



**AUSTRALIAN BANKERS' ASSOCIATION INC.**

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David Bell  
Chief Executive Officer

Level 3, 56 Pitt Street  
Sydney NSW 2000  
Telephone: (02) 8298 0401  
Facsimile: (02) 8298 0447

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Mr John Hawkins  
Committee Secretary  
Senate Standing Committee on Economics  
Parliament House  
CANBERRA ACT 2600

Email: [economics@sen@aph.gov.au](mailto:economics@sen@aph.gov.au)

Dear Mr Hawkins,

**Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Bill)**

The Australian Bankers' Association (ABA) is pleased to provide its submission in response to the Committee's invitation for submissions on this Bill.

The submission comprises this letter and its three annexures:

- (1) Annexure 1 - ABA's submission in response to the Bill;
- (2) Annexure 2 - ABA's submission dated 18 March 2009 to Treasury in response to discussion paper "An Australian Consumer Law - Fair Markets - Confident consumers" dated 17 February 2009; and
- (3) Annexure 3 - ABA's submission dated 22 May 2009 to Treasury in response to "An Australian Consumer Law - consultation on draft provisions on unfair contract terms" released on 11 May 2009.

The ABA trusts that its submission will be of assistance to the Committee in this inquiry and awaits receiving details of any proposed hearings to be conducted by the Committee.

Please contact my Director colleague Ian Gilbert, on (02) 2898 0415 or at [igilbert@bankers.asn.au](mailto:igilbert@bankers.asn.au) if there is anything further we can do to assist the Committee.

Yours sincerely

A handwritten signature in black ink that reads "David Bell".

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**David Bell**

# **Annexure 1**

## Australian Banker's Association

### Submission on the Senate Standing Committee on Economics on the *Trade Practices Amendment (Australian Consumer Law) Bill 2009*

This submission sets out the view of the Australian Banker's Association (ABA) and its members in relation to the *Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Bill)*.

The ABA's views on the national unfair terms regime were previously discussed in detail in its submissions to the Government, including the submission of 18 March 2009 to the "An Australian Consumer Law - Fair markets - Confident consumers" discussion paper (**Discussion Paper**), and its submission in May on the exposure draft documents amending the *Trade Practices Act 1974 (TPA)* and the *Australian Securities and investment commission Act 2001 (ASIC Act) (Exposure Draft)*.

These documents are annexed with this submission for the Committee's reference. The ABA continues to have concerns which remain unaddressed by the Bill, including the unintended and unforeseen consequences of the untested definition of "unfair", the overall uncertainty this regime will cause and the implications for confidence in Australia's financial markets.

While the ABA is pleased that the Bill has addressed some of the concerns over the application of the unfair terms regime to business-to-business transactions (which has been confirmed by Minister Emerson as potentially harmful to small businesses<sup>1</sup>), there are parts of the Bill which have been made public for the first time in legislative draft form. Some parts of the Bill, especially in relation to remedies and enforcement powers, create additional areas of uncertainty and financial exposure and compliance costs in respect of an already heavily regulated financial services industry.

The ABA urges the Committee to delay the introduction of the regime to allow for proper consultation with the business community and to address the concerns and uncertainties that have been raised in respect of the Bill.

#### 1. Insufficient transition period and uncertain transitional arrangements

The proposed 1 January 2010 commencement date for the unfair terms regime will not provide financial institutions and other financial services providers with sufficient time to assess the impact on their standard form consumer contracts and make necessary changes to comply.

To comply with the regime, businesses are required to critically assess whether they are able to offer their products and services on the same terms. For many businesses, the uncertainty of the new regime will require consideration of whether changes to their offerings and prices based on the new level of risk are necessary. Changes to the terms on which products and services are offered requires a long lead time to make necessary systems and process changes within a bank. Banks and other credit providers are also required to concurrently update their systems to comply with the provisions of the *National Consumer Credit Protection Bill 2009 (NCCP)*, and inefficiencies can result if business decisions are made in a piecemeal manner rather than in a way enabling the impact of all these legislative changes as a whole to be fully considered.

The proposed commencement date of 1 January 2010 is also unworkable for the reason that typically, the period between the months of mid-November and mid-January is characterised by banks as one

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<sup>1</sup> In responding to criticism that the unfair terms regime as drafted in the Bill has a negative impact on small businesses, Minister Craig Emerson indicated that the removal of business-to-business contracts from the Bill was because "including them could have in fact disadvantaged small business". In particular, Dr Emerson said that he was "concerned that a vaguely defined notion of unfairness to be subsequently interpreted by the courts could create such uncertainty that financial institutions might refuse to fund the very small businesses the proposal was meant to protect". See Sophie Morris, "Buswell breaks ranks on consumer law", *The Australian Financial Review* (20 July 2009, page 9).

with high volumes and high value of banking transactions. Banks usually freeze any systems changes during this period to minimise the risk of systems problems during this time. It is also a period where employees take holiday leave. Consequently, this period is highly unsuited to a bank making major systems and other changes, including IT systems and documentation related changes that may involve additional human resources. With the Bill unlikely to be enacted until around mid-October, there will be substantial difficulties and constraints in ensuring that all changes can be implemented in time for 1 January 2010.

Also of concern to the ABA is the fact that the Bill and the accompanying Explanatory Memorandum did not expressly contemplate any appropriate transitional arrangements for inconsistent or duplicate laws (such as Part 2B of the *Fair Trading Act 1999* (Vic) (**FTA**)) once the TPA and ASIC Act has been amended. The ABA is of the view that uncertainty and practical compliance issues can arise if the Victorian regulator is able to continue to enforce an inconsistent unfair terms regime during any transition period (or concurrently with the TPA and ASIC Act).

For these reasons, the ABA believes that the following transitional arrangements would be appropriate:

- Any unfair terms regime should not be enforced until 1 January 2011 to coincide with the responsible lending obligations under the NCCP.
- Provisions concerning remedies and redress which are available need to be clarified so to have no retrospective application (see also section 2 of this submission below).
- There should also be express acknowledgment that existing unfair terms laws such as those in Victoria will be repealed immediately upon the commencement of the proposed law on 1 January 2010 to ensure that financial institutions and other businesses do not have to ensure their standard form contracts comply with a number of unfair terms regimes which do differ in important respects.

## **2. Definition of “consumer contract” should not apply to contracts for business type services**

The ABA welcomes the fact that the unfair terms regime under the Australian Consumer Law is restricted to “consumer contracts”. In the ABA’s view, business-to-business dealings and the freedom of contracting should not be subverted by a regime aimed at protecting genuine consumers.

The ABA believes that the Bill’s definition of consumer contracts, which focuses on the purpose of a customer’s actual acquisition (ie “whose acquisition ... is wholly or predominantly for personal, domestic or household use or consumption”) is subjective in nature and will be difficult to implement.

In practice, it will often be difficult for a financial institution to be aware of the purpose for which a customer has acquired a product or service. For example, while certain financial products are generally assumed to be used for personal use, many services (eg credit cards) are suitable for both personal and business use. Even more significantly, the Bill’s definition of “consumer contract” means that a bank’s contract for a service which is predominantly used for commercial purposes may nevertheless be caught by the unfair terms regime merely because it was in fact acquired for personal use. It would be unrealistic and difficult for a bank to prepare standard form contracts which are dependant on the subjective intent of the consumer about the purpose for which a product or service is actually acquired.

In the ABA’s view, the definition of consumer contract should:

- be similar to that used in the current Victorian FTA model, requiring that **both** the purpose of the acquisition and the nature of the product (ie of a kind ordinarily acquired for personal domestic or household purposes, such as a home loan) be taken into account; and

- in relation to credit contracts, consistent with the scope of the proposed National Credit Code (NCC).

### **3. Uncertainty in relation to effect of a declared unfair term**

In the ABA's view, whether a term in a contract is unfair depends on a range of circumstances specific to each individual contract and the parties to that contract. For example, what may appear to be an unfair contract term may nevertheless be fair when taking into account all the relevant circumstances, where, for example, the relevant consumer has knowingly bargained a lower price in return for accepting that term. Those same contract terms may be unfair in relation to another contractual arrangement if no such bargaining took place. Similarly, substantively identical contractual terms may be fair when they are transparent and clearly disclosed, but considered to be unfair when they are illegible, unclearly expressed and hidden from consumers.

The Bill appears to support this view, as the proposed provisions specify that, in determining whether a term in a consumer standard form contract is unfair, a court may take into account "such matters as it thinks relevant", and must take into account the extent to which the term is transparent and the contract as a whole.

In this light, the effect of a term being declared by a court to be an unfair term should apply only to the specific contract to which the application for a declaration relates. However, the drafting of the Bill's non-party redress provisions suggests that this is not the current intention.

For example, s12GNB provides ASIC with the ability to seek redress for "non-parties" who may be affected by a declared unfair term. In permitting the court to grant orders for a class of unidentified persons who may suffer loss or damage (against a party who is advantaged by the declared term in the contract), the availability of non-party redress is by its very nature intended to apply without knowledge of any individual circumstances. This clearly suggests that the effect of a declaration that a court can make will in fact relate to more than one customer's contract. This seems at odds with the policy of the regime that whether a term is unfair will be dependent upon all of the relevant circumstances, the contract as a whole and the transparency of the term.

### **4. Significant prudential implications**

The consumer financial services industry is characterised by large volume of transactions which are effected through standard form contracting. Currently financial institutions generally make every effort to ensure that the terms used and all the relevant charges are not unfair and will continue to do so. However, ultimately, whether or not a term is unfair is determined by the courts and a degree of uncertainty will always exist. This is especially the case, considering the infancy of such a regime and the variety of contracts which are being used.

In the ABA's view, an important safeguard which must be placed on the unfair terms regime is to ensure that declaration of unfair terms does not have retrospective effect.

Of significant concern to the ABA is that this is not currently the case. For example, in relation to non-party redress, if a bank has relied on a term and has collected payment, and that term is subsequently declared unfair and void ab initio, the bank would be at risk of having an order made against it to refund all payments made under that term. Considering the large volume of transactions which are carried out in this sector, such amounts could be very significant. More importantly, any amounts collected by a financial institution (other than upfront prices) may be subject to be refunded at any time within 6 years after the declaration is made that a term is unfair. This will increase uncertainty and prudential risks for all financial institutions.

As the Committee may be aware, businesses operating as authorised deposit-taking institutions (ADI) are subject to prudential supervision and regulation by the Australian Prudential Regulation Authority

(APRA) under section 11B of the *Banking Act 1959* (Cth). The minimum capital requirements that ADIs are obliged to comply with under the Prudential Standards established by APRA require close consideration and assessment of the level of risk posed by each and every credit arrangement entered into by an ADI. The potential for unexpected and significant amounts of refunds through the non-party redress mechanism can have significant implications for the assessment of the credit risk associated with an ADI's exposures, for the purposes of measuring that ADI's capital adequacy.

## **5. Concerns with other enforcement powers**

The ABA is also concerned with the following increased enforcement powers which have the ability to seriously disrupt the financial services industry without clear benefits.

### **(a) Civil pecuniary penalties and unconscionable conduct**

The Bill creates civil pecuniary penalties in relation to unconscionable conduct. The ABA considers this to be inconsistent with the intention behind the use of civil pecuniary penalties, namely, to enable a "middle ground" remedy for provisions which already have criminal sanctions attached.

Whether a bank has acted unconscionably will not always be clear and is an issue in respect of which reasonable minds may differ. Often unconscionability is triggered by a party exercising an otherwise valid contractual right. For the reasons that pecuniary penalties do not apply in relation to misleading and deceptive conduct, the ABA believes that pecuniary penalties should be removed in relation to unconscionable conduct.

### **(b) Public warning powers**

The ability for ASIC to issue public warning notices is too broad and does not reflect the intent to govern shady businesses as stated in the Discussion Paper. As drafted, ASIC is able to exercise this power merely for having "reasonable grounds to suspect" a breach. In addition, defamation action cannot be brought by corporations with ten or more employees, which would limit any available recourse for financial institutions and other businesses which have been harmed by unjustified public warning notices.

Considering the reputational harm such a notice can do to a legitimate business' goodwill, the ABA's view is that this power should be significantly reduced (for example, to allow such public warning notices to be issued only where a business has repeatedly been in contravention).

### **(c) Substantiation notices**

Under the Bill, ASIC and the ACCC may issue potentially damaging and disruptive substantiation notices, whenever a business makes a claim or representation promoting goods or services. The ability for ASIC and the ACCC to request that claims be substantiated is not currently subject to any evidential or independent thresholds.

The ABA is of the view that such broad power will likely lead to "fishing" type exercises by the relevant regulators and will significantly increase the administrative burden of businesses without corresponding benefits. Both the ASIC and the ACCC already have formal information gathering powers under the ASIC Act and the TPA and this additional preliminary investigative tool is unnecessary.

If the Committee believes that such a power is necessary, the ABA believes that at the very least any such power to request substantiation must be accompanied by objectively verifiable and reasonable grounds.

#### **(d) Infringement notices**

Similar to the use of public warning notices, the ABA considers that infringement notices can be a significant source of reputation damage to legitimate businesses. While the second reading speech to the Bill does clarify that this infringement notice mechanism is intended only for minor breaches of the relevant provisions, no such safeguard is expressly provided for in the actual wording of the Bill. The ABA considers that, to the extent that the Committee considers that this enforcement power is required, that the use of such notices be restricted to only minor breaches in the Bill.

### **6. Other issues which were not resolved by the Bill**

#### **(a) Retrospective impact**

The unfair terms regime will apply to all standard form contracts entered into before 1 January 2010 that are varied after that date. The banking sector frequently varies contracts to react to changing market conditions, which includes minor housekeeping changes and passing on changes to interest rates. The ABA is of the strong belief that such changes should not trigger the retrospective application of the unfair terms regime and the regime should only apply to the actual provisions varied and not the entire contract. This should be made clear in the Bill.

There are confusing references in the Explanatory Memorandum to the Bill. In paragraph 2.129 of the Explanatory Memorandum, it is stated that the unfair contract terms provisions will apply to the “contract *as varied*” and from the day the variation takes effect in relation to conduct that occurs thereafter. This is a re-statement of the relevant section in the Bill (section 8(2)(b)).

In the following paragraph (2.130) of the Explanatory Memorandum the opening sentence (in part) states “While the unfair contract terms provisions of the TP Act and the ASIC Act apply to consumer contracts to the extent they are renewed or varied after the date on which the provisions commence...”

As paragraph 2.129 directly concerns the question of a variation to contractual terms and paragraph 2.130 is concerned with another matter the ABA submits that the Bill should make it clear that where a pre-existing consumer contract is varied after commencement, the unfair contract terms provisions should apply to the term as varied rather than the contract.

#### **(b) Lack of clarity in drafting**

There remains uncertainty in the drafting of the unfair terms provisions of the Australian Consumer Law.

In particular:

- In relation to the definition of an “unfair term” and the factors which the court must take into account in determining unfairness, while there is a requirement for the court to take into account “the extent to which it would cause, or there is a substantial likelihood that it would cause, detriment”, this is not a substitute for detriment being part of the definition itself. The ABA is concerned that there is no requirement that a claimant suffer detriment in order for a term to be found to be unfair or for redress to be available. In addition, consistent with the Productivity Commission’s recommendations, a term should only be unfair where it causes actual *material* detriment, not any detriment or a substantial likelihood of detriment.
- The ABA is concerned that a variable interest rate contract has not been clearly exempt as forming part of the “upfront price”. As the Committee would appreciate, the nature of the variable interest rate mechanism is to allow banks to unilaterally vary the interest rate, and this exemption is crucial to ensure that there is no ambiguity whatsoever on this issue.

- The ABA is concerned that the Bill does not provide guidance on the meaning of “legitimate interests”. The ABA is of the view that the legislation should provide guidance on the meaning of the term. Such a fundamental criterion in the legislative model should not be left to non-legislative guidance. Uncertainty is a serious concern of banks with this proposed regime and courts must be given clear legislative guidance about the Parliament’s intention.

**(c) Prohibited terms**

As noted above, the ABA is of the view that any assessment of unfair term must be done taking into account all the individual circumstances in relation to a contract. The possibility that a term can be prohibited under s12BJ of the ASIC Act without regard to the individual circumstances of any contract is contrary to the policy reasons behind such a regime.

This fact that terms can be prohibited through regulations without further consultation may also bring about a high degree of risk. In particular, it is a contravention of the Australian Consumer Law to apply or rely on a prohibited term. If prohibited terms can be introduced without sufficient transition period for suppliers to become aware and ensure they comply, banks and other businesses can inadvertently be in contravention of the regime and then be subject to penalties and other remedies.

**Annexures**

1. The ABA's submission to the "An Australian Consumer Law - Fair markets - Confident consumers" discussion paper dated 18 March 2009.
2. The ABA's response to the Treasury on "The Australian Consumer Law - consultation on draft provisions on unfair contract terms" dated May 2009.

# **Annexure 2**

**Australian Banker's Association**  
**Response to "The Australian Consumer Law - consultation on draft provisions on unfair contract terms"**

The view of the Australian Banker's Association (ABA) and its members in relation to the proposed national unfair terms regime was discussed in its detailed submission of 18 March 2009 to "An Australian Consumer Law - Fair markets - Confident consumers" discussion paper (**Discussion Paper**). This submission relates to the *Trade Practices Amendments (Australian Consumer Law) Bill: Unfair and prohibited contract terms relating to financial services etc* and *Trade Practices Amendments (Australian Consumer Law) Bill 2009: Unfair and prohibited contract terms (Exposure Draft)* released on 11 May 2009, which will amend the *Australian Securities and Investment Commission Act 2001 (Cth) (ASIC Act)* and *Trade Practices Act 1974 (Cth) (TPA)* respectively. The Exposure Draft provides even more reason for the ABA and its members to be alarmed.

The introduction of a national unfair contract terms regime is one of the most significant legislative reforms of modern time but, in the ABA's view, is being forced on the business community in haste and at the worst possible time in Australia's economic history. The regime was originally scheduled for implementation by 2011, but without prior consultation and with little apparent justification, the Government brought this timeframe forward by a whole year. This rushed policy response is very inappropriate given the lack of evidence as to why Australia needs this regime as a matter of urgency. The potential costs and disruption to the banking industry (or all industries for that matter) in order to accommodate the new regime will be immense and the absence of any regulatory impact assessment or even rudimentary cost/benefit analysis by the Government to defend these costs and disruption, especially in the current economic climate, is a significant cause for alarm. The ABA is also very concerned that Treasury has allowed only 10 days for stakeholder comments on the Exposure Draft. Coincidentally, this extremely tight timeframe clashed with the due date also set by Treasury for stakeholder comments on the lengthy draft national consumer credit reform legislation.

The ABA has a number of concerns about the Exposure Draft, but its primary concerns are:

- the lack of empirical evidence that supports a need for an unfair terms regime in Australia, let alone one that protects business customers;
- the additional burdens and costs this regime will impose on an already heavily regulated financial services industry;
- the overall uncertainty this regime will cause and implications for confidence in Australia's financial markets;
- the unintended and unforeseen consequences of the untested "unfair" definition and uncertain drafting;
- the ability of claimants and regulators to readily challenge prices even though they have been properly disclosed by the banks; and
- the significant disruption and costs for businesses to assess the impact of the regime and ensure compliance, and the unworkable and unreasonably short period of time in which to do so.

The ABA would like to meet with Treasury again to discuss these concerns in greater detail.

## **1 No evidence establishing the need for the proposed regime**

In the ABA's view, a national unfair contract terms regime is simply unnecessary. To date, Victoria is the only State or Territory that has implemented this layer of regulation. Further, the Productivity Commission found there to be "only limited information on the extent of consumer detriment"

resulting from perceived unfair contract terms. The Government has not been able to provide any tangible evidence of the extent of any detriment that requires such a legislative response, which brings into question whether Australia needs an unfair contract terms regime at all. Given this lack of evidence, the ABA is very concerned that customers will misuse this regime, for example, raising unfairness in a recovery action to defeat a legitimate process by a bank. Moreover, there is no mention of a regulatory impact statement being conducted in connection with the proposed unfair contract terms regime. In March 2009, the Council of Australian Government's (CoAG) Business Regulation and Competition Working Group published its annual report card in which it reported on the progress of the proposed national consumer law (including unfair contract terms). The timetable contemplated a regulatory impact statement for the national consumer law to be completed by the end of June 2010. A regulatory impact statement cannot be conducted ex post facto once the new unfair contract terms regime has commenced.

However, even if such a regime is thought necessary, given the raft of legislation and disclosure obligations that already exist in the financial services sector, the ABA does not believe an additional layer of regulation is warranted in the sector. The ABA feels that the policy objectives underpinning the proposed unfair terms regime are already achieved by existing regulation, including:

- Commonwealth financial services and credit regulation (such as under Chapter 7 of the *Corporations Act 2001* (Cth) (**Corporations Act**) and the proposed *National Consumer Credit Protection Bill 2009* (Cth));
- unjust transactions legislation (such as under sections 70 and 72 of the current Uniform Consumer Credit Code and under the proposed National Credit Code);
- consumer protection provisions under the ASIC Act and obligations to not engage in unconscionable or misleading or deceptive conduct; and
- the Code of Banking Practice.

Moreover, insurance products are subject to adequate consumer protections through the *Insurance Contracts Act 1984* (Cth), the Corporations Act and the ASIC Act. Imposing a further layer of regulation in an already overregulated industry is wholly unjustified and inconsistent with the Government's supposed deregulation agenda. The ABA would also like to understand how the Government intends the proposed unfair terms regime would work alongside these existing laws.

If, notwithstanding these points, the Government feels an unfair terms regime is needed and is needed in the financial services sector, the stated policy objectives of the reforms certainly do not support an extension of the regime to business customers. The underlying policy objective of these reforms has been stated on a number of occasions to be the protection of *consumers*. The recommendations outlined in the Productivity Commission's report were firmly focussed on *consumers* and the stated policy objectives of various Government groups involved in developing the policy response, such as the Ministerial Council on Consumer Affairs (MCCA) and Standing Committee of Officials of Consumer Affairs, have focussed on ensuring the regime meets the needs of those *consumers* who are "most vulnerable." Lastly, but importantly, the Minister himself has repeatedly talked about the new national consumer law improving *consumer* confidence and protecting *consumers*. Indeed, the new laws have actually been called the "Australian *Consumer Law*."

To the ABA's knowledge, no other major unfair terms regime in the world is drafted to extend protections to business customers, particularly large business customers. For example, consumers "acting as a business or for the purposes of a business" are expressly carved out of the Japanese regime, as are consumers "acting in a business or professional capacity" under the UK regime. A monetary cap applies (based on asset or nominal turnover) to limit the scope of the South African regime. In addition, the Victorian regime only applies to contracts for the supply of goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption and that are

actually used for the purposes of the ordinary personal, domestic or household use or consumption. There is no proper justification for establishing an unfair terms regime in Australia that is substantially inconsistent with all other unfair terms regimes in the world. Moreover, as stated in our previous submission to Treasury, the source of this proposal - the EC Directive 93/13/EEC - is not an appropriate source for Australia as the rationale underpinning the European regime are quite specific to European conditions.

To the extent that the Government thinks it is justifiable and necessary for the Australian regime to extend to small business customers, the regime could adopt the definition of “consumer” in the TPA, which, in general terms, currently provides protection to contracts for goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption and for all goods or services that cost under \$40,000. The regime should also exclude contracts for the resupply of goods and services and wholesale contracts. There is no justifiable reason for the regime extending to large, well resourced and well advised business customers. Nowhere in the Productivity Commission’s report is there any indication or recommendation that large business customers need the protection of the unfair terms regime.

## **2 Overall uncertainty**

### *Eroding certainty of contract*

A fundamental principle of contract law is certainty of contract. This principle is an essential element of all commercial transactions because it allows the parties to adequately allocate and price risk in these transactions. If the application of the proposed regime is uncertain, it will have serious adverse consequences for the operation of Australian banking businesses and Australian financial markets.

The proper operation of Australia’s financial markets depends on the market’s ability to effectively and efficiently price the risk involved in a particular lending situation, which, in turn, enables all market participants to enter the market with a level of confidence. These efficiencies depend heavily on parties to credit arrangements understanding with certainty the allocation of rights, obligations and remedies between them and any limits placed on them. In order to maintain appropriate levels of market confidence, participants must be able to know that the rights created under each agreement and the remedies available (in the event of default, for example) are stable and that the agreed allocation of risk cannot suddenly change on the basis of argument that an agreed, accepted and widely used contractual term is unfair. Given this risk exists under the proposed regime, banking institutions will require appropriate financial compensation for accepting this higher degree of inherent risk. The additional costs will inevitably be passed on to end users of the credit markets - the very consumers the proposed law is designed to protect - in the form of higher borrowing costs that would build new economic inefficiencies and inflationary pressures into the system.

The erosion of certainty also has potentially serious consequences for businesses operating as authorised deposit-taking institutions (**ADI**), which are subject to prudential supervision and regulation by the Australian Prudential Regulation Authority (**APRA**) under section 11B of the *Banking Act 1959* (Cth). The minimum capital requirements that ADIs are obliged to comply with under the Prudential Standards established by APRA require close consideration and assessment of the level of risk posed by each and every credit arrangement entered into by an ADI. The board and management of a bank are subject to a duty to assess and manage this risk in a responsible way. The introduction of a statutory unfair terms regime that casts an additional degree of doubt over the enforceability of any credit arrangement an ADI has on foot may have significant implications for the assessment of the credit risk associated with an ADI’s exposures, for the purposes of measuring that ADI’s capital adequacy. Consistent with the principles of approaching credit risk under the Prudential Standards, a reduction in the certainty with which an ADI can properly assess the credit risk of these arrangements could lead to an upwards revision of the ADI’s capital adequacy requirements, necessitating a reduction in the amount of capital an ADI can make available, which could lead to an unintended tightening of credit markets in Australia. Against these considerations, the ABA is quite

alarmed by the apparent lack of involvement or engagement of APRA in the development of the proposed unfair contract terms regime.

### 3 Drafting lacks clarity

#### *Test for unfairness*

The proposed definition of an “unfair” term is completely untested, based on uncertain principles and inconsistent with tests used in other unfair terms regimes. In addition, the proposed test for unfairness does not reflect the recommendations of the Productivity Commission, as refined by the MCCA and agreed by CoAG. Put together, these recommendations required that a term will only be unfair if:

- (a) it causes a significant imbalance in the parties rights and obligations arising under the contract;
- (b) it is not reasonably necessary in order to protect the legitimate interests of a party;
- (c) it causes a material detriment or there is a substantial likelihood of material detriment;
- (d) it is a term in a standard form, non-negotiated contract; and
- (e) it is unfair in all the circumstances of the contract.

Whilst the definition of “unfair” term in the Exposure Draft includes (a) and (b), it does not include (c) to (e). These are very important aspects of unfairness which must be included in the actual definition of “unfair” term.

The requirement for the court to take into account “the extent to which it would cause, or there is a substantial likelihood that it would cause, detriment” when determining whether a term of a standard form contract is unfair is not a substitute for detriment being part of the definition itself. That is, the ABA is concerned because there is no requirement that a claimant suffer detriment in order for a term to be found to be unfair or for redress to be available. In addition, consistent with the Productivity Commission’s recommendations, a term should only be unfair where it causes actual *material* detriment, not any detriment or a substantial likelihood of detriment. The notion of “substantial likelihood” adds further uncertainty to the regime and will promote not only unmeritorious and vexatious claims, but increased intervention and regulatory error in the hands of over-zealous consumer regulators. It must be removed. Customers already have access to adequate remedies, such as injunctions, to deal with any instances of potential detriment. The ABA also opposes the Government’s view that detriment should extend to more than financial detriment in the financial sector. The uncertainty to businesses and associated costs of calculating non-financial detriment, such as “inconvenience”, do not warrant this extension. It is sufficient that a consumer be compensated for material financial detriment.

While the ABA does not object to the “legitimate interests” limb of the test, it is concerned about the uncertainty this phrase invites. At law, the meaning of “legitimate interests” is unclear. For example, it is not clear that the general commercial interests of a business – namely a company’s primary duty to provide returns to shareholders – are “legitimate interests”. Furthermore, the Government previously stated (in the Discussion Paper) that this element is “designed to ensure that, when applying the test, the question of the *business’ reasons* for including a provision in a contract is addressed.” The ABA has no objection to this. However, the Government’s position appears to have changed, with the explanatory notes to the Exposure Draft indicating that a business would need to show “at the very least, that its legitimate interest is *sufficiently compelling* to overcome *any* detriment caused to the consumer...”, which is a higher threshold. Given this inconsistency and uncertainty in policy, and particularly as a standard form contract will be *presumed not* to be reasonably necessary in order to protect legitimate interests, the Government should, after consultation with banks, prepare guidelines

that indicate exactly what factors would be considered “legitimate interests”. From the perspective of the banking sector, any steps a financial institution needs to take to comply with its regulatory requirements (such as APRA’s regulatory capital requirements) must be codified as “legitimate interests”.

The definition of “unfair” term must require the court to take into account all of the circumstances. The current assessment is not satisfactory as there is no requirement that the court consider the circumstances - at most, the court has a mere discretion to “take into account any such matters it thinks relevant”. In the banking sector, factors such as prudential considerations, the familiarity of the consumer with the terms of contract from prior dealings with the bank, whether the customer was advised to obtain or did obtain independent legal advice and pre-contractual disclosure are all very important factors to the assessment of unfairness and must not be overlooked.

Lastly, the concept of a “standard form contract” is also vague and uncertain and will have the effect of exposing many more contracts than actually intended to the regime. In the ABA’s view, it should not be the task of the respondent to have to prove an essential ingredient of the claimant’s allegation. The Government’s justification for placing the onus on the respondent is flawed - the claimant is in no worse position than in any other area of the law and is in no worse position than the other party to bring evidence regarding the nature of the contract, especially if they are a seasoned negotiator, as is the case for all large business customers, and the claimant only needs evidence of their own contract.

The Government has foreshadowed a set of guidelines to accompany this regime and it is imperative that the Government work closely with the banking sector and industry generally to ensure these guidelines are workable for all.

#### *Upfront price*

The unfair terms regime will not apply to a term that sets the “upfront price” payable under the contract. “Upfront price” is defined as the consideration that is provided or is to be provided and 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. The draft legislation also provides that if a standard form contract is a contract under which credit is provided or is to be provided, the consideration “includes the total amount of principal that is owed under the contract.”

The ABA agrees that the unfair terms regime should not apply to the “upfront price”, but has a number of concerns with the definition of “upfront price” put forward by the Government.

The explanatory notes to the Exposure Draft expressly state that: “*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 repayments of both the principal and interest of a loan (as set out in section 12BI of the ASIC Act).*” However, this is not reflected in the definition for “upfront price” put forward by the Government, particularly as the definition specifically states that it includes the “total amount of principal” but does not mention interest. It is vital to the banking industry the definition of “upfront price” make it very clear that the upfront price will include the repayment of both the principal and the interest of a loan (including variations to interest). In addition, the ABA sees no justification for not including in the definition of “upfront price” fees and charges such as establishment fees, switching fees and exit fees, which are integral parts of an overall loan product, where they have been disclosed to the customer before the contract and the customer has agreed to pay. Such fees are not “contingencies” - they are part of the actual structure of the product.

Moreover, the definition needs to be narrow and put beyond doubt to minimise the risk of courts becoming price regulators and arbiters of what is a “fair” price, which would be an absurd result.

There appears to be no policy justification for “upfront price” not including fees or charges that are technically contingent on the occurrence or non-occurrence of an event. In the ABA’s view, this carve out should be removed. The explanatory notes to the Exposure Draft make it clear that the exclusion of “upfront price” is based on the premise that it would not be desirable to permit a consumer to challenge the basic price paid when this is an issue about which the consumer had a choice and could have decided not to enter into the contract. The ABA is of the view that the same policy justification applies to all fees and charges, whether or not payment of them is contingent on the occurrence or non-occurrence of a particular event. Provided fees and charges are disclosed at or before the time the contract is entered into, customers can make an informed decision as to whether or not to enter into the contract. Customers should not be able to subsequently challenge fees or charges, including switching and exit charges (for example, to convert from a fixed to variable loan), which are integral to their product and have been adequately disclosed simply, because they no longer want to pay this agreed price.

Accordingly, in the ABA’s view, the unfair terms regime should not apply to any price provided it is properly disclosed at or before the time the contract is entered into. Focussing on the transparency of the price is also consistent with the policy approach the Government has taken to other pricing provisions in consumer protection law, such as the recent component pricing reforms.

It is also important to remember that customers are currently not without relief against fees and charges that are perceived as “high”. For example, relief is available under the law of penalties where a charge is a penalty, remedies are available for breach of an obligation under Chapter 7 of the Corporations Act and relief is available under the unconscionability and misleading or deceptive conduct provisions of the ASIC Act.

#### *Grey list*

While the Government has indicated that it has followed the UK approach to having a “grey list” in the regime, it has not done so in the same way. Dubbing the list a list of “Examples of unfair terms” creates a real risk that the list will be misunderstood to be a blacklist of terms, inviting frivolous and vexatious claims, as well as regulatory error. This is especially so as most of these claims will be made to external dispute resolution (**EDR**) schemes unless the EDR schemes determine that the claims should be determined by a court. The law does not exclude an EDR scheme from making a decision about unfairness. The legislation must be clear on its face that unfairness is to be judged according to the legal test for unfairness.

Accordingly, the ABA’s view is that this grey list must be removed from the text of the legislation and, if the Government feels this guidance is necessary, placed in a non-binding, standalone guideline. The ABA recommends that any such guidance make the important points reflected in the explanatory notes to the Exposure Draft that unilateral variation rights may be justified and any suggestion that a term allowing one party, without consent, to assign the contract to the detriment of the other party, does not prohibit or adversely affect the securitisation of loans. Removing the list of “examples” will benefit consumers, as it will ensure that the unfairness test can operate freely and flexibly. No other provisions in the Australian Consumer Law spell out such “examples” and the ABA can see no good reason why unfair terms should be an exception.

In addition, the ABA is very concerned that the Government has given itself the ability to ban terms outright by regulation. This is unworkable in a regime that threatens to extend from genuine consumer to businesses arrangements because an “unfair” term in a genuine consumer context will not necessarily be unfair in a business context. There is no justification for the Government being able to ban terms outright and at a political whim and this ability needs to be removed from the regime. If the Government considers it absolutely necessary and justifiable that it have the ability to ban terms, the ABA recommends that the process for banning be transparent (for example, outlined in a guideline) and that no terms be banned until proper industry consultation is undertaken.

### *Retrospective effect*

The unfair terms regime will apply to all standard form contracts entered into before 1 January 2010 that are varied after that date “to the contract as varied”. It is not at all clear from this drafting or the explanatory notes whether this will mean that the *entire contract* will be open to scrutiny or just the term or terms varied. For this regime to be workable, it must be the latter otherwise each and every contract that the banks have entered into before the commencement date will be open to scrutiny. The banking sector frequently varies contracts to react to changing market conditions, which includes minor housekeeping changes and passing on changes to interest rates. These transitional provisions must provide certainty to our members about the status of contracts entered into before the legislation takes effect given that millions of contracts will be affected. Accordingly, given the accelerated implementation timeframe, any retrospective application should be limited to the actual provisions varied and not the entire contract. Particularly in the banking context, the Government must clarify what kinds of “variations” it contemplates will trigger this (limited) retrospective application.

#### **4 Significant compliance costs**

##### *Not enough time to assess the full impact*

The ferocity with which the Government is pushing through these significant reforms is of huge concern to the ABA and its members. The Government has only allowed 10 days to provide comments on such a significant piece of legislation, which, incidentally, clashes with the timeframe for input into the lengthy draft national consumer credit reform legislation.

No good reason has been proffered as to why it is important to rush this legislation through and without a regulatory impact statement. The ABA would caution against legislating in haste. It is very important to make sure that any legislation is **well thought out** and **carefully drafted**. If the legislation is rushed through and subsequently there is a need for amendments to rectify drafting mistakes and address unintended consequences, significant compliance costs will again be incurred as businesses will be required to re-review their standard form contracts, reassess the impacts and re-review compliance programs.

The proposed implementation date of 1 January 2010 is an unreasonably short timeframe for the banking sector to properly review all of the terms of existing contracts and to reassess product offerings, pricing decisions and impacts on prudential considerations. Taking into account prudential considerations, the ABA considers the new regime should not be effective until the Government properly consults with all industry groups and be no sooner than 1 January 2011 with an appropriate transitional period (determined in consultation with industry). It is imperative that the Government allow sufficient time for the banking sector to properly assess the impact of the regime on its operations, decision-making and contract terms.

Banks employ standard form contracts for contracts with individuals and businesses for the majority of their banking services across a multitude of product lines, including security agreements (such as mortgages and debenture charges). The number of standard form contracts used is currently in the millions. For example, in terms of bank issued facilities in Australia, there are approximately 10 million bank issued credit cards (individual and business) out of a total of 14 million credit card facilities, 1 million personal loans, 4.5 million home loans (including owner occupied and investment) and 28 million accounts with ATM access (individual and businesses). A thorough review will need to be undertaken of each and every type of contract and these contracts may need to be reprinted within the timeframe. If at all achievable (which the ABA severely doubts), this task will require enormous physical effort and impose immense costs on the banking sector, which will inevitably be borne by customers.

The flow-on consequences from the review of contract terms will be utterly enormous. Banks will need to properly retrain tens or even hundreds of thousands of staff and review their compliance

processes. Moreover, changes to contractual arrangements will impact all product offerings and pricing methodologies. Any changes to fee calculations will require costly and time-consuming IT systems changes, which require significant lead times and are simply not achievable within the current implementation timetable.

#### *Not enough time to comply with notice requirements*

The Government must understand that this regime will have a significant and immediate impact on how businesses allocate and price risk, with the result being that businesses need to vary their contractual positions. To vary any contracts, ABA members must comply with strict notice requirements and the ABA is very concerned that the Government has not factored in these notice requirements (or any notice requirements in any other industries) when revising up the timeframe for this reform. Where changes are made to banking contracts, existing consumer protection laws require notice of changes to be given, by advertisements, direct mail, periodical statements on accounts or other means.

#### *Increased litigation costs and regulatory intervention*

The ABA expects this legislation to lead to a sharp increase in litigation of the contracts once introduced: indeed, funded class actions will likely increase with the increasing prevalence of litigation funders. In addition, the uncertain drafting currently adopted lends itself to vexatious, frivolous and unmeritorious claims, placing substantial burdens and costs not only on the business community, but on already busy regulators and an already over-stretched court system. Moreover, because of the extremely short period of time before this legislation is introduced, banks and other businesses that rely on having enforceable customer contracts in place will almost certainly be forced to spend substantial time and money litigating terms of these contracts in order to obtain judicial clarification about the application of the new legislation.

Moreover, based on the experience in Victoria, the ABA is very concerned that the proposed regime gives too much leeway to regulators to unduly interfere with businesses. While only a small handful of cases have actually been litigated under Victoria's unfair terms regime, from what the ABA understands, Consumer Affairs Victoria (CAV) has investigated many industries in relation to unfair terms and rather than having the legislation be the guide as to "unfairness", have had a "wish list" of changes they believe are needed to give consumers fuller protection.

Lastly, to avoid the costs of undue litigation and regulatory intervention, it is imperative that the regime be consistent across all jurisdictions. While the ABA appreciates this is the Government's intention, the uneven application of other generic consumer protection law across the jurisdictions does not give us any comfort. There should be no excuse for nuances between the Commonwealth, State and Territory regimes, or between the approaches taken by the ACCC, ASIC and State and Territory consumer regulators. Businesses should know exactly what to expect no matter what jurisdiction a contract is entered into or which regulator will take charge of the matter. This will involve ensuring that the regulators' guidelines and administrative and investigative processes at the Commonwealth, State and Territory level are identical. This must be the approach the Government takes to the "common national guidance" it discusses in the explanatory notes to the Exposure Draft

#### *Lack of coordination with other proposed reforms in the banking sector*

A series of overlapping reforms to the banking sector are being rolled out of Canberra - through Treasury and Attorney-General, including unfair contract terms, personal property security reforms and consumer and small business lending reforms. These reforms all affect the same contractual arrangements and there will be further unnecessary costs and disruption to our members if they have to adjust to, and ensure compliance with, these reforms in a piecemeal fashion. The more sensible approach would be for the Government to reconcile these reform efforts and present the sector with a consolidated and coordinate reforms package.

# **Annexure 3**



**AUSTRALIAN BANKERS' ASSOCIATION INC.**

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David Bell  
Chief Executive Officer

Level 3, 56 Pitt Street  
Sydney NSW 2000  
Telephone: (02) 8298 0401  
Facsimile: (02) 8298 0447

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SCOCA Australian Consumer Law Consultation  
Competition and Consumer Policy Division  
Treasury  
Langton Crescent  
PARKES ACT 2600

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

Dear Sir/Madam,

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

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

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

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

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

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

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

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

## **1. PART 1**

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

The Consultation Paper describes the principal objective for the Australian Consumer Law (Law) in terms of the PC's<sup>1</sup> desire to see national consistency in consumer protection laws which the PC described as in a number of respects "sound" but in need of "significant improvements to overcome existing inconsistencies, gaps and duplication in content and enforcement.

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

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

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

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

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<sup>1</sup> In this submission the ABA adopts the acronyms used in the Consultation Paper without further explanation

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

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

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

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

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

## **1.2 Chapter 5 – Re-naming the TPA**

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

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

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

## 2. PART II

### 2.1 Chapter 6 – Unfair Contract Terms

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **2.1.1 The proposed unfair contract term definition and scope.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### 2.1.2 Banning certain types of unfair contract terms

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

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

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

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

The types of terms specifically identified are:

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

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

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

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

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

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

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

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

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

**(1) Retention of title clauses**

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

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

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

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

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

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

**(4) Conclusive evidence terms**

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

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

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

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

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

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

**(6) Flat/fixed early termination fees**

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

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

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

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

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

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

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

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

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

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

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

### **(9) Terms mandating arbitration/mediation**

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

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

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

#### **2.1.3 Unilateral variation clauses**

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

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

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

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

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

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

This paragraph is expressed to be without hindrance to terms:

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

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

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

## **2.2 Chapter 7 Agreed reforms to consumer law enforcement powers.**

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

In answer to the question:

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

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

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

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

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

### **2.2.2 Substantiation notices**

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

## **2.3 Chapter 8 - A national regulatory regime for product safety**

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

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

## **3. PART III**

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

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

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

The following matters should be considered in drafting the legislation.

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

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

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

### **3.2 Chapter 10 Suggested Reforms to Definitions**

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

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

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

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

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

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

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

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

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

See above.

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

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

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

See also above comments 3.2.1 to 3.2.5.

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

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

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

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

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

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

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

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

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

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

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

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

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

No. The protections provided by these provisions are adequate.

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

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

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

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

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

Refer to ABA's submissions above.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

See 3.3.16 above.

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

As a general proposition, the ABA disagrees.

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

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

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

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

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

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

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

## **4. Part IV**

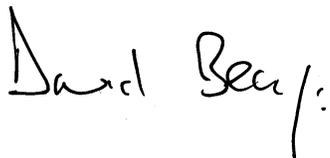
### **4.1 Chapter 12 Implementing the National Consumer Law**

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

### **4.2 Chapter 14 – Review of Enforcement Powers**

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

Yours sincerely



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**David Bell**