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The Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600 Email: economics.sen@aph.gov.au

Dear Senators

Australian Consumer Law – Unfair Contract Terms

The Australian Finance Conference is a national finance industry association, whose membership of 60 covers finance companies, banks and building societies. The members provide a wide range of finance to consumers and to business, including wholesale finance. We welcome the opportunity to comment on the Unfair Contract Terms (UCT) provisions of the *Trade Practices Amendment (Australian Consumer Law) Bill 2009* (the Bill).

The AFC is of the view the Bill's UCT provisions generally reflect the Productivity Commission's informed, balanced and practical approach to the regulation of unfair contract terms in consumer contracts. In particular, we welcome the application to consumer contracts only as we see no market failure justifying its application to business contracts.

We do, however, have concerns that some provisions undermine contractual certainty and fail to reflect the broader legislative context which regulates contractual fairness in consumer contracts, the National Consumer Credit Protection (NCCP) regime in particular. Some provisions also fail to consider the financial market structures that affect product pricing, delivery systems and consistency and certainty of product offering.

Of particular concern to the AFC is the degree to which determination of core concepts are being left to the courts to determine over time, especially standard form contracts and detriment, and the application of the regime to existing contracts if they are varied on, or after, 1 January 2010.

We do not believe litigation is the ideal way to develop legislative principles. That should be done in the legislation itself. Government is keen to encourage parties to resolve issues away from the courts. The proposed regime will force parties to court to work out the boundaries of what is unfair.

Laws against unfair contract terms cannot define 'unfairness' precisely because it is an inherently subjective concept. As pointed out by the Productivity Commission, the unclear boundaries of unfairness may potentially lead to regulatory overreach. Unconscionability provisions in the ACL, however, can deal with the most egregious exploitation of contracts. Such an approach looks beyond the contract to the overall transaction and is a more balanced means of addressing any concerns about consumer detriment than simply an 'unfair contact terms' regime based on an undefined concept that must be tested in the courts.

We **recommend** the Parliament defer implementation of the UCT provisions of the ACL regime until all of its consumer protection provisions are known. This will enable all the consumer protection

provisions to be developed together to avoid regulatory overreach and to ensure clarity, consistency and relevance.

There are other reasons to support deferral of the UCT regime. In addition to the development of consistent consumer protection provisions, the ACL should look to consistency with other consumer-related legislation, particularly the National Consumer Credit Protection (NCCP) regime. Given the speed with which regulatory reform is being progressed, it is obvious legislation is being developed in silos rather than in the broad market context of multiple consumer protection statutes. This may result in more appropriate consumer protection approaches being overlooked as outcomes are narrowly focused.

The AFC is of the view the NCCP regime provides a more appropriate approach to the management of unjust credit terms through the re-opening provisions. Those NCCP provisions take the contract formation context into account, in addition to a broad range of factors, including contract terms that are not reasonably necessary for the legitimate interests of a party to the contract. It avoids the issues of 'standard form contracts' and takes a more balanced look at the transaction, rather than a simplistic reliance on the contract itself.

The reversal of onus requiring a party to prove a contract is not in standard form has the effect of *prima facie* applying the regime to all consumer contracts. In light of this, to assert the regime only applies to standard form contracts is misplaced. The concept of standard form should be defined by legislation as it is a fundamental scope issue – it should not be left to a reverse onus to be argued in court. We **recommend** the Parliament include a definition of 'standard form contract' in the legislation.

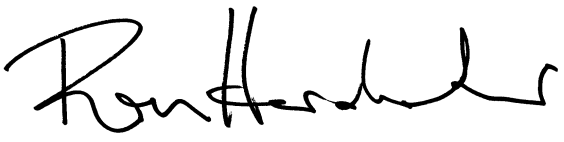
The AFC is also greatly concerned by the application of the UCT regime to contracts entered into before it was enacted should those contracts be varied once the UCT regime is in place. To bring the whole of an existing contract into the regime because it is varied after 31 December 2009 is, of itself, unfair.

Existing contracts are made on the basis of law applying at the time of their making. The approach of the proposed legislation is to make the regime, in effect, retrospective. The legislation should only apply to existing contracts for terms varied by agreement after the new law is introduced. We **recommend** the Parliament apply the regime only to contracts and variations made after 31 December 2009.

We support, however, the exclusion of business contracts from the regime. At no point has Government made out a regulatory case for applying the proposed regime to contracts between businesses. No market failure has been identified to justify the broader application. We **recommend** the Parliament continue to exclude business contracts from the regime.

Kind Regards,

Yours truly,



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