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The Secretary  
Senate Economics Legislation Committee  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

Dear Sir/Madam

### **Submission to Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill 2009**

The Consumer Action Law Centre (**Consumer Action**) thanks the Committee for the opportunity to make a written submission to its Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (the **Bill**).

The Bill proposes to implement two significant and overdue sets of reform to Australia's consumer protection laws: to introduce a national unfair contract terms law; and to provide the consumer regulators with more modern and flexible enforcement and remedies powers. Consumer Action has advocated for these reforms for many years and strongly supports the Bill.

Our comments on specific provisions of the Bill and some recommendations for improvement are detailed below.

#### **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. Amongst other work, last year we published a comprehensive report into the consumer protection provisions of the *Trade Practices Act 1974* (the **TPA**) and how they compared with international best practice provisions, looking at developments in the comparable jurisdictions of the United Kingdom (**UK**), the United States, Canada and the European Union (**EU**).<sup>1</sup>

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<sup>1</sup> Consumer Action Law Centre, *The consumer protection provisions of the Trade Practices Act 1974: Keeping Australia up to date*, May 2008, available at [www.consumeraction.org.au/publications/policy-reports.php](http://www.consumeraction.org.au/publications/policy-reports.php).

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## Unfair contract terms

Schedule 1 Part 1 and Schedule 3 Part 1 of the Bill contain provisions to implement a new national unfair contract terms (**UCT**) law in Australia. The UCT law will mainly be implemented through Schedule 1 of the Bill, which creates a new Australian Consumer Law enforceable by the Australian Competition and Consumer Commission (**ACCC**). Part 1 of Schedule 3 of the Bill essentially mirrors these provisions but applies them in relation to financial services, in respect of which the Australian Securities and Investments Commission (**ASIC**) will be the responsible regulator. This structure accords with the existing model of consumer protection regulation in Australia, in which ASIC has responsibility for financial services regulation, including consumer protection, and thus the consumer protection provisions in the TPA are mirrored in the *Australian Securities and Investments Commission Act 2001 (ASIC Act)*.

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 and we therefore strongly support the Bill's introduction of national UCT laws. Australia currently lags behind world's best practice in consumer policy, and the lack of national UCT laws is one of the principal reasons that this is the case.

Our principal concern with this part of the Bill is that, for no good reason, the UCT provisions will not apply to insurance contracts. This must be corrected before the Bill is passed.

### *Background*

The Bill is the culmination of a comprehensive consultation process. The EU adopted its *Directive on unfair terms in consumer contracts* in April 1993<sup>2</sup> and the UK enacted regulations implementing this Directive into its national law in 1994, replacing these with more thorough regulations in 1999.<sup>3</sup> Victoria initiated a review of its fair trading legislation in early 2001 and the review's reference panel recommended, amongst other changes, the introduction of UCT laws in its June 2002 report, which were enacted in Victoria by the *Fair Trading (Amendment) Act 2003* (Vic) and came into force on 9 October 2003.

Under the auspices of the Ministerial Council on Consumer Affairs (**MCCA**), the Standing Committee of Officials of Consumer Affairs (**SCOCA**) established a Working Party on Unfair Contract Terms in late 2002 to investigate the need for nationally consistent regulation of unfair terms in consumer contracts, and released a discussion paper in early 2004 which generated numerous submissions.<sup>4</sup> The SCOCA process was then subsumed into the extensive Productivity Commission Review of Australia's Consumer Policy Framework, which began with an Issues Paper in January 2007<sup>5</sup> and, following two formal rounds of submissions and public hearings as well as other papers and discussions, resulted in a final report which was released in

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<sup>2</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

<sup>3</sup> Unfair Terms in Consumer Contracts Regulations 1999.

<sup>4</sup> Standing Committee of Officials of Consumer Affairs Unfair Contract Terms Working Party, *Unfair Contract Terms: A Discussion Paper*, January 2004.

<sup>5</sup> Productivity Commission, *Consumer Policy Framework*, Productivity Commission Issues Paper, January 2007.

May 2008.<sup>6</sup> In its final report, the Productivity Commission recommended that an UCT provision be incorporated into a new national consumer law.<sup>7</sup>

The MCCA subsequently agreed to a national consumer law including an UCT provision at its August 2008 meeting and the Council of Australian Governments (**COAG**) agreed to implement a new consumer policy framework comprising a single national consumer law and including a provision regulating UCT at its October 2008 meeting.

The next stage of consultation began in February 2009 when SCOCA released an information and consultation paper on the details of its proposals to implement a single Australian Consumer Law including UCT regulation. Following another round of submissions, the Federal Government released another consultation paper in May 2009, this time focusing specifically on the proposed draft UCT provisions and including an exposure draft bill, seeking further comments from stakeholders. The Bill was subsequently introduced into parliament in June 2009.

Regardless of one's views on the content of the Bill, it cannot be said that consultation on national UCT regulation for Australia has not occurred.

#### *Rationale for national unfair contract terms laws*

Consumer Action's support for national UCT laws has been explained in detail many times in a range of documents and submissions we have produced. For example, our report last year into Australia's consumer protection laws included detailed discussion of UCT regulation and concluded that Australia should introduce 'general, market-wide regulation of unfair terms in consumer contracts into the [Trade Practices] Act, based on the EU/UK and Victorian models'.<sup>8</sup>

Rather than repeat these arguments in detail, we consider that the 2004 SCOCA discussion paper noted above contains a good summary of the main issues and the reasons why UCT regulation is desirable:

Standard form contracts can have advantages to both supplier and purchaser provided that a fair balance is achieved between both parties to the contract. They reduce transaction costs for the supplier which would otherwise be passed on to the purchaser. They allow for lengthy and detailed contracts to be finalised with the minimum of time and by lay persons who only need to negotiate the specifics such as price, description of goods and services and delivery times. Over a period of time, people become familiar with the contracts because they are standard and may encourage a general understanding of trading practice.

However, standard form contracts do pose problems. These types of contracts will usually have been drafted by professionals on behalf of the supplier. Generally, the purchaser has no time or opportunity to read the contract before signing, let alone obtain the same standard of advice as the supplier. If there is time to read it, it is doubtful whether the purchaser will understand the meaning and impact of each term in the light of the whole contract...

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<sup>6</sup> Productivity Commission, *Review of Australia's Consumer Policy Framework*, Productivity Commission Inquiry Report No. 45, April 2008.

<sup>7</sup> Productivity Commission, *Review of Australia's Consumer Policy Framework*, Productivity Commission Inquiry Report No. 45, Volume 2 – Chapters and Appendixes, April 2008, pp168-169.

<sup>8</sup> Consumer Action Law Centre, above n1, pp132-174.

It has become increasingly clear that many such standard form contracts contain clauses which are unfair or unnecessarily one-sided to the detriment of the purchaser. One reason that these have become so prevalent is that there is little, if any, competition in this regard. Purchasers do not usually "shop around" on the basis of the best contract terms: it would be too impractical an exercise for the vast majority of people to decide, for example, which hire-car company to use based on the best contract terms. Purchasers predominantly focus on price and the quality or characteristics of the product. They may not appreciate that a "good" price has been achieved through the imposition of onerous terms. As a result, terms may well be standard across an industry and even if the purchaser went elsewhere, they would be faced with a similar situation.<sup>9</sup>

In our view enactment of UCT laws will not only benefit individual consumers, they have the potential to provide competition benefits by increasing consumer confidence in undertaking market transactions and therefore increasing participation.

UCT laws in forms very similar to those proposed in the Bill have been in place across the EU, including in the UK, for over a decade. They have also now been operating in Victoria for nearly seven years. In all of these jurisdictions, there is evidence that UCT laws have worked well.

For example, in the UK the regulator, the Office of Fair Trading (**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.<sup>10</sup> In the 04/05 reporting year the OFT reported receiving nearly 1,700 complaints about unfair terms, achieving changes to over 1000 unfair terms and obtaining more than 60 undertakings from businesses. 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. By the 06/07 year, complaints were down to just over 1000 and only nine undertakings were obtained. In the 07/08 year, the OFT received only 113 complaints about unfair terms.<sup>11</sup> In Victoria the regulator, Consumer Affairs Victoria (**CAV**), has reported negotiating changes to terms in consumer contracts across several industries since UCT laws came into effect, including the hire car, fitness, mobile phone, pay TV, carpets and curtains, window and floor coverings, cruise ships and racing clubs industries.<sup>12</sup>

For the benefits to be realised, it is critical that national UCT regulation apply economy-wide, including to financial services contracts. We therefore strongly support the Bill's coverage of

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<sup>9</sup> Standing Committee of Officials of Consumer Affairs Unfair Contract Terms Working Party, above n4, pp16-17.

<sup>10</sup> See the list of guidances issued by the OFT at

[www.oft.gov.uk/advice\\_and\\_resources/resource\\_base/legal/unfairterms/guidance](http://www.oft.gov.uk/advice_and_resources/resource_base/legal/unfairterms/guidance).

<sup>11</sup> OFT, *Web Annexe A: Summary of OFT Consumer Law Casework 2004 to 2005 Excluding Consumer Credit*, pp4-6; OFT, *Annual report 2005-06 Web Annexe A: Summary of OFT consumer law casework 2005 to 2006 excluding consumer credit*, pp3-4; OFT, *Annual report and resource accounts 2006-07 Annexe A: Consumer law casework 1 April 2006 to 31 March 2007 – excluding consumer credit*, pp2-3; 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*, p3.

<sup>12</sup> See, eg, CAV, *Annual Report 2007-2008*, October 2008, pp10-12; CAV, *Report to the Minister for Consumer Affairs for the year ended 30 June 2007*, November 2007, pp20-24; 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).

financial services through its mirror amendments to the ASIC Act with ASIC responsible for enforcement. We are unaware of any reasons why any particular industry, including the insurance industry, or its contracts would need to be excluded from UCT regulation.

### *Unfair contract terms provisions*

Consumer Action believes that the UCT provisions in the Bill largely reflect the policy intent as communicated by the MCCA and COAG. Some comments on specific elements of the provisions are set out below. For conciseness, when discussing issues below that are common to the provisions in both Schedule 1 Part 1 (general unfair terms) and Schedule 3 Part 1 (unfair terms in financial product and services contracts), we refer only to the sections in Schedule 1 Part 1 but our comments apply equally to the mirror provisions set out Schedule 3 part 1.

#### a) Definition of unfair term

We support the Bill's approach to defining a term as 'unfair' based on a general definition in section 3 and an indicative and non-exhaustive list of examples of terms that may be unfair in section 4.

This two-fold approach to defining an unfair term is consistent with the models of successful unfair contract terms laws enacted in other jurisdictions, and reflects best practice in consumer protection regulation by following a "general-plus-specific" model that allows for flexibility to address changing conditions or practices through use of a general definition, but also incorporates clarity and certainty in relation to known current problems as well as guidance in the interpretation of the general provision.<sup>13</sup>

We also support section 3(4), which provides that the party asserting that a term is reasonably necessary in order to protect their legitimate interests bears the onus of proving that this is the case. This is sensible and practical given it is the party seeking to rely on the term is in the best position to produce evidence about the term's nature.

However, we do hold concerns about sections 3(2)(b) and 3(3), which introduce the concept of "transparency" as being required to be taken into account in determining whether or not a contract term is unfair. This is the only part of the Bill's definition of 'unfair' that was not in the MCCA-agreed model for UCT provisions<sup>14</sup> and was not foreshadowed in the consultation and information paper of February 2009. The other two matters that a court *must* take into account in determining whether a term of a consumer contract is unfair pursuant to section 3(2), being possible consumer detriment and the contract as a whole, are reasonable and accord with the MCCA model.

The Bill requires the court to consider 'the extent to which the term is transparent' under s.3(2)(b). There seem to be good intentions behind this provision. The May 2009 consultation paper explained that its intention was to draw the court's attention to unfairness that is

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<sup>13</sup> For further discussion see Consumer Action Law Centre, above n1, pp116-17, 138-41.

<sup>14</sup> See, eg, *Trade Practices Amendment (Australian Consumer Law) Bill 2009: Explanatory Memorandum*, 2008-2009 The Parliament of the Commonwealth of Australia House of Representatives, pp11-12.

exacerbated by a *lack* of transparency of the term<sup>15</sup> and the Explanatory Memorandum to the Bill (the **EM**) also discusses the provision in terms of the "lack" of transparency, stating that a 'lack of transparency in the terms of a consumer contract may be a strong indication of the existence of a significant imbalance in the rights and obligations of the parties under the contract' and that 'transparency, on its own account, cannot overcome underlying unfairness in a contract term'.

However, despite good intentions we consider that the "transparency" requirement may substantially undermine the operation of the UCT provisions. This is because, fundamentally, UCT laws address a negotiation problem, not a disclosure problem. UCT regulation is designed to address the inability of consumers to negotiate the terms of standard-form contracts proposed by suppliers and the availability, legibility and presentation (or otherwise) of those terms is largely irrelevant to this concern. As SCOCA pointed out in its summary of the reasons for UCT regulation (quoted earlier):

- One of the main advantages of standard form contracts is that they cut transaction costs by reducing the need to negotiate over all the terms of the contract, allowing lay persons to negotiate only the specifics such as price, description of goods and services and delivery times;
- Standard form contracts pose problems because they have been drafted on behalf of the supplier and the consumer has no time or opportunity to read the contract and obtain the same standard of advice about the terms;
- Even if the consumer did have time to read the terms:
  - it is doubtful they would understand the meaning and impact of each term in the light of the whole contract; and
  - the supplier may not be prepared to change clauses at their request;
- A major reason why standard form contracts tend to contain clauses which are unfair or unnecessarily one-sided is that there is little, if any, competition on contract terms. It is too impractical for most people to "shop around" on the basis of the best contract terms and purchasers predominantly focus on price and the quality or characteristics of the product. Consumers may not appreciate that a "good" price has been achieved through onerous terms and, as a result, terms may well be standard across an industry so that even if the consumer went elsewhere, they would be faced with a similar situation.<sup>16</sup>

Given the market problem that unfair contract terms laws are intended to address, it is misconceived to oblige the court to consider disclosure issues in assessing unfairness. Section 3(2)(b) requires the court to consider the technical disclosure of a contract term (a procedural issue), as opposed to its nature and effect (a substantive issue), subverting the policy intent of the Bill.

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<sup>15</sup> The Treasury, *The Australian Consumer Law: Consultation on draft provisions on unfair contract terms*, 11 May 2009, p11.

<sup>16</sup> Standing Committee of Officials of Consumer Affairs Unfair Contract Terms Working Party, above n9.

We are concerned that the inclusion of this requirement directs the court that transparency is a primary consideration. It could have the practical effect that courts will regard a term as “less unfair”, and thus possibly not unfair at all, if it has been clearly typed out in the contract, regardless of whether it is realistic to expect the consumer to have read, understood or negotiated over that contract term, and regardless of the extent of the unfairness of the content and effect of that term. Despite the EM's statements, the provision is not drafted in terms of a court being required to take into account the extent to which a term is *not* transparent but the extent to which it is.

The lack of transparency of a contract term may be relevant to an assessment of whether that term is unfair in particular circumstances, but in a great many incidences the transparency of the term simply will not be a material issue in determining the substantive fairness or unfairness of a term. We therefore strongly recommend that section 3(2)(b) and 3(3) be removed, to remove the mandatory requirement for the court to consider the extent to which the term is transparent in determining whether a term is unfair.

Lack of transparency could be retained as a consideration specifically listed that the court *may* take into account, amongst others, if it considers relevant. We suggest that a "lack of transparency" consideration, including the factors listed in section 3(3), could form the basis of a new provision in the Bill stating that a court may take the extent to which a term is not transparent into account in determining whether a term is unfair.

#### **Recommendations**

Delete Schedule 1 Part 1 item 1 sections 3(2)(b) and 3(3), and Schedule 3 Part 1 item 7 sections 12BG(2)(b) and (3), from the Bill.

Consider inserting a new provision, based on the above provisions, stating that a court *may* take into account the extent to which a term is *not transparent* in determining whether a term of a consumer contract is unfair.

#### b) Exclusion for core terms

Section 5 provides that a term is not unfair to the extent that, but only to the extent that, the term defines the main subject matter of the contract, sets the upfront price payable under the contract or is a term required or expressly permitted by law. Terms that define the main subject matter or upfront price are often referred to as the “core terms” of the contract.

The exclusion for core terms is consistent with the MCCA-agreed model, and is based on the rationale that consumers are much more likely to be aware of, consider and negotiate over core contract terms such as the price and characteristics of the product or service they are buying than other contract terms. This rationale is generally sound, but Consumer Action had been concerned that the exemption for the core term of ‘upfront price’ would risk creating a loophole that suppliers would rely on to avoid scrutiny of contract terms imposing *additional* fees and charges. We therefore strongly support section 5(2), which clarifies that the ‘upfront price’ is the consideration disclosed at or before the time the contract is entered into and, importantly, does

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

However, Consumer Action is still concerned about the drafting of section 5. It is intended to be based on the similar provision in the UK regulations<sup>17</sup> but, in fact, it is drafted differently. Section 5 provides that section 2 – which is the provision deeming an unfair term void – ‘does not apply’ to a term ‘to the extent that, but only to the extent that’ the term sets the upfront price payable. Regulation 6(2) of the UK Unfair Terms in Consumer Contracts Regulations 1999 instead provides that ‘the assessment of fairness of a term’ ‘shall not relate to’ the subject matter or price.

The UK provisions only exclude core terms from assessment for unfairness to the extent that the unfairness is alleged to relate to the main subject matter or upfront price – these core terms are otherwise assessable for unfairness. This is different to an approach that entirely excludes these core terms from any assessment for unfairness, regardless of whether the unfairness is alleged to arise from a different aspect of the terms. The UK courts have distinguished these two approaches, finding that the UK regulations follow the former, which they call the “excluded assessment” construction of the provisions, as opposed to the latter approach which they call the “excluded term” construction.<sup>18</sup>

It is unclear that section 5 follows the “excluded assessment” approach. It may be that, by stating that section 2 does not apply ‘only to the extent that’ the term deals with a core matter, section 5 does indeed follow an ‘excluded assessment’ approach, but because it is drafted differently to the UK provision this is less clear, and will probably only be determined following a superior court decision on the issue. Further, while the EM cannot override an interpretation based on the wording of the section, it does possibly suggest an “excluded term” construction, stating:

The exclusion of terms that define the main subject matter of a consumer contract ensures that a party cannot challenge a term concerning the basis for the existence of the contract. Where a party has decided to purchase the goods, services, land, financial services or financial product that is the subject of the contract, that party cannot then challenge the fairness of a term relating to the main subject matter of the contract at a later stage.

and

The exclusion of upfront price means that a term concerning the upfront price cannot be challenged on the basis that it is unfair.<sup>19</sup>

Particularly given the EM’s statements, it needs to be made clear that section 5 only excludes core contract terms from the effect of section 2 to the extent that any unfairness relates to the main subject matter or upfront price, but that these terms are void for other types of unfairness.

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<sup>17</sup> See, eg, *Trade Practices Amendment (Australian Consumer Law) Bill 2009: Explanatory Memorandum*, above n14, p.12.

<sup>18</sup> *Abbey National plc and Others v Office of Fair Trading* [2009] EWCA Civ 116 §§8-13; *Office of Fair Trading v Abbey National plc and Others* [2008] EWHC 875 (Comm) §§422-436.

<sup>19</sup> *Trade Practices Amendment (Australian Consumer Law) Bill 2009: Explanatory Memorandum*, above n14, pp25-26.

There is no reason to prevent any unfair term from being voided for reasons *other than* its upfront price or subject matter.

### **Recommendation**

Amend Schedule 1 Part 1 item 1 section 5, and Schedule 3 Part 1 item 7 section 12BI, to clarify that terms which define the main subject matter of the contract; set the upfront price payable under the contract; or are required or expressly permitted by law, are only not subject to the provision that voids unfair terms to the extent that the unfairness relates to that subject matter, that upfront price, or that part of the content of the term required or expressly permitted by law.

#### c) Standard form contracts

Given the policy intent under the MCCA model to apply the Australian UCT law only to non-negotiated or standard-form contracts, Consumer Action supports section 7. This section provides for a non-prescriptive definition of a standard form contract, relying on its ordinary meaning as well as providing guidance through a non-exhaustive list of relevant matters to consider. A more prescriptive definition would simply provide opportunities for avoidance, with unscrupulous businesses structuring their contracts and/or contract “negotiations” to ensure they fell outside the technical definition of a standard form contract.

Section 7 also provides that the party asserting that a contract is not a standard-form contract bears the onus of proving that this is the case. Again, we agree that this is appropriate as it is that party which is in the best position to produce evidence about the way in which it contracts with other consumers.

More broadly, however, we note that there is little reason to limit coverage of the UCT laws to standard form contracts. Regulation of genuinely negotiated contract terms is not generally required but this limitation does present a risk of becoming a loophole and the concern about regulating genuinely negotiated terms can be dealt with in other ways. For example, the current Victorian UCT laws provide 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,<sup>20</sup> and we are aware of only one Victorian case in which the issue of whether a term or contract was individually negotiated has even been raised (half-heartedly) by a supplier.<sup>21</sup> It is

<sup>20</sup> *Fair Trading Act 1999* (Vic) section 32X.

<sup>21</sup> 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

similarly unlikely that there will be a flood of consumer actions under the new national laws, let alone in relation to negotiated contracts.

Further, this limitation, a feature of the UK regulations, is under review in the UK. In 2005 the Law Commission and the Scottish Law Commission recommended that regulating unfair contract terms be extended to cover individually negotiated terms, noting that this would increase certainty and close off the loophole created by the exclusion.<sup>22</sup> The UK government accepted the Commissions' recommendations subject to the regulatory assessment process.<sup>23</sup> In addition, in the EU several countries did not include the exclusion for individually negotiated terms (or for terms regarding the price and subject matter of the contract) in their national UCT laws and the European Commission has reported that few problems have arisen in practice as a result.<sup>24</sup>

#### *Exemption from the unfair contract terms provisions for insurance contracts*

As stated above, there are no reasons why any particular industry need be exempt from coverage under UCT regulation. The policy reasons for introducing UCT laws apply to consumer contracts generally, regardless of the specific product or service involved.

The *only* consumer contracts in Australia that will be exempted from the UCT provisions in the Bill are insurance contracts.

This is not achieved through a specific provision of the Bill. Instead, section 15 of the *Insurance Contracts Act 1984* (Cth) (the **ICA**) provides that contract of insurance is not capable of being made the subject of relief under any other piece of legislation, and the Bill does not expressly amend or override this provision. The EM also makes it clear that the UCT provisions 'do not apply to contracts of insurance covered by the *Insurance Contracts Act 1984*, to the extent that that Act applies'.<sup>25</sup>

Consumer Action does not see any reason why insurance contracts with consumers should be treated any differently to other consumer contracts. There is no reason cited in the EM, merely an explanation of how ICA section 15 operates, and the exclusion was not raised previously including in either of the consultation papers on the UCT provisions released this year.

We can only speculate that purported justifications for this exclusion may be that the ICA covers the field for consumer protection in relation to insurance and/or that the ICA adequately covers

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term was unfair if it had been arrived at after genuine negotiation, and represented a compromise between the positions of both parties.'

<sup>22</sup> The Law Commission and The Scottish Law Commission, *Unfair Terms in Contracts: Report on a reference under section 3(1)(e) of the Law Commissions Act 1965*, February 2005, pp31-32.

<sup>23</sup> Letters from Rt. Hon. Ian McCartney MP, Minister for Trade, Investment and Foreign Affairs to the Chairmen of the Law Commission and the Scottish Law Commission, 24 July 2006, available at:

[www.berr.gov.uk/consumers/buyingselling/sale-supply/unfair-contracts/index.html](http://www.berr.gov.uk/consumers/buyingselling/sale-supply/unfair-contracts/index.html). The UK Government has since progressed work on a consolidated 'Consumer Bill of Rights' that would include simpler and clearer unfair contract terms protections: HM Government, *A Better Deal for Consumers: Delivering Real Help Now and Change for the Future*, Presented to Parliament by The Secretary of State for Business, Innovation and Skills By Command of Her Majesty, July 2009.

<sup>24</sup> European Commission, *Report from the Commission on the implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*, COM/2000/0248, April 2000, pp14-15.

<sup>25</sup> *Trade Practices Amendment (Australian Consumer Law) Bill 2009: Explanatory Memorandum*, above n14, pp31-32.

the issues relating to one-sided terms in standard form insurance contracts. However, no provisions in the ICA address the issue of unfair terms in insurance contracts. For example, section 15 of the ICA is contained within the “duty of the utmost good faith” part of the ICA, but that general duty only implies an additional term into insurance contracts requiring each party to act with the utmost good faith, including not to rely on terms in the contract if this would be to fail to act with the utmost good faith, but does not prevent the inclusion of any particular term in a contract nor subsequent reliance on such a term generally. Further, there are many other industries that, like insurance, are subject to industry-specific regulation to address industry-specific matters in addition to being subject to general consumer protection laws. These industries include banking and financial services including consumer credit, energy services and telecommunications. None of these industries are excluded from the UCT provisions because no existing general or industry-specific regulation addresses the problem of unfair contract terms, thus the existence of industry-specific laws in a particular field of commerce is largely irrelevant to whether or not UCT laws should apply to contracts in that field.

In fact, insurance is arguably one of the areas in which consumers most need UCT regulation. Insurance contracts can be complex with fine print exclusions and claim requirements significantly impacting on or altering the overall insurance cover purchased under the contract.

For example, consumers commonly have their claims for lost, damaged or stolen items or baggage denied under their travel insurance policies because insurers commonly include a term in travel insurance contracts excluding cover for loss, theft or damage of property left “unattended” or “unsupervised” in a “public place”. However, this essentially ensures that the insurance cover consumers believe they have bought for lost or stolen property is generally not useful, as it is precisely when consumers take their eyes off their property, even if only for a very short period, that their property is likely to be lost or stolen, and consumers assume that their insurance would cover this situation but it does not tend to. Numerous determinations in the favour of insurers in such cases, based on the terms of the travel insurance policy, have been made by the General Insurance division of the Financial Ombudsman Service (formerly the Insurance Ombudsman Service) over the years. In just one recent case, a consumer whose luggage was stolen after he boarded a city transfer bus at Hong Kong airport and placed his luggage in the luggage rack on the lower level of the bus but sat on the top deck had his claim denied because he did not keep the luggage under observation.<sup>26</sup> In another recent case, a consumer’s claim for one stolen bag was denied after he hailed a taxi on a road in Thailand to go to the airport and left his bags 3 to 6 metres away while he was haggling with the taxi driver over the fare, as the driver had pulled into the kerb slightly away from where he had been standing with his bags.<sup>27</sup>

The total exclusion of insurance contracts from the UCT provisions in the Bill is excessive and unreasonable and is a significant flaw in the Bill in its current form. We strongly oppose any exemption for insurance contracts and recommend that this be remedied by inserting a provision into the Bill providing for the UCT provisions to apply to insurance contracts, either by overriding section 15 of the ICA or amending section 15 of the ICA. Insurance is a financial service, thus the provisions of Schedule 3 Part 1 should apply.

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<sup>26</sup> Financial Ombudsman Service, General Insurance Division, *Determination: Case No: 37465*, 25 March 2009.

<sup>27</sup> Financial Ombudsman Service, General Insurance Division, *Determination Case No: 36202*, 25 February 2009.

## Recommendation

Insert a provision into the Bill either expressly providing for the provisions in Schedule 3 Part 1 (once enacted) to apply to insurance contracts despite anything to the contrary in section 15 of the *Insurance Contracts Act*, or amending section 15 of the *Insurance Contracts Act* to provide that it does not exclude the provisions in Schedule 3 Part 1 (once enacted).

## Enforcement and remedies powers

Consumer Action strongly supports the provisions in the Bill providing the ACCC and ASIC with new enforcement and remedies powers.

Effective enforcement powers are important to ensure that the substantive consumer protection provisions are complied with and contraventions addressed. For example, the Organisation for Economic Co-operation and Development's (OECD) report on best practices in consumer protection enforcement regimes noted an inverse relationship between effective enforcement mechanisms and the level of government intrusion into business activity that may be required, because effective enforcement is a greater deterrent to non-compliance and therefore reduces the need for more widespread inspection and government monitoring.<sup>28</sup>

The current enforcement provisions in the TPA and the ASIC Act do not give the regulators adequate and effective powers to detect, deter or stop conduct in breach of consumer protection laws. Most obviously, the ACCC and ASIC does not have substantiation notices available to require suppliers to provide evidence to back their claims about goods or services. The ASIC cannot seek civil pecuniary (monetary) penalties or orders banning a person from acting as a director of a corporation as part of civil enforcement proceedings for a breach of the consumer protection provisions, even though these can be cost-effective compliance tools<sup>29</sup> and are available for breaches of the competition provisions of the TPA.<sup>30</sup>

Effective remedies provisions are also very important as they ensure redress for persons, particularly consumers, who have been adversely affected by poor and unlawful conduct. The OECD has also developed a best practice framework for effective consumer dispute resolution and redress, and this sets out a three-pronged framework which includes mechanisms for consumers acting individually; for consumers acting collectively; and for consumer protection enforcement authorities to obtain or facilitate redress on behalf of consumers.<sup>31</sup> The third half of this best-practice framework is not currently in place in Australia, because the TPA and the ASIC Act do not allow the ACCC or ASIC to seek redress for consumers other than identified, individual consumers who have each provided consent to the regulator's application on their behalf in writing before the application is made.<sup>32</sup>

<sup>28</sup> OECD Committee on Consumer Policy, *Best Practices for Consumer Policy: Report on the Effectiveness of Enforcement Regimes*, 20 December 2006, p9; citing Philip Hampton, *Reducing administrative burdens: effective inspection and enforcement*, HM Treasury, March 2005.

<sup>29</sup> See, eg, OECD Committee on Consumer Policy, above n28, pp51-52, 55-56.

<sup>30</sup> *Trade Practices Act 1974* (Cth) sections 76, 86E.

<sup>31</sup> OECD, *OECD Recommendation on Consumer Dispute Resolution and Redress*, 12 July 2007.

<sup>32</sup> *Trade Practices Act 1974* section 87(1B); *Australian Securities and Investments Commission Act 2001* section 12GM(3).

### *Orders to redress loss or damage suffered by non party consumers*

We strongly support these new provisions. The OECD report on consumer redress referred to above explicitly recognised the important role that the regulator can play in obtaining redress for consumers, given the difficulties that individuals can face on their own, and the OECD report into effective enforcement regimes added that regulator powers to obtain consumer redress are not only justified on fairness grounds but can also enhance enforcement outcomes:

...adding a compensation order to a financial penalty or other sanction may serve to enhance compliance, since it can give an adequate value to [the overall penalty], if the other sanction alone cannot achieve this; and at relatively low additional administrative cost, that of ensuring that the consumer is paid the compensation.<sup>33</sup>

As discussed above, this issue has been a significant gap in the TPA's and the ASIC Act's remedies provisions for a number of years. The Bill addresses this by inserting provisions into those acts enabling the regulators to obtain orders against a party that has engaged in conduct in contravention of consumer protection provisions, to redress, prevent or reduce the loss or damage suffered by consumers in relation to the contravening conduct.

However, Consumer Action has a concern over the drafting of these provisions. The orders are expressly provided to be available to redress, prevent or reduce the 'loss or damage' suffered by consumers. Further, the kinds of orders that may be made to redress loss or damage suffered by consumers expressly includes an order directing the business to 'refund money' to a consumer. Yet the provisions also provide that the court may make such order or orders as it thinks appropriate 'other than an award of damages'.

An award of *damages* is a general legal concept that can include many different heads of *damages*, including direct loss or damage, consequential damage and punitive damages. Refunds of money would address one type of direct loss or damage suffered by consumers, and indeed the orders are intended to redress consumer loss or *damage* generally. It is therefore unclear how the exclusion of orders for an 'award of damages' interacts with express provisions enabling orders to redress 'loss or damage' including to 'refund money'. The EM also sheds no light on this question. We are concerned that this confusion could lead to unintended problems or set-backs in future court cases in the absence of further clarification.

Consumer Action therefore strongly recommends that the Bill be amended to clarify exactly what types of orders are intended to be excluded from the court's powers under these provisions, rather than excluding awards of damages too generally. We consider that it would not be reasonable to exclude orders to redress direct loss or damage suffered by consumers, but consequential loss or damage and punitive damages could reasonably be excluded from the non-party redress provisions.

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<sup>33</sup> OECD Committee on Consumer Policy, above n28, p54.

## **Recommendation**

Amend Schedule 2, Part 4 item 18 section 87AAA(1), and Schedule 3 Part 5 item 26 section 12GNB(1), to replace the phrase 'other than an award of damages' with a phrase setting out specific types of orders, for example 'other than an award for consequential loss or damage or punitive damages'.

### *Infringement notices*

Consumer Action supports the provisions enabling the regulators to issue infringement notices for breaches of certain consumer protection provisions. The ability to issue infringement notices for minor but not insignificant breaches of consumer protection laws is important, with the Productivity Commission noting that 'the inclusion of such powers in the new national generic law would be desirable to continue to provide scope for consumer regulators to deal with minor offences in a cost-effective manner'.<sup>34</sup> A minor breach might not justify large public expenditure to address through a large regulator investigation and/or court action, but may nevertheless have caused minor consumer detriment justifying a proportionate response to encourage better conduct in future, including better processes and systems to prevent contraventions. At present, a business can engage in these sorts of breaches with relative impunity, given that the likelihood of any enforcement action being undertaken to address them is very low.

However, a major omission from these provisions in the Bill is that infringement notices will not be available for breaches of any provisions in any industry codes made under Part IVB of the TPA. This includes the new Retail Grocery Industry (Unit Pricing) Code of Conduct, which contains several substantive consumer protection provisions, many of which are precisely the type of provision that might be subject to minor breaches justifying an infringement notice response, for example, a supermarket displaying incorrect and misleading unit prices on some shelves due to a computer glitch or inaccurate data entry. The ACCC also expressly recommended in its grocery prices report last year that infringement notices be made available under the TPA to enable the Horticulture Code of Conduct to be more effectively enforced.<sup>35</sup>

## **Recommendation**

Amend Schedule 2 Part 5 of the Bill to enable infringement notices to be issued for appropriate provisions of the industry codes made under Part IVB of the *Trade Practices Act*.

### *Enforcement and remedies relating to unfair terms*

We strongly support the provisions in the Bill enabling the ACCC and ASIC to take their own legal actions to prevent the inclusion or use of an unfair term in a standard form contract. Schedule 2 Part 7 and Schedule 3 Part 8 of the Bill enable the regulators to seek a declaration that a term of a consumer contract is an unfair term and injunctions or other orders against a party applying or relying on, or purporting to apply or rely on, a declared term.

<sup>34</sup> Productivity Commission, above n7, p248.

<sup>35</sup> ACCC, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, July 2008, p400.

The effectiveness of UCT laws critically depends on the ability of government regulators to enforce it. This is a different sort of legal action to either an individual consumer's legal action or a regulator-led representative action on behalf of a consumer or consumers.

UCT laws are intended to address the widespread inclusion of unfair terms in standard form contracts as a general feature of the modern marketplace. The nature of the problem is that it is a market-wide problem, not one that affects the odd individual or group of individuals. Thus, one of the most important features of UCT laws (including the EU, UK and Victorian models) 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 to take action on the individual consumers affected by a contract term.

Another benefit of UCT regulation is their strong pro-competition effect in promoting consumer confidence and increased market participation and in addressing sub-optimal consumer contracting decisions. However, these benefits do not accrue if the law does not enable pre-emptive regulator action to weed out unfair terms and instead is limited to remedies after the fact. This is because, under a model that only enables remedies after the fact, consumers continue to face a high risk of encountering unfair terms and carry the burden of having to pursue a remedy. Consumers cannot have confidence that they will not be placed in this situation.

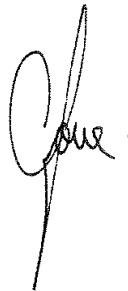
Thank you again for inviting submissions on the Bill. Please contact Nicole Rich on 03 9670 5088 or at [nicole@consumeraction.org.au](mailto:nicole@consumeraction.org.au) if you have any questions about this submission.

Yours sincerely

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