements of standard-form contracts as they are used in practice.

Paragraph ^7(2)(f) provides that additional factors may be added to this list by way of regulations. This is to permit the expansion of the list in response to changes in markets and the way in which standard-form contracts are constructed and used. These regulations would be made by the minister, having consulted with and obtained the relevant agreement required from the States and Territories under the IGA.

### **Section ^8 — This Part does not apply to contracts of service**

Section ^8 of the draft provisions exclude contracts of service (that is, employment contracts) from the application of the unfair contract terms provisions.

#### **Why are ‘contracts of service’ excluded from the scope of the provisions?**

Employment contracts and relationships are subject to comprehensive regulation through other national, state and territory legislation, such as workplace relations laws. Contracts of service are not ‘services’ for the purposes of the TPA.

This provision is not applicable in the context of the ASIC Act.

## **ENFORCEMENT ISSUES**

### **National guidance**

COAG has agreed that Australia’s consumer enforcement agencies will issue common national guidance in relation to the enforcement of the unfair contract terms provisions. This will provide greater clarity for consumers and businesses about the enforcement of the provisions, as well as greater consistency in enforcement approaches by national, state and territory consumer enforcement agencies.

#### **When will the national guidance be made available?**

National guidance on unfair contract terms is being developed through a collaborative process being undertaken by Australia’s consumer enforcement agencies (the ACCC, ASIC and the state and territory offices of fair trading) and will be available prior to the commencement of the unfair contract terms provisions.

### Will a finding that a term is void amount to a 'contravention' for the purposes of the enforcement provisions of the ACL or the ASIC Act?

A finding that a contract term is void, under subsections 2(1) or 6(1) of the ACL or 12BF(1) and 12BJ(1) of the ASIC Act, would not be a 'contravention' of the ACL or ASIC Act.

A breach of subsections 6(2) or (3) would be a 'contravention' for the purposes of the TPA and will be subject to civil pecuniary penalty. A breach of subsections 12BJ(2) or (3) of the ASIC Act will be a 'contravention' for the purposes of the ASIC Act, and will also be subject to a civil pecuniary penalty.

## APPLICATION AND TRANSITIONAL PROVISIONS

The unfair contract terms provisions will apply to new standard-form contracts entered into on or after the commencement date of the First Commonwealth Bill (the commencement date).

In relation to an existing contract which is renewed on or after the commencement date, the unfair contract terms provisions will apply to the contract **as renewed** from that day on which the renewal takes effect (the renewal day), in respect of conduct that occurs on or after the renewal day.

In relation to an existing contract which is varied on or after the commencement date, the unfair contract terms provisions will apply to the contract **as varied** from that day on which the variation takes effect (the variation day), in respect of conduct that occurs on or after the variation day.

### Will the unfair contract terms provisions apply to existing contracts?

The unfair contract terms provisions will only apply to existing contracts to the extent that they are renewed or varied after the commencement date of the provisions. This approach reflects the approach adopted in the Victorian *Fair Trading Act 1999*.

### When will the unfair contract terms provisions commence?

COAG agreed that all Australian Governments will pass legislation to implement a national consumer law by the end of 2010.

On 17 February 2009, the Hon Chris Bowen MP, Minister for Competition Policy and Consumer Affairs, announced his intention that the unfair contract terms provisions should commence on **1 January 2010** at the Commonwealth level. This would allow the state and territory governments to apply the provisions in their jurisdiction by the end of 2010.

**Will the States and Territories apply the unfair contract provisions from the commencement date?**

The First Commonwealth Bill will provide for the application of the provisions by the States and Territories from the date on which they commence at the Commonwealth level. The States and Territories must apply the provisions under the NPA from 1 January 2011.

**ATTACHMENT**  
**THE DRAFT UNFAIR CONTRACT TERMS PROVISIONS**

# EXPOSURE DRAFT

Inserts for

## Trade Practices Amendment (Australian Consumer Law) Bill 2009: Unfair and prohibited contract terms

EXPOSURE DRAFT (11/05/2009)

### Schedule 1—Unfair and prohibited contract terms

#### *Trade Practices Act 1974*

##### 1 At the end of the Act

Add:

### Schedule 2—The Australian Consumer Law

#### Part 1—Preliminary

##### 1 Definitions

In this Schedule:

*prohibited term*: see subsection 6(4).

*rely on*, in relation to a term of a standard form contract, includes the following:

- (a) attempting to enforce the term;
- (b) attempting to exercise a right conferred, or purportedly conferred, by the term;
- (c) asserting the existence of a right conferred, or purportedly conferred, by the term.

*transparent*, in relation to a term of a standard form contract: see subsection 3(3).

*unfair*, in relation to a term of a standard form contract: see subsection 3(1).

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*upfront price*: see subsection 5(2).

## Part 2—Unfair and prohibited contract terms

### Division 1—Unfair terms

#### 2 Unfair terms of standard form contracts

- (1) An unfair term of a standard form contract is void.
- (2) The contract continues to bind the parties if it is capable of operating without the unfair term.

#### 3 Meaning of *unfair*

- (1) A term of a standard form contract is *unfair* if:
  - (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
  - (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term.
- (2) In determining whether a term of a standard form contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:
  - (a) the extent to which it would cause, or there is a substantial likelihood that it would cause, detriment (whether financial or otherwise) to a party if it were to be applied or relied on;
  - (b) the extent to which the term is transparent;
  - (c) the contract as a whole.
- (3) A term is *transparent* if the term is:
  - (a) expressed in reasonably plain language; and
  - (b) legible; and
  - (c) presented clearly; and
  - (d) readily available to any party affected by the term.
- (4) For the purposes of paragraph (1)(b), a term of a standard form contract is presumed not to be reasonably necessary in

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order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.

## 4 Examples of unfair terms

Without limiting section 3, the following are examples of the kinds of terms of a standard form contract that may be unfair:

(a) a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;

(b) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;

(c) a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;

(d) a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;

(e) a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;

(f) a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;

(g) a term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied, or the land to be sold or granted, under the contract;

(h) a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning;

(i) a term that limits, or has the effect of limiting, one party's vicarious liability for its agents;

(j) a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent;

(k) a term that limits, or has the effect of limiting, one party's right to sue another party;

(l) a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract;

# EXPOSURE DRAFT

(m) a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract;

(n) a term of a kind, or a term that has an effect of a kind, prescribed by the regulations.

## **5 Terms that define main subject matter of standard form contracts etc. are unaffected**

(1) Section 2 does not apply to a term of a standard form contract to the extent that, but only to the extent that, the term:

(a) defines the main subject matter of the contract; or

(b) sets the upfront price payable under the contract; or

(c) is a term required, or expressly permitted, by a law of the Commonwealth or a State or Territory.

(2) The *upfront price* payable under a standard form contract is the consideration that:

(a) is provided, or is to be provided, for the supply, sale or grant under the contract; and

(b) is disclosed at or before the time the contract is entered into;

but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event.

## **Division 2—Prohibited terms**

### **6 Prohibited terms of standard form contracts**

(1) A prohibited term of a standard form contract is void.

(2) A person must not include, or purport to include, a prohibited term in a standard form contract.

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

(3) A person must not apply or rely on, or purport to apply or rely on, a prohibited term of a standard form contract.

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

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(4) A *prohibited term* of a standard form contract is a term of a kind prescribed by the regulations.

(5) The contract continues to bind the parties if it is capable of operating without the prohibited term.

## Division 3—Miscellaneous

### 7 Standard form contracts

(1) If a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise.

(2) In determining whether a contract is a standard form contract, a court may take into account such matters as it thinks relevant, but must take into account the following:

(a) whether one of the parties has all or most of the bargaining power relating to the transaction;

(b) whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;

(c) whether another party was, in effect, required either to accept or reject the terms of the contract (other than the terms referred to in subsection 5(1)) in the form in which they were presented;

(d) whether another party was given an effective opportunity to negotiate the terms of the contract that were not the terms referred to in subsection 5(1);

(e) whether the terms of the contract (other than the terms referred to in subsection 5(1)) take into account the specific characteristics of another party or the particular transaction;

(f) any other matter prescribed by the regulations.

### 8 This Part does not apply to contracts of service

This Part does not apply to a standard form contract to the extent that it is a contract of service.

### 2 Application and transitional provisions

(1) Part 2 of Schedule 2 to the *Trade Practices Act 1974* applies to a contract entered into on or after 1 January 2010.

(2) That Part does not apply to a contract entered into before 1 January 2010. However:

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(a) if the contract is renewed on or after that day—that Part applies to the contract as renewed, on and from the day (the *renewal day*) on which the renewal takes effect, in relation to conduct that occurs on or after the renewal day; and

(b) if a term of the contract is varied on or after that day—that Part applies to the contract as varied, on and from the day (the *variation day*) on which the variation takes effect, in relation to conduct that occurs on or after the variation day.

(3) Despite paragraphs (2)(a) and (b), that Part does not apply to a contract to the extent that the operation of that Part would result in an acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution) from a person otherwise than on just terms (within the meaning of that paragraph of the Constitution).

# EXPOSURE DRAFT

Inserts for

## **Trade Practices Amendment (Australian Consumer Law) Bill 2009: Unfair and prohibited contract terms relating to financial services etc.**

EXPOSURE DRAFT (11/05/2009)

### **Schedule 2—Unfair and prohibited contract terms relating to financial services etc.**

#### *Australian Securities and Investments Commission Act 2001*

##### **1 Subsection 12BA(1)**

Insert:

*prohibited term* has the meaning given by subsection 12BJ(4).

##### **2 Subsection 12BA(1)**

Insert:

*rely on*, in relation to a term of a standard form contract,  
includes the following:

- (a) attempting to enforce the term;
- (b) attempting to exercise a right conferred, or purportedly conferred, by the term;
- (c) asserting the existence of a right conferred, or purportedly conferred, by the term.

##### **3 Subsection 12BA(1)**

Insert:

*transparent*, in relation to a term of a standard form contract,  
has the meaning given by subsection 12BG(3).

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## 4 Subsection 12BA(1)

Insert:

*unfair*, in relation to a term of a standard form contract, has the meaning given by subsection 12BG(1).

## 5 Subsection 12BA(1)

Insert:

*upfront price* has the meaning given by subsection 12BI(2).

## 6 After Subdivision B of Division 2 of Part 2

Insert:

### Subdivision BA—Unfair and prohibited contract terms

#### 12BF Unfair terms of standard form contracts

(1) An unfair term of a standard form contract is void if the contract is:

- (a) a financial product; or
- (b) a contract for the supply, or possible supply, of services that are financial services.

(2) The contract continues to bind the parties if it is capable of operating without the unfair term.

#### 12BG Meaning of *unfair*

(1) A term of a standard form contract referred to in subsection 12BF(1) is *unfair* if:

- (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term.

(2) In determining whether a term of a standard form contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:

- (a) the extent to which the term would cause, or there is a substantial likelihood that the term would cause, detriment (whether financial or otherwise) to a party if it were to be applied or relied on;
- (b) the extent to which the term is transparent;

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- (c) the contract as a whole.
- (3) A term is *transparent* if the term is:
  - (a) expressed in reasonably plain language; and
  - (b) legible; and
  - (c) presented clearly; and
  - (d) readily available to any party affected by the term.

(4) For the purposes of paragraph (1)(b), a term of a standard form contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.

## **12BH Examples of unfair terms**

Without limiting section 12BG, the following are examples of the kinds of terms of a standard form contract referred to in subsection 12BF(1) that may be unfair:

- (a) a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;
- (b) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;
- (c) a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;
- (d) a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;
- (e) a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;
- (f) a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;
- (g) a term that permits, or has the effect of permitting, one party unilaterally to vary financial services to be supplied under the contract;

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(h) a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning;

(i) a term that limits, or has the effect of limiting, one party's vicarious liability for its agents;

(j) a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent;

(k) a term that limits, or has the effect of limiting, one party's right to sue another party;

(l) a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract;

(m) a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract;

(n) a term of a kind, or a term that has an effect of a kind, prescribed by the regulations.

## **12BI Terms that define main subject matter of standard form contracts etc. are unaffected**

(1) Section 12BF does not apply to a term of a standard form contract referred to in subsection (1) of that section to the extent that, but only to the extent that, the term:

(a) defines the main subject matter of the contract; or

(b) sets the upfront price payable under the contract; or

(c) is a term required, or expressly permitted, by a law of the Commonwealth or a State or Territory.

(2) The *upfront price* payable under a standard form contract referred to in subsection 12BF(1) is the consideration that:

(a) is provided, or is to be provided, for the supply under the contract; and

(b) is disclosed at or before the time the contract is entered into;

but does not include any other consideration that is contingent on the occurrence or non-occurrence of a particular event.

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(3) To avoid doubt, if a standard form contract referred to in subsection 12BF(1) is a contract under which credit is provided or is to be provided, the consideration referred to in subsection (2) of this section includes the total amount of principal that is owed under the contract.

## **12BJ Prohibited terms of standard form contracts**

(1) A prohibited term of a standard form contract is void if the contract is:

- (a) a financial product; or
- (b) a contract for the supply, or possible supply, of services that are financial services.

(2) A person must not include, or purport to include, a prohibited term in a standard form contract of such a kind.

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

(3) A person must not apply or rely on, or purport to apply or rely on, a prohibited term of a standard form contract of such a kind.

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

(4) A *prohibited term* of a standard form contract of such a kind is a term of a kind prescribed by the regulations.

(5) The contract continues to bind the parties if it is capable of operating without the prohibited term.

## **12BK Standard form contracts**

(1) If a party to a proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party to the proceeding proves otherwise.

(2) In determining whether a contract is a standard form contract, a court may take into account such matters as it thinks relevant, but must take into account the following:

- (a) whether one of the parties has all or most of the bargaining power relating to the transaction;
- (b) whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;

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(c) whether another party was, in effect, required either to accept or reject the terms of the contract (other than the terms referred to in subsection 12BI(1)) in the form in which they were presented;

(d) whether another party was given an effective opportunity to negotiate the terms of the contract that were not the terms referred to in subsection 12BI(1);

(e) whether the terms of the contract (other than the terms referred to in subsection 12BI(1)) take into account the specific characteristics of another party or the particular transaction;

(f) any other matter prescribed by the regulations.

## 7 Application and transitional provisions

(1) Subdivision BA of Division 2 of Part 2 of the *Australian Securities and Investments Commission Act 2001* applies to a contract entered into on or after 1 January 2010.

(2) That Subdivision does not apply to a contract entered into before 1 January 2010. However:

(a) if the contract is renewed on or after that day—that Subdivision applies to the contract as renewed, on and from the day (the **renewal day**) on which the renewal takes effect, in relation to conduct that occurs on or after the renewal day; and

(b) if a term of the contract is varied on or after that day—that Subdivision applies to the contract as varied, on and from the day (the **variation day**) on which the variation takes effect, in relation to conduct that occurs on or after the variation day.

(3) Despite paragraphs (2)(a) and (b), that Subdivision does not apply to a contract to the extent that the operation of that Subdivision would result in an acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution) from a person otherwise than on just terms (within the meaning of that paragraph of the Constitution).