



8 April 2009

By email: australianconsumerlaw@treasury.gov.au

SCOCA Australian Consumer Law Consultation
Competition and Consumer Policy Division
Treasury
Langton Crescent
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Dear Sir/Madam

Australian Consumer Law – submission on unfair contract terms regulation

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to provide comments to the Standing Committee of Officials of Consumer Affairs' (**SCOCA**) on its consultation and information paper *An Australian Consumer Law: Fair markets – Confident consumers* (the **Paper**).

Below we comment on the matters set out in Chapter 6 of the Paper, namely unfair contract terms regulation. We will provide separate comments regarding other matters raised in the Paper. We apologise for the delay in providing our comments on the Paper to SCOCA.

In summary, we strongly support effective national unfair contract terms regulation. However, we hold some significant concerns about the ability of the current proposals set out in the Paper to deliver this effective regulation.

In particular we are concerned that the current proposed model is unclear with regard to implementation and enforcement by regulators. In our view, it appears that SCOCA proposes regulators will not have the ability to undertake their own actions to prevent the inclusion or use of unfair terms in consumer contracts, and will only be able to act where they are doing so on behalf of a consumer or consumers who have suffered detriment or the substantial likelihood of detriment. If this understanding is correct, we cannot support the current proposals on national unfair contract terms regulation.

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

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National unfair contract terms regulation

Consumer Action has advocated for effective regulation of the use of unfair terms in consumer contracts to be introduced nationally for a number of years. For example, we strongly supported the development of national unfair contract terms regulation in submissions to the SCOCA Working Party on Unfair Contract Terms in early 2004 and made detailed submissions to the Productivity Commission's inquiry into Australia's consumer policy framework in June 2007 and March 2008, including strongly recommending national regulation of unfair contract terms.

The reasons for our support of national unfair contract terms regulation have been explained in detail in these and other documents, as SCOCA is no doubt aware. Therefore, we do not propose to repeat this material. It seems sufficient to note here that we agree with SCOCA's comment in the Paper that the use of unfair contract terms is widespread in consumer contracts and causes consumer detriment (p29). We also endorse the statements made by the Federal Minister for Competition Policy and Consumer Affairs' in releasing the Paper that:

What we're talking about are situations where businesses use their position to remove all risk from a transaction and push it on to the consumer. For example, it's not uncommon to find terms where the supplier can vary a contract unilaterally, exclude the supplier's liability, or prevent consumers from cancelling contracts.

There are rarely any legitimate business reasons for terms like these, and in many cases they serve only to subordinate the interests of consumers to the whim of businesses.

Though many contracts containing unfair provisions may never give rise to any substantive unfairness, many do.

The existence of these unfair contracts leaves consumers in a vulnerable position, and this isn't conducive to the effective participation of consumers in the market.

This reduces competition and innovation, and compromises the effectiveness and efficiency of markets. This is all bad news for consumers.¹

Australia currently lags behind world's best practice in consumer policy in its lack of national unfair contract terms laws and we welcome their introduction.

However, we are concerned that the model for national unfair contract terms regulation described in the Paper contains several elements that do not accord with best practice and, in fact, would substantially undermine the effectiveness of the regulation. Our comments on specific elements of the proposed model are set out below.

Definition of 'unfair'

We are broadly supportive of the proposed definition of when a term will be considered unfair, as set out in the Paper (p30). We agree that a reference to 'good faith' is not necessarily helpful and that the concept of 'not reasonably necessary to protect the legitimate interests of the supplier' arguably better captures the intent of ensuring assessment is made of whether it was

¹ The Hon Chris Bowen MP, Minister for Competition Policy and Consumer Affairs, *Australian Consumer Law - The Future*, Address to the Monash Centre for Regulatory Studies, 17 February 2009.

reasonable for a supplier to include a term in a consumer contract. It also makes explicit the necessary balance between supplier and consumer interests that are properly considered in determining whether a term is unfair in all of the circumstances.

However, we also strongly recommend that the definition provision in the national law follow the two-fold approach to determining whether a contract term is unfair taken in the European Union (EU), United Kingdom (UK) and Victorian models, by including both a general definition of unfairness and an indicative and non-exhaustive list of terms that may be considered unfair under the general definition. The Paper sets out in a break-out box the sorts of terms that could be included in such a list (p31). This two-fold structure reflects best practice in consumer protection regulation by following a “general-plus-specific” model that allows for flexibility to address changing conditions or practices but also incorporates clarity in relation to known current problems as well as guidance in the interpretation of the general provision or obligation.²

In our view, a failure to include an indicative list of terms could render the law open to criticisms of uncertainty. Further, an approach by which a regulator effectively developed such a list in the form of guidelines, in the absence of clear guidance in the legislation, would risk accusation that the regulator was making or interpreting the law.

Application only to standard-form, non-negotiated contracts

We agree that the problem of the widespread use of unfair terms in consumer contracts principally arises due to the widespread use of standard-form, non-negotiated contracts by suppliers. However, the inclusion of this exemption in the coverage of the national law will inherently give rise to a potential “loophole”. We believe it is highly likely that this loophole will be targeted by unscrupulous suppliers who will attempt to establish procedures for limited or sham “negotiations” with consumers over what remain in essence standard-form contracts drafted by those suppliers.

SCOCA proposes to deal with the obvious law-avoidance problem this exemption will create by providing for a reverse-onus that will require a supplier alleging a contract is not a standard-form contract to prove that is the case. If SCOCA proceeds with this exemption, which we do not advise, we strongly support such a reverse onus requiring the supplier to prove that a contract was not standard-form and/or was negotiated. However, it will also be critical that the definition of ‘negotiated’ be carefully drafted to exclude trivial, limited or sham negotiations.

We note that the current Victorian unfair contract terms laws have dealt with this issue more sensibly by removing the potential for law-avoidance created by a “negotiated contract” exemption. Instead the Victorian *Fair Trading Act 1999* provides that, in determining whether a term is unfair, assessment may be made not only of the indicative list of terms but also whether the term was individually negotiated (s.32X). While we accept that regulation of genuinely negotiated contract terms is not generally required and poses a theoretical risk, the reality is that there has hardly been a flood of consumer litigation under the Victorian unfair contract terms laws and we are aware of only one case in which the issue of whether a term or contract was

² For further discussion see Consumer Action Law Centre, *The consumer protection provisions of the Trade Practices Act 1974: Keeping Australia up to date*, May 2008, pp 116-17, 138-41.

individually negotiated has even been raised (half-heartedly) by a supplier.³ It is similarly highly unlikely that there will be a flood of consumer actions under the new national laws, let alone in relation to negotiated contracts, given the general barriers to consumer-initiated legal actions. Thus we consider that the proposed exemption/loophole for negotiated contracts carries far greater risks than the current Victorian approach to this issue.

Exclusion of upfront price of the good or service as per the UK approach

This element is based on the corresponding feature of the Productivity Commission's recommendation.⁴ We agree that the general rationale for unfair contract terms regulation does not apply as readily to core contract terms about the upfront price of a consumer good or service being purchased, which consumers are much more likely to be aware of and consider.

However, as with the proposed "negotiated contract" exemption discussed above, this exclusion risks creating a loophole that suppliers may attempt to rely on – in this case to avoid scrutiny of contract terms that impose additional fees and charges. The new national laws must therefore be drafted not only on the basis of the current UK provisions but, additionally, to clarify that only the core upfront and, importantly, *non-contingent* price of a good or service is excluded from coverage under the unfair contract terms provisions. Indeed, the Productivity Commission also made this point in reaching its recommendation:

Charges that are less transparent should still be potentially subject to regulatory action under the new provision. For example, this could include charges triggered by various contingent events after activation of the contract — 'contingent prices'. Accordingly, regulation would extend to such matters as unreasonable cancellation charges, but not to prices deemed as unfairly high.⁵

Current legal proceedings in the UK between the UK Office of Fair Trading (**OFT**) and the major UK banks in relation to this very question confirm the difficulties that arise if it is not made explicit in the legislation that contingent fees and charges are not covered by this exclusion.⁶ While it might seem clear that contract terms imposing subsequent and contingent fees are not intended

³ See *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd* (Civil Claims) [2008] VCAT 2092, §§ 64-71. Further, it is clear that the Victorian approach to the issue of how negotiated terms should be treated is sufficiently well-understood by the courts. For example, in the Supreme Court of Victoria Cavanough J has stated: 'Plainly, individual negotiation of the term is meant to be a factor tending strongly against a finding of unfairness. That is fully consistent with the underlying policy of Part 2B, which respects true freedom of contract and which seeks principally to prevent the abuse of standard form consumer contracts which, by definition, will not have been individually negotiated.' *Jetstar Airways Pty Ltd v Free* [2008] VSC 539 at §112; and in VCAT see the statements of Harbison J in *Director of Consumer Affairs Victoria v Craig Langley Pty Ltd & Matrix Pilates & Yoga Pty Ltd* (Civil Claims) [2008] VCAT 482 at §§ 66-67: 'Section 32X requires me to consider whether or not the terms have been individually negotiated. Although no guidance on how this should be applied is found in the Act, it appears to me to reflect the commonsense view that terms of a consumer contract which have been the subject of genuine negotiation should not be lightly declared unfair. This legislation is designed to protect consumers from unfair contracts, not to allow a party to a contract who has genuinely reflected on its terms and negotiated them, to be released from a contract term from which he or she later wishes to resile. I can visualise that it might be very difficult to argue that a term was unfair if it had been arrived at after genuine negotiation, and represented a compromise between the positions of both parties.'

⁴ Productivity Commission, *Review of Australia's Consumer Policy Framework: Productivity Commission Inquiry Report Volume 2 – Chapters and Appendixes*, No. 45, 30 April 2008, pp 161-62, 168.

⁵ Productivity Commission, above n4, p 162.

⁶ *Abbey National plc and Others v Office of Fair Trading* [2009] EWCA Civ 116; *Office of Fair Trading v Abbey National plc and Others* [2008] EWHC 875 (Comm).

to be excluded from assessment for unfairness, the reasoning of the UK courts on this question has been reasonably complex and those courts had the benefit of being able to draw on European legal material that would not necessarily be available to Australian courts. Further, the question remains subject to a live appeal. It must be made clear that the Australian unfair contract terms laws are intended to apply in relation to contingent fees and charges.

All of the circumstances of the contract to be taken into account including broader impacts

Consumer Action agrees that it is appropriate that all relevant circumstances be taken into account in determining whether a term in a consumer contract is unfair or not. This is already a feature of the current Victorian laws. We agree with the Productivity Commission, however, that an explicit public benefit test would be inappropriate for inclusion in the legislation, especially given it is largely without precedent in the consumer law area and might create a large amount of uncertainty.

We also note that the inclusion of a broad requirement to consider ‘all the circumstances’ provides further safeguards against a finding that a term is unfair in a situation where it was genuinely negotiated or related to an upfront price that a consumer clearly understood and considered before entering into a contract. It militates against the need to provide for blanket exclusions for specific situations such as these, which create loophole risks.

Remedies available only where the claimant (individual or class) shows detriment or substantial likelihood of detriment – remedies of term voided only for the contracts of consumers subject to detriment, potential damages for detriment and other remedies available under the Australian Consumer Law

Our understanding is that this element would allow consumers, a group or class of consumers, or a regulator acting on behalf of consumers, to seek a remedy for the inclusion or use of an unfair term in a consumer contract, but that it would not allow a regulator to undertake its own action against an unfair contract term.

Regulator-led representative actions are a different type of legal action to regulator own-motion actions. We note also that, as a matter of practice, representative actions by regulators are exceedingly rare. While we support the new regulation providing the capacity for regulators to take representative action on behalf of consumers, we cannot support SCOCA’s proposals for national unfair contract terms regulation if they do not also provide for the regulators, federal or state, to undertake their own actions to address the inclusion of unfair contract terms in standard-form consumer contracts, including by seeking declarations or injunctions to prevent their ongoing inclusion and use in contracts.

This proposed element is based on the Productivity Commission’s recommendation that an *ex post* enforcement model is preferable to an *ex ante* enforcement model,⁷ although SCOCA has agreed that action should also be able to be taken not only when a consumer or consumers have already suffered detriment but when a consumer or consumers (or regulator representing consumers) can prove a substantial likelihood of detriment. It is clear in the Productivity

⁷ Productivity Commission, above n4, pp 165-68.

Commission's final report that the capacity of a regulator to pre-emptively rule out unfair terms that could cause (future) detriment to consumers is what it considers to be the *ex ante* model.

As noted earlier, the mischief unfair contract terms laws are intended to address is the widespread inclusion of unfair terms in standard-form contracts, a ubiquitous feature of the modern marketplace. Corresponding to the nature of the problem as a market-wide problem, one of the principal benefits – in fact, arguably the single most important feature – of all existing models of unfair contract terms regulation (whether the EU, UK or Victorian laws, for example) is that they allow the regulator to take proactive action to address the inclusion or use of an unfair term in a standard-form contract in use in the marketplace, and do not merely bestow legal rights on the individual consumers affected by a contract term to take legal action.

Further, one of the other benefits of unfair contract terms regulation is their strong pro-competition effect in promoting consumer confidence and increased market participation and in addressing sub-optimal consumer contracting decisions, but these benefits will not flow if the effect of the law is limited to remedies after the fact, rather than pre-emptive regulator action to weed out unfair terms. Under such a model, for consumers the risk of encountering unfair terms essentially remains high, and with the burden on the consumer to seek a remedy. Consumers cannot have confidence that they will not be placed in this situation and this leads to a range of inefficiencies. We attach a cost/benefit analysis of unfair contract terms intervention that discusses these issues in more detail. As the Paper notes in discussing current consumer law penalties, remedies limited to losses suffered or gains made through offending conduct do not always provide an effective deterrent to poor conduct (p44), and the same is undoubtedly true with regard to the use of unfair contract terms by suppliers. In any circumstances it would be unfortunate to miss the opportunity to improve consumer confidence and hence consumers' ability to drive competition in the market, however, in the present circumstances it would be a particularly surprising decision given the recognised need to actively support ongoing consumer confidence and competition in markets that are under pressure due to current difficult economic conditions.

The EU 1993 Directive on unfair terms in consumer contracts, which the UK's and all other EU member states' unfair contract terms laws implement into their national laws, is explicit on this issue. It requires *both* that individual consumers be granted relief from unfair terms and that adequate and effective means be implemented under the law to prevent the continued use of unfair terms in consumer contracts.⁸

In the UK and Victoria, it is this feature of the unfair contract terms laws that has been effective in producing benefits for consumers. For example, the UK OFT has tackled unfair terms in contracts across a number of industries and markets including package holiday contracts, entertainment contracts, tenancy agreements, health club agreements, aged-care home contracts and default charges in credit card contracts.⁹ In the 04/05 reporting year it received nearly 1,700 complaints about unfair terms, achieved changes to over 1000 unfair terms and

⁸ European Union, *Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*, Preamble and Articles 6-7.

⁹ See, eg, the list of guidances issued by the OFT: www.of.gov.uk/advice_and_resources/resource_base/legal/unfairterms/guidance.

obtained more than 60 undertakings from businesses.¹⁰ In the 05/06 year, the OFT received closer to 1,300 complaints, and obtained over 50 undertaking including from such notable businesses as BP, British Airways, GE Capital Motor Finance, Eurostar (UK), Travelodge and Tesco.¹¹ By the 06/07 year, complaints were down to just over 1000 and only nine undertakings were obtained.¹² In the 07/08 year, the OFT received only 113 complaints about unfair terms.¹³

In Victoria, Consumer Affairs Victoria (**CAV**) has negotiated numerous changes to terms in consumer contracts across several industries since unfair contract terms laws came into effect in late 2003, including the hire car, fitness, mobile phone, pay TV and carpets and curtains industries.¹⁴ In the last financial year it secured further changes to contract terms relating to window and floor coverings, car hire, health and fitness centres, pay TV, cruise ships and racing clubs.¹⁵ It is also notable that the capacity of the regulator to take its own actions could hardly be said to have resulted in a deluge of court cases, with only three reported cases in the Victorian Civil and Administrative Tribunal (**VCAT**) brought by the Director of CAV.¹⁶ Further, CAV was successful in all of these cases. By contrast, in over five years there have been only five reported VCAT cases brought by individual consumers and in only one was the consumer successful. In her case the business appealed to the Supreme Court of Victoria, at which point CAV stepped in to represent her.¹⁷

The importance of unfair contract terms laws granting capacity to the regulator to take proactive action is well summed-up by the NSW Commissioner for Fair Trading's comments to the 2006 NSW parliamentary inquiry investigating unfair contract terms laws:

I think the important thing about the Victorian and United Kingdom models is that they do not rely on an individual consumer going forward with litigation; they allow a regulatory authority to take action. You get a systemic change to the contract that benefits all, rather than just a remedy for the person who complained and who actually had the money to go to court.¹⁸

The Productivity Commission appears to have recommended an *ex post* model of enforcement because it was worried about a theoretical greater risk of regulatory overreach under the *ex ante* model. However, it details no evidence of regulatory overreach and, in fact, notes that the

¹⁰ OFT, *Web Annexe A: Summary of OFT Consumer Law Casework 2004 to 2005 Excluding Consumer Credit*, pp 4-6.

¹¹ OFT, *Annual report 2005-06 Web Annexe A: Summary of OFT consumer law casework 2005 to 2006 excluding consumer credit*, pp 3-4.

¹² OFT, *Annual report and resource accounts 2006-07 Annexe A: Consumer law casework 1 April 2006 to 31 March 2007 – excluding consumer credit*, at 2-3.

¹³ OFT, *Annual Report and Resource Accounts 2007-08 – Annexe A of HC836: Consumer law casework 1 April 2007 to 31 March 2008 – excluding consumer credit*, p 3.

¹⁴ See, eg, CAV, *Report to the Minister for Consumer Affairs for the year ended 30 June 2007*, November 2007, pp 20-24; Minister for Consumer Affairs media releases: 'Telcos warned again over unfair contract terms' (18 October 2004); 'Victoria drives hire car contract reform' (22 April 2005); 'Victoria continues charge for fairer contracts' (16 August 2005); 'Foxtel revises digital pay TV contracts' (4 May 2006); 'VCAT disconnects unfair mobile phone contracts' (2 August 2006); 'Victorian consumers protected on loyalty contracts' (4 October 2006).

¹⁵ CAV, *Annual Report 2007-2008*, October 2008, pp 10-12.

¹⁶ *Director of Consumer Affairs v AAPT Ltd* (Civil Claims) [2006] VCAT 1493; *Director of Consumer Affairs Victoria v Craig Langlely Pty Ltd Matrix Pilates Yoga Pty Ltd* (Civil Claims) [2008] VCAT 482 and 1382; *Director of Consumer Affairs Victoria v Trainstation Health Clubs Pty Ltd* (Civil Claims) [2008] VCAT 2092.

¹⁷ *Jetstar Airways Pty Ltd v Free* [2008] VSC 539.

¹⁸ NSW Legislative Council Standing Committee on Law and Justice, *Unfair terms in consumer contracts*, Report 32, November 2006, p 71.

practical feasibility and successful application of the *ex ante* approach has been demonstrated. It also noted some significant drawbacks of a model that allows for action only if detriment is already suffered by a consumer and where the remedy is that the term is voided only for consumers who have suffered detriment.¹⁹

Further, the Productivity Commission explicitly noted that the *ex post* model effectively represents merely an extension to the consumer unconscionable conduct provision of the *Trade Practices Act 1974* but allowing broader action on unfair terms. However, as Consumer Action has pointed out on several occasions, one of the reasons why unfair contract terms regulation is needed is that unconscionable conduct prohibitions are ill-suited to tackling market-wide problems such as unfair contract terms for a number of reasons, including that they rely on individual consumer legal action and turn on evidence of harm in particular circumstances.²⁰

We recognise that the SCOCA proposals broaden the Productivity Commission's recommendation by permitting action where a substantial likelihood of detriment can be proved, not just actual detriment. However, in our view this remains a significant evidentiary hurdle and almost certainly will curtail regulator action in practice, particularly as it appears that regulators will only be able to act in representative actions on behalf of consumers meaning they must, in practice, collect evidence about the effect of a term on consumers and present this consumer evidence in such actions. We therefore consider that the current proposals do not represent a material departure from the Productivity Commission *ex post* enforcement model, which is manifestly flawed.

We strongly recommend that the proposed national unfair contract terms regulation explicitly provide regulators with the capacity to initiate their own legal actions in relation to contract terms, in which they may seek remedies that do not turn on detriment to consumers and thus enable pre-emptive action.

Application to financial services and consumer credit

It is critical that national unfair contract terms regulation applies economy-wide, including to financial services and consumer credit contracts.

We support the commitment by all Australian governments that national consumer laws should apply to all sectors of the economy, including financial services and consumer credit, as noted by the Paper (p24). We also understand that the application of unfair contract terms regulation to financial services may need to be enacted by way of mirror provisions in the national financial services and consumer credit laws and, if this is the case, support capacity being allocated to the Australian Securities and Investments Commission to act as the relevant regulator.

Banning certain types of unfair contract terms

It is proposed that the national unfair contract terms regulation will provide the capacity for particular types of contract terms to be banned from use on the basis that they are always unfair.

¹⁹ Productivity Commission, above n4, p 165-66.

²⁰ See, eg, Consumer Action Law Centre, *Submission to the Productivity Commission Inquiry into Australia's Consumer Policy Framework*, June 2007, pp 26-32; Consumer Action, above n2, pp 149-55, 158-70.

Given this commitment, the Paper asks for views on whether particular types of contract terms should be banned in the initial text of the new Australian Consumer Law.

As a preliminary matter, Consumer Action notes that the Victorian *Fair Trading Act* contains similar provisions enabling unfair terms to be prescribed in regulations, in which case their use in a standard-form contract or attempted enforcement is an offence (s.32Z). However, it is hard to ignore that no terms have ever been prescribed under these provisions. We therefore strongly suggest that at least some recognised categories of always-unfair terms be banned in the initial law to ensure that this element is, in fact, in use and is able to build a case for further (or less) use of it in future as appropriate.

Consumer Action agrees that the types of terms described in the Paper are generally unfair. Some of the types of terms listed in the Paper stand out as always unfair and we recommend they be banned in the initial text of the new laws. We also recommend that some types of terms not listed in the Paper be banned as always unfair. Our comments on the banning of certain terms are as follows:

- Terms denying existence of pre or post contractual representations; entire agreement terms; terms deeming facts; terms under which consumers acknowledge they have read or understood the contract; conclusive evidence terms

The Paper points out that these types of terms have the object or effect of deterring consumers from pursuing claims based on evidence extraneous to the written contract between the consumer and the supplier.

Such terms are of doubtful legal effect because whether or not additional factual or evidentiary matters exist and are relevant to a dispute are questions of fact to be determined regardless of what the written contract states. Therefore, the principal reason for the inclusion of such terms is to deter consumers from pursuing claims based on conflicting evidence, not to exclude such evidence in the event a dispute did proceed to a legal hearing. Further, even if they could be of effect it would be manifestly unfair for a supplier to be able to exclude relevant evidence from judicial consideration of a dispute simply because it was not favourable to the supplier. Indeed, the rules of evidence generally require parties to disclose (discover) relevant evidence in their possession to opposing parties even if such evidence is not favourable to the disclosing party. Such terms are always unfair and should be banned.

- Terms that are void under laws that imply terms into contracts

As the Paper acknowledges, the inclusion in a consumer contract of terms limiting or excluding supplier liability – that a supplier knows are of no effect due to the operation of laws implying certain terms into contracts – is done to deter consumers from pursuing statutory rights, given most consumers do not know what their legal rights are. This applies equally to terms that include a final caveat such as ‘to the extent permitted by law’, as rightfully noted by the Paper. Such terms are always unfair and have been an ongoing problem undermining the awareness and effectiveness of existing statutory warranty rights. They should be banned.

- Flat/fixed early termination fee terms and accelerated payment terms

We agree that early termination fees are not in themselves unfair, but the Paper correctly notes that a term that provides for a *fixed* or *flat* early termination fee (including paying out the remainder of the contract price) if a consumer exits a contract early is unfair because it inherently does not and cannot take account of the supplier's reasonable costs in such a situation and must therefore represent an arbitrary windfall to the supplier. Such terms also remove the need for the supplier to assess their costs or losses or to mitigate their loss. Such terms should be banned.

- Terms requiring payment of supplier's enforcement costs

As with early termination fees, the requirement to pay some enforcement or collection costs if a consumer defaults under a contract is not in itself unfair, but the requirement to pay all such costs will always be unfair. Such terms do not limit the consumer's obligations to the supplier's reasonable enforcement or collection costs nor do they provide any incentive for the supplier to undertake reasonable or efficient enforcement action.

Further, as the Paper notes, legally such terms are in effect subject to an implied limitation to costs incurred reasonably and good faith. However, consumers are highly unlikely to be aware of such legal matters and these terms can therefore be used by suppliers to pressure consumers into paying additional enforcement costs they would not be required to pay if they disputed the claim in court. This is particularly the case given such terms are prevalent in relation to debt collection and consumers already struggling to pay debts are unlikely to be in a position to be able to support legal action against claimed additional enforcement costs. These terms should be banned.

- Terms requiring pre-payment of the majority of the price before delivery, installation or performance

Terms requiring the payment of genuine deposits are a reasonable feature of all sorts of everyday consumer transactions. However, a contract term that requires majority pre-payment upfront shifts most of the risk of non-performance of the contract to the consumer even though it is the supplier that controls most of that risk. As the Paper notes, such terms also remove the consumer's sole basis for any bargaining power in the relationship, being the fact that a supplier desires payment.

Such terms are a clear exception to ordinary business practices and in reality, are used principally in situations in which goods or services are targeted towards vulnerable consumer classes that are more likely to submit to demands for upfront pre-payment. They are never fair but this additional feature of their use makes them particularly undesirable. They should be banned.

- Terms mandating compulsory arbitration

Arbitration is a dispute resolution procedure designed almost solely for commercial or business-to-business dispute resolution. An attempt to mandate its use in a consumer

contract is a clear attempt to limit a consumer's access to an affordable, and therefore any, dispute resolution process. This is one of the clearest examples of a term that is always unfair in a consumer contract. They should be banned.

- Terms that allow continued debits after the expiry of a fixed term contract

The Paper does not include this type of term in its list of terms being considered for banning. However, such terms have become common in certain industries despite their obvious unfairness to consumers and the fact they essentially allow suppliers to collect additional funds from consumers without any legitimate basis for doing so. Consumers who enter into a fixed term contract and agree to a debit arrangement reasonably assume that their payment obligations continue only while the contract continues. If a supplier wishes to continue providing goods or services to a consumer, and thus continue debiting a consumer's account, after the expiration of a fixed term contract there is nothing to prevent the supplier from obtaining further agreement from the consumer to continue with arrangements or to enter into a new fixed term. At the very least, such terms should be banned if they require a consumer to cancel ongoing debits by notice in writing and/or if cancellation is purported to take delayed effect.

- Terms that allow unilateral variation of any term at any time for any reason; terms that allow unilateral variation of the price, fees or charges by a supplier under a fixed term contract without a consumer right to cancel the contract at no charge

Again, the Paper does not consider these types of term, however, they are principal examples of the types of terms that have been identified as unfair across a range of contracts, including by CAV.²¹

Unilateral variation by a supplier is often unfair but it could not be said to be always unfair. However, unfettered supplier ability to unilaterally vary any term of a contract for any reason is clearly going beyond the protection of a legitimate business interest. For example, such a term was noted as being unfair in the AAPT case brought by CAV under the Victorian unfair contract terms laws.²²

In addition, in particular the ability to unilaterally vary the price under a fixed term contract is unfair. As discussed earlier, price terms are one of the few terms of a consumer contract that consumers are likely to be aware of and take into account in making a decision about entering into a contract. To vary such a core part of the bargain when a consumer is "locked in" to a contract is manifestly unfair. Unilateral variation may be fair in some circumstances but this sort of unilateral variation term should be banned. An exception should, however, be made for contracts in which it is *explicitly contemplated* that the supplier may unilaterally vary the price based on reasonable considerations, for example variable rate home loan contracts.

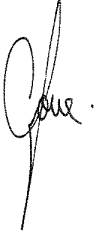
²¹ See above, n14.

²² *Director of Consumer Affairs v AAPT Ltd (Civil Claims)* [2006] VCAT 1493 at §50.

We thank SCOCA for the opportunity to provide our comments on the proposed national unfair contract terms regulation and would welcome further discussion about any of the matters raised in this submission. As noted above, we will provide separate comments on other matters discussed in the Paper. Please contact Catriona Lowe on 03 9670 5088 or at ceo@consumeraction.org.au if you have any questions.

Yours sincerely

CONSUMER ACTION LAW CENTRE

A handwritten signature in black ink, appearing to read 'C. Lowe', with a vertical line extending downwards from the end of the signature.

Catriona Lowe
Co-CEO

A handwritten signature in black ink, appearing to read 'N. Rich', with a vertical line extending downwards from the end of the signature.

Nicole Rich
Director – Policy & Campaigns

Attach.