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

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1 Introduction - scope of submission

The reforms to Australian consumer law which would arise from the enactment of the *Trade Practices Amendment (Australian Consumer Law) Bill* 2009 (**Bill**) would perhaps be the most significant legal reforms for Australian consumers since the passing of the TPA.

Our submission relates to three aspects of the consumer law reform to which the Bill gives effect:

1 creation of the ACL and the unification of the Australian provisions relating to consumer protection, as stated in the TPA and the State and Territory fair trading legislation (**Unification Initiative**);

2 the introduction of a regime for dealing with unfair terms as stated in Part 1 of Schedule 1 to the Bill (**Unfair Terms Initiative**); and

3 the introduction of enforcement regimes, including in respect of the prohibitions on unconscionable conduct and unfair terms as stated in Schedule 2 to the Bill (**Enforcement Initiative**).

In our view it is crucial to consider the Bill in the context of the wider picture of Australian consumer protection. Given the importance of the ACL, and the ongoing consideration by the Government of the content of the ACL, at the end of this submission we outline the elements of a consumer protection regime which we submit would address some of the shortcomings of the TPA and also allay fears concerning the position of small business.

Because the same issues arise, we do not make any specific submission on proposed amendments to the corporations legislation.

An Executive Summary of our submission in respect of each of the above is set out below.

A list of abbreviations is set out at the end of this submission.

2 Executive Summary

Our submission may be summarised as follows.

1 We are in general support of the initiatives to which the Bill gives effect.

2 The Unification Initiative has to be seen in the context of Australian consumer protection as a whole. From that perspective, there is a fundamental problem, namely, that Part V, Division 2 of the TPA is not an effective tool for protection. The problems with Part V, Division 2 include:

- it lacks clarity – both for consumers and suppliers;
- it creates serious anomalies in the treatment of commercial contracts;
- it creates serious anomalies in the treatment of consumer contracts; and
- the definition of consumer is inappropriate.

We explain these problems by examining the TPA as the Government's contract with Australian consumers and business. (See section 3.)

3 In relation to the Unfair Terms Initiative:

- the use of presumptions is in itself 'unfair' from the supplier's perspective, particularly in relation to the lack of positive guidance as to what is a standard form contract;
- the most fundamental problem with the initiative lies in the formulation of the examples of terms which are potentially unfair terms. These are in our submission manifestly incomplete and far too broadly expressed. Perhaps unwittingly, the Government has effectively deemed all exclusion and limitation clauses not expressly permitted by other legislation to be unfair terms; and
- in addition, in our view, the decision to include land contracts within the regime is ill-advised. (See section 5.)

4 The scope of the Enforcement Initiative has been influenced by a misunderstanding of the concept of unconscionability. There is simply no justification for the imposition of the rigors of the enforcement regime to unconscionable conduct. From a broader perspective, the Enforcement Initiative relies on an overly intrusive and heavy handed philosophy of consumer protection. (See section 6.)

5 Although not directed at the Bill, because the ACL is such an important reform for Australian consumers we have attempted to set out some key ingredients of legislation which, we submit, would replace Part V, Division 2 of the TPA with a clearer and simpler approach to implied terms and consumer rights and remedies. (See section 7.)

3 The Government's contract with consumers and suppliers

3.1 Introduction

It is timely indeed for the Government to begin to address the inconsistencies which have emerged in the way in which the TPA has been adopted by the State and Territory fair trading legislation. This is, very clearly, an important and worthwhile objective. One of the major problems of Australian consumer protection law has been the ad hoc approach which has occurred over the past 30 years.

We submit that it is appropriate to see the TPA as the Government's contract with Australian consumers and business, that is, those who supply goods and services to consumers. It is, of course, a standard form contract. Very little by way of negotiation is permitted in provisions such as those in Part V, Division 2 which are directed specifically at consumer protection. In terms of bargaining power, the Government is, through enforcement provisions, in a position to dictate to business.

As a 'standard form contract', the Government must, in relation to the TPA, ask itself the same questions which it requires business suppliers to ask under proposed section 3(3) of the Unfair Terms Initiative, namely:

- in relation to the drafting of the terms of the TPA, are they 'transparent', that is, 'expressed in reasonably plain language' and 'readily available to any party affected' by the terms?
- from the substantive perspective of proposed section 2(1), do any of the terms 'cause a significant imbalance in the parties' rights and obligations arising under the contract'? and
- in relation to the rights under the Unfair Terms Initiative, there must be an evaluation of whether there is a significant imbalance between supplier and

consumer. In relation to the Enforcement Initiative, it includes the position between business and Government – is there a significant imbalance?

We submit that the TPA does not meet these standards. An 'us and them' philosophy has developed over the past 20 years under which, in attempting to promote consumers' rights, the Government has subjected business to more and more regulation much of which is couched in terms of penalising business. There appears to be a lack of co-operation by Government with business and, above all, insufficient attention is being given to how Government can act as a facilitator between consumers and business. Government appears to see its role as the gatekeeper. This is not conducive to free enterprise. Nor is it conducive to competition.

The ACL is the opportunity for the Government to take a positive role. We are concerned that giving effect to the Unfair Terms Initiative while Part V, Division 2 of the TPA is in its current form is an incomplete solution. Not only will many of the problems which currently exist in Australian consumer protection law remain, but they are likely to be exacerbated by enactment of the Bill. We set out below certain observations about the TPA which relate to the wider picture of current Australian consumer protection law.

3.2 Lack of clarity

It is a fundamental element of any consumer protection regime that it be accessible to and clear to both consumers and those who are bound by the regime. The linchpin of the TPA from this perspective – Part V, Division 2 – is, we submit:

- not accessible to or clear to consumers; and
- not clear to suppliers who are bound by the regime.

Part V, Division 2 of the TPA is derived from certain provisions of the 1893 Act, which was enacted at the end of the nineteenth century to codify the law of sale of goods in the United Kingdom. It was subsequently adopted in all Australian states and territories. The 1893 Act was not, and was never intended to be, a consumer protection statute. It was drafted from a commercial perspective. In addition, from the point of view of consumer buyers of goods, it was expressed in concepts which ordinary consumers cannot understand.

For example:

- the implication of terms as 'conditions' and 'warranties' relates to whether a buyer of goods is entitled to reject the goods and terminate the contract, or merely claim damages, but generally speaking consumers are only concerned with the right to reject;
- the language of the 1893 Act, in using concepts such as 'merchantable quality', sale 'by sample', sale 'by description', 'encumbrance' and so on is entirely unintelligible to consumers;
- the idea that Australian consumers in 2009 must know the nature of the terms implied under an 1893 Act of the UK Parliament in order to understand their rights under contracts to which consumer protection provisions apply is inappropriate; and
- there is nothing in the 1893 Act, and therefore nothing in Part V, Division 2, which secures to consumers who do not wish to return (or cannot return) defective goods a right to have those defective goods repaired. The damages to which they are entitled fall to be assessed under the general law or the applicable sale of goods legislation rather than a consumer protection statute.

Until these aspects of the law are dealt with in Australia, we will not have a genuine consumer protection regime.

Lack of clarity creates uncertainty – both for consumers and business. That leads to market inefficiencies. Lack of reliable information also places a greater burden on

enforcement agencies – as more consumers complain and as more suppliers appear to contravene the law. Each is a negative influence on business and consumer confidence and satisfaction. This all serves to increase in costs which must ultimately be borne by consumers.

The proposal to deal with particular types of contract – such as contracts for the provision of financial services – in separate legislation should logically imply different regimes for different consumers. However, we note that there is no attempt in the formulation of the examples of unfair terms to be included in the ASIC Act to relate unfairness to the characteristics of the contracts with which that Act deals. If the Government is concerned to achieve simplicity and accessibility, and the considerations are the same, only one piece of legislation should be necessary.

3.3 Treatment of commercial contracts

The definition of 'consumer' in section 4B of the TPA has led to a large number of inexplicable anomalies. The examples set out in Schedule 1 illustrate some of the anomalies which currently arise under the TPA.

We are familiar with the problems which face commercial parties in coping with the application of the definition to commercial contracts. In our experience, very few commercial people fully understand the application of the TPA.

3.4 Treatment of consumer contracts

In 'genuine' consumer contracts, where a person acquires goods or services for personal use, the TPA will apply. However, not only do anomalies still arise, but the protection which the TPA provides is often somewhat illusory or not appreciated by the consumer.

Consider the following example of an anomaly:

Home owner (C) decides to hire a pneumatic drill from S Ltd to break up a concrete path at C's home.	• say the price under the contract of hire is $150 - C is a consumer and has the protection of the TPA; • however, the goods are not of a kind ordinarily acquired for personal, domestic or household use or consumption; • therefore, S Ltd is entitled to: – exclude any common law liability; and – limit its liability for breach of a quality or fitness term implied by Part V, Division 2 to (eg) resupply of the services - unless it is established that it is not fair or reasonable to permit S Ltd to rely on the limitation of liability;

The typical concern of a consumer to whom defective goods have been supplied is simply to return the goods. Very few consumers appreciate that in order to be entitled to return the goods they must rescind the contract under section 75A. That requires proof that the supplier has breached a condition rather than a warranty – another aspect of Part V, Division 2 that consumers do not appreciate. It is unrealistic to expect consumers to debate with the supplier whether the supplier has breached a condition or a warranty. It is, of course, true that the consumer can complain to the consumer protection bodies if the supplier refuses to recognise his or her rights. However, that does not solve the problem that the TPA assumes an understanding of the law that consumers do not have.

3.5 Definition of consumer

We fully appreciate the theoretical and practical difficulties involved in framing an appropriate definition of 'consumer'. However, in our view, the TPA adopts an unduly complex approach.

In *Confident Consumers,* detailed reference is made to various definitions of 'consumer' under Australian consumer law. That is made from the perspective that the TPA states one definition, other jurisdictions have different definitions. However, the problem is much more significant than that:

- There are at least six different definitions of consumer embodied in section 4B of the TPA.
- Section 51AB has another definition.
- Section 51AC uses a concept of 'business consumer', even though many of the consumers under section 4B are also 'business consumers'.
- Section 51ACA has another definition.
- Section 74A, which purports to utilise the definition in section 4B, in fact uses one of the several definitions embedded in that section.

There will be an additional definition for the Unfair Terms Initiative. That is couched in terms of 'consumer contract'; but that is also how section 4B operates. For example, a person who buys goods for $20 is a consumer unless the goods are purchased for resupply because, under section 4B, that is a consumer contract.

Although it may not be possible to frame a single definition of consumer applicable to all aspects of consumer protection, it would dramatically improve the TPA if the number of definitions could be reduced. The best way to do that would be to make the definition adopted for the Unfair Terms Initiative the basic definition. From the consumer protection perspective it comes closest to capturing the essence of 'consumer'.

3.6 Practical problems in enforcement

Equally, commercial people have little understanding of their obligations and rights under the TPA.

Many consumers who seek to return defective goods to a retailer are met by the response that it is not the retailer's responsibility – the consumer must complain to the manufacturer. Even though the goods may be goods of a kind ordinarily acquired for personal, domestic or household use or consumption, the manufacturer may say it is only obliged to repair the goods. A typical example would be a consumer who purchases a CD player from a major department store. The CD player does not work. The sales assistant at the department store says it cannot be replaced. The consumer will have to return the goods to the manufacturer.

Again, the problem is that the simple consumer protection remedy – return of the goods to the supplier – is not available unless the consumer can prove breach of condition. The fact that, in ignorance of their obligations, retailers send consumers away with the statement that the consumer must complain to the manufacturer is a function of the drafting of the TPA – it can only be understood by lawyers. Trying to 'educate' suppliers by severe enforcement regimes is not the answer. Suppliers must be made aware of their obligations and that can be done effectively only if those obligations can be explained in simple terms. See below, section 7.

Section 68 of the TPA, when combined with section 53(g) and section 75AZC(1)(k), are designed to prevent suppliers hiding behind exclusions and limitations of liability in relation to contracts regulated by Part V, Division 2 of the TPA. Logically, the prospect of incurring the penalties for making representations of the type referred to in section 75AZC(1)(k) ought to be a major deterrent to the use of exclusions and limitations of

liability prohibited by section 68 of the TPA. That is not, however, the position. There are three quite different problems:

1 Exclusions and limitations of liability prohibited by section 68 of the TPA are still commonly used. In our experience, many sets of standard terms are contrary to the TPA. It is common for internet web sites to have statements to the effect that persons who access the site agree that there is no liability for negligence, even though it will generally be the case that the provision of the information is a supply of services to a consumer to which section 68 applies, and notwithstanding that statements on web sites may be misleading or deceptive for the purposes of section 52 of the TPA. Such statements contravene the TPA. They are even found on web sites of governments and government bodies, including consumer protection agencies.

2 Because the definition of 'consumer' in section 4B makes the TPA applicable to many contracts which can only be described as commercial transactions, business people regularly include provisions which are prohibited by section 68 of the TPA without any appreciation that they are risking prosecution for contravention of section 75AZC(1)(k). It seems to be a common misconception that section 68A of the TPA permits limitations of liability in any commercial contract. People do not understand the limited application of that section.

3 Commercial consumers appear to be as much in the dark as ordinary consumers. Because it is common practice to include contractual limitations of liability based on section 68A without regard to whether the goods or services are of a nature which permit such limitations, commercial consumers appear to accept such limitations without demur, and presumably do not require suppliers to give effect to the contractual rights which the TPA mandates for their benefit.

Whether such limitations of liability are nevertheless sufficient to dissuade 'consumers' from enforcing their rights under contracts in which they appear is unknown. We very much doubt that there is any concerted effort by suppliers of goods and services to avoid their responsibilities. In our experience it is simply a matter of ignorance. Only lawyers can understand the complexities of the consumer protection regime. From that perspective, any thoughts that consumer protection bodies will rigorously enforce the Enforcement Initiative are in our view very optimistic. The conclusion is that, for the reasons outlined above, suppliers find it impossible to comply with the TPA regime.

Moreover, those suppliers of goods and services who take their legal obligations seriously are forced to spend considerable sums by instructing lawyers in the careful and informed drafting which is necessary to ensure that limitations of liability do not fall foul of section 68 of the TPA, with attendant risk of prosecution. These suppliers are disadvantaged by their concern to adhere to the law. In any event, small business cannot afford to obtain the sophisticated legal advice necessary to navigate the TPA.

3.7 International perspective

Australian consumers already have the benefit of a very extensive consumer protection regime. It is, indeed, much more extensive than any of Australia's major trading partners.

We are regularly asked to review the standard terms of business of overseas companies thinking of doing business in Australia. There is often a concern for the business to have the same, or substantially the same, terms in Australia as in other major countries. That is, however, impossible. Provisions which are, for example, perfectly valid under English or US law cannot be used in Australia. There is, indeed, a high degree of surprise when told of the reach of the TPA, including section 52 and the unconscionability prohibitions.

There may well come a time when the preferred way of doing business in Australia is over the internet. The intricate laws which purport to protect Australians will not have that effect. In this regard, Australian businesses will be seriously disadvantaged, to the detriment of the economy. Presumably, at some stage Australian consumer protection

agencies will seek to work with overseas agencies in an effort to obtain some sort of reciprocal enforcement agreement. But it is our view that it is most unlikely that the international community will accept the definition of consumer in section 4B of the TPA. And, based on our understanding of the consumer protection regimes applicable overseas, the TPA as a whole is out of step with those regimes.

4 Unification Initiative

As we have already indicated, the Unification Initiative in the Bill is to be applauded.

Our concern, as explained above, is that what will be unified is not a genuine consumer protection regime. It is not user-friendly and it applies to too many commercial transactions.

In addition, again as explained above, the effect of the TPA is to create various categories of consumer, according to the price at which goods or services are supplied and whether those goods or services are of a kind ordinarily acquired for personal, domestic or household use or consumption and depending on what aspect of the TPA is at issue. It is unclear to us whether the Government intends to apply the definition of consumer in the Unfair Terms Initiative to Part V, Division 2 of the TPA. It is therefore unclear whether the impact of the Unfair Terms Initiative will be to create yet another category of consumer. If so, it will lead to further complexities.

See further below, section 5.3.

5 Unfair Terms Initiative - Part 1 of Schedule 1 to the Bill

5.1 Introduction

In the Freehills Submission, we gave detailed reasons for why it was inappropriate for the unfair terms regime to apply to all standard form contracts. We therefore believe that it was correct for the application of the Unfair Terms Initiative to be limited to consumers. In addition, we support the decision to adopt a definition of consumer which is in narrower terms than the definition in section 4B of the TPA. In our view the Bill uses a much more appropriate definition, and has the effect that the Unfair Terms Initiative is a genuine consumer protection reform. The benefits of this include saving business the significant costs which would have been required to accommodate the regime proposed in the *Consultation*. While that may not lead to reduced prices for consumer goods and services, the fact that there should be no significant increase in compliance costs means that there should be no material increase in prices for consumer goods and services.

The need for an unfair terms regime can, of course, be debated. However, in our view such a regime can be supported on the simple basis that the restriction of Part V, Division 2 of the TPA to implied terms – and provisions which regulate rights in relation to those implied terms – is seriously defective. Consumers are also entitled to protection against unfair terms relating to express obligations.

Nevertheless, there are in our view several unsatisfactory aspects of the Unfair Terms Initiative which need to be addressed. Set out below is a discussion of four aspects of the Unfair Terms Initiative which seem to us unsatisfactory or most problematic. These should be read in conjunction with the comments on the Enforcement Initiative in section 6.

5.2 Use of presumptions

(a) Introduction

It goes without saying that it is essential to strike the right balance between the interests of consumers and suppliers of goods and services under standard form contracts. There is no doubt that the mere use of standard form contracts is not inimical to the interests of consumers. What is objectionable is the use of those contracts to impose a disproportionate burden of risk.

A certain degree of inequality of bargaining power is an inevitable feature of consumer contracts. That cannot be removed. Nor would consumers benefit from the negotiation of all their contracts. Indeed, the idea that consumers desire to negotiate is by no means an obvious one. Accordingly, what needs to be redressed is the use of a superior bargaining position to impose terms which are 'unfair' terms.

(b) Theoretical underpinnings

Any reform of the law must have a coherent basis in theory, relevantly, contract theory and consumer protection theory.

In principle, there are two categories of unfair terms in contracts:

1 terms which are the product of unfair tactics in bargaining; and

2 terms which are unfair in the sense of being contrary to policy.

Under Australian law, terms within the first category are addressed by reference to concepts which control what is sometimes termed 'procedural unfairness'. Concepts such as duress, misrepresentation, mistake and unconscionable conduct provide the source of rights.

Section 52 of the TPA and prohibitions on unconscionable conduct in the TPA deal (amongst other things) with terms which are the product of unfair tactics in bargaining. Given that the Unfair Terms Initiative is concerned with standard form contracts which are not negotiated, this category may be put to one side.

It is the second category of unfair terms which is relevant to the Unfair Terms Initiative. And it is this category which has been the subject of reforms in many jurisdictions around the world, in both common law and civil law countries. That includes the Directive and the UK Regulations, on which Part 2B of the *Fair Trading Act* 1999 (Vic) was to some extent based.

This second category of unfair terms can be subdivided into:

- terms which are inherently unfair; and
- terms which are unfair in the particular circumstances of the case.

The common law provides only limited means for dealing with terms which are inherently unfair. Apart from specific heads of public policy, the common law is more or less restricted to the control of penalties and contracts in restraint of trade. (See Freehills Submission at sections 8.3 and 8.4.) That of itself suggests the need for an unfair terms regime to protect consumers.

However, it should not be forgotten that the TPA has both directly and indirectly led to the unenforceability of terms on the basis that they are contrary to policy. There are two main categories:

- terms expressly prohibited by section 68 of the TPA (and analogous provisions in other parts of the TPA); and
- terms which seek to exclude or limit liability for contravention of the statutory prohibitions on conduct, including conduct in contravention of section 52 of the TPA, have been held by the courts to be contrary to public policy.

Taken overall, it is clear that Australian consumers do already have the benefit of substantial protection from unfair terms. The 'gap' to be filled by the unfair terms regime is therefore not as significant as might be thought. In addition:

- section 68 of the TPA applies to many 'consumer' transactions with commercial parties; and
- the public policy under which terms which exclude or limit liability for contravention of the statutory prohibitions in the TPA are void apply to all contracts in trade or commerce, even those between large public companies.

The common law provides more extensive controls on terms which are unfair in the particular circumstances of the case. However, these controls have tended to be technical. The principal device is the application of specific rules to control the use of 'unfair' exclusion and limitation clauses in contracts. It is the fact that this aspect of the common law is technical – and therefore not accessible to consumers – that suggests the need for an unfair terms regime to protect consumers.

(c) Abstract control

Given that the optimum level of consumer protection is more likely to be provided by a regime which does not require consumers to litigate their contractual disputes, addressing terms which are inherently unfair is more likely to be successful than seeking to address unfair terms in contracts on a case by case basis. This leads to what academics have termed the 'abstract control' of unfair terms in consumer contracts. (See Freehills Submission at section 2.)

Part and parcel of this approach is the use of presumptions. Certain categories of contractual terms can be presumed to be unfair. A small number of terms can be declared unfair. Therefore, although in the former case it would be open to the supplier to justify the term, in the latter case justification would not be permitted. (The former are 'grey-listed' terms, the latter 'black-listed' terms.)

The reform outlined in the *Consultation* was in our view difficult to support on a theoretical basis because of the failure to distinguish between consumer and commercial contracts. Limiting the reform to consumer contracts is of considerable assistance in ensuring that it is coherent from a theoretical perspective. Nevertheless, a tension between abstract control and control based on the particular circumstances of the case arises from the use of presumptions.

(d) Impact of the Bill's presumptions

In our view, the presumptions in the Bill both go too far and achieve too little in the way in which they impact on consumers. They:

- go too far because the overall result is that rather than controlling the use of 'unfair' terms, the Unfair Terms Initiative is in effect an attempt to control *unreasonable* terms; and
- achieve too little in the way in which they impact on consumers because they achieve results which are unduly legalistic and complex.

Since the Unfair Terms Initiative is in relation to standard form contracts, it is difficult to justify the failure of the definition of 'consumer contract' (in proposed section 2(3)) to incorporate the requirement of a standard form contract. This gives the misleading impression that the initiative is about unfair terms in consumer contracts. Consumers may wrongly believe that all contracts are regulated. And, just as a supplier may be unsure whether it has contracted on a standard form, so also there is no way that a consumer can know whether it has contracted on a standard form. Ultimately, the presumptions are simply uninformative.

It follows that the major premise on which the reform is based is absent from the definition of the focus of the reform. This is a serious defect. The presumption in proposed section 7(1) that any consumer contract is a standard form contract is unfair to suppliers because there is no legislative basis on which the presumption can be rebutted.

Only a court can, under proposed section 7(2), determine that the presumption has been rebutted. The potential for spurious claims is unnecessarily great. And, as noted above, the consumer is as much in the dark as the supplier. Without wishing to be provocative, it is strange that the Government proposes to enact legislation requiring contracts to be transparent and yet it does not define the scope of the regime. Given the Enforcement Regime which will ultimately apply in relation to unfair terms, business is entitled to be given guidance on the scope of the Unfair Terms Initiative.

We submit that a more acceptable and logical way to deal with the matter would be to include the requirement of standard form contract in the definition of consumer contract and to relate the presumption that a particular contract is a standard form contract to one or more of the matters currently in proposed section 7(2) of the unfair terms regime. For example, the presumption that the contract is a standard form contract could apply if:

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

(b) the consumer was required either to accept or reject the terms of the contract (other than the terms referred to in section 5(1)) in the form in which they were presented; or

(c) any other matter prescribed by the regulations.

Some or all of the other matters currently in proposed section 7(2) could then be reformulated as bases for showing that the contract was not a standard form, that is, to provide a basis for rebuttal of the presumption. For example:

(a) the consumer had all or most of the bargaining power relating to the transaction;

(b) the consumer was given an effective opportunity to negotiate the terms of the contract (including the terms referred to in section 5(1));

(c) the terms of the contract (including the terms referred to in section 5(1)) take into account the specific characteristics of the consumer or the particular transaction; or

(d) any other matter prescribed by the regulations.

As things presently stand, the absence of a definition of standard form contract will result in the illegitimate imposition of a burden of proof. A revision along the lines above would also be beneficial to consumers. The concern of the Government not to be tied to a legal definition of standard form contract is also accommodated.

As outlined in the Freehills Submission, at sections 12.4 and 13.2, the impact of the presumptions in relation to unfair terms, and the basis on which the presumption must be rebutted under proposed section 3, is to convert the Unfair Terms Initiative into an initiative in relation to *unreasonable terms*. In addition, although the *Consultation* objected to imposing a negative burden of proof on consumers in relation to the legitimate interests of the supplier, in relation to the definition of standard form contract it was content to impose a negative burden on suppliers – to establish that the contract was not a standard form contract. Since that burden is in relation to a preliminary matter, it is much more significant than the legitimate interests burden. The end result is that, except in relation to proposed section 3(1)(a), the supplier at all times has the burden of proof.

It is difficult to justify the way in which the requirements of proposed section 3(1) are divided for the purpose of the presumption in proposed section 3(4). On its face, section 3(1) states two requirements each of which is essential in order for a term to be unfair. However, the supplier will not know whether it must discharge the burden in section 3(4) until it is held that the requirements of section 3(1)(a) are satisfied. This means that, in the litigation context, the supplier would be bound to go to the expense of preparing evidence to discharge the burden in all cases except those where it was able to seek summary determination of the matters in section 3(1)(a). That is unlikely to occur. In addition, greater reliance ought to be placed on the significant imbalance idea – as the central concept in this part of the regime.

Above all, as a matter of substance, where a standard form contract includes one of the examples in section 3, the combined effect of:

- the presumption in relation to standard form contracts;
- the drafting of the examples; and
- the burden in proposed section 3(4),

is to create a presumption that all terms in consumer contracts are unfair terms. In the absence of strong empirical evidence to support that approach, this creates a significant imbalance in the Australian consumer protection contract.

(e) A simpler approach to the presumptions

In our submission it would be relatively easy to remove the complications and potential for unfairness in the use of presumptions by placing greater reliance on the examples in proposed section 4. These are the steps we suggest:

1 a term of a consumer contract is unfair if it would cause a significant imbalance in the parties' rights and obligations arising under the contract;

2 a term of a consumer contract is presumed to cause a significant imbalance in the parties' rights and obligations arising under the contract if it falls within the list of examples of unfair terms; and

3 the term is not unfair if the supplier establishes that the term did not in fact cause a significant imbalance in the parties' rights and obligations arising under the contract or was reasonably necessary in order to protect the legitimate interests of the supplier.

Because an approach on those lines relies heavily on the examples of unfair terms it is, of course, important for the examples of unfair terms to be fully stated in clear terms. That is in any event a fundamental consideration.

5.3 Formulation of the examples

(a) Introduction

In our submission, a major shortcoming of the examples of unfair terms is that they are stated in terms which are far too broad. They are also, for the most part, incomplete as statements of terms which are likely to cause a significant imbalance in the parties' rights and obligations.

We appreciate that the formulation of the examples is based on that in Part 2B of the *Fair Trading Act* 1999 (Vic). However, in our submission, mistakes have been made in the formulation of the terms. Literally applied they would create severe burdens for suppliers of goods and services who would find it extremely difficult to justify ordinary terms commonly found in consumer contracts which no-one had previously thought to be unfair.

Very important words have been omitted from the relevant examples. Those words provide guidance as to when and why the terms are likely to be unfair. Set out in Schedule 2 are the examples listed in proposed section 4 of the unfair terms regime together with analogues in the examples stated in the Directive from where they are derived.

Clearly, the formulation of the examples in the Bill has departed quite markedly from the Directive. That is not, in itself, a reason for objecting to the examples in the Bill – the protection to be afforded to Australian consumers cannot be determined by the protection to be afforded to consumers in Europe. However, there is nothing in the formulations which is designed to suit Australian conditions.

(b) Limitation of liability

A major question which needs to be addressed by the Government is whether one objective of the Unfair Terms Initiative is to outlaw all terms limiting the liability of a

supplier of goods or services. We are not aware that that was a concern of the various proposals leading up to the Bill. Certainly, it has not been articulated in clear terms. Examples (a), (i) and (k) have the effect that it is presumed to be unfair to include any term limiting liability, irrespective of the basis or extent of limitation. The effect is to render the supplier's liability unlimited in amount, thus rendering it impossible for suppliers to insure their risks. That is in our view unworkable in practice and inconsistent with the spirit of the civil liability reforms.

In the EM (par 2.57), the point is made that there are many instances in which express legislative provisions permit the use of clauses limiting liability. That is incorrect. Although there may well be specific examples in certain statutes, these have no general application to terms which are currently permitted under the general law. For example, currently, if a supplier agrees to deliver goods on a specific date but wishes to limit its liability for late delivery the matter is governed entirely by the common law. However, the unfair terms regime would render that term challengeable on the grounds of fairness. Again, assume that, although not required by law to do so, a supplier offers to consumers a 7-day period in which goods can be returned on the basis that the consumer has changed his or her mind. Is the fact that the right of the consumer is limited to a period of 7 days a basis for saying that it falls within one of the examples in proposed section 4? What if the supplier requires proof of purchase as a requirement for returning goods on this basis? Is that within example (a) as 'a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract'?

The principal concern of the regime as a whole is with obligations which the supplier has expressly undertaken in favour of the consumer. In relation to limitations of liability that is effectively the only operation of the regime. The issue does not relate to limitations of liability in relation to terms implied by Part V, Division 2. Terms limiting liability of that nature are already void under section 68 of the TPA. It would seem likely that suppliers will react to the reform by ensuring that they undertake very limited express obligations. The end result will be that, in a given market, suppliers will compete only in relation to price.

(c) Overlap

Taking again the example of limitation of liability, there is considerable overlap between examples (a), (i) and (k).

- What is the difference between a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract (example (a)) and a term that limits, or has the effect of limiting, one party's vicarious liability for its agents (example (i))?
- What is the difference between a term that limits, or has the effect of limiting, one party's vicarious liability for its agents (example (i)) and a term that limits, or has the effect of limiting, one party's right to sue another party (example (k))?

(d) Termination

Similar problems arise in relation to the examples relating to termination provisions. It can be seen from comparison with the wording of the Directive that important words have been omitted. It is the words omitted which are suggestive of unfairness, not the words included.

Example (b) is 'a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract'. But that is the nature of termination rights. During the term of the contract any termination right, for example, for breach of contract, will be enjoyed by one party. The fact that there is no express right in favour of both parties on breach is not indicative of an unfair term for two reasons:

1 the clause does not prevent the consumer terminating in reliance on the right conferred by law; and

2 if the contract were to contain an express right, the issue might arise as to whether the consumer is being misled into thinking that the express right is his or her only right.

If the real reason for the provision is that consumer contracts must include an express right of termination in favour of the consumer the legislation should clearly state that.

But the fundamental point is that the unilateral right of termination is clearly objectionable only if it applies during the term of the contract in circumstances where there is no reason for termination. That is why the Directive speaks in terms of termination on 'a *discretionary* basis'.

In addition, if the contract does not have a fixed term, the law will imply a right of termination on reasonable notice. Both parties enjoy that right. If the contract gives the supplier an express right to terminate on reasonable notice, that is not unfair because that is what the law implies. The consumer's right to terminate is not removed, and can still be relied upon. In the Directive this is dealt with by the addition of words which do not appear in example (b), namely, 'terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so'.

Example (e) is in the form:

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

A supplier's business may change over time. The prices at which goods and services are supplied may vary over time. Those and other reasons may dictate that only the supplier has the right to renew. (It has to be borne in mind that a unilateral right to vary the price at which goods or services are supplied during the term would be an unfair term.) If the supplier is not entitled to refuse to renew, it could find itself bound for an indeterminate period – locked into an infinite cycle of renewable contracts. In our submission, the corresponding example in the Directive is more focused and logical. It expresses the position in terms of 'automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early'.

(e) Agents

Example (i) refers to 'a term that limits, or has the effect of limiting, one party's vicarious liability for its agents'. This is dramatically different from the analogous example in the Directive. The reference point of the Directive to agents of suppliers is that suppliers should be regarded as bound by commitments undertaken by their agents. However, the Bill translates that into a term that limits the supplier's 'vicarious liability' for its agents. That is an entirely different matter. Rather than relating to whether the supplier is bound by the contract, the example relates to the liability of the supplier under the contract.

There is, in fact, nothing in the examples in proposed section 4 to deal with suppliers who deny the authority of their agents to enter into binding contracts on their behalf. It appears that the formulation of the example derives from a misunderstanding of the issue. Since corporate suppliers necessarily act through their agents, the impact is to place every limitation of liability of a supplier at issue. We do not believe that is the Government's intention.

There is, in addition, the concern that the expression 'vicarious liability' is out of place in a consumer protection statute.

(f) Anomalies

All of the anomalies in the current law noted earlier (section 3) will remain if the definition of consumer in section 4B of the TPA remains in current form. There are also further anomalies.

Returning to an example given earlier:

Supplier Ltd contracts to supply by way of hire a pneumatic drill to Consumer to break up a concrete path at Consumer's home	• say the price under the contract of hire is $150 - Consumer is a consumer for the purposes of section 4B of the TPA; • however, the goods are not of a kind ordinarily acquired for personal, domestic or household use or consumption; • therefore, section 68A of the TPA entitles Supplier Ltd to limit its liability for negligence irrespective of the nature of the loss which Consumer sustains if the drill has been negligently maintained; • the term limiting Supplier Ltd's liability for negligence cannot be challenged as an unfair term. It can only be challenged under section 68A of the TPA as not being fair or reasonable.

The solution to this anomaly seems to us straightforward. The consumer should be required to advise the supplier that the consumer is acquiring the goods for personal use or consumption. That would provide the supplier with an opportunity to advise the consumer – if it is the case – that the goods cannot be used in that way.

Another anomaly relates to sales by auction. The implied terms in Part V, Division 2 of the TPA do not generally apply to supply by way of auction sale. The implication of terms into such contracts is therefore left to the sale of goods legislation and the common law. Because the buyer is not a consumer, the supplier does not need to be concerned with the scope of section 68A. However, the unfair terms regime is applicable to sale by auction. Therefore, the supplier does not get the assistance of the terms expressly permitted by legislation even if the goods are not of a kind ordinarily acquired for personal domestic or household use or consumption. Accordingly, a term which limits liability is presumed to be unfair even though Parliament has exempted auction sales from the consumer protection regime in Part V, Division 2.

There are several other anomalies arising from the lack of consistency between the objects of consumer protection under the TPA and the objects of protection under the Unfair Terms Initiative. For example:

- sale of land contracts are not the subject of mandatory implied terms;
- leases of land are not the subject of mandatory implied terms; and
- services of a professional nature provided by a qualified architect or engineer are not regulated by section 74.

The suppliers under these contracts are subject to the Unfair Terms Initiative. However, so far as the TPA is concerned, the consumers are not the objects of consumer protection.

(g) Need for reformulation

The examples in proposed section 4 assume that the party who has the benefit of the regime may be either the supplier or the recipient of the goods, services or land. However, now that the decision has been made not to apply the regime to all standard form contracts it can safely be assumed that the party who has the benefit of the regime is the recipient of the goods, services or land.

Accordingly, the examples should be reformulated from the consumer's perspective.

5.4 Scope of the regime

(a) Introduction

As already stated, we agree that it is important to restrict the Unfair Terms Initiative to consumer contracts.

At the same time, we appreciate the concerns which may remain over the position of small businesses. The protection of small businesses in relation to their standard form contracts is in our submission something which can be addressed within the current regime. That requires analysis of the scope of Part V, Division 2 of the TPA and the overall shape of the Australian consumer protection regime in the ACL. We offer a few suggestions on that in the proposal for a 'new look' consumer protection framework at the end of this submission.

For the present, we have concerns over two aspects of the Unfair Terms Initiative:

1 the inclusion of land transactions; and

2 the treatment of contracts involving ships.

(b) Land transactions

We do not understand the decision to include domestic contracts for the sale or lease of land within the framework of the unfair terms regime. In relation to leases:

- Residential tenancies are already heavily regulated by State and Territory legislation.
- In appropriate cases the TPA prohibitions will apply. And, unlike the supply of goods and services in general, leases do not fall within Part V, Division 2 of the TPA.
- Most leases are in any event on standard terms prepared by independent bodies – rather than the lessor – and it makes no sense to subject those provisions to the unfair terms regime. In particular, because the terms have not been prepared by the lessor it is difficult to see how the lessor could discharge the burden of proof which the Bill currently imposes on suppliers to justify the inclusion of a term which is otherwise an unfair term.

We submit that it is not appropriate to regulate standard form tenancy agreements. However, if the Government intends to proceed with this, we suggest that terms prepared by an independent body be exempted, so that the unfair terms regime applies only to 'special conditions' which are imposed on a 'take it or leave it' basis.

In relation to sale of land, and putting to one side the point that such contracts tend to be even more standard than leases, in domestic sale transactions it is not really possible to identify the buyer (or seller) as a consumer who is forced to contract on a standard form. Both parties usually agree to contract on the standard form which is in use in the particular jurisdiction.

Clear differences between land contracts and consumer contracts for the supply of goods or services can be indentified. They include the following:

- In an ordinary consumer supply of goods or services, the potential for unfair terms is a direct function of the disparity of bargaining power – in a sale of land contract neither party is likely to have superior bargaining power.
- In an ordinary consumer supply of goods or services, the standard form is prepared by the supplier – in a sale of land contract neither party is the author of the standard form.
- The author of the standard form in a land transaction is in fact an independent body. The standard form has therefore been prepared to reflect the competing interests of both buyers and sellers.
- Since neither the seller nor the buyer under a sale of land could be considered to be the author of the standard form, how could either discharge the burden of showing that there was a legitimate interest in including the particular term?
- In an ordinary consumer supply of goods or services, although it may be available independently of the contract (eg through a web site), the standard form is typically shown to the consumer at the point of supply – in a sale of land contract, the buyer typically has access to the form weeks in advance by law.

- In an ordinary consumer supply of goods or services, the consumer is not legally advised – in a sale of land contract, although the position varies from jurisdiction to jurisdiction, the buyer is almost invariably advised by a lawyer or licensed conveyancer, and always has the opportunity to seek that advice.
- In most jurisdictions, buyers of land enjoy a cooling-off period – generally, no such period applies to the supply of goods or services to consumers.
- The sheer magnitude of a sale of land transaction sets it apart from the ordinary consumer acquisition.
- Whatever may be the position in relation to the supply of goods or services to consumers, the price under a contract for the sale of land is very much a function of the transaction as a whole. A seller who insists on onerous terms will not find a buyer.
- The risk allocation under contracts for the supply of goods or services is inherently variable, and not necessarily understood by consumers. But the risk allocation of a sale of land transaction is well understood. The buyer has the opportunity to investigate the seller's title, whether the land is affected by road proposals and so on. Applying the unfair terms regime to the transaction will be destabilizing.

On the basis of the above, one logical role for the unfair terms regime is in relation to 'special conditions', insisted on by the seller or buyer. Even in that context, there is a genuine potential for a buyer to abuse the regime. By definition the issue of an unfair term is most likely to arise in relation to 'special conditions'. If those special conditions make the land less attractive, the price obtained by the seller will reflect that fact. If the buyer is entitled to have one or more of the special conditions declared void, the buyer will have shifted the risk of the matter dealt with in the special condition back to the seller. The buyer therefore has the benefit of the lower price and is also freed from the very matter which reduced the price.

The converse is potentially true from the seller's perspective, that is, when the land is more attractive because of special conditions inserted by the buyer. However, in jurisdictions where the vendor prepares the standard form, this will only occur as a result of negotiation by the buyer of special conditions, in which case the regime cannot apply.

In our view, the true role of the unfair terms regime – if it has any role at all – is where the seller is a developer selling a number of properties under a standard form prepared to give effect to a risk allocation which is markedly in favour of the seller and in which the usual standard form document is not used. Therefore, we submit that if the Government considers that it is essential for the unfair terms regime to apply to sale of land, two further elements should be introduced:

1 the regime should apply only where the seller is selling the land in the course of a business; and

2 the regime should not apply if the terms of the sale are substantially based on a standard form prepared by an independent body.

(c) Contracts involving ships

So far as contracts involving ships are concerned, we consider that the scope of the regime is inappropriate in four respects.

1 The language of the Bill is not consumer-friendly. The definition of 'ship' is the meaning given by the *Admiralty Act* 1988 (Cth) – which is not an accessible source. And the whole of proposed section 8 is expressed in language which no ordinary consumer could easily understand.

2 Subject to paragraph 3 below, there is no real basis on which a contract of marine salvage or towage, a charterparty of a ship or a contract for the carriage of goods by ship could be seen as a consumer transaction. In other words,

since those contracts will not fall within the definition of consumer contract, there is no need to exclude them from the scope of the unfair terms regime.

3 It would be anomalous to exclude all charterparty contracts. If Fred and Martha charter a vessel from Marine Services Ltd to have a fishing holiday, why should the fact that their contract is a charterparty exclude them from protection from unfair terms? We also have some misgivings about the exclusion of contracts for the carriage of goods by ship. If Elizabeth contracts with Removals Ltd to have her household goods shipped from Sydney to Melbourne, it is difficult to see why she should lose the protection of the unfair terms regime on the basis that her goods are being sent by sea rather than by road. We appreciate that legislation such as the *Carriage of Goods by Sea Act* 1991 (Cth) applies to some such transactions. But, equally, there is legislation applicable to carriage of persons and goods by air.

4 Since many of these contracts will fall within the scope of Part V, Division 2, their exclusion from the unfair terms regime would create the anomalous situation in which the consumer would be protected by that Division but not by the unfair terms regime.

In conclusion, in our submission, proposed section 8 is largely misconceived. There is in our view no need to exclude the contracts referred to. If the underlying concern is to ensure that legislation such as the *Carriage of Goods by Sea Act* 1991 (Cth) is not affected by the unfair terms regime, that is accounted for by the qualification in section 5(1)(c), applicable to 'a term required, or expressly permitted, by a law of the Commonwealth or a State or Territory'. Perhaps, for more abundant caution, consideration could be given to including a statement along the lines that 'nothing in this Act affects the operation of the *Carriage of Goods by Sea Act* 1991 (Cth)'. However, we strongly suspect that it would then be necessary to refer to other legislation.

6 Enforcement Initiative - Schedule 2 to the Bill

6.1 Introduction

Our submissions in relation to the Enforcement Initiative are confined to two matters:

1 the potential impact of the enforcement regime which the Enforcement Initiative will create in relation to the unfair terms regime; and

2 the decision to include the current prohibitions on unconscionable conduct within the enforcement regime.

6.2 Impact in relation to unfair terms regime

On the basis of the discussion above, we have the following two concerns about the impact of applying the enforcement regime which the Enforcement Initiative will create in relation to the unfair terms regime. These are predicated on the assumption that the Government promulgates regulations which prohibit specific terms as unfair terms. (Referred to above as 'black-listed terms'.)

1 Since the prohibited terms will operate within the framework of the provisions of the Bill relating to the concept of consumer contract, the presumption that every consumer contract is a standard form contract will apply. Clearly enough, the impact of that will be to create a presumption of contravention – with all that that entails for the author of the standard form.

2 If the form of drafting in proposed section 4 of the unfair terms regime is used as the template for prohibited terms, they will not be sufficiently precise to warrant the application of the enforcement regime. That is in our view an

additional reason for reformulating the current examples in proposed section 4. Properly expressed, they are the most likely source of prohibited terms – should it become apparent that suppliers are continuing to include such terms in their standard form contracts.

6.3 Prohibitions on unconscionable conduct

(a) Introduction

It is not easy to see why the prohibitions on unconscionable conduct should be seen as appropriate for all aspects of the Enforcement Initiative in which they have been included.

In our view, insufficient consideration has been given to three matters:

- the remedial impact of those provisions;
- the nature of unconscionable conduct; and
- the relationship with the prohibition on misleading or deceptive conduct.

The aspect which concerns us relates to a point which the EM makes on several occasions (see paras 4.10, 8.20), namely, that the prohibition on misleading or deceptive conduct is merely a 'norm of conduct', whereas the prohibitions on unconscionable conduct are not. In our view, this is wrong. All are 'norms of conduct' – as that expression has been used (incorrectly, in our view) in the misleading or deceptive conduct cases.

(b) Remedial impact

Prior to its inclusion as a prohibition – indeed, several prohibitions – in the TPA, the only remedy for a consumer subjected to unconscionable conduct was rescission of the contract affected by the conduct and restitution of benefits conferred under the rescinded contract, such as return of the purchase price for land.

As we recall, originally, the TPA remedies for unconscionable conduct were limited to the discretionary orders under section 87 of the Act. However, that was later changed, so that, under the current version of the prohibitions, a claim for damages may be made for conduct in contravention of the prohibitions. Of course, such a claim assumes that the person affected has suffered loss or damage. But in cases where that is so, the TPA provides the person affected with much more extensive remedies than were ever available under the general law of contract.

Further amendments to the TPA mean that even commercial parties can obtain relief in respect of unconscionable conduct. The only limitation is that such relief is not available to a publicly listed company. In addition, amendments to the provisions have clearly resulted in the conception of unconscionable conduct under the TPA being significantly broader than its conception under the general law.

So far as we are aware, all this has been done without hard empirical evidence that these reforms were needed. Of course, they are now a fact of life. It is, however, one thing to change the law to extend the reach of the concept of unconscionable conduct. It is in our submission something quite different to attach to that conduct the enforcement regime envisaged in the Bill. The idea that all private remedies have to be supported by quasi-criminal provisions, and for government bodies to be equipped with very extensive and intrusive powers is quite another thing. It is hardly in the spirit of free enterprise and portrays the Government in a negative light.

(c) Nature of unconscionable conduct

There is an underlying sentiment in the EM that unconscionable conduct is reprehensible conduct. It is something to be stamped out, like fraud or dealing in dangerous goods. This is on the basis, we presume, that unconscionable conduct is something which can be identified in the abstract. But a look at the drafting of the unconscionable conduct prohibitions ought to be sufficient to dispel that idea – the 'shopping list approach' in several of the prohibitions, including under section 51AC, illustrates the difficulty, indeed

impossibility, of framing an abstract control, let alone identifying some essential – and detrimental feature – inherent in all such conduct.

The true position is that whether there is unconscionable conduct depends on the particular circumstances of the particular case. Conduct which is unconscionable conduct in one context – one transaction – will not be unconscionable in another. For the most part, unconscionable conduct is unique to the particular transaction. That is also shown by the 'shopping list approach' in several of the prohibitions.

However, the key point is that all conduct which can be characterised as merely 'unconscionable conduct' is conduct which a person is legally entitled to engage in. For example, if a bank is found to have engaged in unconscionable conduct in obtaining a mortgage, it nevertheless has a legal right to exercise its rights under the mortgage. The role of unconscionable conduct is to provide a basis for saying that the bank is not entitled to exercise its legal right. Whether it is appropriate to deny the bank any entitlement ever to exercise that right is another matter. Even if the contract is rescinded, the bank does not cease to be entitled to be paid the amount of the loan. Again, that is because the conduct is not regarded as sufficiently reprehensible to justify the unjust enrichment that that would cause.

The extent to which one party can be regarded as having engaged in unconscionable conduct against another depends very much on their relative positions. People who are able to look after their own interests have traditionally had no right to complain of 'unconscionable' conduct. That is all changed by the TPA, but it does not affect the key point that the prohibitions on unconscionable conduct do not relate to illegal conduct or conduct which is regarded as wrongful under the general law. For example:

> Sport Association Inc is a body which sets the rules of sport for the clubs, players and teams which compete. Assume it announces that it will introduce provisions designed to protect players who contract with clubs from unfair terms in standard player contracts, and consults with the clubs on that basis.
>
> Assume, however, that the Association has a change of heart and decides to change the rules so as to regulate all standard form contracts relating to the sport, including those applicable to the contract between clubs, between clubs and management companies which contract with players and contracts between clubs and sponsors and so on.
>
> Is it unconscionable conduct for Sport Association Inc to allow affected people only 10 days in which to make submissions on such an important matter?

(d) Relationship with misleading or deceptive conduct

The prohibition on misleading or deceptive conduct in trade or commerce has indeed been described as a 'norm of conduct'. So also are the prohibitions on unconscionable conduct. That is because they all prohibit particular categories of conduct, that is, conduct which does not live up to the norm. Engaging in misleading or deceptive conduct does not, of itself, give rise to any remedy. There is a right to damages under section 82 only if loss or damage results from the conduct. The same is true of unconscionable conduct.

All corporate and non-corporate members of the community, including governments and their individual representatives, whether elected or not, aspire to both norms of conduct – whether or not acting in trade or commerce. But nobody can hope to be successful. The point is that in our experience these norms are impossible to adhere to at all times and on all occasions. For example, *Confident Consumers,* p 63 makes the point that 'Currently, the definition of "consumer" in the TPA applies in respect of: the unconscionable conduct provisions (Part IVA)'. That is incorrect.

People regularly make misleading statements quite innocently. Thus, when people do depart from the norms, they may or may not be aware of it. A statement by a person that he or she believes to be true but which is in fact false is the classic example of misleading conduct. The prohibition on misleading or deceptive conduct is a strict prohibition to which it is no defence to say: 'we honestly believed what we said was true'. Again, a statement which is literally true may nevertheless be misleading, and the potential to

make misleading statements innocently is a characteristic of all discourse. For example, *Confident Consumers,* p 65 says: 'The New South Wales, Northern Territory and ACT FTAs do not impose a monetary threshold [sic] on the definition of "consumer".' That statement is literally true, but (at the very least) misleading in the case of New South Wales and the Australian Capital Territory. The reason why no monetary *limit* is applied in New South Wales is that the relevant provisions apply only to goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption. In the case of the Australian Capital Territory, there is no monetary limit because the FTA does not include provisions corresponding to Part V, Division 2 of the TPA. Similarly, the discussion in *Confident Consumers,* p 66 of whether the definition of consumer should include 'business goods' and 'business purposes' is misleading because it is apt to give the impression that section 4B does not apply to 'business consumers'. However, it does. Unless the goods are purchased for resupply, any purchase for a price not exceeding $40,000 will be a consumer contract. In fact, in relation to goods and services such as electricity, gas, telephony, televisions, refrigerators, sound systems and so on a 'business consumer' will almost invariably be a consumer for the purposes of section 4B, no matter what the price.

There are various presumptions in the TPA. One concern (see Diane Skapinker and J W Carter, 'Breach of Contract and Misleading or Deceptive Conduct in Australia' (1997) 113 *LQR* 294) is the presumption in section 51A of the TPA. The presumption in that provision, applicable where a corporation makes a 'representation with respect to any future matter' is to the effect that the 'corporation shall, unless it adduces evidence to the contrary, be deemed not to have had reasonable grounds for making the representation'. The impact is that a representation with respect to a future matter is deemed to be misleading. Therefore, to return to the Sport Association Inc example, if the Association represented that it intended to make rules in 2010, it is presumed to have contravened the prohibition on misleading or deceptive conduct.

The explanation of the provision in *Confident Consumers*, pp 84-5 is unhelpful, and in our view misleading. It states:

> 'where, without reasonable grounds, a corporation makes a representation with respect to any future matter (including doing, or refusing to do, any act), the representation will be presumed to be misleading'

The presumption does not apply where the representation is made 'without reasonable grounds'. Rather, it applies where the representation relates to a future matter. If the presumption applied only where made 'without reasonable grounds' section 51A would not have caused all the problems it has.

Confident Consumers, p 85 goes on to say:

> 'The circumstances surrounding these representations are often matters within the knowledge of the person or corporation making the representation and it is difficult to obtain conclusive proof of dishonesty or recklessness from the surrounding circumstances without an admission of guilt from the defendant.'

With respect to the author, in our view, that is a misstatement of the position. At common law, a representation in relation to a future matter is a misrepresentation – misleading conduct – if it was not based on reasonable grounds. Whether reasonable grounds existed is a question of fact. Courts have, in fact, had little difficulty with that. But putting that point to one side, 'conclusive proof of dishonesty' is not required at common law. Nor is 'conclusive proof of ... recklessness'. In fact, there is no requirement of 'conclusive proof' of anything. The standard is a balance of probabilities. Perhaps the crucial point, however, is that the state of mind of the person is not relevant. Nor does section 51A make any presumption in relation to that. The impact is to require the person who made the representation to adduce evidence of reasonable grounds.

The position is the same with unconscionable conduct. There is no reason why a person who engages in unconscionable conduct should know that to be the case. From their perspective, they are acting in accordance with their legal rights. That their conduct constitutes unconscionable conduct may be something of which they are quite unaware.

As with the prohibition on misleading or deceptive conduct, liability does not depend on the presence of an intention to act unconscionably.

For example, assume that Sport Association Inc, a body which sets the rules of sport for the clubs, players and teams which compete, has regulations which prohibit unconscionable conduct in relation to players and which empower the Association to bring disciplinary proceedings against clubs which breach the rules. These include the award of compensation, imposition of pecuniary penalties, warning notices and disqualification of club directors.

With the above setting, consider the following:

The following three players are awarded compensation for unconscionable conduct	**Basis for finding of unconscionable conduct**	**Penalties and other sanctions imposed on the clubs by the Association**
Player 1 of Club A is late for training and is suspended for one game by application of the rule which says that a club may suspend any player who is late arriving for training	Player 1 had stopped on the way to training to save a drowning man	Club A was ordered to pay a pecuniary penalty of $100,000
Player 2 of Club B is identified leaving a sailing club after 11.00pm. Player 2 is suspended for two games by application of the rule which says that a club may suspend any player who is found to have been present at licensed premises after 10.00pm	Player 2 had been attending his grandfather's 100th birthday celebration	A public warning was issued to Club B, which caused spectators to boycott its next two games, costing it $100,000 in revenue
Player 3 of Club C is seen wagering on sport and is suspended for the rest of the season by application of the rule which says that a club may suspend any player who is found wagering on sport	Player 3 had been placing a bet for his brother, who was in hospital and not expected to live beyond that day's matches	Club C's managing director was disqualified from holding office, which led to his dismissal from directorships with three public companies on the basis of their rules that no director who had been disqualified from holding office was eligible to be a director, so that Club C's managing director lost salary of $100,000 per year

In each of the examples above, the club was acting within the rules when it took the steps referred to in the first column. However, in each case, because the club failed to take account of the extenuating circumstances, its conduct was unconscionable. The enforcement step taken – referred to in the third column – is clearly far too severe. Now, of course, it might be said that the Association acted harshly. However, the clubs have no right of redress because the Association was entitled to impose the penalties. In any event, it would hardly provide any comfort to the clubs to say that the Association will exercise its enforcement powers only when it thinks it appropriate.

(e) Conclusion

The reasons why it is not appropriate to expose those who engage in misleading or deceptive conduct to the full rigors of the enforcement regime apply equally to those which engage in unconscionable conduct. In our submission, the decision explained in the EM in relation to misleading or deceptive conduct should also have been made in relation to unconscionable conduct.

From the perspective of the Enforcement Initiative, the concern of regulators in relation to both unconscionable conduct and misleading or deceptive conduct is the same. Arguably,

unconscionable conduct is *less* of a concern than misleading or deceptive conduct. After all, by definition, a corporation which engages in unconscionable conduct is entitled (as a matter of law) to do what it has done. However, no person could claim a right to engage in misleading or deceptive conduct.

Where a supplier has a history of complaints in relation to unconscionable conduct and/or misleading or deceptive conduct, it would be appropriate for a regulator to step in. Systematic unconscionable conduct or misleading or deceptive conduct is a legitimate concern of a regulator. In our submission, application of the enforcement regime to unconscionable conduct would then be justified. And there is no reason in principle or logic to exempt misleading or deceptive conduct from application of the regime in such cases.

7 A user-friendly contract

7.1 Introduction

As we stated at the beginning of our submissions, the TPA, as the contract between the Government, business and consumers, does not meet the standards for a standard form contract in the unfair terms regime. If nothing else, it is far too complex.

The TPA looks very much like the tax legislation – strange section and part numbering to reflect one ad hoc amendment after another. The ACL is the Government's opportunity to make a fresh start with a much more straightforward regime, or at least to achieve that in relation to the most significant aspects of the TPA.

Intricate drafting is neither necessary nor helpful. There is much to be said for simple user-friendly drafting. That would not leave loopholes for business to escape through. There is much more protection in generalised wording which is not overly conceptual.

Of course, we would not suggest that the process is an easy one. But it is not as difficult as some appear to assume. Set out below are our suggestions on what it might look like. There are four aspects:

(1) minimum content terms;

(2) rights and remedies;

(3) prohibited terms; and

(4) helping small business.

7.2 Minimum content terms

The crucial feature of the TPA (and the ACL) from a consumer protection perspective is the guarantee which Part V, Division 2 provides in relation to the minimum content of a supply contract. The problem, however, is that the language is taken from the 1893 Act and does not reflect consumer concerns.

Section 1 - Minimum content terms (supplier obligations)

Every consumer supply contract imposes the following obligations on the supplier:

(1) (**description**) to supply goods and services which substantially match any description applied to the goods and services by the supplier, including in any written information or sample of the goods and services provided or shown to the consumer prior to the contract;

(2) (**quality**) to supply goods and services which are of a quality that it is reasonable for the consumer to expect, having regard to the nature of the goods, the content of the description obligation, any sample of the

goods and services shown to the consumer and the price payable by the consumer;

(3) (**fitness**) to supply goods and services which are reasonably fit for all purposes for which they are commonly acquired and which are reasonably fit for any specific purpose advised by the consumer to the supplier prior to entry into the contract;

(4) (**durability**) to supply goods and services which are reasonably durable, such that the supplier's quality and fitness obligations continue for a reasonable period of time;

(5) (**resupply or repair**) where a consumer right to resupply or repair is exercised, at no additional cost to the consumer, to resupply or repair under a consumer supply contract; and

(6) (**title**) to transfer ownership to the extent provided for by the contract of the goods on delivery to the consumer and, in relation to services, to ensure that the supplier has the right to provide the services at the time they are supplied.

Note to consumers: the 'Minimum content terms (supplier obligations)' apply to your consumer supply contract whether or not they are set out in any contract document.

7.3 Rights and remedies

In relation to rights and remedies, the key point is that the ACL must divorce itself from the condition-warranty distinction as the basis for rights and remedies in relation to defective goods.

There is no reason to leave consumer remedies in respect of breach of implied terms to be determined under the general law of contract. We submit that that is an unhelpful approach. It is also, at least from the consumer's perspective, indeterminate. From a practical perspective, all rights and remedies arise under contractual terms. Accordingly, it is in our submission appropriate to express those rights and remedies as contractual terms.

Section 2 - Minimum content terms (consumer rights)

Every consumer supply contract confers the following rights on the consumer if the supplier does not perform any Minimum content term (supplier obligation):

(1) (**cancellation**) to cancel the contract by returning goods to the supplier within a reasonable time;

(2) (**refund of price**) if the consumer exercises the right to cancel, a right to receive a refund of the price in full;

(3) (**resupply**) as an alternative to cancellation, to require the supplier to resupply the goods or services within a reasonable time of the supply;

(4) (**repair**) as an alternative to cancellation or resupply, to require the supplier to repair the goods to the consumer's reasonable satisfaction within a reasonable time; and

(5) (**compensation**) to receive reasonable compensation from the supplier.

Note to consumers: the rights of refund, resupply and repair are alternative rights. You cannot claim a refund of the price and also require the supplier to resupply goods or services or repair goods. However, the 'Minimum content terms (supplier obligations)' apply to such resupply and repair.

7.4 Prohibited terms

The concept of prohibited term must relate to the Minimum content terms set out above.

The objective is to mandate the Minimum content terms (supplier obligations) and Minimum content terms (consumer rights). There is, we submit, no need to use lawyer's terms such as 'void'. It is sufficient to say that the consumer supply contract does not include any provision which is inconsistent with any Minimum content term (supplier obligation) or Minimum content term (consumer right).

Section 3 - Prohibited terms

(1) A consumer supply contract must not include and is deemed not to include a Prohibited term.

(2) A Prohibited term is a contractual provision, notice or statement inconsistent with any part of a Minimum content term.

(3) In addition, a provision is a Prohibited term if:

(a) it restricts a consumer's right to choose between any Minimum content terms (consumer rights);

(b) it subjects any Minimum content term to any requirement not set out in those terms; or

(c) it specifies what is or is not reasonable in circumstances where a Minimum content term uses the word 'reasonable'.

Note to suppliers: it is an offence under [section ? of the ACL] to include a prohibited term in a consumer supply contract. The concept of prohibited term includes a notice or statement. It is therefore an offence to give a notice or make a statement to a consumer which is inconsistent with any 'Minimum content term (supplier obligation)' or 'Minimum content term (consumer right)'.

7.5 Helping small business

It is often pointed out that at times there is little difference from a negotiating perspective between a consumer and a small business.

The TPA provides very substantial protection to Australian businesses. In many cases that includes the operation of Part V, Division 2, in relation to 'Consumer Protection'.

If a specific and simplified regime were enacted to deal with the position of genuine consumer contracts, without the repeal of the current Part V, Division 2, that part of the TPA would remain available to help small business. In other words, Part V, Division 2 could become the protection for small business.

However, if the Government is serious about protecting *small business* consumers, it must identify the relevant consumers. As pointed out in the beginning of this submission, one concern of the TPA is that *any corporation* may be treated as a consumer where goods or services which are of a kind ordinarily acquired for personal, domestic or household use or consumption are acquired. In other words, the TPA does not discriminate between businesses according to size.

Although there is no easy way to prevent anomalies arising, since small businesses rarely enter into contracts where the price exceeds $50,000, that figure could be the limit for the application of the protective provisions. The qualification in relation to goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption could then be deleted.

A concept of 'business consumer contract' should be introduced. Logically, that should be the converse of the definition of consumer supply contract. The definition might read:

Business consumer supply contracts

'Business consumer supply contract' means a contract for the supply of goods or services which has all of the following features:

(a) the price does not exceed $50,000;

(b) the business consumer did not acquire the goods or services for the purpose of resupply; and

(c) the contract was not entered into predominantly for personal, domestic or household use or consumption.

Although the point may not have been appreciated in the debates on the scope of the unfair terms regime, small businesses already obtain very significant protection from unfair terms by virtue of the operation of sections 68 and 68A of the TPA. As noted earlier (see above, section 3.3) in many commercial contracts:

- section 68 mandates the implied terms where the contract relates to goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption; and
- section 68A:
  - mandates the implied terms relating to title;
  - mandates all the implied terms where it would not be fair or reasonable for the supplier to rely on a limitation of liability permitted by section 68A; and
  - in all cases prevents total exclusion of the implied terms or the supplier's liability for breach.

In our submission, this is adequate protection for business against unfair terms. If it is thought necessary to add a further layer of protection against unfair terms, it should logically apply to standard form contracts. If a commercial supplier or consumer contracts on its own standard form it needs no protection. However, if it contracts on the other party's standard form there is a concern that the other party may include terms which are unfair. In order to avoid the need for a detailed regime, it would in our view be sufficient to focus on the liability provisions.

Contractual liability provisions may include exclusion and limitation clauses, indemnity provisions and termination clauses. Perhaps a concept of 'unfair term in a business consumer contract' could be used. For example:

Unfair terms in Business consumer supply contracts

(1) Where a Business consumer supply contract is entered into on the standard terms of business of the supplier, and the contract includes a liability provision, the liability provision is not enforceable against the business consumer if the business consumer establishes that the provision is unfair.

(2) A 'liability provision' is a term of the standard terms of business which excludes or limits the liability of the supplier, or requires the business consumer to indemnify the supplier in respect of any liability of the supplier or business consumer.

(3) Unless the supplier establishes that the provision was reasonably necessary in order to protect the legitimate interests of the supplier, a liability provision is unfair if:

(a) it excludes all liability under the contract for breach of contract by the supplier or limits all liability to an amount which is manifestly inadequate;

(b) it excludes liability for personal injury caused by negligence of the supplier or limits liability to an amount which is manifestly inadequate;

(c) it requires the business consumer to indemnify the supplier in respect of the supplier's negligence or breach of the contract; or

(d) it confers a discretion on the supplier to terminate the contract before its commencement or expiry without being liable to compensate the business consumer.

* * *

Thank you for the opportunity to present this submission.

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31 July 2009

Schedule 1

Anomalies arising under the TPA

(Refer to section 3.3.)

Example	Anomalies
1 Large Supplier Pty Ltd contracts to supply 100 bags of soil to Small Business Pty Ltd for $1000. Small Business Pty Ltd supplies the soil to buyers for domestic use	• Small Business Pty Ltd is not a consumer under section 4B – it has purchased for resupply; • Large Supplier Pty Ltd is permitted to exclude all liability, including in relation to terms which would be implied under the applicable sale of goods legislation; and • Small Business Pty Ltd may have no redress against Large Supplier Pty Ltd in respect of claims by buyers arising from quality or contamination problems with the soil.
2 Public Listed Co Ltd contracts to supply an electricity generator to Small Business Pty Ltd for $50,000 for use in its business	• Small Business Pty Ltd is not a consumer under section 4B – the price exceeds $40,000 and an electricity generator does not fall within the category of goods ordinarily acquired for personal, domestic or household use or consumption; and • Public Listed Co Ltd is permitted to exclude all liability, including in relation to terms which would be implied at common law.
3 Public Listed Co Ltd contracts to supply a cement mixer to Small Business Pty Ltd for $35,000 for use in its business	• Small Business Pty Ltd is a consumer under section 4B – the price does not exceed $40,000; but • Public Listed Co Ltd is permitted to limit its liability – section 68A applies because the goods are not of a kind ordinarily acquired for personal, domestic or household use or consumption.
4 Public Listed Co Ltd contracts to supply $350,000 of standard telephony services to Another Public Listed Co Ltd for business use	• Another Public Listed Co Ltd is a consumer under section 4B – the services are of a kind ordinarily acquired for personal, domestic or household use or consumption; and • Public Listed Co Ltd is not permitted to limit its liability for negligence – section 68A does not apply.
5 Small Business Pty Ltd contracts to supply 100 personal computers to Public Listed Co Ltd for $350,000 for use in its business	• Public Listed Co Ltd is a consumer under section 4B – the goods are of a kind ordinarily acquired for personal, domestic or household use or consumption; and • Small Business Pty Ltd is not permitted to limit its liability – section 68A does not apply.

Schedule 2

Examples of unfair terms – comparison with Directive

(Refer to section 5.3(a).)

Below are the examples listed in proposed section 4 of the unfair terms regime together with analogues in the examples stated in the Directive from which they are derived. Without limiting (proposed) section 3, the following are examples of the kinds of terms of a consumer contract that may be unfair:

	Section 4	**Directive**
(a)	a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract	obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his
		inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him
(b)	a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract	authorizing the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract
		enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so
(c)	a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract	requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation
(d)	a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract	enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract
(e)	a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract	automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early
(f)	a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract	providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded
(g)	a term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract	enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided

(h)	a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning	giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;
(i)	a term that limits, or has the effect of limiting, one party's vicarious liability for its agents	limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality
(j)	a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent	giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement
(k)	a term that limits, or has the effect of limiting, one party's right to sue another party	excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract
		excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier
(l)	a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract	excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract
(m)	a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract	excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract
(n)	a term of a kind, or a term that has an effect of a kind, prescribed by the regulations	

Schedule 3

Abbreviations

Term	Meaning
1893 Act	*Sale of Goods Act* 1893 (UK)
ACL	Australian Consumer Law
ASIC Act	*Australian Securities and Investments Commission Act* 2001
Confident Consumers	Standing Committee of Officials of Consumer Affairs, *An Australian Consumer Law Fair markets - Confident consumers*, 17 February 2009
Consultation	*The Australian Consumer Law: Consultation on Draft Unfair Contract Terms Provisions* dated 11 May 2009
Directive	European Directive of 1993 (Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts)
EM	Explanatory Memorandum, *Trade Practices Amendment (Australian Consumer Law) Bill* 2009
Freehills Submission	Submission made by Professor J W Carter on behalf of Freehills and dated 22 May 2009
TPA	*Trade Practices Act* 1974 *(Cth)*
UK Regulations	*Unfair Terms in Consumer Contracts Regulations* 1999 (UK)

Attachment 1

Brief career résumé – J W Carter

1975	BA (Syd)
1977	LLB (hons) (Syd)
1981	PhD (Cantab)
1981	Appointed to Faculty of Law, University of Sydney
1984	Published *Breach of Contract*, Law Book Co Ltd, Sydney, 1984
1986	Published *Contract Law in Australia*, Butterworths Pty Ltd, Sydney, (with K E Lindgren and D J Harland), 1986
1987	Published *Cases and Materials on Contract Law in Australia*, Butterworths Pty Ltd, Sydney, (with D J Harland and K E Lindgren), 1988
1987-9	Consultant and Commissioner (part-time) with the Law Reform Commission of New South Wales
1988	Established *Journal of Contract Law*, Butterworths Pty Ltd, Sydney, 1988 (appointed General Editor – current position)
1989	Published *Outline of Contract Law in Australia*, Butterworths Pty Ltd, Sydney, 1989
1991	Published *Breach of Contract* (2nd ed) Law Book Co Ltd, Sydney, and Sweet & Maxwell, London, 1991
1992	Appointed consultant, Freehills (current position)
1995	Published *Restitution Law in Australia*, Butterworths, Sydney, (with Keith Mason), 1995
1995	Awarded Personal Chair in Commercial Law (current position – fractional)
2002	Published *Carter on Contract*, LexisNexis Butterworths, Sydney, 2002 (loose leaf service – 2 vols)
2006	Published *Carter's Guide to Australian Contract Law*, LexisNexis Butterworths, Sydney, 2006
2007	Published *Contract Law in Australia*, 5th ed, LexisNexis Butterworths, Sydney, (with Elisabeth Peden and G J Tolhurst), 2007
2007	Published *Cases and Materials on Contract Law in Australia*, 5th ed, LexisNexis Butterworths, Sydney, (with Elisabeth Peden and G J Tolhurst), 2007
2008	Published *Mason & Carter's Restitution Law in Australia*, 2nd ed, Butterworths LexisNexis, Sydney, (with Keith Mason and G J Tolhurst), 2008

Attachment 2

Freehills Submission

22 May 2009

Submission - unfair contract terms provisions

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Submission

This submission (**Submission**) was prepared by Professor John Carter, Consultant to Freehills, in response to the request for comments by The Hon Chris Bowen MP, Minister for Competition, Policy and Consumer Affairs in *The Australian Consumer Law: Consultation on Draft Unfair Contract Terms Provisions* dated 11 May 2009 *(Consultation)*.

1 Objectives of Submission

The principal assertion of this Submission is that the proposal to apply the draft unfair contract terms legislation to business to business (**B2B**) contracts would be detrimental to the interests of consumers, business and the Australian economy.

The *Consultation* states that:[1]

> [I]t would be invidious to suggest that the same term, which may be considered unfair in relation to a contract entered into by a natural person, would not be similarly unfair in relation to a business, where neither of them is in a position to negotiate the term.

This statement fails to appreciate the difference between consumer contracts and B2B transactions. For example, a provision requiring a customer to obtain its own insurance in relation to damage to the customer's property during the performance of a contract might well be unfair in the consumer context, but be an ordinary element of risk allocation in the B2B context. (It is, essentially, a question of who should insure the risk.)

More specifically, the Submission has the following objectives in relation to the *Consultation* and its proposals:

- to show their inappropriateness;
- to identify problems for affected parties;
- to expose structural and drafting problems; and
- to outline the potentially significant (and yet to be investigated) impact.

2 Perspective on the *Consultation*

We understand that, as originally conceived, the *Consultation* was intended to relate to an adaptation of Part 2B of the *Fair Trading Act* 1999 (Vic). That was, in turn, based on the European Directive of 1993[2] (**Directive**) on unfair terms in consumer contracts, which contains an indicative and non-exhaustive list of terms which may be regarded as unfair in the consumer context.

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1 *Consultation*, p 8.

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

The rationale for those reforms was the introduction of an element of 'abstract control' of unfair terms in consumer contracts.[3] The basis for the reforms was therefore that, certain terms being inherently unfair to consumers, their use should not be permitted in consumer contracts.

The *Consultation* departs significantly from that rationale and focus by:

- proposing that the reforms be applied to B2B contracts; and
- changing the focus from terms which are inherently unfair to terms which are unfair in particular circumstances.

In other words, the *Consultation* works as a generalised reform but requires an *individualised* review of particular transactions.

3 Objections to the *Consultation*

The objections to the *Consultation* are fundamental and touch every aspect of the *Consultation* in its application to B2B contracts. They are discussed below under the following headings:

- Insufficient consultation
- Unrealistic time frame
- Standard form contracts
- Relationship with other reforms
- Significant impact
- Commonly used provisions become problematic
- Cost and efficiency
- International perspective
- Drafting problems
- Structural problems

In addition, some observations are made in relation to proscribed terms and consumer contracts.

4 Insufficient consultation

The proposals in the *Consultation* are:

- effectively a general censure of the standard form contracts used in Australia, not only in the consumer context but also in business transactions; and
- if adopted, likely to have an enormous impact on the general law of contract as applied to B2B transactions.

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[3] See David Harland, 'The Regulation of Unfair Contracts in Australia' in S Rachagan, ed, *Developing Consumer Law in Asia*, University of Malaya, Kuala Lumpur, 1994, p 89; E Hondius, 'EC Directive on Unfair Terms in Consumer Contracts' (1994) 7 *JCL* 34. See also Paolisa Nebbia, 'Reforming the UK Law on Unfair Terms; the Draft Unfair Contract Terms Bill' (2007) 23 *JCL* 227.

It therefore seems remarkable that interested and affected parties have been given less than 10 working days to respond.

The need for further consultation is highlighted by the fact that in the past decade there have been a large number of reforms of Australian contract law:

- through regular amendments to the *Trade Practices Act* 1974 (Cth) (TPA);
- the adoption by the states and territories of many of those reforms in the fair trading legislation; and
- the large sums of money spent on regulatory bodies such as the ACCC and ASIC.

It may be perceived that:

- past statutory reforms have been ineffective; and,
- by implication, the common law of Australia, as applied to standard form contracts used in B2B transactions, is defective.

This sends a negative message about Australian law to those who might otherwise consider doing business in Australia.

5 Unrealistic time frame

The *Consultation* states that the Government plans:

- to introduce legislation, presumably based on the Exposure Drafts, in the winter sittings[4]; and
- that the legislation should commence at the Commonwealth level on 1 January 2010 and at state and territory level by the end of 2010.[5]

It is unrealistic to expect Australian business to prepare to implement such significant changes within the short time frame. It also seems reckless to impose the costs required to comply with the legislation at this time of severe financial difficulty for Australian business, and the economy as a whole.

Increased costs for Australian business mean increased costs for Australian consumers, increased risk of financial failure and the risk of further unemployment.[6]

6 Standard form contracts

Standard form contracts have been in use since the 16th century. Consumer standard forms became widespread in the 19th century with the growth of the canal companies and railways in the United Kingdom. The modern legislative reforms, which began in about 1960, have targeted standard forms of the latter kind. It is only in quite recent times that reform of contract law has included reform of standard form business contracts, and this has been very selective.[7]

The *Consultation* fails to appreciate the distinction. Nor does the *Consultation* distinguish between categories of standard form contracts, which include at least the following:

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4 *Consultation*, p 6.

5 *Consultation*, p 21.

6 See below, para 10.

7 See *Unfair Contract Terms Act* 1977 (UK).

(1) standard terms of business of a supplier provided to consumers;

(2) standard terms of business of a supplier used in a B2B transaction;

(3) standard forms developed by independent bodies, such as a sale of land contract approved by a law society or a standard building contract;

(4) standard forms developed by major players in an industry or trade, and used by those in the industry or trade, such as the New York Produce Exchange form of charterparty;

(5) standard forms developed by industry bodies and trade associations, such as the IFSA contracts and the London Grain and Feed Trade Association's GAFTA contracts; and

(6) short form contracts in essentially standard form used in a variety of contexts, including bills of lading, bills of exchange, letters of credit and so on.

It appears that no common law country has enacted legislation directed to unfair terms in standard forms in general.[8]

We make the following points in relation to categories (3) to (6) (which are treated by the *Consultation* as falling under category (2)).

- As a matter of general principle or practice, the standard form is not the standard form of one of the parties. Rather, it is the standard form of neither party or both parties. The Exposure Draft makes no allowance for this. Such contracts are not negotiated. In general, only the commercial terms are negotiated, although 'special conditions' are common in some contracts falling within category (3).
- Since the ultimate focus of the *Consultation* is in relation to individual contracts, as a matter of logic, in relation to categories (3) to (6) it is a *departure* from the standard form which is more likely to be unfair than its use.
- Many of the standard forms in categories (3) to (6) are not only used in Australia but also overseas. The idea that the terms of an IFSA or GAFTA contract or a bill of lading might be challenged under Australian law as 'unfair' would represent a very serious disincentive to the choice of Australian law. Any idea of promoting Australia as the business capital of the Asia-Pacific region will be seriously compromised.[9]

The various categories of standard form contract should be considered before introducing any Bill on unfair terms to the Australian Parliament.

7 Relationship with other reforms

7.1 Introduction

All regulatory reforms come at a cost. Whether those reforms are made in the context of consumer contracts alone or contracts in general, consumers pay.[10] It is important to ensure that compliance costs are kept to a minimum and that reforms are consistent.

The *Consultation* is open to the criticism that the relationship between the proposals and other legislation has not been fully considered and that it would cut across other

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8 See further below, para 11.2 (Australia would be unique).

9 See further below, para 11.

10 See further below, para 10.4.

initiatives. On one view, there is no need for legislation dealing with unfair terms in B2B contracts.

In addition to the legislation below, mention may be made of insurance contracts and consumer credit transactions. These are the subject of very extensive legislative provisions. The relationship between that legislation and the legislation proposed in the *Consultation* is not discussed in detail. There is no reference in the *Consultation* to the *Insurance Contracts Act* 1984 (Cth). The importance of insurance arrangements to the allocation of contractual risk is obvious and yet there is no reference at all to insurance arrangements in the context of B2B standard form contracts.

7.2 Civil liability

All states and territories have in recent years introduced civil liability legislation. So also has the Australian Government in relation to specific provisions of the TPA, the *Australian Securities and Investments Commission Act* 2001 (Cth) (ASIC Act) and the *Corporations Act* 2001 (Cth).

The objectives of the civil liability legislation include:

- limiting business liability, especially in relation to negligence, to manageable levels; and
- allowing insurance arrangements to be made to cover liability, again especially in relation to negligence.

Subject to the terms of the legislation, these objectives serve to promote freedom of contract. Yet, the *Consultation* curtails freedom of contract. Contract provisions relating to the incidence of risk in B2B transactions would be a prime target for unfair term contentions. This is difficult to reconcile with the objectives of the civil liability reform.

7.3 *Trade Practices Act* 1974

The TPA includes many provisions which benefit not only consumers but also business consumers. The implied term provisions in Part V, Division 2 of the Act guarantee a high level of accountability for the quality and fitness for purpose of goods and services.

For example, even in a B2B contract for the supply of goods or services, a purchaser of goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption is a 'consumer' for the purposes of Part V, Division 2 of the TPA[11] no matter what the price. Any exclusion or limitation clause relating to the implied terms or their breach will be void under s 68 of the Act. In practice, in the B2B context exclusion and limitation clauses are the terms most likely to be challenged on the basis of unfairness. The matter is therefore already dealt with.

Two further instances where legislation is already in place to protect purchasers of goods or services in a B2B context are noted:

- franchisees have the benefit of industry codes which effectively dictate the standard terms governing franchise contracts;
- s 51AC(3) of the TPA, relating to unconscionable conduct in business transactions, not only requires regard to be had to the requirements of any applicable industry code but paras (j), (ja) and (k) specifically permit consideration to be given to:
  - the extent to which the supplier was willing to negotiate the terms and conditions of any contract for supply of the goods or services with the business consumer;

[11] Unless, in the case of goods, the goods are acquired for re-supply.

- whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the business consumer for the supply of the goods or services; and
- the extent to which the supplier and the business consumer acted in good faith.

It is unclear whether franchisees may rely on the proposed unfair terms legislation to say that terms which are consistent with the applicable industry code may nevertheless be challenged as unfair. In relation to unconscionable conduct, it seems clear that in a B2B transaction, the business consumer is already entitled to challenge as unconscionable conduct the supplier's conduct in administering a standard form contract and refusing to negotiate. And the reference to unilateral variation is one of the bases for deciding that a term is unfair under the Exposure Draft.

It may also be noted that although no remedy in damages is available to a party who agrees to an unfair term, it is strongly arguable that requiring agreement to an unfair term would per se be unconscionable conduct for the purposes of s 51AC of the TPA. Indirectly, therefore, the business consumer may have a right to compensation under the Act.

8 Significant impact

8.1 Introduction

The use of standard form contracts is efficient. There is no common law rule against their use. Nor is there any common law concept of an 'unfair term'. Putting illegal contracts to one side, the common law employs specific rules to restrict the use of (and reliance on) terms which are 'unfair'. It has also refrained from adopting inequality of bargaining power as a general concept to control standard form contracts. Whatever may be the position in relation to contracts with consumers, in the B2B context the courts have been mindful of the need to promote certainty and freedom of contract.

Relevantly, the three types of provision which illustrate the common law approach are:

(1) exclusion clauses;

(2) agreed damages clauses; and

(3) restraint of trade clauses.

8.2 Exclusion clauses

Where the common law applies, the use and operation of exclusion clauses is controlled by construction principles.

In relation to B2B contracts, the High Court of Australia has stated the law in a way which is antithetical to the reform proposals in the *Consultation*. In *Darlington Futures Ltd v Delco Australia Pty Ltd*[12] the Full High Court agreed with the approach of the House of Lords in *Photo Production Ltd v Securicor Transport Ltd.*[13] In that case Lord Diplock said:[14]

> In commercial contracts negotiated between business-men capable of looking after their own interests and of deciding how risks inherent in the performance of

[12] (1986) 161 CLR 500 at 507-8.

[13] [1980] AC 827.

[14] [1980] AC 827 at 851.

> various kinds of contract can be most economically borne (generally by insurance), it is, in my view, wrong to place a strained construction upon words in an exclusion clause which are clear and fairly susceptible of one meaning only even after due allowance has been made for the presumption in favour of the implied primary and secondary obligations.

The High Court expressed its position, in the context of a standard form contract, by saying in *Darlington Futures Ltd v Delco Australia Pty Ltd*:[15]

> [T]he interpretation of an exclusion clause is to be determined by construing the clause according to its natural and ordinary meaning, read in the light of the contract as a whole, thereby giving due weight to the context in which the clause appears including the nature and object of the contract, and, where appropriate, construing the clause *contra proferentem* in case of ambiguity.

8.3 Agreed damages clauses

An agreed damages clause is a provision which quantifies the compensation payable for breach of contract. The clause is valid and enforceable if classified as a liquidated damages clause. The clause is invalid and unenforceable if classified as a penalty.

In deciding whether an agreed damages clause is a penalty, the Full High Court expressed the general principle in *Ringrow Pty Ltd v BP Australia Pty Ltd*:[16]

> Exceptions from that freedom of contract require good reason to attract judicial intervention to set aside the bargains upon which parties of full capacity have agreed. That is why the law on penalties is, and is expressed to be, an exception from the general rule. It is why it is expressed in exceptional language. It explains why the propounded penalty must be judged 'extravagant and unconscionable in amount'. It is not enough that it should be lacking in proportion. It must be 'out of all proportion'. It would therefore be a reversal of longstanding authority to substitute a test expressed in terms of mere disproportionality. However helpful that concept may be in considering other legal questions ..., it sits uncomfortably in the present context.

8.4 Restraint of trade clauses

A contract term is in restraint of trade if it restricts the freedom of a person to carry on trade with other persons in such manner as he or she chooses. Such a term is presumed to be void, but may be justified as reasonable between the parties and not injurious to the public. Restraints of trade are not as common in standard form contracts as agreed damages provisions and exclusion clauses. However, when they occur they are only enforced if found to be reasonable.

So far as the *Consultation* is concerned:

- if the restriction in question is one which has been accepted and passed into general currency it will not in general be within the restraint of trade doctrine.[17]
- a stricter view is taken of terms in restraint of trade entered into between employer and employee than of similar terms between vendor and purchaser.[18]

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15 (1986) 161 CLR 500 at 510.

16 (2005) 224 CLR 656 at 669; [2005] HCA 71 at [32].

17 *Australian Capital Territory v Munday* (2000) 173 ALR 1 at 21 per Heerey J (with whom Miles and O'Connor JJ agreed).

18 *Geraghty v Minter* (1979) 142 CLR 177 at 185 per Gibbs J (with whom Aickin J agreed).

- the courts take a broad approach to the 'commercial interest' which is necessary to justify a term in restraint of trade.[19]
- inequality of bargaining has been used to strike down provisions in standard form exclusive services contracts.[20]

8.5 Conclusions

The brief analysis above of typical clauses in commercial contracts allocating risk between the parties shows that under the common law they are subject to restrictions which, by denying application or validity to the terms, operate to the same effect as the proposals in the *Consultation*.[21]

It can also be seen that a general theme in the judgments of the High Court of Australia is that business people — even those who contract on standard forms — should be left to look after their own interests. This promotes consistency, certainty and the reliability of insurance arrangements. The *Consultation* does not promote any of those concerns.

This is also the tip of the iceberg. To introduce a legislative regime in relation to unfair terms in B2B contracts would impact on the whole law of contract. The *Consultation* does not include any analysis of the impact on contract law or business confidence. Indeed, there is not even any evidence of widespread use of 'unfair terms'. There is no more than an assertion that a contract should be assumed to be unfair if the parties contracted on a standard form. In addition, because there is no analysis of the various types of standard form,[22] the *Consultation* provides no basis for exclusion of certain types of standard form contract from the operation of the proposed legislation.

9 Commonly used provisions become problematic

Perhaps the greatest problem for business is that contractual provisions which have been common for some time — because of their presence in standard form contracts — become problematic. Effectively, that will happen overnight.

The problem is, if anything, even more acute in relation to standard forms which have been prepared by third parties such as trade associations. Small businesses who use such forms for efficiency and cost reasons do not have the resources to undertake internal reviews of the documents. They will need to rely on specialist advice. They are faced with the stark choice between leaving things as they stand and risking challenges to the terms, or incurring substantial costs.

The reform will also impact on government standard forms.

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19 See, eg *Queensland Co-operative Milling Association v Pamag Pty Ltd* (1973) 133 CLR 260.

20 See, eg *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616 at 623; [1974] 1 WLR 1308 at 1315 per Lord Diplock (with whom Lords Simon and Kilbrandon agreed).

21 It may be noted that the strictest approach in relation to restraint of trade is in respect of employment contracts which are excluded from the *Consultation*.

22 See above, para 6.

10 Cost and efficiency

10.1 Introduction

The *Consultation* creates a significant disincentive to the use of standard form contracts. It would appear that one objective of the *Consultation* is to discourage the use of standard form contracts. But it is clearly not efficient for business to negotiate all contracts — whether with consumers or in a B2B context — on a one-to-one basis.

Standard form contracts were developed principally for reasons of cost, efficiency and certainty. Some standard form contracts have evolved over hundreds of years. Those prepared by industry bodies and trade associations reflect established and well-accepted apportionment of risk which are by definition regarded as fair.

Many standard forms are based on assumptions about other transactions. If one form is changed that will impact on rights and liabilities under other standard forms. For example, a contract for the sale of goods may be made on the assumption that the buyer will accept certain risks in relation to carriage of the goods. The carrier's standard form may assume that the seller has no liability to the buyer once the seller has arranged for carriage. The *Consultation* makes no allowance for interrelation between standard forms.

Efficiency does not just relate to the supplier who administers a standard form to a consumer or business consumer. Businesses advertise their standard forms. They are generally available on the web site of the supplier. The mere presence of those standard forms is beneficial. Consumers and business consumers can shop around, compare standard forms and choose the one which they prefer. From this perspective, it is wrong to assume (as the *Consultation* appears to do) that consumers of goods or services see the standard form at the moment before they contract. And, of course, repeat contracts are made by consumers and business consumers who know exactly what the standard form entails.

In addition, many contracts, but particularly consumer supply contracts, are 'negotiated' at point of sale. Where standard forms deal with matters such as incidence of insurance responsibility, the employees involved in administering the contract would not normally have authority to vary the contract. The *Consultation* makes no allowance for the fact that a consumer who wishes to negotiate the terms of the contract may be turned away, or may be asked to incur a cost which it is not prepared to bear. Of course, under the *Consultation*, the consumer will get the opportunity both to agree to the standard form and to challenge specific terms of the standard form should it be in the consumer's interests to do so. These considerations are material whether or not the consumer is a business consumer.

10.2 Compliance costs

As far as we are aware, no assessment has been made of the compliance costs for business to which adoption of the *Consultation* would lead. There may be an underlying assumption that businesses have a single standard form, or perhaps a consumer and a commercial standard form. The reality, however, is that most businesses have several standard forms and many businesses have large numbers of standard forms. In some cases hundreds of different contract forms are used. When that is multiplied across business in general, the result of the *Consultation* is that many thousands of contracts will have to be reviewed from a compliance perspective.

If, as seems likely, the impact of adoption of the *Consultation* is that fewer standard forms will be used, compliance costs will include increased negotiation costs. It is, of course, by no means obvious that consumers and business consumers wish to negotiate contracts. For business consumers that is, again, an increased cost. There is, moreover, no offset in the *Consultation*. In other words, compliance will not lead to any economies or cost savings.

Another hidden cost in the *Consultation* is waste. Assume that a business undertakes a compliance review which determines that one or more terms of the standard forms which the business uses are open to challenge under legislation enacted to give effect to the *Consultation*. All existing copies of the standard forms will need to be scrapped. In addition, where the terms have previously been notified, the terms of the new standard form must be notified. That also costs money. Where standard forms have various options, the computer systems which give effect to those options must be modified. Again there is a cost.

10.3 Litigation costs

There is no 'remedy' for an unfair term under the Exposure Draft. Instead, the term is void. The impact of this will be felt, initially, in the commercial rather than consumer context.[23]

If A and B are parties to a commercial contract, in any action by A to enforce the contract against B, it will be open to B to claim that the term sought to be enforced is void as an unfair term in A's standard terms. That will necessarily increase A's enforcement costs.

Moreover, because of the way that the Exposure Draft works,[24] A will bear the burden of proving either that the contract was not a standard form or that the term was reasonably necessary in order to protect A's legitimate interests. That will force A to incur costs in the claim even if B's contention is unlikely to succeed. The way that the draft legislation is framed will make it very difficult for A to apply to have B's allegation that the term is void struck out on a summary basis.

Commercial litigation in Australia is extremely expensive. Governments should not be encouraging claims which are spurious by the imposition of presumptions that legislation has not been complied with. In the commercial context that assists unmeritorious claims. It is common in any claim brought in Australia for breach of contract against a commercial consumer to find that defences and counter-claims range widely over:[25]

- well-established contractual defences, such as that the term sought to be enforced is a penalty;
- misleading or deceptive conduct in contravention of s 52 of the TPA; and
- unconscionable conduct within one of the various statutory prohibitions, including s 51AC of the TPA.

Adoption of the views expressed in the *Consultation* will result in the addition of yet another statutory defence:

- that the term sought to be enforced is an unfair term for the purposes of the relevant provision of the TPA.

10.4 Consumer pays

If one thing is clear it is that whatever the costs of complying with legislation enacted to give effect to the *Consultation*, they will be borne by consumers. That is true whether the standard form is used in a consumer or a B2B contract. The business supplier must pass on its costs to a business consumer who will in turn pass on its increased costs to consumers of its goods or services. Equally, a business which cannot pass on the costs must find cost savings in other areas, for example, by retrenching employees. Litigation costs can be crippling to a business. A commercial supplier who successfully enforces against the commercial consumer a term which was alleged to be unfair will not recover

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23 See below, para 10.4.

24 See below, para 12.4.

25 Similar points may be made where the *ASIC Act* applies.

all its costs from the commercial consumer. The costs order will be less than actual direct litigation costs, and internal costs incurred will not be recovered in full or (in many cases) at all.[26]

Even in the context of consumer contracts, there is no empirical evidence in the *Consultation* that consumers would prefer to pay higher prices than contract on standard form terms which are not negotiated. In this respect, a glaring omission from the *Consultation* is any consideration of the relationship between the price of goods and services and the (standard) terms on which goods and services are offered. In most contexts consumers have a choice between suppliers. Some suppliers offer goods and services on a 'no frills' basis. Others do so on a 'top of the range' basis. The risk allocation provisions reflect such matters. For example, one supplier may offer after sales services which are no more than the minimum required by law. Another supplier might offer more generous after sales services. The price will vary accordingly. Pressure on the terms of the standard form contracts brought to bear by compliance with legislation enacted to give effect to the *Consultation* will tend to iron out those differences and reduce the range of choice available to consumers. It will almost certainly disadvantage small to medium size businesses.

The impact, again, will be to increase prices for consumer goods and services. For example, if a supplier is able to offer a low price at the start of, say, a 12-month service contract, it may need to have the opportunity unilaterally to increase the price after, say, six months. Because of the risk that the price variation clause will be an unfair term, the supplier may be forced to charge a single (and higher) price for the 12-month service contract.

11 International perspective

11.1 Introduction

There is no consideration in the *Consultation* of the wider impact that adoption of the *Consultation* might have. Particularly in relation to B2B contracts, there is an international dimension which is entirely ignored in the *Consultation*.

Adoption of the *Consultation* would have a significant negative impact from an international perspective. Australia would:

- be out of step with the international community;
- not be an attractive place to do business; and
- not be an attractive place to litigate.

11.2 Being out of step

There is general acceptance in the world economy that where legislation is thought necessary to deal with unfair terms the legislation should be limited to consumer contracts. Moreover, the concept of 'consumer' is a narrow one.[27] Australia would be unique in subjecting B2B standard form contracts to an assessment from the perspective of unfair terms.[28] The implications of that are noted below.

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[26] The *Consultation* appears to envisage that quite detailed and extensive evidence would need to be given. See *Consultation*, p 10.

[27] Under Part 2B of the *Fair Trading Act* 1999 (Vic), see s 3.

[28] See also above, para 6.

One of the most compelling reasons for business to rely on standard forms is that it creates certainty. Many standard forms have been in use for some time. Decisions of the courts on those standard forms represent the legal background against which parties contract. There is a high degree of uniformity in the interpretation and application of standard forms which are in use in areas such as sales of goods, charterparties and bills of lading. The prospect of these decisions being challenged on the basis of what is in reality consumer protection legislation is most alarming.

If Australia is to be a 'major player' in the world economy its legislation must reflect accepted principles of international contract law. Accepted principles of international contract law place a premium on freedom of contract. An obvious example is the *United Nations Convention on Contracts for the International Sale of Goods* 1980 (CISG)[29] which has been adopted by Australia. By virtue of s 66A of the TPA (Cth), the provisions of CISG prevail over the provisions of Part V, Division 2 'to the extent of any inconsistency'. It is unclear from the Exposure Draft whether the rules in relation to unfair terms will be deemed to be a provision of Part V, Division 2 of the TPA. But if that is not the case the Government will have taken away an incentive to the use of CISG, and to that extent served to isolate Australia from other contracting states.

Mention may also be made of the *UNIDROIT Principles for International Commercial Contracts* (1994) (**UNIDROIT Principles**), as revised in 2004 (**UNIDROIT Principles 2d**). The preamble states: 'These Principles set forth general rules for international commercial contracts.' Article 1.1 of UNIDROIT Principles 2d states 'The parties are free to enter into a contract and to determine its content.' UNIDROIT Principles (and UNIDROIT Principles 2d) have achieved a high degree of international commendation and acceptance.[30] They are, potentially at least, extremely important in the Asia-Pacific region as they provide a neutral 'contract law', that is, one which is neither common law based nor civil law based. Taken together, CISG and UNIDROIT Principles 2d are important ingredients of a movement to a world law of contract in commercial transactions.[31]

Even from the perspective of domestic law applied to standard form contracts, Australia will be out of step with the world community in allowing parties to 'second-guess' a standard form. That can only serve to create uncertainty. In *A/S Awilco of Oslo v Fulvia SpA di Navigazione of Cagliari (The Chikuma)*[32], Lord Bridge said:

> It has often been pointed out that shipowners and charterers bargain at arm's length. Neither class has such a preponderance of bargaining power as to be in a position to oppress the other. They should be in a position to look after themselves by contracting only on terms which are acceptable to them. Where, as here, they embody in their contracts common form clauses, it is, to my mind, of overriding importance that their meaning and legal effect should be certain and well understood. The ideal at which the courts should aim, in construing such clauses, is to produce a result, such that in any given situation both parties seeking legal advice as to their rights and obligations can expect the same clear and confident answer from their advisers and neither will be tempted to embark on long and expensive litigation in the belief that victory depends on winning the sympathy of the court. This ideal may never be fully attainable, but we shall certainly never even approximate to it unless we strive to follow clear and

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29 For the official text see *Final Act of the United Nations Conference on Contracts for the International Sale of Goods* (UN Doc A/CONF 97/18, April 10, 1980, Annex I).

30 See Franco Ferrari, 'General Principles and International Uniform Commercial Conventions Law: A Study of the 1980 Vienna Sales Convention and the 1988 Unidroit Conventions' (1997) 2 *Unif L Rev* 451.

31 See M J Bonell, 'Do We Need a Global Commercial Code?' (2000) 5 *Unif L Rev* 469.

32 [1981] 1 WLR 314 at 321-2. The other members of the House of Lords agreed.

> consistent principles and steadfastly refuse to be blown off course by the supposed merits of individual cases.

Of Australian law it has been said:[33]

> The recent emphasis on distinguishing commercial and consumer contracts, and the more pragmatic approach of the modern law, the development of estoppel and the law of restitution, as well as a growing insistence of good faith in negotiation and enforcement and the control of unconscionable conduct have also served to make the law less predictable. However, consistency and certainty in commercial law are essential. They enable confident planning for the future, assist in the reliability of steps taken in the course of performance and promote accurate and reliable legal advice as to the existence, content and scope of contractual rights and liabilities.

Adoption of the *Consultation* can only lead to uncertainty. That is particularly harmful in contexts where the standard form contracts being applied in Australian courts are also in use in other countries.

11.3 Loss of revenue

If Australia is out of step with the world contract community in its domestic law, there will be an economic impact, namely, a loss of revenue. London is the centre of dispute resolution for commercial contracts of arbitration, insurance, charterparty and sale of goods in Europe. That is true even where the contract does not involve residents of the United Kingdom.[34] This generates enormous foreign exchange revenue. The *Consultation* will severely compromise the efforts of Australian governments to make Australia the centre for dispute resolution in the Asia-Pacific region.

It follows that choice of the law of an Australian jurisdiction is not attractive as a choice of law for a contract between parties only one of which is located in Australia. And it is hardly likely to be considered as a viable choice of law where neither party to the standard form contract is located in Australia. It similarly follows that whether or not Australia is an attractive place to litigate, Australia will not be an attractive place to do business. In this context it may be noted that s 52 of the TPA is a concern to the international contract community. Adoption of the *Consultation* will further exacerbate problems which already exist.

Finally, the Exposure Draft is silent on whether contracts which choose a foreign law as the law of the contract will be subject to the proposed legislation if a dispute is the subject of arbitration or litigation in Australia. We assume that s 67 of the TPA (or an analogous provision) would apply to restrict choice of law. That will be a further inroad into freedom of contract.

12 Drafting problems

12.1 Introduction

Although the Exposure Draft has the attraction of being short, such a momentous reform is unlikely to be satisfactorily achieved by anything less than a detailed and lengthy piece of legislation. That is the last thing that Australian business needs in the present economic climate.

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33 J W Carter, *Carter on Contract*, LexisNexis Butterworths, Sydney, §01-130.

34 See Lord Goff, 'Opening Address [to the Second *Journal of Contract Law* Conference]' (1992) 5 *JCL* 1.

Any legislation, but particularly legislation which would have a major impact on the common law of contract, needs to be clear, certain and predictable in its operation. None of those words can be applied to the Exposure Draft.

In addition to the major structural problems identified below,[35] problems with the Exposure Draft (all of which are obvious) include:

- inadequately defined concepts;
- vague definitions;
- the use of presumptions; and
- the examples of unfair terms.

12.2 Inadequately defined concepts

The terms of the Exposure Draft,[36] and the *Consultation*, revolve around the concept of 'standard form contract'. It is therefore the key concept. That the key concept is undefined is a fundamental deficiency in both the Exposure Draft and the *Consultation* as a whole. Clause 7 states the matters which a court may take into account in deciding whether a contract is a standard form contract, but if the concept is not defined how can clause 7 be applied to achieve *predictable* results? The justification offered in the *Consultation* seems insufficient:[37]

> 'Standard-form contract' has not been defined to avoid opportunities for avoidance which might be occasioned by the use of an express definition.

Other undefined concepts include:

- 'subject matter of the contract';[38] and
- 'significant imbalance'.[39]

Similar objections may be made in relation to the concepts of 'rely on' and 'transparency' which are defined in terms which are incomplete ('rely on ... includes') or lead to further concepts the content of which is not explained ('transparent if ... presented clearly and readily available'). For example, does a statement (now commonly used) to the effect that terms are available to be viewed on a specified website meet the 'clearly and readily available' test?

12.3 Vague definitions

Another key concept is 'upfront price'. Clause 5(2) of the Exposure Draft assumes that the upfront price is a money consideration. However, where the standard form is administered by the customer, the 'consideration' is in fact non-monetary, namely, the supply of goods or services. There seems to be no mechanism to deal with this.

Clause 5(2)(b) exempts from the concept of 'upfront price' 'consideration that is contingent on the occurrence or non-occurrence of a particular event'. Since contracts contain a great many provisions which rely on the 'occurrence or non-occurrence of a particular event' it is difficult to envisage how the exemption will be applied.

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35 See below, para 13.

36 References are to clauses of the Trade Practices Amendment (Australian Consumer Law) Bill 2009: Unfair and prohibited contract terms.

37 *Consultation*, p 19.

38 See below, para 12.3.

39 See below, para 12.3.

Clause 5(1)(a) of the Exposure Draft exempts from the operation of clause 2 a term that 'defines the main subject matter of the contract'. Presumably, this is intended to apply to the land, goods or services described in the contract as the agreed return for the payment by the customer.[40] That should not be left to supposition. There is, however, no statement of what must be treated as included as part of the subject matter. In particular, the Exposure Draft is silent on whether it includes statements as to the attributes of the subject matter. A fundamental objection to the Exposure Draft is that it pays insufficient attention to the fact that all the terms of a contract are interrelated. A contract is a composite whole. The agreement of the parties on risk allocation, termination, damages, price variation and so on are all ingredients of the bargain which serve in one way or another to define its subject matter.

That aspect of clause 5(1)(a) of the Exposure Draft leads to the key concept of 'unfair'. The overriding consideration is whether the term causes a 'significant imbalance in the parties' rights and obligations arising under the contract' (clause 3(1)(a)). How is the 'significant imbalance' to be determined? The provision refers to 'the parties' rights and obligations arising under the contract', but the 'balance' is necessarily that struck by the contract. The only way to consider whether there is an 'imbalance' is to look at the parties' position without the term. But to do that involves treating the consumer as having the benefit of all other terms of the contract (and the 'rights and obligations arising under the contract') without the burden of the alleged unfair term. That is an unfair approach because it forces the supplier to provide the benefits promised in the contract without having the benefit of the impugned term. Particularly in commercial contracts, there is an inevitable and important connection between what the Exposure Draft refers to as 'the main subject matter of the contract' and 'upfront price' on the one hand and all other terms of the bargain on the other. The Exposure Draft seeks to sever the former in requiring an evaluation of the latter. That is clearly wrong.

The same problems surround the use of 'detriment' in clause 3(2)(a) of the Exposure Draft.[41] If a term is considered in isolation from the terms of the contract as a whole it may well appear to be unfair. The detriment may be having to pay more money to the supplier. But when account is taken of the balance of the contract that may not be the position at all. And, in any event, the concept of 'detriment' surely begs the question. It is true that clause 3(2)(c) requires 'the contract as a whole' to be considered when deciding whether a term is unfair under clause 3(1). However, the impact of the use of presumptions (as explained below) is that the term is deemed to be unfair ***without regard to*** the interpretation of the contract as a whole. And the basis for showing that the term is unfair is that it was 'reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term', something which is unlikely to be established simply by construing the contract as a whole.

12.4 Use of presumptions

It seems fair to say that many of the problems identified above in relation to concepts and definitions in the Exposure Draft are 'solved' by the use of presumptions. With all due respect to those responsible for the *Consultation* and the Exposure Draft, this approach is inappropriate and dangerous.

The presumptive approach is applied to fundamental aspects of the *Consultation*. Clause 3(4) states that:

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40 *Consultation*, p 15 states 'This is based on the premise that the customer has the choice not to purchase the particular good [sic], service or land being offered.' However, the assumption of a supply of specific goods is not always correct, and in the B2B context not even usually correct.

41 See *Consultation*, p 11 (detriment may relate to consumers individually or as a class).

> ... a term of a standard form contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.

Similarly, clause 7(1) of the Exposure Draft creates a presumption, applicable where one party 'alleges that a contract is a standard form contract', that the contract is a 'standard form contract'. Given that there is no definition of 'standard form contract' this is a remarkable approach.

Both clause 3(4) and clause 7(1) create legal burdens of proof. In relation to the former, the *Consultation* states:[42]

> Without the presumption, a claimant would need to have evidence of a negative proposition prior to the commencement of proceedings, in order to provide particulars in support of their pleadings. An individual or business claimant would find this very difficult on the basis that evidence of the respondent's justifications for including a term would be in the control of the respondent, and there is no reasonable expectation that such evidence could become available to a claimant. ...
>
> It is inherently difficult for a claimant to prove a negative proposition. This would, in effect, require the claimant to 'second guess' the reasons for the inclusion of a term, in circumstances where this evidence is far more quickly and cost-effectively brought to the court's attention by the respondent.

This betrays a lack of understanding of the normal processes by which rights and remedies are enforced in contract law and also of the various types of standard form contract.

Take a simple case in which a plaintiff alleges a breach of contract by a defendant. The plaintiff will almost always be required to prove a negative, for example, that the goods supplied under the contract were not of the contract quality or that a service provider failed to exercise reasonable care and skill. The *Consultation* misses the point that objections to having to prove negative propositions are made in relation to the position of defendants not the position of plaintiffs.[43]

As has been pointed out,[44] it is incorrect to describe standard forms prepared by independent bodies, trade associations and so on as the standard form of the supplier (or consumer). The forms are prepared to reflect and meet industry or trade needs and the general type of transaction at issue. A supplier who chooses to contract on those terms will have no basis for providing evidence that the term was reasonably necessary in order to protect that party's interests. The purpose of the term is to protect the interests of a class of persons, not an individual contracting party.

In the context of unfair terms, establishing an allegation that the term of a contract is unfair is clearly a burden which must be placed on the party making that allegation.[45] That party must establish:

- that the contract was a standard form contract; and
- that the term in question was unfair.

The onus of proving the first element is expressly reversed by the terms of the Exposure Draft. Putting to one side the problem that there is no definition of 'standard form contract', the Exposure Draft commits the supplier to the very point which was used as a justification for the drafting of clause 3(4), namely, to prove a negative. Therefore, even

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42 *Consultation*, p 10.

43 *Joseph Constantine SS Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 ('defence' that frustration was not self-induced).

44 See above, para 6.

45 See further below, para 13 (structural problem).

though the supplier has 'no case to answer' unless the contract is a standard form contract, it is the supplier who bears the legal burden of proof in relation to the matter. That is difficult enough to justify in the context of a claim by a consumer. It is quite absurd in the case of a business consumer.

12.5 Examples of unfair terms

Set out below are some brief observations on some of the examples in clause 3 of the Exposure Draft of terms which may be unfair terms. There is, however, a fundamental objection to clause 3. The examples are based on the Directive. As mentioned,[46] that is directed at the (abstract) control of terms which are inherently unfair. The decision to make the control of unfair terms a case by case exercise, including in relation to B2B contracts, means that the Directive is not applicable. It also means that examples of unfair terms must indicate clearly the reason why the term is thought to be unfair. That is by no means obvious in many examples in clause 3.

Examples (a) and (b) do not make sense, in that they contemplate that a contract is unfair merely because it entitles one party (but not the other) to 'avoid or limit performance of the contract' (example (a)) or 'to terminate the contract' (example (b)). These examples will not work, at least in the B2B context, because it is in most cases inevitable that the supplier party will seek to limit its responsibility. The customer will not generally need to limit its liability because its principal obligation is to pay money. And it is impossible to evaluate the fairness of a right to terminate without knowing the circumstances (missing from example (b)) in which the right operates. It is instructive in that regard to consider the analogous examples in the Directive:

(a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;

(b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;

...

(f) authorizing the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;

(g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so.

Example (c) in clause 3 of the Exposure Draft is expressed as:

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

The sense in which 'penalises' is used is unclear.[47] However, it is certainly broader than the common law conception.[48] The impact is to replace the common law of penalties with a provision that has no content. An analogous provision in the Directive states:

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46 See above, para 2.

47 Cf *Consultation*, p 14, where it seems to be assumed that the word will be interpreted as under the common law.

48 See above, para 8.3.

(e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;

Examples (i) and (k) in clause 3 of the Exposure Draft are perhaps the most difficult. Under the former, a term is unfair if it 'limits, or has the effect of limiting, one party's vicarious liability for its agents'. Under the latter a term is unfair if it 'limits, or has the effect of limiting, one party's right to sue another party'. Since a corporation acts through its agents and employees for which it is vicariously liable, at one stroke, every exclusion clause in favour of a corporate party is presumed to be unfair. Example (k) confirms that is the intention. The learning and established common law principles on the basis of which parties have contracted for many years must be put to one side. It is again useful to note the analogous example in the Directive in relation to agents:

(n) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality;

These examples are difficult enough in the consumer context. In the B2B context they are uncommercial. It is impossible to make many termination rights and all exclusion and limitation clauses prima facie unfair terms. It would place suppliers in an impossible position, by suggesting that they should accept unlimited liability. Their insurance arrangements are based on a quite different legal matrix.

Given that s 68A of the TPA permits some limitations of liability, drafting contracts to accommodate both that provision and unfair terms provisions will lead to very complex contracts (something that the *Consultation* is designed to avoid).

13 Structural problems

13.1 Introduction

As explained below,[49] there is a major structural problem in relation to the operation of clause 3 of the Exposure Draft. A second — and more general — structural problem is that there is no link between the problem of unfair terms and the solution proposed.[50]

There are two more specific problems:

- the theoretical perspective; and
- lack of discrimination.

13.2 Operation of clause 3

Clause 3 purports to define a term in a standard form contract as 'unfair' if it satisfies 2 requirements:

(1) a 'significant imbalance in the parties' rights and obligations'; and

(2) that the term 'is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term'.

However, as noted above,[51] clause 3(4) puts the onus of proving that the term 'is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term' on that person.

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49 See below, para 13.2.

50 See below, para 13.3.

51 See above, para 12.4.

The onus of proof is on the party who administered the standard form, who must prove that the term at issue is 'reasonably necessary in order to protect the legitimate interests' of the supplier. By definition — since otherwise the question of justification does not arise — that onus can be relevant only if the term at issue is an unfair term. In other words, the impact of clause 3(4) is that the supplier bears the onus of proving that the term is not an unfair term and as a matter of substance the Exposure Draft creates yet another presumption, namely, that (save as exempted by the Exposure Draft), all terms in standard form contracts are unfair.[52] Clause 3 should be reconsidered.

One justification in the *Consultation*[53] is that the supplier is able to adduce 'material relating to the business's costs and business structure, the need for, and nature of, risk mitigation and relevant industry practices'. However, if the supplier did not draft the standard form, for example, because it was prepared by a trade association, evidence of the supplier's business costs and business structure has no probative value on the matter.

The *Consultation* purports to analyse, and the Exposure Draft purports to control, *unfair terms* in standard form contracts. However, ultimately, the impact of the reform is to require parties who contract on standard forms to justify all their terms, that is, to establish that all the terms of their contracts are reasonably necessary in order to protect their legitimate interests. That is not the control of unfair terms. Rather, it is the imposition of a requirement on those who contract on a standard form basis to ensure that all their terms are *reasonable*. It follows that, from beginning to end, the *Consultation* is misleading in a most fundamental way.

13.3 Problem and solution

The theme which runs through some of the *Consultation*, and also much of the academic writing on standard form contracts,[54] is that although such contracts are an efficient way of doing business they are also open to abuse. Where proffered on a 'take it or leave it' basis, the consumer has no choice in relation to the terms. That defect in standard form contracts arises from inequality of bargaining power.

The Australian Government has already responded to the problem for consumers in an unequal bargaining position by mandating certain implied terms, prohibiting exclusion clauses which seek to qualify those terms or the rights to which they give rise and in the prohibitions on unconscionable conduct.[55] Although that may leave some room for the control of unfair terms relating to other matters, the source of such unfair terms is the lack of bargaining power. However, in the Exposure Draft that feature or justification is limited by clause 7(2)(a) to a consideration of whether the contract is a standard form contract.

The impact is that the solution in the *Consultation* does not match the problem. That is another major structural weakness. Properly understood, the consideration goes to whether the term at issue is unfair. Of course, this is a fundamental reason for not including B2B contracts within the *Consultation*. In the B2B context, if there is equality of bargaining power the question whether a term is unfair cannot logically arise.

13.4 Theoretical perspective

At the beginning of this Submission attention was drawn to the theoretical perspective on the approach to unfair terms under Part 2B of the *Fair Trading Act* 1999 (Vic) and the

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52 See *Consultation*, p 9.

53 *Consultation*, p 10.

54 See the references in J W Carter, *Carter on Contract*, LexisNexis Butterworths, Sydney, §25-080.

55 See above, para 7.3

Directive.[56] The theoretical basis is the abstract control of certain terms. The control is 'abstract' because it is based on the premise that certain terms are inherently unfair. In the consumer context, such terms may be proscribed because they cannot be justified.

Whatever may have been the original intention, the *Consultation* has moved away — and quite dramatically moved away — from that approach. Not only is it proposed that terms in B2B contracts be subject to the regime, but the idea of proscribing certain inherently unfair terms has been rejected in favour of an individualised approach. The question under the Exposure Draft is not whether a particular term is inherently unfair. Instead, the question is whether a particular term is unfair (in effect, 'unreasonable') in the specific circumstances in which it is used.

13.5 Lack of discrimination

Because the *Consultation* is based on an underlying presumption that standard form contracts are mischievous, or at least to be viewed with suspicion, there is a lack of discrimination between the various types of standard form contract.

The movement from a concern with contract terms which are inherently unfair to an individualised approach has led to a distortion of the proposed operation of any legislation based on the *Consultation*. That is most acutely felt in relation to B2B contracts. It seems clear that contracts prepared by independent bodies should not be affected by the *Consultation*.

The operation of the burden of proof in relation to key matters demonstrates a lack of balance which taints the whole *Consultation*. But again it is most obvious in relation to B2B contracts. It is one thing to create presumptions in relation to what is a standard form contract and where there are particular justifications but it is extremely difficult to accept the application of these matters to cases where one day a party might be a supplier under a standard form and the next day a consumer under the same standard form.

14 Proscribed terms and consumer contracts

14.1 Introduction

The *Consultation* does not propose any proscribed terms. But it leaves the option open.[57] That is particularly disquieting for the commercial community. The very idea that in a B2B contract the use of certain terms might attract a pecuniary penalty is a source of great concern.

14.2 Consumer contracts

Although this Submission necessarily focuses principally on B2B contracts, many of the criticisms made above are relevant, if not directly applicable to, supply contracts with consumers.

Consider application of the definition of 'subject matter of the contract'. If the standard form contract of a pay television service provider states:

(1) The customer's access package comprises access to television channels 1, 2, 3 and 4.

(2) The service provider has the right, without notice to the customer, to delete or replace one or more of the television channels in your customer package.

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56 See above, para 2.

57 See *Consultation*, p 18.

There would seem little doubt that clause 2 might well be regarded as 'unfair'. But the contract may alternatively provide:

(1) The customer's access package comprises access to such television channels as the service provider from time to time chooses to transmit to the customer.

(2) At no time will the customer's access package exceed 4 channels.

This form of contract looks to be more objectionable from the consumer's perspective than the first form of contract. However, since under clause 1 the subject matter of the alternative contract is 'such television channels as the service provider from time to time chooses to transmit', the drafting of the Exposure Draft would seem to mean that clause 1 of the alternative contract would not be subject to the regime.

One answer to many of the problems identified above[58] in relation to the Exposure Draft is that the concept of 'unfair term' would be more accurately expressed as a term which is the product of inequality of bargaining power. Focusing on that concept may well be a proper basis for distinguishing between consumer and B2B transactions.

14.3 Enforcement

The impact of enforcement costs in the B2B context is as important to consumers as it is to business.[59]

Of greater concern in the context of consumers who acquire goods or services for personal use is that they have no remedy. As we understand the Exposure Draft, the idea is that consumers (properly so-called) must litigate in order to obtain the benefit of the proposed legislation. However, consumers do not litigate. Even if consumers are given the benefit of 'small claims' procedures,[60] they are unlikely to take such steps in relation to small amounts, such as a $10 'administrative fee' exacted in addition to what the standard form stated to be the full price. This again brings into prominence the movement from the control of inherently unfair terms to the individualised approach of the Exposure Draft.

If the Government is concerned to stamp out terms which are clearly unfair in the context of the supply of goods, land or services to consumers, that is more appropriately done by treating consumers as a class. There is, from that perspective, some justification for the use of proscribed terms.

15 Conclusions

Legislation dealing with 'unfair terms' in B2B contracts is unnecessary and inappropriate. Although there must also be misgivings about the need for such legislation in relation to consumer contracts, it is sufficient to say that the objections to a regime in the context of B2B are overwhelming.

Perhaps the single most important objection to the *Consultation* is that it has been prepared without due consultation and without proper consideration of the likely impact of the proposed legislation on Australian contract law.

In terms of the rationale for the *Consultation*, much of the difficulty stems from the application of an abstract concept of inherently unfair terms to particular transactions. If the concern is to stamp out terms which are clearly unfair in the context of the supply of

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58 See above, paras 12 and 13.

59 See above, paras 10.3 and 10.4.

60 However, we assume that in some jurisdictions they will have the benefit of 'small claims' procedures administered by consumer affairs bodies.

goods, land or services to consumers, that is more appropriately done by treating consumers as a class.

In terms of its breadth, the *Consultation* adopts an approach under which standard form contracts prepared by independent bodies are treated in the same way as standard form contracts tailored to the needs of a particular supplier. The *Consultation* does not consider the relevance of the distinctions between the different types of standard form.

From a cost-benefit perspective, adoption of the *Consultation* would not only increase the cost of doing business in Australia, it would also deprive the economy of valuable revenue. No benefits to business have been identified. And it is by no means clear that the benefits to the community of requiring suppliers who use standard forms to comply with the legislation would outweigh the costs which the community must incur.

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