

Standing Committee on Law and Justice

# **Unfair terms in consumer contracts**

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## Terms of reference

That the Standing Committee on Law and Justice inquire into and report on the incidence and impact of unfair contract terms in consumer contracts for the supply of goods and services of a kind ordinarily acquired for personal, domestic or household use or consumption, in particular:

1. whether consumer contracts contain terms which cause a significant imbalance in the rights and obligations arising under a contract, to the detriment of the consumer, including the incidence of:
  - (i) terms which allow the supplier to unilaterally vary the price or characteristics of the goods or services without notice to the consumer;
  - (ii) terms which penalise the consumer but not the supplier when there is a breach of the agreement;
  - (iii) terms which allow a supplier to suspend services supplied under the contract while continuing to charge the consumer; or
  - (iv) terms which permit the supplier but not the consumer to terminate the contract.
2. whether the use of standard form contracts has increased the prevalence of the above terms in consumer contracts;
3. the remedies available under common law and statute with respect to the above terms in consumer contracts;
4. the effectiveness of specific purpose legislation such as the UK *Unfair Terms in Consumer Contracts Regulations 1999* and the Victorian *Fair Trading Act 1999* (Part 2B – Unfair Terms in Consumer Contracts); and
5. any other relevant matter.

These terms of reference were referred to the Committee by the Hon John Della Bosca MLC, Minister for Commerce on 28 August 2006.

## Committee membership

<b>The Hon Christine Robertson MLC</b>	Australian Labor Party	<i>Chair</i>
<b>The Hon David Clarke MLC</b>	Liberal Party	<i>Deputy Chair</i>
<b>The Hon Rick Colless MLC</b>	The Nationals	
<b>The Hon Amanda Fazio MLC</b>	Australian Labor Party	
<b>The Hon Greg Donnelly MLC</b>	Australian Labor Party	
<b>Ms Lee Rhiannon MLC</b>	The Greens	

### Secretariat

Ms Rachel Callinan, Director  
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Ms Dora Oravec, Council Officer Assistant



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## Chair's foreword

The Committee was referred this Inquiry into the incidence and impact of unfair terms in consumer contracts on 28 August 2006, from the Minister of Commerce, the Hon John Della Bosca, MLC. Despite the short inquiry timeframe, the evidence provided to the Committee demonstrated that there is overwhelming support for the introduction of legislation for the protection of consumers in relation to unfair terms in consumer contracts in New South Wales.

Given the strong support for unfair terms legislation, the Committee has recommended that, in accordance with the scheme in Victoria (currently the only jurisdiction in Australia with unfair consumer contract terms legislation), the NSW Government seek an amendment to the *Fair Trading Act 1987* (NSW) to establish a scheme for the protection of consumers in relation to unfair terms in consumer contracts.

The Committee also highlights the benefits to the NSW Government of drawing on the experience of the Victorian Government when it develops and implements a new scheme for NSW, and has recommended that consultation with the Victorian Government be a key part of any strategy of implementation of unfair terms legislation.

Throughout the Inquiry, the Committee also received a number of insightful suggestions from participants in relation to the implementation of any unfair consumer contract terms scheme in NSW, which it believes warrant further consideration. The Committee has therefore recommended that the NSW Government, when developing the amendment to the *Fair Trading Act 1987* (NSW), consider the views set out in this report regarding appropriate inclusions in the NSW scheme.

The Committee is particularly grateful to all those who have contributed to this Inquiry. Participants provided a clear, succinct analysis of the issues that greatly assisted the Committee's understanding of this complex area of law. I especially thank representatives from Consumer Affairs Victoria for their attendance at the Committee's public hearing, as they provided a vital perspective on the adoption and implementation of unfair terms legislation in Victoria.

I thank my fellow Committee members for their assistance in producing this bi-partisan report. I believe that the recommendations the Committee has produced reflect this unanimity and should be viewed as such by the Government that must respond to them.

I also thank members of the Committee secretariat, Rachel Callinan, Victoria Pymm and Dora Oravec for their assistance in the production of this report.

On behalf of the Committee, I commend this report to the Legislative Council.



Christine Robertson

**Committee Chair**

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# Executive summary

## Introduction (Chapter 1)

On the 28 August 2006 the Committee was referred terms of reference by the Minister of Commerce, the Hon John Della Bosca MLC, requiring it to inquire into and report on the incidence and impact of unfair terms in consumer contracts and the efficacy of specific purpose legislation implemented in other jurisdictions.

The Committee received submissions from a number of consumer advocacy bodies, Government agencies, academics and a broad range of industry groups.

The Committee also held a public hearing with witnesses from the NSW Office of Fair Trading, CHOICE, the Communications Law Centre, the Australian Bankers' Association, the NSW Law Society, Consumer Affairs Victoria and Associate Professor Zumbo, from the University of New South Wales.

## Incidence and impact of unfair contract terms (Chapter 2)

Chapter 2 explains key terminology used in this report and examines the incidence and use of unfair terms in consumer contracts. Terms of reference (a) (i)-(iv) ask the Committee to examine whether consumer contracts contain terms which created a significant imbalance between the supplier and the consumer. The types of contractual terms that are considered to be unfair are explored, and the use of standard form contracts and their contribution to the prevalence of unfair contract terms is also examined.

The Committee uses a number of case studies relating to mobile phones, rental cars, banking and fitness centres which were provided by participants to the Inquiry, to illustrate the significant disadvantage that unfair terms in consumer contracts may impose on the consumer. While data measuring the instance of unfair terms in consumer contracts specifically is not collected by regulatory bodies (such as the NSW Office of Fair Trading and Consumer Affairs Victoria) the Committee received a substantial amount of evidence indicating that all four of the types of unfair terms it investigated are prevalent in consumer contracts.

The Committee also received evidence that the widespread use of standard form contracts has contributed to the increase of unfair terms in consumer contracts. While standard form contracts provide a convenient and economic way for a consumer to engage a service provider, they also leave the consumer open to unfair terms, particularly if contracts are very lengthy, are not written in plain English, and refer to additional material that is not provided with the original contract.

## Current legal and regulatory environment (Chapter 3)

While there is no specific unfair consumer contract terms legislation in NSW, consumers may rely on litigation to seek redress from unfair contract terms in certain circumstances. This Chapter explains the current legal and regulatory environment of NSW, in preparation for the discussion of the efficacy of this framework in the following Chapter.

The Committee examines the State and Commonwealth regulatory framework that consumers in NSW may rely on to seek compensation for or protection from unfair contractual terms. These are the *Contracts Review Act 1980* (NSW), the *Fair Trading Act 1987* (NSW), and the *Trade Practices Act 1974* (Cth). This Chapter also discusses the remedies available at common law and equity.

The Committee also examines the role of the NSW Office of Fair Trading in assisting consumers settle disputes with suppliers over unfair terms in consumer contracts, although it is limited in this role to the extent that it cannot require a supplier to take a course of action.

The Committee also heard that a number of industry groups in New South Wales, including the telecommunications industry, the banking industry, the building industry and the insurance industry, are also regulated by industry specific codes and legislation. It was argued by some Inquiry participants that the current regulatory scheme is sufficient to provide consumers with protection. For example, the Australian Bankers' Association argued that the regulations applied to the banking sector provide protection for consumers and banks, to ensure that contracts do not disadvantage either party.

### **Adequacy of the current legal and regulatory framework (Chapter 4)**

Chapter 4 examines the views of Inquiry participants regarding the adequacy of the current legal and regulatory framework and analyses the views presented as to whether specific purpose legislation is required to protect NSW consumers against unfair contractual terms and provide appropriate remedies. This discussion draws on the analysis set out in the previous chapters regarding the nature of the problem (Chapter 2) and the existing legal and regulatory framework laws (Chapter 3).

The majority of evidence to this Inquiry suggests that the protection offered to consumers in NSW through the *Contracts Review Act 1980* (NSW), the *Fair Trading Act 1987* (NSW), and the *Trade Practices Act 1974* (Cth), is insufficient to protect consumers from unfair terms in contracts and to provide redress. Participants explained to the Committee that these Acts are limited in the protection they offer consumers in relation to unfair terms in consumer contracts. Those limitations include that litigation pursuant to the current statutory provisions is costly and time consuming for consumers, that there is an emphasis on procedural rather than substantive fairness and that the current remedies are not able to effect the systemic change required.

However, a number of participants argued that industry specific legislation and the codes of conduct that apply to specific industries provide sufficient protection for consumers, and that further regulation in relation to consumer protection would impose an unnecessary burden on businesses. The Committee is also aware that unfair contract terms are problematic to varying degrees in different industries.

The Committee acknowledges that, while codes such as the *Consumer Credit Code* provide useful guidance in terms of contract fairness, they are limited in their application to specific industries and generally do not specifically and/or comprehensively address the issue of unfair terms.

In this Chapter, the Committee also considers whether NSW should proceed with its own specific purpose legislation, or whether national legislation is more appropriate. In August 2002 the Ministerial Council of Consumer Affairs directed its Standing Committee of Officials of Consumer Affairs (SCOCA) to establish a national working party to investigate ways of addressing unfair terms in consumer contracts and to consider the implementation of a nationally consistent and effective regulatory regime. However, the Committee was advised that while SCOCA had recommended that

national legislation be adopted, it had not received approval on its Regulatory Impact Statement from the Office of Regulation Review.

Inquiry participants who expressed support for the need for specific purpose legislation to protect the interests of NSW consumers almost universally expressed support for national legislation but, given the uncertainty about whether a national response to the issue would eventuate, advocated for NSW (and other States) to enact their own legislation.

The Committee has concurred with the majority view expressed during this Inquiry that, as national legislation is not foreseeable in the immediate future, NSW should proceed with its own legislative initiative. The Committee has therefore recommended that the NSW Government seek an amendment to the *Fair Trading Act 1987* (NSW) to establish a scheme for the protection of consumers in relation to unfair terms in consumer contracts.

### **Specific purpose legislation in other jurisdictions (Chapter 5)**

The terms of reference require the Committee to examine the efficacy of specific purpose legislation in other jurisdictions, specifically the UK Unfair Terms in Consumer Contracts Regulations (1999) and Part 2B of the Victorian *Fair Trading Act 1999*. In this Chapter the Committee examines both these schemes in relation to the effect they have had for consumers and suppliers in these jurisdictions. The Committee examines evidence relating to the adequacy of the definition of 'unfair' and the implementation strategy adopted, for both schemes.

In the UK a directive from the European Union led to the Unfair Terms in Consumer Contracts Regulations 1994, which was later superseded by the 1999 version (UTCCR). Under the UTCCR, if a contract term is found to be unfair, it is not legally binding on the consumer and, if a trader refuses to accept that a term is unfair, a consumer can take legal action.

The Director of the UK Office of Fair Trading (UK OFT) is responsible for determining whether or not contract terms may be considered unfair and can instigate legal action to stop the use of a certain term in consumer contracts. However, the UK OFT advised the Committee that cases are normally resolved informally, when the UK OFT accepts an undertaking in lieu of court proceedings.

Victoria enacted fair trading legislation in 1999, in the form of the *Fair Trading Act 1999*. In 2003, this Act was amended to include a new Part 2B which sets out provisions relating specifically to unfair terms in consumer contracts. Representatives from Consumer Affairs Victoria, which administers the legislation, told the Committee that Part 2B was important for a number of reasons, including that it provides a standard which industry broadly can look to, as it is not limited to various sectors.

The majority of evidence provided to the Committee suggests that each of these pieces of legislation successfully limit the use of unfair terms in consumer contracts without imposing unnecessary burdens on industry. Participants noted that both the UTCCR and Part 2B of the *Fair Trading Act 1999* (Vic) provided consumers with the ability to address unfair contract terms without litigation or reliance on industry self-regulation.

Finally, the Committee notes that New Zealand is also considering the implementation of unfair terms in consumer contracts legislation.

## Specific purpose legislation for New South Wales (Chapter 6)

Chapter 6 concludes the Committee's report with consideration of what form the NSW legislation should take and examines several matters raised by Inquiry participants regarding the formulation and implementation of the scheme.

The Victorian model was favoured by the majority of submission makers and witnesses that advocated for the introduction of specific purpose legislation in NSW. A number of Inquiry participants emphasised the need for consistency between jurisdictions in implementing specific unfair terms legislation, particularly in the absence of a national scheme.

Therefore, the Committee has recommended that the NSW Government model its amendment to the *Fair Trading Act 1987* (NSW), to establish a scheme for the protection of consumers in relation to unfair terms in consumer contracts, on Part 2B of the *Fair Trading Act 1999* (Vic).

In undertaking this Inquiry the Committee has had the benefit of the views of Consumer Affairs Victoria, whose representatives appeared before the Committee at its public hearing. It is clear that it would also be beneficial if the NSW Government could draw on the experience of the Victorian Government when it develops and implements a new scheme for NSW. The Committee has therefore recommended that the NSW Government, when developing the amendment to establish a scheme for the protection of consumers in relation to unfair terms in consumer contracts, consult with the Victorian Government to draw upon its experiences in designing and implementing Part 2B of the *Fair Trading Act 1999* (Vic).

In addition, the Committee received a number of insightful suggestions from participants to this Inquiry, which it believes warrant further consideration, in relation to the implementation of any unfair consumer contract terms scheme in NSW. The Committee has therefore recommended that the NSW Government, when developing the amendment to establish a scheme for the protection of consumers in relation to unfair terms in consumer contracts, consider the views set out in this report regarding appropriate inclusions in the NSW scheme.

Similarly, the Committee recommends that the NSW Government, create a taskforce within the NSW Office of Fair trading to develop the scheme. The taskforce should include industry representatives as well as consumer representatives and other relevant stakeholders and experts.

## Summary of recommendations

- Recommendation 1** 60  
That the NSW Government seek an amendment to the *Fair Trading Act 1987* (NSW) to establish a scheme for the protection of consumers in relation to unfair terms in consumer contracts.
- Recommendation 2** 78  
That the NSW Government model its amendment to the *Fair Trading Act 1987* (NSW), to establish a scheme for the protection of consumers in relation to unfair terms in consumer contracts, on Part 2B of the *Fair Trading Act 1999* (Vic).
- Recommendation 3** 78  
That the NSW Government, when developing the amendment to establish a scheme for the protection of consumers in relation to unfair terms in consumer contracts, consult with the Victorian Government to draw upon its experiences in designing and implementing Part 2B of the *Fair Trading Act 1999* (Vic).
- Recommendation 4** 89  
That the NSW Government, when developing the amendment to establish a scheme for the protection of consumers in relation to unfair terms in consumer contracts, consider the views set out in this report regarding appropriate inclusions in the NSW scheme.
- Recommendation 5** 90  
That the NSW Government, when developing the amendment to establish a scheme for the protection of consumers in relation to unfair terms in consumer contracts, create a taskforce within the NSW Office of Fair trading to develop the scheme. The taskforce should include industry representatives as well as consumer representatives and other relevant stakeholders and experts.

## Acronyms and abbreviations

<b>ABA</b>	Australian Bankers' Association
<b>ACIF</b>	Australian Communications Industry Forum
<b>ACMA</b>	Australian Communications and Media Authority
<b>AFC</b>	Australian Finance Conference
<b>CAV</b>	Consumer Affairs Victoria
<b>CCLC</b>	Consumer Credit Legal Centre
<b>CLC</b>	Communications Law Centre
<b>COAG</b>	Council of Australian Governments
<b>CTTT</b>	Consumer Trader and Tenancy Tribunal
<b>EWON</b>	Energy and Water Ombudsman of New South Wales
<b>HIA</b>	Housing Industry Association
<b>MBA</b>	Master Builders Australia
<b>MBA NSW</b>	Master Builders Association of NSW
<b>MCA</b>	Ministry of Consumer Affairs (New Zealand)
<b>MCCA</b>	Ministerial Council on Consumer Affairs
<b>NSW OFT</b>	New South Wales Office of Fair Trading
<b>RIS</b>	Regulatory impact statement
<b>SCOCA</b>	Standing Committee of Officials of Consumer Affairs (which supports the MCCA)
<b>TIO</b>	Telecommunications Industry Ombudsman
<b>TTF</b>	Tourism and Transport Forum Australia
<b>UCCCMC</b>	Uniform Consumer Credit Code Management Committee (one of the four advisory committees that support the SCOCA)
<b>UCTAct</b>	<i>Unfair Contract Terms Act 1977</i> (UK)
<b>UK OFT</b>	United Kingdom Office of Fair Trading
<b>UTCCR</b>	Unfair Terms in Consumer Contracts Regulation 1999 (UK)
<b>VCAT</b>	Victorian Civil and Administrative Tribunal

# Chapter 1 Introduction

This Chapter gives an overview of the inquiry process, including the methods the Committee used to encourage participation by members of the public, government agencies and interested organisations. It also includes an outline of the contents of the report.

## Terms of reference

- 1.1 The terms of reference for this Inquiry were referred to the Committee by the Hon John Della Bosca MLC, Minister for Commerce, on 28 August 2006. The terms of reference are reproduced on page iv.

## Conduct of the Inquiry

### Submissions

- 1.2 The Committee called for submissions by advertising in the *Sydney Morning Herald* and the *Daily Telegraph* on 6 September 2006 and by writing to relevant organisations and individuals inviting submissions. The Committee has received 29 submissions, a list of which is reproduced as Appendix 1. The submissions have been published on the Committee's website.
- 1.3 Submissions were received from individuals, representatives of the banking and insurance sectors and the building and telecommunications industries as well as from legal organisations, academics and consumer advocacy groups. The Committee also received submissions from the Telecommunications Industry Ombudsman, the Energy and Water Ombudsmen NSW and government agencies from NSW, New Zealand and the United Kingdom.

### Public hearing

- 1.4 The Committee held a public hearing at Parliament House on 20 October 2006. The Committee heard from witnesses representing the NSW Office of Fair Trading, consumer advocacy groups, a representative from the banking sector, as well as representatives from Consumer Affairs Victoria. A full list of witnesses is reproduced as Appendix 2. The transcript of the hearing is available on the Committee's website.
- 1.5 The Committee would like to thank all the individuals and organisations that made a submission or gave evidence to the Committee. The Committee is especially grateful to those witnesses who travelled from Victoria to assist the Committee to understand the issues involved in this inquiry.

## Report structure

- 1.6** **Chapter 2** explains significant terminology used in this report and examines the incidence and use of unfair terms in consumer contracts. The types of contractual terms that are considered to be unfair are explored and the use of standard form contracts and their contribution to the prevalence of unfair contract terms is also examined.
- 1.7** **Chapter 3** sets out the current legal and regulatory framework in NSW relevant to the issue of unfair terms in consumer contracts, including the remedies available at common law and equity and under NSW and Commonwealth legislation, as well as the role of the NSW Office of Fair Trading. The Committee also examines various industry codes and industry specific legislation that contain provisions relevant to unfair terms in consumer contracts.
- 1.8** **Chapter 4** examines the views of Inquiry participants regarding the adequacy of the current legal and regulatory framework and analyses the views presented as to whether specific purpose legislation is required to protect NSW consumers against unfair contractual terms and provide appropriate remedies. The Committee agrees with the majority of Inquiry participants who strongly expressed the need for specific purpose legislation to protect NSW consumers.
- 1.9** In this chapter, the Committee also considers whether NSW should proceed with its own specific purpose legislation, or whether national legislation is more appropriate. The Committee has concurred with the majority view expressed during this Inquiry that, as national legislation is not foreseeable in the immediate future, NSW should proceed with its own legislative initiative.
- 1.10** **Chapter 5** provides an analysis of two jurisdictions that have enacted specific purpose legislation to address the problem of unfair terms in consumer contracts - Victoria and the United Kingdom.
- 1.11** **Chapter 6** concludes the Committee's report with consideration of what form the NSW legislation should take and examines several matters raised by Inquiry participants regarding the formulation and implementation of the scheme.

## Chapter 2 Incidence and impact of unfair terms in consumer contracts

This chapter provides definitions of significant terminology used in this report and examines the incidence and use of unfair terms in consumer contracts. The Committee also examines the types of contract terms that are considered to be unfair. The use of standard form contracts and their contribution to the prevalence of unfair contract terms is also examined.

### Definitions

2.1 In this section significant terms used throughout this report are explained. Legislative definitions are drawn upon where appropriate, including definitions contained in specific purpose legislation relating to unfair terms in consumer contracts in the UK and Victoria.

#### Consumer

2.2 The *Fair Trading Act 1987* (NSW) defines a consumer as a person who acquires goods or services from a supplier or who acquires an interest in land other than land used or intended for use or apparently intended to be used for industrial or commercial purposes.<sup>1</sup>

2.3 The *Trade Practices Act 1974* (Cth) defines a consumer in more specific terms:

A consumer, who can be either an individual or a business, is someone who acquires:

- Goods or services of a type normally bought for personal or household use, whatever their costs or
- Any other type of goods or services costing \$40 000 or less or
- A commercial road vehicle or trailer of any cost that is used mainly to transport goods on public roads

provided that the goods are not acquired solely for reselling or for using up or transforming commercially to produce, repair or treat other goods.<sup>2</sup>

#### Consumer contracts

2.4 The terms of reference require the Committee to examine ‘consumer contracts for the supply of goods and services of a kind ordinarily acquired for personal, domestic or household use or consumption.’<sup>3</sup>

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<sup>1</sup> *Fair Trading Act 1987* (NSW), s5(1)

<sup>2</sup> *Trade Practices Act 1974* (Cth), s4B, *Summary of the Trade Practices Act 1974 and additional responsibilities of the ACCC under other legislation*, May 2003, p40: [www.accc.gov.au](http://www.accc.gov.au) (accessed 26 September 2006)

<sup>3</sup> The terms of reference are set out on page iv.

- 2.5** A consumer contract is not defined in NSW or Federal legislation; however, the Victorian *Fair Trading Act 1999* (Vic) defines it as ‘an agreement whether or not in writing and whether or specific or general use, to supply goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption for the purposes of the ordinary personal, domestic or household use or consumption of those goods and services.’<sup>4</sup>
- 2.6** There are a variety of contracts that a consumer may agree to, including less formal contractual agreements such as a concert ticket, and all clauses of a contract will bind a consumer, even if they have not read it:

If you sign a written contract then generally you are bound by all of its terms even if you did not read or understand them. There are various types of contracts which you may come across in everyday life which do not require your signature, for example a parking ticket or a drycleaning docket which has clauses printed on the back. Generally the rule is that you are bound by the clauses if you have read them or if you knew they were there but did not bother to read them, or if the other person took reasonable steps to draw them to your attention.<sup>5</sup>

### **Standard form contracts**

- 2.7** A standard form contract is a common form of consumer contract that does not allow for a process of negotiation between the two parties. The Victorian *Fair Trading Act 1999* defines a standard form contract as ‘a consumer contract that has been drawn up for general use in a particular industry, whether or not the contract differs from other contracts used in that industry’.<sup>6</sup> Standard form contracts come in many forms, drafted and tailored by industries to suit their needs.
- 2.8** Standard form contracts have become an increasingly common way for businesses and consumers to agree to an arrangement for the provision of services. Standard form contracts are commonly used in relation to services such as mobile phones, cable television, Internet service provision, gym membership, concerts and film tickets, banking services and hire cars.
- 2.9** Mr Rod Stowe, NSW Deputy Commissioner for Fair Trading, explained how standard form contracts enable services to be provided to consumers quickly and easily and also make monitoring more realistic for regulators such as the NSW Office of Fair Trading (NSW OFT):

Firstly, it may be cheaper for a service provider to use a standard form contract; then they can pass on any savings to the consumer. Secondly, where standard contracts have similar provisions across the industry, it does allow the consumer perhaps to focus on those particular standard clauses in making comparisons. Finally, standard contracts are also used by regulators to ensure fairness. For example, in the case of tenancy agreements there is a prescribed form that needs to be taken. Regulators such as ourselves have dictated how the contract is to be drafted so there are fair terms. There are also requirements that certain provisions be included in things like building contracts. Again, we enshrine into the contract what we see to be fair and reasonable

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<sup>4</sup> *Fair Trading Act 1999* (Vic), Part 1

<sup>5</sup> Law Society of NSW: [www.lawsociety.com.au/page.asp?partid=6623](http://www.lawsociety.com.au/page.asp?partid=6623) (accessed 26 September 2006)

<sup>6</sup> *Fair Trading Act 1999* (Vic), Part 2B, s32U

information so consumers are put on notice about important issues. They are the sorts of advantages that exist in terms of standard contracts.<sup>7</sup>

- 2.10** Later in this Chapter, the Committee considers whether the use of standard form contracts has increased the prevalence of unfair terms in consumer contracts.

### Unfair terms

- 2.11** The Victorian *Fair Trading Act 1999* states that '[a] term in a consumer contract is to be regarded as unfair if, contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer.'<sup>8</sup> Consumer Affairs Victoria explains that 'a term that disadvantages the consumer and is not within the concept of good faith' and further, that good faith 'implies that both the consumer and supplier are dealing openly and fairly'.<sup>9</sup>

- 2.12** Similarly, the Office of Fair Trading in the United Kingdom uses the notion of good faith in its definition of an unfair contractual term:

Contrary to the requirement of good faith it [an unfair contract term] causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of consumers. 'Good faith' means that traders must deal fairly and openly with you.<sup>10</sup>

### What kind of terms are considered to be unfair?

- 2.13** The terms of reference require the Committee to examine whether consumer contracts contain terms that cause a significant imbalance in the rights and obligations arising under the contract, to the detriment of the consumer.<sup>11</sup> Four types of terms are specifically listed: terms which allow the supplier to unilaterally vary the goods or services; terms which penalise the consumer but not the supplier when there is a breach; terms which allow the supplier to suspend services but continue to charge the consumer; and clauses which permit the supplier but not the consumer to terminate the contract.

- 2.14** In this section, the Committee examines the types of contractual terms that are generally considered to be unfair, including those identified in the terms of reference. Case studies drawn from a number of industries are used to broadly illustrate the practical impact of unfair terms in consumer contracts.

<sup>7</sup> Mr Rod Stowe, Deputy Commissioner, Policy and Strategy, Officer of Fair Trading, Evidence, 20 October 2006, p9

<sup>8</sup> *Fair Trading Act 1999* (Vic), s32W

<sup>9</sup> Consumer Affairs Victoria: [www.consumer.vic.gov.au](http://www.consumer.vic.gov.au) (accessed 8 September 2006)

<sup>10</sup> Office of Fair Trading UK: [www.oft.gov.uk](http://www.oft.gov.uk) (accessed 8 September 2006)

<sup>11</sup> The terms of reference are set out on page iv.

**Terms which allow the supplier to unilaterally vary the goods or services**

**2.15** Unilateral change clauses allow one party, usually the supplier, to change an aspect of the contract without allowing the other party a similar right. One submission maker described unilateral change clauses as being ‘...extremely prevalent in all ongoing consumer contracts. The unilateral change clauses are drafted very widely to enable the supplier to unilaterally vary any aspect of the contract.’<sup>12</sup>

**2.16** Associate Professor Frank Zumbo with the University of New South Wales’s School of Business Law and Taxation explained that some unilateral changes clauses would be considered to be fair while others would not:

In some cases unilateral variation terms would be considered fair and in other instances they would be considered unfair. For example, the obvious one would be if you have a variable interest line with a bank, and as the price of money, the interest rates, go up by the Reserve Bank it would be fair to change the interest rate on your loan. In that case it is fair because it is costing that bank money to lend that money to you, so that would certainly be fair. If the unilateral variation protects a legitimate valid interest and does so reasonably by the bank or the supplier, that is fine. That is fine in any term. But where the unilateral variation is disproportionate and unnecessary, or cannot be justified by the recouping of costs, you can make an argument that it is unfair.<sup>13</sup>

**2.17** Mr Ian Gilbert, Director of the Australian Bankers’ Association, advised the Committee why unilateral change clauses are used, highlighting their efficacy in financial contracts which continue over a long period of time and may be subject to significant changes in circumstances:

... the nature of a banking service generally speaking—unless it is a one-off purchase of a bank cheque or something like that—is a contract that endures over a period of time. You could have a home loan contract of up to 25 or 30 years. You have a savings or a transaction account that goes for as long as you want to keep it. So over time circumstances can change. The cost of providing the product can change and the regulatory environment can change, necessitating a change that needs to be made to the contract in order to continue to comply with legal changes. They are the sorts of things that unilateral change clauses are all about. It is basically about maintaining the relevance of the contractual terms to the activity that is going on and the service that is being provided.<sup>14</sup>

**2.18** In his submission, Mr Gary Smith, General Manager of Regulatory Compliance & Self-regulation with Optus, noted that a key reason for contracts to be unilaterally varied from time to time was to ‘reflect technical developments, new services, innovative service provision and competitive pressure on prices.’<sup>15</sup> Mr Smith noted that consumers demand and ‘have grown to

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<sup>12</sup> Submission 21, Consumer Credit Legal Centre (NSW) Inc and Redfern Legal Centre, p3

<sup>13</sup> Associate Professor Frank Zumbo, Evidence, 20 October 2006, p56

<sup>14</sup> Mr Ian Gilbert, Director, Australian Bankers’ Association, Evidence, 20 October 2006, p40

<sup>15</sup> Submission 9, Optus, p2

expect ready access to new features and service elements without the need to enter into new contractual arrangements.<sup>16</sup>

- 2.19** Several Inquiry participants provided examples of terms allowing suppliers to unilaterally vary a contract without notice to the consumer that significantly disadvantaged consumers. For example, the NSW Legal Aid Commission provided an example of a contract concerning website services:

In a contract about website services a company reserved the right, at its sole discretion, to change, modify, add or remove any portion of the agreement in whole, or in part, at any time. Changes in the agreement were to be effective when notice of such a change was posted and the continued use of the site after the changes were posted was considered acceptance of those changes.<sup>17</sup>

- 2.20** The Consumer Credit Legal Centre (NSW) Inc and the Redfern Legal Centre in their joint submission provided the example of a major bank that had recently advertised a credit card with a very low interest rate, which was very popular with consumers. Many consumers did not use the credit card for new purchases, but instead transferred existing credit card balances to the new card, in order to take advantage of the low interest rate. The bank subsequently used its unilateral change clause to introduce a new fee of \$160 to customers who were not using the card for new purchases.<sup>18</sup> The submission describes this action as ‘clearly unfair’, noting that in effect the bank had:

... used the unilateral change clause to vary the pricing of the contract so significantly that it was unrecognisable from the original contract the consumer had chosen to enter only a few months before.<sup>19</sup>

- 2.21** Ms Lyn Baker, the NSW Commissioner for Fair Trading, expressed the view that where unilateral change clauses were necessary they should be drafted so there is a balance between parties’ rights:

Industry claims that such clauses are used because businesses must be able to adapt quickly to unforeseeable and uncontrollable changes in circumstances. However, the consumer has agreed to the original conditions, so why should the supplier be able to force a consumer to accept changes? The answer is not really to prohibit such clauses outright, but to redraft them so that there is a balance between parties’ rights and obligations. Clauses that allow unilateral variation should be narrowly and clearly drafted, and set out the specific circumstances in which a variation may occur. Generally there should be a requirement to give the consumer a reasonable notice of the change, and the consumer should be able to cancel a contract without penalty if the changes do not suit.<sup>20</sup>

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<sup>16</sup> Submission 9, p2

<sup>17</sup> Submission 22, Legal Aid Commission of NSW, p3

<sup>18</sup> Submission 21, pp3-4

<sup>19</sup> Submission 21, p4

<sup>20</sup> Ms Lyn Baker, Commissioner, Office of Fair Trading, Evidence, 20 October 2006, p3

***Case study: Car hire contract***<sup>21</sup>

John and his wife hired a car for a holiday. When they picked the car up they weren't given the car they had booked, they were given a smaller and less powerful car. The hire company told them that the car they booked was unavailable and that the hire contract they had signed entitled the company to change the car if the type originally booked was unavailable.

***Case study: Pay TV contract***<sup>22</sup>

Bob signed a contract with a pay television company, choosing to subscribe to several sport channels. After a few months, the company reduced the number of sport channels Bob was subscribing to, and increased the number of comedy channels. When Bob complained about the change in his subscription, he was told that the contract he had signed allowed the company to unilaterally vary the service they provided to him.

**Penalties against consumer but not supplier for breach of contract**

- 2.22** The Committee heard of a number of examples of contract terms that allow penalties against the consumer but not the supplier where there is a breach of the agreement.
- 2.23** CHOICE gave the example of a term in a vendor mortgage that was the subject of a complaint to the NSW Consumer, Trader and Tenancy Tribunal (CTTT):
- The purchaser shall forfeit to the vendor and the vendor shall keep the deposit and all instalments paid under this contract, as liquidated damages for non-performance of the contract without necessity for the vendor to give notice or do any other thing.<sup>23</sup>
- 2.24** CHOICE explained that 'when the purchasers fell into arrears and in reliance on the above clause the vendor retained the purchaser's payment of \$58,000.' After taking action in the CTTT, the consumer was compensated \$28,000 of the payment and the judgement to award compensation was reached.<sup>24</sup> As noted in the NSW Law Society Journal in a discussion of this case '[the case] highlights the importance of unfair contract terms legislation that would enable regulators to require that such terms be removed from all contracts and the need for legislation to apply to credit contracts.'<sup>25</sup> The inclusion of consumer credit contracts in unfair contract terms legislation is discussed in Chapter 6.

<sup>21</sup> This case study is based on information in: Consumer Affairs Victoria, 'Unfair terms in vehicle rental agreements for cars, 4WDs, motor homes and vans', 2005, p14. This document can be found on the CAV web site: [www.consumer.vic.gov.au](http://www.consumer.vic.gov.au).

<sup>22</sup> This case study is based on an example provided by: Ms Baker, Evidence, 20 October 2006, p3

<sup>23</sup> Submission 19, CHOICE, p8

<sup>24</sup> Submission 19, p8

<sup>25</sup> Turner M, Caveat vendor: Vendor terms contracts, *The Law Society Journal of New South Wales*, November 2006, pp34-36

**2.25** The Energy and Water Ombudsman NSW (EWON) noted that in its experience no contracts include terms in which suppliers are penalised for terminating the contract agreement early, however nearly all contracts imposed significant penalties for the early termination of the contract by the consumer. EWON stated that:

This is clearly a significant imbalance in the parties' rights under the contract, and the imposition of penalties on consumers arguably amounts to an unfair contract term under the Victorian and United Kingdom legislation.<sup>26</sup>

**2.26** EWON also informed the Committee that the most frequent cause of supplier termination is non-payment of bills and suggests that customers to whom electricity, gas or water supplies may be terminated are the most vulnerable consumers in society who are often receiving Centrelink payments and can little afford re-connection fees.<sup>27</sup>

**2.27** The Consumer Credit Legal Centre and the Redfern Legal Centre also noted in their joint submission that:

Contracts drafted by suppliers never have any terms that provide for any penalty to the supplier for breach of contract by the supplier. Contracts drafted by suppliers include the charging of significant penalty fees and charges for the breach of contracts.<sup>28</sup>

***Case study: Mobile phone contract***<sup>29</sup>

Nick missed a monthly instalment payment for his mobile phone. The mobile phone company charged him a penalty fee for the overdue payment and also sent him a notice for the payment of the total balance remaining on the contract. When he contacted the company, Nick discovered that the contract he had signed meant that the company could ask for full payment of the contract if he didn't pay an instalment on time, as well as asking that he return his mobile phone.

**Terms allowing supplier to suspend services but continue to charge consumer**

**2.28** Another type of contractual term that can lead to unfairness is terms that allow the suspension of the service by the supplier while continuing to charge or penalise the consumer. A common example of this type of contractual term is that of fitness club contracts that permit the refusal of a refund to a customer who can no longer exercise due to medical reasons that arose after the customer joined the club.<sup>30</sup>

<sup>26</sup> Submission 7, Energy and Water Ombudsman New South Wales, p12

<sup>27</sup> Submission 7, p13

<sup>28</sup> Submission 21, p4

<sup>29</sup> This case study is based on examples provided by: Submission 19, p7 and Submission 21, p7

<sup>30</sup> Submission 22, p4

***Case study: Gym membership contract***<sup>31</sup>

Mrs B signed a membership contract with her local gym. After breaking her leg, she wanted to cancel the contract, but found that it contained a clause requiring payment for a minimum of 12 months' membership. Mrs B was forced to pay the balance remaining on her full years' membership even though she wasn't able to use the gym. When her years' membership ended, the gym continued to debit her membership fees. When she complained to the gym she was told that she should have notified the company if she wished to terminate the contract after the minimum term expired.

**2.29** EWON provided a number of examples that had been brought to its attention of providers restricting the supply of energy and water and fining the consumer. EWON also noted that 'as energy and water are essential services, suppliers hold a powerful tool – the ability to take away the service – for persuading consumers to do, or refrain from doing a particular action.'<sup>32</sup> EWON provided an example of a Standard Form Customer Connection Contract which included a term setting out the circumstances where a service could be terminated:

We may arrange to disconnect your property if:

- you do not pay on time any amount due to us under this contract for the supply of electricity or connection services arranged by us
- you do not provide the security we require
- you refuse or fail to give an authorised person access to your property in accordance with any rights of access provided for in the Electricity Supply Act
- you obstruct an authorised person in relation to anything in connection with this contract.<sup>33</sup>

**Terms that permit the supplier but not the consumer to terminate the contract**

**2.30** The Committee was advised that a clause allowing the supplier to terminate the contract while not allowing the consumer the same right was another common example of an unfair term.

**2.31** The Consumer Credit Legal Centre and the Redfern Legal Centre in their joint submission gave the example of terms in consumer leases:

A number of major consumer lease companies have a term in their contract that states that if a customer defaults on the lease then the amount of the entire amount to be paid during the entire term of the lease is owed by the consumer in liquidated damages. This is an excessive penalty. It is particularly harsh when the consumer does

<sup>31</sup> This case study is based on examples provided by: Submission 19 & Ms Baker, Evidence, 20 October 2006, p4 and Submission 22, p4

<sup>32</sup> Submission 7, p12

<sup>33</sup> Submission 7, p13 Note: this example has been truncated.

not even get to continue to lease the goods yet has to pay the lease as if they had leased the goods.<sup>34</sup>

**2.32** Ms Elizabeth Beal, Director of the Communications Law Centre (CLC), an independent public interest organisation specialising in communications law and policy based in Victoria, expressed the view, in relation to the telecommunications industry, that this type of clause was particularly detrimental and costly to consumers:

[The] ability to ensure the contract will not be changed if you have entered into it for a fixed period of time is a particular issue in the telecommunications industry when a contract is entered into for, say, 12 months for a particular service and if you have signed up and agreed to pay particular fees for a particular period of time then expectation is that the provider will uphold that agreement in the same way as the consumer is required to uphold that agreement. But we frequently see huge penalty fees for the consumer to get out of a contract early, with the provider having a right not only in the contract, if they wanted to, to increase fees and still not let the consumer out. Although consumers now have a right to get out under the code, we do not see them being informed of that right.<sup>35</sup>

**2.33** Ms Beal also noted that, combined with a unilateral change clause, which allows suppliers to increase charges and fees, this clause can limit a consumer's rights, while increasing their obligations under the contract significantly:

There is an expectation on consumers that if they have signed up for 12 months they have to put up with the increased fees because they have signed a 12-month contract. Those kinds of key issues are important.<sup>36</sup>

***Case study: Website services contract***<sup>37</sup>

Kate signed an online contract for 1 year's access to a website which hosted an online journal she read regularly. A few months later, Kate received a letter from the service provider announcing that the site was no longer operable and that all contracts would cease to be recognised.

### **Other types of unfair terms**

**2.34** As outlined above, the terms of reference require the Committee to address four specific criteria of unfair terms that may occur in consumer contracts. Inquiry participants identified a number of other types which may also be considered unfair, including:

- terms which exclude or restrict liability for death or personal injury
- terms imposing unjustified financial penalties

<sup>34</sup> Submission 21, p9

<sup>35</sup> Ms Elizabeth Beal, Director, Communications Law Centre, Evidence, 20 October 2006, p32

<sup>36</sup> Ms Beal, Evidence, 20 October 2006, p32

<sup>37</sup> This case study is based on an example provided by: Submission 22, p4

- terms requiring excessive notice periods for consumer cancellation
- terms binding consumers to other, hidden, terms.<sup>38</sup>

***Case study: Banking contract***<sup>39</sup>

Helen was ill and couldn't make the repayments on her car loan. Her bank sent her an arrears notice every month and charged her a \$40 fee each time they sent her a notice. She was charged hundreds of dollars in arrears fees by the time she was able to start making repayments on her loan. The banking contract Helen had signed allowed her bank to charge her a fee if she defaulted on her loan, at which point the bank would send an arrears notice. The contract meant that the bank could charge the fee each time they sent Helen an arrears notice.

## Use of standard form contracts

**2.35** The terms of reference require the Committee to consider whether the use of standard form contracts has increased the prevalence of the use of unfair terms in consumer contracts.<sup>40</sup> The nature of standard form contracts was described in paragraphs 2.7-2.10.

**2.36** Several Inquiry participants discussed the rationale for the use of standard form contracts. For example, Mr Ian Gilbert, Director, Australian Bankers' Association, explained that, from the Banking Association's perspective, standard form contracts were an efficient method of dealing with the huge number of services banks provide to customers:

So those two concepts of business efficacy—that is, the fact that banks have millions of customers—those millions of customers have more than often one relationship with the bank across a product or a product range; they may have multiple ways of accessing their bank account; for example, internet, phone, ATM, Eftpos. Those things all need to be managed in a sense in a wholistic way and the standard form of contracts obviously provide that efficaciously and at reasonable cost to the organisation and, obviously, to the customer.<sup>41</sup>

**2.37** Further, Mr Gilbert highlighted the benefits of using standard form contracts to both the service provider and the consumer, highlighting the importance of consistency to consumers who may contract with the service provider for more than one service and would therefore have a familiarity with the contract terms:

Consumers, in dealing with their bank and perhaps taking repeat services from the bank, will be familiar with that bank's contract or contracts for those types of services. In that sense the consumer is protected because there ought to be nothing in there

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<sup>38</sup> Submission 22, p6

<sup>39</sup> Submission 21, pp3-4

<sup>40</sup> The terms of reference are set out on page iv.

<sup>41</sup> Mr Gilbert, Evidence, 20 October 2006, p43

that they are not aware of because they know—because it is a standardised contract—that that is the contractual arrangement they have with the bank...<sup>42</sup>

- 2.38** Mr Gilbert also identified the importance of staff selling or providing a contract being properly trained in the content of the contracts. He noted that standard form contracts provide a single contract for a service that sales people may easily become familiar with, without having to undergo specialised training:

Standard form contracts make it far easier to take staff across the basics of those contracts. That is a protection for the consumer as well—that the staff understand it in the same way as the consumer understands it. So there is a mutual benefit in having that. Of course, if staff understand the contracts then they will understand where the bank's obligation is to comply with the contract. That is to the consumer's advantage. In a perfect world that would happen every time, but obviously it does not happen all the time.<sup>43</sup>

- 2.39** The Optus submission also outlined the benefits of standard form contracts that 'lead to reduced transaction costs and improved information flows leading to efficiency gains for both customers and suppliers.'<sup>44</sup>

- 2.40** While the business efficacy of using standard form contracts is understood, the Committee notes that the criticisms relating to standard form contracts raised by Inquiry participants were not in relation to their use *per se*. The problem identified by Inquiry participants was that standard form contracts facilitated the incorporation of unfair terms. In this regard, Mr Peter Kell, Chief Executive Officer of CHOICE, noted:

Standard form contracts are part and parcel of the way business is done in some industries. We are not opposed to standard form contracts. It is the tendency in some industries to include unfair provisions within them that is the problem. There are many cost benefits from using them.<sup>45</sup>

- 2.41** The view was generally expressed that standard form contracts had increased the prevalence of unfair terms in consumer contracts. For example, Ms Baker, the NSW Commissioner for Fair Trading, told the Committee that:

For example, since 1980 some of the worst unfair contract clauses have appeared in [standard form] contracts for goods and services that did not exist before then; for example, mobile phones, pay TV and health and fitness centres. There are many more people, including young people, signing up for complicated contracts day after day. In some cases they sign up over the Internet, where they click an "I agree" button to obtain services. There is a general view that the incidence is increasing because a number of contracts did not exist before.<sup>46</sup>

<sup>42</sup> Mr Gilbert, Evidence, 20 October 2006, p41

<sup>43</sup> Mr Gilbert, Evidence, 20 October 2006, p41

<sup>44</sup> Submission 9, Optus, p2

<sup>45</sup> Mr Peter Kell, Chief Executive Officer, CHOICE, Evidence, 20 October 2006, p20

<sup>46</sup> Ms Baker, Evidence, 20 October 2006, p5

- 2.42 The Committee heard that there are a number of ways in which standard form contracts may promote the use of unfair terms, including the lack of opportunity to seek advice or vary contract terms, the referencing of additional documentation not provided with the original contract; an excessively lengthy contract which consumers would be unlikely to read 'on the spot'; and the formatting of a contract so that it is not clearly legible.

### **Inability to seek advice or negotiate and imbalance in bargaining power**

- 2.43 A number of witnesses argued that there is a widespread inability for the consumer to individually negotiate the terms of a standard form contract, which may mean that many unfair terms could be included without the consumer being aware of them. For example, Mr Stowe, NSW Deputy Commissioner for Fair Trading, noted that there is no opportunity to negotiate or seek advice on the terms of the contract:

Frequently consumers do not read the contract or do not seek advice. Even if they actually understand the terms, as I say because it is a take-it-or-leave-it situation they are faced with very few choices.<sup>47</sup>

- 2.44 The Committee did, however, receive evidence from the Tourism and Transport Forum Australia (TTF) that many vehicle rental suppliers represented by the TTF put their standard form contracts on their websites for consumers to access at their leisure, in order to seek legal advice or assistance.<sup>48</sup>

- 2.45 Nonetheless, Associate Professor Zumbo commented that there is no room in a standard form contract for the negotiation of specific terms, that if a consumer is not happy with the terms of a contract, the alternative is not to sign it:

So the ability to renegotiate a term is effectively not there. The salesperson is going to say, "What are you talking about? This is the contract. Take it or leave it." If you take it away and ring the company to try to renegotiate it you will get the reaction given by the earlier witness: "We are too busy. If you do not like it you can leave it." So on a self-help basis there is no hope that a consumer can renegotiate or seek to change the terms of the standard form contract. In terms of the legislation, even where you feel that the term is reprehensible you need to show that there is something that the organisation did beyond putting the contract before you and saying take it or leave it to argue that it is unconscionable. So the standard is very high.<sup>49</sup>

- 2.46 In relation to the focus of consumers on competition between suppliers and the impact of standard form contracts on this, the Committee was advised by Dr David Cousins, Director, Consumer Services Victoria, that:

... the reality from the consumer side is that consumers generally concentrate on price and one or two other key things. The rest is not in the frame ...

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<sup>47</sup> Mr Stowe, Evidence, 20 October 2006, p6

<sup>48</sup> Submission 26, Tourism and Transport Forum Australia, p2

<sup>49</sup> Associate Professor Zumbo, Evidence, 20 October 2006, p53

You could say that standard contracts, in some situations, remove the element of competition on contract terms if everyone is bound to the same contract term. In reality, that may not be an important part of competition in any way. When you get down to the esoterics of it, most people are not going to compete on those terms at all.<sup>50</sup>

- 2.47 In addition, the Committee was also informed that standard form contracts are entered into by parties with unequal bargaining powers, for example, individual consumers and large service providers. As noted by Mr Lynden Griggs, a Senior Lecturer with the University of Tasmania, '[s]tandard form contracts have no doubt brought significant economic benefits (in lower transaction costs), but ... have come at the expense of genuine bargaining between two parties.<sup>51</sup>

### **Lack of alternatives to the standard form contract**

- 2.48 A number of witnesses told the Committee that, in many industries there is little alternative to a standard form contract containing unfair terms that consumers often do not have the option to 'walk away' if they do not agree with the contract terms. Ms Gisela Ramensky, Member, Business Law Committee, NSW Law Society, told the Committee that in reality a consumer has a limited ability to choose a product, such as financial services, without signing a standard form contract:

It is fairly disingenuous to say "If you don't like our terms, go to a different bank" because all the banks have very similar terms, and I have looked at many, many loan agreements from a wide variety of banks. Similarly with credit card agreements and with merchant trading agreements. There is an agreement in all merchant trading contracts to say that the merchant always bears the loss if there is any fraud, and there is absolutely no way that you can negotiate that because they all have the same terms.<sup>52</sup>

- 2.49 Ms Beal told the Committee that consumers have a limited choice amongst products, even if not all the contract terms are the same:

We are not opposed to standard form contracts. It is the tendency in some industries to include unfair provisions within them that is the problem. You might find a couple of really bad clauses by a couple of providers but they will not always be the same providers and they will not always be on the same issue and they will not always be for the same sort of service. So whether it is Internet, mobile or landline they are consistently bad. They are also consistently bad in terms of which provider they are.<sup>53</sup>

<sup>50</sup> Dr David Cousins, Director, Consumer Affairs Victoria, Evidence, 20 October 2006, p72

<sup>51</sup> Submission 1, Mr Lynden Griggs, p2

<sup>52</sup> Ms Gisela Ramensky, Member, Business Law Committee, NSW Law Society, Evidence, 20 October 2006, p45

<sup>53</sup> Ms Beal, Evidence, 20 October 2006, p33

**Additional documentation**

**2.50** A further aspect of standard form contracts that contributes to the prevalence of unfair terms, and consumers' lack of awareness and understanding of them, is the practice of referencing additional documentation in the contract.

**2.51** In this regard, Ms Beal referred to 'external documentation' that forms part of a contract but which is not summarised within the contract or provided with it:

One of the main problems that we have identified in previous analysis is the external documentation in relation to the service that is unclear whether it forms part of the contract. You might have schedules for this premium-type service in the area of internet acceptable use policies that, as a matter of contract law, form part of the contract. They are described in the contract and referred to. But they contain quite different and, often, quite burdensome terms. However, they are not summarised in the standard form of agreement summary and they are not provided with the contract. It is like this extra obligation.<sup>54</sup>

**2.52** Ms Jenny Lovric of CHOICE noted that, with online contracts, consumers are often directed to other parts of the website for additional terms and conditions not included in the main contract:

The other issue about online contracts is that sometimes the terms and conditions may be buried. So, a term within the contract will say that the consumer has to go to some other part of the web site to find the terms and conditions. Therefore, the consumer is seeing what he is contracted to on the face of it.<sup>55</sup>

**Excessive length of contract**

**2.53** Several Inquiry participants noted that standard form contracts are usually very lengthy and that this made the contracts difficult for consumers to comprehend in their entirety.

**2.54** For example, Ms Lovric of CHOICE informed the Committee that standard form contracts were often too long to expect consumers to read, particularly online contracts where a check box is provided next to a contract of substantial length:

It is a tick the box to a 100-page contract that is the issue and the idea that the consumer has been provided with all the information, so they are bound by the contract. The issue is that the contracts are sometimes terribly long with fine print and it is unrealistic to think that the consumer will read every term.<sup>56</sup>

**2.55** It was brought to the Committee's attention, however, that there are sometimes good reasons why standard form contracts are long. For example, Mr Gilbert of the ABA explained that it is often through adherence to legislative requirements that lengthy explanations are added to consumer contracts:

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<sup>54</sup> Ms Beal, Evidence, 20 October 2006, p32

<sup>55</sup> Ms Jenny Lovric, Senior Policy and Research Officer, CHOICE, Evidence, 20 October 2006, p21

<sup>56</sup> Ms Lovric, Evidence, 20 October 2006, p20

You need to understand that, for example, under the Commonwealth's financial services reform legislation disclosure statements blew out to something like 70 pages to cover all the requirements that needed to be dealt with under the legislation. Good sense has prevailed, and the Commonwealth is now going back over that and starting to work back through it, to try to get meaningful information into the hands of consumers without further burdening them. That is a very welcome process, and we commend the Government for it. So there are a lot of regulatory obligations that have to be reflected in contracts.<sup>57</sup>

- 2.56** Ms Ramensky of the Business Law Committee of the Law Society of NSW noted that contracts were often not deliberately written to be lengthy and obscure, but may be the result of making amendments to an original 'antiquated' contract:

Lots of contracts are prepared by relying on contracts that have gone beforehand, rather than drafted afresh. Very few people now say, "I will do a loan agreement and start with a blank piece of paper." Normally they work from a document that has been prepared previously. It actually requires quite a bit of work to put some of this convoluted language into simple language, to extract the essence of what is really meant. I would not like to say that people do it deliberately. I would probably say that they are drawing on antiquated precedents and have not turned their mind to the real issues.<sup>58</sup>

- 2.57** The Committee is aware of work that has been done within the telecommunications sector to create a model contract that addresses the length of standard form contracts (as well as other problems including overly complex language and unfair terms), as discussed at paragraph 3.52.

### **Online format**

- 2.58** Several Inquiry participants noted that the increased use of online shopping and contracting has significantly increased the prevalence of unfair terms and the number of consumers agreeing to contracts without a full appreciation of their terms.

- 2.59** For example, Dr Luke Nottage, Senior Lecturer with the Faculty of Law at the University of Sydney emphasised the role of information technology in the increased use of unfair terms:

Economic liberalisation and increased concentration of economic power, despite certain rearguard actions by some competition law regulators, has combined with globalisation and the Information Technology revolution to generate growing volumes of standard-form contracts containing a myriad of unfair contract terms. Virtually anyone can set up shop online and copy over one-sided standard form contracts found online in jurisdictions with little tradition of consumer protection law, built up painstakingly in countries like Australia since the 1970s. Consumers hardly ever read them before "clicking" their "consent", and can't negotiate the terms anyway even if they do read and understand them. Enforcement agencies increasingly

<sup>57</sup> Mr Gilbert, Evidence, 20 October 2006, p40

<sup>58</sup> Ms Ramensky, Evidence, 20 October 2006, p48

lack resources, as well as jurisdiction, to patrol even the worst excesses under current law.<sup>59</sup>

- 2.60** Ms Lovric of CHOICE noted that online contracts are often not read by consumers, and the questions of negotiating terms does not arise because the contracts can be scrolled through and are conveniently accompanied by an 'I agree' check box:

With these kinds of contracts being online—where the consumer scrolls down many pages and then clicks an "I agree" button at the bottom—it is even less likely that a consumer will take the time to read them. They may be standard form contracts in an electronic form, and that renders it even less likely that they will read them or that they will have the opportunity to negotiate or amend the terms that may be offensive. It is a take-it-or-leave-it situation. Perhaps—and this is a theory—if consumers have the contract in front of them they can go through the terms and block out those that are unacceptable. These online contracts are not amenable to that kind of negotiation between the supplier and the consumer.<sup>60</sup>

- 2.61** Mr Kell of CHOICE expressed the view that the introduction of online contracts saw some service providers reverting to former practices where consumers bore an unreasonable amount of the risk between the contracting parties:

In my experience, it is not unreasonable to observe that some of the participants in e-commerce took the opportunity of the new forms of contracts and service delivery and payments in the electronic world to revisit what had often been long-established practices in terms of the allocation of risk between the supplier and consumer. Over a long period practices emerged about the supplier bearing a reasonable amount of risk and the consumer quite rightly bearing a reasonable amount of risk as well. We suddenly saw instances in electronic commerce where all the risk was suddenly passed on to the consumer. For example, suddenly the risk for security of identification numbers was passed on to the consumer in some contracts we saw. That is not how time-honoured custom had developed about the security of other forms of payments, such as cheques and so on.<sup>61</sup>

### **Lack of plain English**

- 2.62** The Committee also heard that many contracts were not expressed in plain English and that this represented a barrier to consumers understanding their rights and obligations. For example, Ms Baker, the NSW Commissioner for Fair Trading, noted that the language of standard form contracts was difficult for people for whom English was a second language, as well as those who spoke English well:

Yes, people with English as a second language will have difficulty because the contracts are in English. People who speak English will also have difficulty because

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<sup>59</sup> Submission 24, Dr Luke Nottage. Dr Nottage is also the Co-Director of the Australian Network for Japanese Law and the Program Director of the Sydney Centre for International and Global Law.

<sup>60</sup> Ms Lovric, Evidence, 20 October 2006, p21

<sup>61</sup> Mr Kell, Evidence, 20 October 2006, p21

the language is impenetrable, even if you do speak English, so I think it is a subset of the whole thing. Unfairness could also relate to the size of the font.<sup>62</sup>

- 2.63** Ms Ramensky of the NSW Law Society, stressed the need for plain English to be used in contracts, noting that plain English could be more important than the length of the contract:

In my view, there is nothing that needs to be said that cannot be said in plain English. And if you cannot say it in plain English, then you probably do not understand it yourself. I am not suggesting that loan agreements or any other sorts of agreements would mean the corporations would lose any protections they might otherwise get with convoluted contracts; I am just saying that they should be in plain English, and they can be. As for the structure of the contract, that is a matter of style ... If it is 20 pages long and in plain English, that does not matter.<sup>63</sup>

- 2.64** Associate Professor Zumbo noted that the use of plain English was emphasised in the Unfair Terms in Consumer Contracts Regulation (1999) in the UK and Part 2B of the *Fair Trading Act 1999* (Vic) (both of which are examined in Chapter 3). He argued that the use of plain English is essential to the promotion of fairness in consumer contracts:

So the theme of plain English is emphasised in the UK legislation. It is also emphasised in the Victorian legislation. Promoting fairness is about dealing with terms but it is also about providing clarity and understanding of those terms and having those terms expressed in clear, intelligible language that people can understand and read.<sup>64</sup>

## Other issues

### Unfair terms are not dealt with by market forces

- 2.65** The Committee was advised that unfair contract terms were unlikely to influence a consumer's decision to purchase goods or services, as it was normally factors such a price or the actual product that determined whether a consumer would purchase.
- 2.66** For example, Mr Kell, the Chief Executive Officer of CHOICE, argued that fair contract terms are not an area in which service providers compete for market share:

... one of the important points to note is that often unfair contract terms will relate to elements of the service that the consumer does not factor into the initial purchasing decision. Therefore, competition does not come into play. When shopping around for most products, most consumers do not factor in what will happen if something goes terribly wrong, because people do not envisage that that will happen. If there are unfair contract terms that relate to how complaints are dealt with or what happens if the contract has to be terminated, they are rarely one of the forces driving competition in the marketplace.<sup>65</sup>

<sup>62</sup> Ms Baker, Evidence, 20 October 2006, p7

<sup>63</sup> Ms Ramensky, Evidence, 20 October 2006, p47

<sup>64</sup> Associate Professor Zumbo, Evidence, 20 October 2006, p52

<sup>65</sup> Mr Kell, Evidence, 20 October 2006, p21

- 2.67** Ms Lovric, also from CHOICE, emphasised that market forces have little impact if contracts used by competitors are essentially the same:

An industry will use the same kind of contracts with the same bad terms and conditions. The idea that the market will kick in and the consumer will go to a better product with better terms and conditions is fictitious when the contracts are essentially the same.<sup>66</sup>

- 2.68** Associate Professor Zumbo also argued that market forces were not sufficient to guarantee consumer protection, as fair contractual terms are not something that providers compete on:

Market forces do not work in relation to all terms; they may work with some terms. Firstly, you do not have a market in terms. You have a market for the supply of goods or services, for the supply of a loan or for a mobile phone. So the market is for the provision of that mobile phone. Sure, the term being the price and repayment of any loan or credit aspect of that mobile phone contract is a term and you can shop around.<sup>67</sup>

- 2.69** Ms Beal explained to the Committee that the CLC's research of the telecommunications industry showed that it was pricing that was the main competitive factor and that telecommunications providers were uniformly bad when it came to the provision of equitable contracts:

Competition in pricing in the telecommunications industry appears to be what affects consumers. At times we see benefits to consumers with competitive pricing for services. But the competition does not appear to translate into giving you a fairer deal. ... My experience in looking at the contracts has been that they are uniformly unfair across the board. There is not one provider that is better than the others. That has been the case since we commenced our analysis five years ago. We have consistently found that there has not been one provider that is worse, or better. They are not all the same but they all have what I describe as similar levels of unfairness, similar levels of breaching legislation.<sup>68</sup>

### **Terms go far beyond what is necessary to protect against risk**

- 2.70** Several Inquiry participants noted that unfair terms often go well beyond what is necessary to protect the business or supplier against risk. For example, Ms Beal, Director of the Communications Law Centre in Victoria, advised the Committee that, with reference to standard form contracts used in the telecommunications industry, many clauses went far beyond what was required to ensure the supplier was protected from risk:

My experience has been that there is deliberate drafting to maximise benefit to the industry. Clearly, they go way beyond, particularly before any action was taken, and continue to use every opportunity to go beyond what they need to conduct the business. The breadth in which the clauses are drafted, for instance, in relation to escaping liability for negligence of a work person coming into a person's house, are so

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<sup>66</sup> Ms Lovric, Evidence, 20 October 2006, p21

<sup>67</sup> Associate Professor Zumbo, Evidence, 20 October 2006, p52

<sup>68</sup> Ms Beal, Evidence, 20 October 2006, p33

broad that my legal view is they would often be unenforceable anyway because they are so ridiculously broad. There appears to continue to be a trend to draft the contracts to maximise as if it were an economic deal from the point of view of industry as opposed to being a standard contract for a simple deal of which they enter into millions.<sup>69</sup>

- 2.71** Associate Professor Zumbo also stated that standard form contracts often included terms which went further than what is necessary to protect a businesses interest, shifting the obligations to the consumer:

The problem with standard form contracts is...when business abuses the standard form contract to include terms in the contract that are unfair, terms that go beyond what is necessary to protect the interests of the business and seek to shift the contractual risk and obligations onto the consumer in a disproportionate way.<sup>70</sup>

- 2.72** Mr Kell also made this point from his experience at CHOICE:

In my experience, it is not unreasonable to observe that some of the participants in e-commerce took the opportunity of the new forms of contracts and service delivery and payments in the electronic world to revisit what had often been long-established practices in terms of the allocation of risk between the supplier and consumer. Over a long period practices emerged about the supplier bearing a reasonable amount of risk and the consumer quite rightly bearing a reasonable amount of risk as well. We suddenly saw instances in electronic commerce where all the risk was suddenly passed on to the consumer. For example, suddenly the risk for security of identification numbers was passed on to the consumer in some contracts we saw. That is not how time-honoured custom had developed about the security of other forms of payments, such as cheques and so on.<sup>71</sup>

## Extent of the problem

- 2.73** The Legal Aid Commission described the extent of the problem of unfair terms in consumer contracts as ‘endemic’:

Unfair terms in consumer contracts are an endemic problem for consumers in society today. Examples can be found across the board; in the provision of financial services to insurance car hire agreements to mobile phone contracts to computer sales and on and on. The experience of the Commission is that unfair terms in consumer contracts are so widespread and have such an impact that legislative reform is demanded.<sup>72</sup>

- 2.74** Ms Baker, the NSW Commissioner for Fair Trading, informed the Committee that the NSW OFT does not specifically measure complaints concerning unfair terms:

<sup>69</sup> Ms Beal, Evidence, 20 October 2006, p29. ‘The Communications Law Centre is an independent not for profit public interest organisation specialising in media, communications, online law and policy in telecommunications’: Submission 11, p1

<sup>70</sup> Associate Professor Zumbo, Evidence, 20 October 2006, p54

<sup>71</sup> Mr Kell, Evidence, 20 October 2006, p21

<sup>72</sup> Submission 22, pp1-2

The Office of Fair Trading cannot provide specific statistics on complaints about unfair contract terms. We have a system called the Customer Assistance System whereby complaints are lodged, but it has no code for unfair contracts. One of the reasons for that is that there is no specific provision in Fair Trading legislation dealing with it. Contracts containing potentially unfair terms of course come to our attention in dealing with complaints, whose immediate cause may be misleading. In other words, consumers do not ring us up and say, "I want to complain about an unfair contract term." That is the point at which we code the complaint. It may be at some later time during the transaction with the customer that we identify that it is a contract. We cannot actually provide specific statistics on that.<sup>73</sup>

**2.75** Ms Baker advised, however, that anecdotal evidence suggests that the incidence of unfair contract terms is increasing and that this is due to the growing use of standard form contracts:

... the incidence has probably increased since 1980. The use of contracts for the normal, run-of-the-mill person has significantly increased because of changes in the market. For example, since 1980 some of the worst unfair contract clauses have appeared in contracts for goods and services that did not exist before then; for example, mobile phones, pay TV and health and fitness centres. There are many more people, including young people, signing up for complicated contracts day after day. In some cases they sign up over the Internet, where they click an "I agree" button to obtain services. There is a general view that the incidence is increasing because a number of contracts did not exist before.<sup>74</sup>

**2.76** Dr Elizabeth Lanyon, the Chair of the Unfair Terms Taskforce at Consumer Affairs Victoria (CAV), informed the Committee that only 300 of the 18,000 complaints that CAV receives per annum could be identified as relating to unfair terms in consumer contracts, but that this was a large *underestimate* of the number of consumers affected by unfair terms:

Also, work we have just done on consumer detriment says, in any event, probably only about 6 per cent of consumers who are suffering some problem will go to Telco, the Ombudsman or Consumer Affairs. The next ... 46 per cent, will go back to the supplier and 26 per cent will be inactive and just give up. Even the people who come to Consumer Affairs are a minute subset of the people who are suffering some sort of problem.<sup>75</sup>

**2.77** Dr Lanyon also informed the Committee that there had been an increase in complaints since the introduction of specific purpose legislation in Victoria, from consumers 'self-identifying':

... we think we have a threefold increase in people self-identifying, but it is a small number. We feel like there is a growing recognition among consumers that there is something that they can call an unfair term and that they understand it.<sup>76</sup>

**2.78** Mr Kell, Chief Executive Officer of CHOICE, explained that it was difficult for CHOICE to quantify the number of complaints they dealt with in relation to unfair terms in consumer

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<sup>73</sup> Ms Baker, Evidence, 20 October 2006, p3

<sup>74</sup> Ms Baker, Evidence, 20 October 2006, p5

<sup>75</sup> Dr Elizabeth Lanyon, Chair, Unfair Terms Taskforce, Consumer Affairs Victoria, Evidence, 20 October 2006, p65

<sup>76</sup> Dr Lanyon, Evidence, 20 October 2006, p65

contracts, noting that CHOICE received approximately 115,000 complaints annually, but that complaints were increasing:

... it is important to note that this figure includes a wide range of inquiries. The majority do not directly relate to unfair contracts. We are not in the position to give an exact figure of how many relate to unfair contracts at short notice. However, it is apparent to CHOICE that the number of complaints about products/services that have featured in studies of unfair contracts, such as mobile telephone services, gym memberships and credit cards has been increasing.<sup>77</sup>

**2.79** In terms of the *types* of consumer items that attracted the use of unfair terms it appears that services are more problematic than goods. In this regard, Mr Kell advised that most complaints received by CHOICE related to the provision of services, rather than goods:

A share of wallet, if you like, increasingly goes towards services. We are seeing more and more complaints emerging about services, and also about the way that contemporary markets are developing. Increasingly, products have a service element. With a telecommunications company you may get a mobile phone but it is the telecommunications service that you are purchasing.<sup>78</sup>

**2.80** Mr Kell also gave an indication why a particular industry might be problematic:

In some cases competitive forces in a market where information is poor will actually drive you down that road. ... The other point I would make about that is that you do get the impression at times that some of the legal advice that is provided to suppliers has elements of, "Well, everyone else is doing this and you can probably get away with it, so why not slip it in?"<sup>79</sup>

**2.81** The UK OFT advised that, between 2000-2005, a considerable number of terms that fall into the categories listed in the Committee's terms of reference had been amended through UK OFT enforcement:

As an indicator of numbers of potentially unfair terms found in the categories that you list, we have calculated that between the years 2000 and 2005 we have secured amendment to the following:

*i) terms that allow the supplier to unilaterally vary the price or characteristic of the goods or services without notice to the consumer*

Under the Regulations terms of this nature would be caught by Schedule 2 paragraph 1(k) as to characteristics and 1(l) as to price. Between the years 2000 and 2005, **164** terms were amended under 1(k) challenge and **151** under 1(l) challenges.

*ii) terms which penalise the consumer but not the supplier when there is a breach of the agreement*

Under the Regulations terms of this nature would be variously caught by Schedule 2 paragraphs 1(b), (c), (d), (e) and (o). Between the years 2000 and 2005, **1142** terms

<sup>77</sup> Answers to question on notice taken during evidence 20 October 2006, Mr Peter Kell, Chief Executive Officer, CHOICE, p2

<sup>78</sup> Mr Kell, Evidence, 20 October 2006, p18

<sup>79</sup> Mr Kell, Evidence, 20 October 2006, p26

were amended under 1(b), **12** under 1(c), **107** under 1(d) **380** under 1(e) and **10** under 1(o) challenges.

*(iii) terms which allow a supplier to suspend services supplied under the contract while continuing to charge the consumer*

Under the Regulations terms of this nature would be caught by Schedule 2 paragraph 1(o) Between the years 2000 and 2005 **10** terms were amended under 1(o) challenges.

*(iv) terms which permit the supplier but not the consumer to terminate the contract*

Under the Regulations terms of this nature would be caught by Schedule 2 paragraph 1(f) Between the years 2000 and 2005, **149** terms were amended under 1(f) challenges.<sup>80</sup>

## Committee comment

- 2.82** The above discussion illustrates the kind of unfair terms that create a significant imbalance between the rights and obligations of the consumer and the supplier, to the detriment of the consumer. Submissions received by the Committee revealed a wide-range of unfair contract terms across a number of industries providing goods and services to consumers.
- 2.83** The evidence presented by Inquiry participants shows that the growing use of standard form contracts in the past few decades has increased the prevalence of unfair terms in consumer contracts. While standard form contracts provide a convenient and economic way for a consumer to engage a service provider, they also leave the consumer open to unfair terms, particularly if contracts are very lengthy, are not written in plain English, and refer to additional material that is not provided with the original contract.
- 2.84** In trying to determine the extent of the problem, the Committee sought data from regulatory bodies such as the NSW OFT and Consumer Affairs Victoria. The Committee was informed, however, that accurate data collection in relation to unfair contractual terms as a particular consumer issue was not available.
- 2.85** Nonetheless, the anecdotal evidence presented by witnesses and submission makers working in the area of consumer complaints, the law and various industries clearly indicates that this is a very real and significant ongoing problem for a large number of consumers in NSW as it is elsewhere. Inquiry participants identified the following services as the most problematic in relation to unfair terms:
- mobile phones
  - cable television
  - internet service provision
  - gym membership

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<sup>80</sup> Submission 5, UK Office of Fair Trading, p2 (Emphasis added in bold type). The Committee notes that this information represents only a portion of the total number of terms that have been amended through OFT enforcement.

- banking services
- hire cars.

**2.86** The Committee is concerned that the prevalence of these terms has, and will continue to, cause a significant injustice to consumers. It is also clear that the contract terms discussed above may be particularly detrimental to vulnerable consumers. The Committee particularly notes the comments of the Energy and Water Ombudsman NSW in this regard (see paragraph 2.26).

**2.87** In the following chapter the Committee examines the legal and regulatory framework that relates to unfair terms in consumer contracts and examines the current remedies available to consumers in NSW.



## Chapter 3 Current legal and regulatory framework

This chapter sets out the current legal and regulatory framework in NSW relevant to the issue of unfair terms in consumer contracts. It examines the State and Commonwealth legislation that consumers may rely on to seek redress in relation to unfair contractual terms and also discusses the doctrine of unconscionable conduct. Various industry codes and industry specific legislation that have some impact on consumer contracts are also examined.

### Overview

- 3.1 There is no specific purpose legislation in NSW that addresses the issue of unfair terms in consumer contracts. Instead, the common law, equity and various statutes operate in a piecemeal way to provide some degree of protection and redress for consumers in relation to unfair contractual terms.
- 3.2 The equitable doctrine of unconscionable conduct provides a limited avenue of redress for consumers who can show that the contract they have entered into is 'unconscionable'. This doctrine has been given statutory force at the Federal level through the *Trade Practices Act 1974* (Cth) which prohibits unconscionable conduct. At the State level, the *Fair Trading Act 1987* (NSW) contains a provision similar to the Federal legislation, likewise prohibiting conduct that is unconscionable. In addition, the *Contracts Review Act 1980* (NSW) provides redress for 'unjust contracts'.
- 3.3 As well as the option of bringing a court case pursuant to the doctrine of unconscionable conduct or one of the statutory provisions outlined above, a consumer may also make a complaint to the NSW Office of Fair Trading (NSW OFT). The NSW OFT receives complaints concerning a wide range of consumer matters and provides assistance or referral services to complainants. Affiliated with the NSW OFT is the NSW Consumer Trader and Tenancy Tribunal, which is empowered to determine complaints regarding consumer, tenancy and home building issues.
- 3.4 As well as the legislative provisions, various industries have adopted voluntary codes of conduct to guide their practices. These codes provide some guidance in relation to the fairness of contractual terms. Industry specific legislation also has some impact on consumer contracts, though none of the codes or industry legislation specifically addresses the issue of unfair terms in consumer contracts.

### Doctrine of unconscionable conduct

- 3.5 The terms of reference require the Committee to examine the remedies available under common law in relation to unfair terms in consumer contracts.<sup>81</sup> Submissions that addressed this aspect of the terms of reference, however, primarily referred to the **equitable** doctrine of unconscionable conduct. For example, the NSW OFT noted in its submission:

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<sup>81</sup> The terms of reference are set out on page iv.

Under the common law there is currently no remedy for unfair contract terms per se. Yet in equity, Australian law has always recognised that not all contracts are the result of a process of true negotiation.<sup>82</sup>

- 3.6** The Committee was informed that equity may provide some protection to consumers who are the victims of ‘unconscionable conduct’ by the party who stands to benefit from the transaction and where they have suffered from a ‘special disadvantage’.<sup>83</sup> The Legal Aid Commission described the doctrine as follows:

Recognising that the rigidity of the common law could at times produce unfair results, equity developed a set of principles for particular classes of people in discrete areas to avoid unconscionable results. Areas in which principles of equity has developed have included estoppel, undue influence, equitable fraud, fiduciary duties, mistake and confidentiality.

More recently, it has been recognized by Mason CJ in the landmark High Court decision of *Commonwealth Bank of Australia Ltd v Amadio* that in one sense, these doctrines constitute ‘species of unconscionable conduct’ by the party who stands to receive a benefit under a transaction which, in the eye of equity, cannot be enforced because to do so would be inconsistent with equity and good conscience.<sup>84</sup>

- 3.7** The Commission stressed, however, that something more than unconscionable conduct must be shown, as the courts also require there to be ‘special disadvantage’:

However, it must be remembered that equity has never had the power to intervene simply on grounds of unfairness or unconscionability. As Toohey J stated in *Louth v Diprose*: *Although the concept of unconscionability has been expressed in fairly wide terms, the courts are exercising an equitable jurisdiction according to recognised principles. They are not armed with a general power to set aside bargains simply because, in the eyes of judges, they appear to be unfair, harsh or unconscionable.* Even accepting Mason CJ’s sweeping statement in *Amadio* on the underlying principle of unconscionability, the Court only recognised its jurisdiction for intervening on the facts in *Amadio* where it was also able to be established that Mr and Mrs Amadio were suffering from a ‘special disadvantage’ as against the party seeking to enforce the agreement.

Consequently, equity would have no remedy to offer per se, without some further inequitable circumstance or conduct (that could enliven its jurisdiction), about terms of agreements that permitted a supplier to unilaterally vary the price or other characteristic of a good or service; that penalised a consumer but not the supplier when there is a breach of an agreement; that permitted a supplier to suspend services supplied under the contract whilst continuing to charge the consumer; or permitted the supplier but not the consumer to terminate the contract.<sup>85</sup>

- 3.8** The Committee was also advised by the NSW OFT that equitable relief is discretionary and is based on the concept of restitution:

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<sup>82</sup> Submission 16, Office of Fair Trading, p7

<sup>83</sup> Submission 22, Legal Aid Commission of NSW, pp10-11

<sup>84</sup> Submission 22, p10 (references cited not included)

<sup>85</sup> Submission 22, pp10-11 (references cited not included)

Equitable relief is discretionary in nature. Once the existence of a vitiating factor affecting the formation of the contract has been proven, the court can then decide if equitable relief is appropriate. Relief is restitutionary in nature – that is, the remedy aims to return the parties to their pre-contractual positions, rather than fulfill the expectancy of the contract. The court may order that the contract be voidable at the election of the weaker party, and if the contract becomes void, the court will direct that any consideration paid under the contract be returned in full.<sup>86</sup>

**3.9** Other equitable remedies include ‘specific performance’ or ‘rectification’ in the case of mutual mistake:

Evidence of a vitiating factor affecting the formation of the contract can be used as a defence to a claim for specific performance. Thus where the stronger party is trying to enforce the contract and compel the weaker party to carry out their obligations under the contract, the weaker party can resist by arguing unfairness in the contracting process. The remedy of rectification is limited to cases of mutual mistake, as it is not the role of the court to draft fair terms for the parties to agree to. Rectification refers to the court ordering that a part of the contract be rewritten to accurately reflect the common intention/understanding of the parties.<sup>87</sup>

**3.10** The Legal Aid Commission emphasised the limited application of equity in the area of unfair terms in consumer contracts and noted that, in terms of a remedy, equity is limited to setting aside the agreement or confirming that a contract has been validly rescinded.<sup>88</sup> The limitations of this doctrine in providing a solution to consumers who feel they are bound by unfair terms are discussed in Chapter 4.

## Statutory remedies

**3.11** The statutory remedies available to a NSW consumer include taking an action in relation to ‘unconscionable conduct’ pursuant to section 51AB of the *Trade Practices Act 1974* (Cth) or section 43 of the *Fair Trading Act 1987* (NSW), both of which use similar wording. The alternative statutory remedy is to pursue an action under the *Contracts Review Act 1980* (NSW), which provides redress for ‘unjust contracts’.

### ***Contracts Review Act 1980* (NSW)**

**3.12** When NSW enacted the *Contracts Review Act 1980* it was the first jurisdiction in Australia to enact legislation that attempted to deal with harsh or unconscionable contracts.<sup>89</sup>

**3.13** The Legal Aid Commission’s submission set out the background to the development of the *Contracts Review Act 1980* and described its purpose as follows:

<sup>86</sup> Submission 16, pp7-8

<sup>87</sup> Submission 16, pp7-8

<sup>88</sup> Submission 22, pp10-11

<sup>89</sup> Ms Lyn Baker, Commissioner, Office of Fair Trading, Evidence, 20 October 2006, p2

The legislation gave Courts in NSW the power to reopen unjust contracts that were ‘unconscionable, harsh or oppressive’ ‘in the circumstances relating to the contract at the time it was made’. In deciding whether the contract or a provision of it is ultimately unjust, the Court is required to consider the public interest and all the circumstances of the case including ‘such consequences or results as those arising in the event of compliance’.<sup>90</sup>

- 3.14** The Act defines the term ‘unjust’ to include conduct that is unconscionable, harsh or oppressive, and provides a substantial list of matters to be considered by court in determining whether a contract or a provision of a contract is unjust in the circumstances.<sup>91</sup> As Mr Frank Zumbo, Associate Professor with the University of New South Wales’s School of Business Law and Taxation, notes:

From the outset, it is apparent that the *Contracts Review Act* has been drafted to allow the Courts to consider a wide range of matters in deciding whether or not a contract or any of its provisions are unjust.<sup>92</sup>

- 3.15** Where a court finds a contract or a provision within it to be unjust, it has a number of options open to it, including refusing to enforce any or all of the provisions of the contract, making an order declaring the contract void in whole or in part, or making an order varying the contract.<sup>93</sup>

### ***Trade Practices Act 1974 (Cth)***

- 3.16** The *Trade Practices Act 1974* ‘contains a range of provisions aimed at protecting consumers and corporations that qualify as consumers’.<sup>94</sup> Most of these provisions, however, relate to the protection of the consumer in a broader sense than the actual terms of a consumer contract. For example, parts of the Act relate to the responsibility of industry not to engage in misleading or deceptive conduct, advertise falsely or advertise goods they cannot produce.<sup>95</sup>
- 3.17** The Act does not specifically address the issue of unfair terms in consumer contracts. The most relevant provision in relation to consumer contracts is section 51AB, which ‘prohibits unconscionable conduct by corporations when they supply goods or services that are ordinarily acquired by consumers for their personal, domestic or household use’.<sup>96</sup>

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<sup>90</sup> Submission 22, p12. *Contracts Review Act 1980* (NSW), s4 and s 9.

<sup>91</sup> *Contracts Review Act 1980* (NSW), section 9(1) (a) and (b)

<sup>92</sup> Submission 20, Associate Professor Frank Zumbo, pp20-21

<sup>93</sup> *Contracts Review Act 1980* (NSW), section 7(1)

<sup>94</sup> *Summary of the Trade Practices Act 1974 and additional responsibilities of the Australian Competition and Consumer Commission under other legislation*, May 2003: [www.accc.gov.au](http://www.accc.gov.au) (accessed 26 September 2006)

<sup>95</sup> *Summary of the Trade Practices Act 1974 and additional responsibilities of the Australian Competition and Consumer Commission under other legislation*, May 2003, pp29-30: [www.accc.gov.au](http://www.accc.gov.au) (accessed 26 September 2006)

<sup>96</sup> *Summary of the Trade Practices Act 1974 and additional responsibilities of the Australian Competition and Consumer Commission under other legislation*, May 2003, p25: [www.accc.gov.au](http://www.accc.gov.au) (accessed 26 September 2006)

- 3.18** The term ‘unconscionable conduct’ is not defined in the Act, although a list of factors is provided to indicate the kind of matters that may be considered when determining if there has been a breach of the section.<sup>97</sup> While these factors are predominately process focussed, they do include the consideration of ‘the imposition of conditions not reasonably necessary to protect the supplier’s legitimate interest.’<sup>98</sup>

### ***Fair Trading Act 1987 (NSW)***

- 3.19** The *Fair Trading Act* was introduced in 1987 and it governs transactions involving goods and services purchased for personal, domestic or household use, balancing fairness and equity for all participants in the marketplace. The Act regulates how businesses offer their goods and services, including a general prohibition on deceptive, misleading or unconscionable business conduct, and specific prohibitions on a range of unfair practices; prohibition of deceptive or misleading conduct; product safety, safety standards, powers to ban or restrict the sale of dangerous products, and safety-related product recalls; substantiation of claims; consumer product information standards; and direct commerce.
- 3.20** Section 43 of the *Fair Trading Act 1987 (NSW)* is similar to section 51AB of the *Trade Practices Act 1974 (Cth)*. It prohibits unconscionable conduct by suppliers in connection with the supply of goods or services and sets out a range of factors that can be considered by the courts in determining unfairness.<sup>99</sup>
- 3.21** Mr Rod Stowe, NSW Deputy Commissioner for Fair Trading, explained that under the *Fair Trading Act 1987 (NSW)* (and the *Trade Practices Act 1974 (Cth)*) consumers must seek relief in the courts:

The NSW *Fair Trading Act* mirrors the provisions in the *Trade Practices Act 1974*. Section 43 is relevant in this in terms of unconscionable conduct. What those two pieces of legislation do is allow a regulator to seek for a court to have contracts reopened where they are perceived to be unjust, on the basis of the circumstances that arise in how the contract was formed. It really looks at the situation where the consumer enters into the contract, whether he or she was at some particular advantage that the trader should have been aware of in making that contract. So there is a provision under unconscionable conduct in the *Trade Practices Act 1974* and the *Fair Trading Act* under which regulators can pursue matters. There is not a specific monetary penalty in the *Fair Trading Act*; it is a matter of going to the courts to seek relief.<sup>100</sup>

- 3.22** The NSW OFT in its submission noted that the unconscionable conduct provisions do not attract criminal sanctions but, rather, that an application may be made to the Supreme Court

<sup>97</sup> *Fair Trading Act 1974 (Cth)*, s 51AB(2)

<sup>98</sup> *Summary of the Trade Practices Act 1974 and additional responsibilities of the Australian Competition and Consumer Commission under other legislation*, May 2003, p25: [www.accc.gov.au](http://www.accc.gov.au) (accessed 26 September 2006)

<sup>99</sup> Submission 16, p13

<sup>100</sup> Mr Rod Stowe, Deputy Commissioner, Policy and Strategy, Office of Fair Trading, Evidence, 20 October 2006, p8

‘for civil remedies, including injunctions to stop illegal conduct, monetary compensation, rescission or variation of a contract, refund or specific performance of a contract.’<sup>101</sup>

## Role of the NSW Office of Fair Trading

**3.23** The NSW OFT falls under the Department of Commerce and is responsible for administering 44 pieces of legislation in relation to safeguarding consumer rights and advising business and traders on fair and ethical practice.<sup>102</sup> The aim of the NSW OFT is to achieve fairness for all in the marketplace:

Besides direct services for individuals, the legislative framework the OFT administers sets the rules for fairness in the countless daily transactions between consumers and traders. Unfair practices are investigated and prevented and a licensing system helps ensure unqualified or inappropriate people do not work in a range of NSW industries.<sup>103</sup>

**3.24** The NSW OFT provides information to consumers and traders regarding their rights and responsibilities in the marketplace and accepts complaints relating to a wide range of consumer matters including general consumer goods and services.<sup>104</sup> The Commissioner for Fair Trading, Ms Baker, advised that the NSW OFT has ‘... an integrated call centre which was established only last year. It handles about 1.5 million customer contacts a year.’<sup>105</sup>

**3.25** The NSW OFT advised the Committee that the first step it takes in responding to a complaint, including those concerning unfair terms in consumer contracts, is to ‘... encourage the consumer to raise the issue directly with the service provider to see whether it can be resolved.’<sup>106</sup>

**3.26** Where appropriate the NSW OFT may refer a complaint to an industry specific ombudsman, as noted by Mr Stowe, NSW Deputy Commissioner for Fair Trading:

At that point we may also determine there is a specialist industry ombudsman who might be able to help, such as the telecommunications ombudsman or the banking and financial services ombudsman.<sup>107</sup>

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<sup>101</sup> Submission 16, p13

<sup>102</sup> Office of Fair Trading: [www.fairtrading.nsw.gov.au/corporate/aboutus.html](http://www.fairtrading.nsw.gov.au/corporate/aboutus.html) (accessed 8 November 2006). The legislation the OFT administers includes the *Fair Trading Act 1987*, the *Consumer Claims Act 1998*, the *Consumer Credit Act 1995*, the *Contracts Review Act 1980*, the *Fitness Services (Pre-paid Fees) Act 2000*, the *Home Building Act 1987* and the *Motor Dealers Act 1974*.

<sup>103</sup> Office of Fair Trading: [www.fairtrading.nsw.gov.au/corporate/aboutus.html](http://www.fairtrading.nsw.gov.au/corporate/aboutus.html) (accessed 8 November 2006)

<sup>104</sup> Other matters include: the purchase of new and second hand motor vehicles and motor vehicle repairs, residential building, consumer credit and problems with real estate or strata managing agents.

<sup>105</sup> Ms Baker, Evidence, 20 October 2006, p6

<sup>106</sup> Mr Stowe, Evidence, 20 October 2006, p5

<sup>107</sup> Mr Stowe, Evidence, 20 October 2006, p5

**3.27** If the consumer has not been able to resolve the dispute with the trader, the NSW OFT may intervene to try to resolve the complaint directly with the service provider and the consumer, by informing the parties of their rights and responsibilities and to assist them to reach agreement.<sup>108</sup>

**3.28** Mr Stowe also advised that the NSW OFT is ‘... not empowered to direct the trader to take a course of action in those negotiations’,<sup>109</sup> such as to withdraw an unfair term from the contract agreement or to reimburse a consumer for funds lost through an unfair contract term. As noted in the NSW OFT’s submission, it has no authority to take an action itself:

In the absence of specific legislation on unfair contract terms like that in place in the United Kingdom and Victoria, Fair Trading has no authority to take action seeking the removal of unfair contract terms.<sup>110</sup>

**3.29** If negotiations fail to produce an acceptable solution, the NSW OFT will advise the consumer that she or he can take the matter to the Consumer, Trader and Tenancy Tribunal (CTTT) to get relief or take action under the *Contracts Review Act*:

It is only out of that negotiation process that we get a successful resolution. If that is not possible, it is likely we will advise the consumer to take the matter to the Consumer, Trader and Tenancy Tribunal, which is able to hear consumer matters and make determinations to provide relief. The consumer may also have rights under the *Contracts Review Act*. However, one of the issues in utilising that option is that it involves litigation and cost to the consumer.<sup>111</sup>

**3.30** The CTTT is an independent statutory authority, providing an inexpensive means of resolving consumer disputes through conciliation and ultimately a hearing process and the making of enforceable orders. The CTTT has 8 Divisions relating to home building, strata and community schemes, motor vehicle sales and repairs, residential parks and retirement villages, and residential tenancy and consumer credit.

**3.31** The Committee notes that it received very little information regarding the capacity of the CTTT to deal with complaints consumers may have regarding unfair terms in contracts. The Committee was therefore unable to gain a clear picture of the advantages or disadvantages of this body in providing relief to consumers in this area. The Committee is aware, however, that the CTTT is not a tribunal of general jurisdiction and can only determine disputes over which it has specifically been given jurisdiction.<sup>112</sup> As no legislation in NSW specifically addresses the issue of unfair terms in consumer contracts the CTTT does not have jurisdiction in relation to this specific type of consumer complaint.

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<sup>108</sup> Mr Stowe, Evidence, 20 October 2006, p5; and Submission 16, p4

<sup>109</sup> Mr Stowe, Evidence, 20 October 2006, p5

<sup>110</sup> Submission 16, p4

<sup>111</sup> Mr Stowe, Evidence, 20 October 2006, p5

<sup>112</sup> Consumer Trader and Tenancy Tribunal, *Annual Report 2004-2005*, p6

## Industry codes and industry specific legislation

**3.32** The Committee was advised that various industries operate under specific codes and legislation that regulate their practices in relation to consumers and each other. The Committee received information in relation to the telecommunications industry, the banking and finance industry and the home building industry, as discussed in this section.<sup>113</sup> While generally these codes and industry legislation do not specifically address the issue of unfair terms in consumer contracts, it was nonetheless argued by some Inquiry participants that they provide adequate regulation in this area.

### Banking and consumer credit industry

**3.33** A number of industry codes and specific legislation regulate the banking and consumer credit industry, including the Consumer Credit Code<sup>114</sup> and the Code of Banking Practice.<sup>115</sup> In addition, the Banking and Financial Services Ombudsman provides a free and independent dispute resolution service to handle complaints about banks and their affiliates operating in Australia.<sup>116</sup>

**3.34** The submission from Abacus Australian Mutuals, the peak association for the majority of mutual building societies and credit unions in Australia, advised the Committee that the *Consumer Credit Code* is ‘the primary law regulating consumer credit contracts’.<sup>117</sup>

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<sup>113</sup> The Committee notes that the discussion of these three industries in this section reflects the submissions received, rather than indicating that unfair contract terms is a particular problem in these industry. The Committee has not drawn conclusions on which industries are more problematic than others.

<sup>114</sup> The *Consumer Credit Code* is based on template legislation first adopted in Queensland and later adopted in all States and Territories. While the Code is essentially ‘national’ legislation, its administration is the responsibility of each State and Territory. The Standing Committee of Officials of Consumer Affairs (which reports to the MCCA) established the Uniform Consumer Credit Code Management Committee in 1996 to monitor and co-ordinate activities relating to the *Code* in order to ensure consistency in its implementation and administration across jurisdictions. For further information see the Consumer Credit Code website at: [www.creditcode.gov.au/display.asp?file=/content/code\\_principles.htm](http://www.creditcode.gov.au/display.asp?file=/content/code_principles.htm) (accessed 10 November 2006)

<sup>115</sup> The *Code of Banking Practice* was developed by the Australian Bankers' Association in November 1993, was modified in 2003 and is currently under review as at August 2006. The Code can be viewed at: [www.bankers.asn.au/ArticleDocuments/20040526\\_FINAL\\_CODE\\_MODIFIED\\_WORD\\_DOCUMENT.doc](http://www.bankers.asn.au/ArticleDocuments/20040526_FINAL_CODE_MODIFIED_WORD_DOCUMENT.doc) (accessed 10 November 2006).

<sup>116</sup> Mr Ian Gilbert, Director, Australian Bankers' Association, Evidence, 20 October 2006, p37. See also [www.bfso.org.au](http://www.bfso.org.au).

<sup>117</sup> Submission 25, Abacus Australian Mutuals, p1. Abacus was [f]ormed in July 2006 in a merger between the *Credit Union Industry Association* (a part of Cuscal Ltd) and the *Australian Association of Permanent Building Societies* (AAPBS): Submissions 25, p2. Abacus also identified two further industry codes relevant in this context: ‘Building societies and credit unions also subscribe to the *Electronic Funds Transfer (EFT) Code of Conduct* and, for credit unions, the *Credit Union Code of Practice*. The *Credit Union Code of Practice*, for example, promotes fair treatment of members by formalising standards of disclosure and conduct.’

**3.35** Abacus stated that it is not aware ‘... of any evidence that makes a case for unfair contract terms existing under consumer credit contracts’. Abacus also expressed the view that:

... the current regulatory framework and self-regulatory measures covering building societies and credit unions provide a broad layer of protection against unfair credit contract terms and a range of redress opportunities for consumers who have grounds for complaint. As examples, powers under the UCCC that deal with unfair contract terms include:

- s.70 provides courts with power to reopen unjust transactions. This provision addresses circumstances where a contract is formed (being procedural fairness) as well as the terms of the contract (being substantive unfairness);
- s.72 permits a court to review unconscionable interest or other charges associated with a consumer credit contract. This addresses, for example, where interest rates are changed in a manner that is manifestly unreasonable or discriminates unjustifiably against the debtor.<sup>118</sup>

**3.36** The Australian Finance Conference (AFC), a national finance industry association, highlighted the importance of the *Consumer Credit Code* which it argued:

... already adequately manages unjust credit contracts through the s70 re-opening provisions. These provisions take the contract formation context into account, in addition to a broad range of factors, including contract terms that are not reasonably necessary for the legitimate interests of a party to the contract (s70(2)(e)). The re-opening provisions allow for the contractual process to be assessed in its entirety and in context.<sup>119</sup>

**3.37** The AFC noted the substantial amount of regulation already covering the banking sector arguing that the complexity of this environment cautions against further regulation in the areas of unfair contract terms:

Consumer credit contract terms are not just dictated by the Code’s requirements; they must also reflect a broader legislative context (including privacy, trade practices and securities law) and the financial market structures that affect product pricing, delivery systems, and consistency and certainty of product offering. The complexity of this environment cautions against regulator prescription of contract terms on the grounds of fairness to the detriment of innovation and contractual certainty.<sup>120</sup>

**3.38** Mr Ian Gilbert, Director of the Australian Bankers’ Association, noted that notions of fairness were defined in codes specific to the banking industry:

The bank code obligates the bank in its dealings with the customer to act fairly, reasonably, ethically and in a consistent manner. Whether those things mean the same thing as in the Victorian legislation, who knows? But there is a clear intention within the banking regulation and self-regulation that notions of fairness do apply.<sup>121</sup>

<sup>118</sup> Submission 25, pp2-3

<sup>119</sup> Submission 4, Australian Finance Conference, pp1-2

<sup>120</sup> Submission 4, p2

<sup>121</sup> Mr Gilbert, Evidence, 20 October 2006, p41

- 3.39** Mr Gilbert expressed his view that the legislation and industry codes are sufficient to address the issue of unfair terms in consumer contracts in the banking industry:

Legislation and codes which apply very much to banking and financial services, which do not apply to other parts of the business sector in Australia, ensure that unfair aspects do not occur in bank contractual arrangements. In our submission, looking at the four or five categories perceived of unfair terms in the Committee's terms of reference, we sought to deal with that upfront by suggesting that none of them applied in a banking context. They are not features, in our view, of a banking relationship with its customer.<sup>122</sup>

- 3.40** Mr Gilbert emphasised the role of the *Code of Banking Practice*, which binds banks to acting 'fairly and reasonably and ethically and consistently in its dealings with customers.'<sup>123</sup>

- 3.41** Mr Gilbert also explained that the current system of regulation also provided a form of protection for the banks, which have a duty to protect the customers who invest against any risk incurred by customers who may be using the bank to facilitate a loan, for example:

It is not so much terms as business, commerce, interest, customer interest, and so forth. There is a whole balancing of those things, and banks have to do that. Banks have legal obligations to the community for depositors, to protect depositor interests and, of course, lending has its risks. Lending has to be dealt with carefully to ensure that those deposits that banks are holding and are leading to people are safe.<sup>124</sup>

- 3.42** This need for risk protection necessitates clauses that are very broad and may seem unfair out of context, Mr Gilbert explained. He highlighted that a bank operated in a very specific environment that required the bank to 'manage risk prudently':

As we have been trying to emphasise in our submission, the context of a contractual term is absolutely critical. To simply look at the contract term and say, "That is unfair" is, in itself, a very imprecise exercise; you need to understand the context. Our context is not the same as a lot of other contexts in the business community.<sup>125</sup>

### **Telecommunications industry**

- 3.43** The Australian Communications and Media Authority (ACMA) is the Australian Government's industry regulator responsible for the regulation of broadcasting, radiocommunications, telecommunications and online content.<sup>126</sup>

- 3.44** The Telecommunications Industry Ombudsman (TIO) investigates and determines '... complaints from residential and small business customers about matters relating to service, billing and the manner of charging for telecommunications and Internet services.'<sup>127</sup>

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<sup>122</sup> Mr Gilbert, Evidence, 20 October 2006, p37

<sup>123</sup> Mr Gilbert, Evidence, 20 October 2006, p37

<sup>124</sup> Mr Gilbert, Evidence, 20 October 2006, p38

<sup>125</sup> Mr Gilbert, Evidence, 20 October 2006, p38

<sup>126</sup> For further information about the ACMA see: [www.acma.gov.au](http://www.acma.gov.au)

**3.45** The TIO advised the Committee that the *Telecommunications Act 1997* (Cth) emphasises a co-regulatory regime and that this has resulted in the introduction of a series of codes of practice for telecommunications companies that have been developed by the Communications Alliance.<sup>128</sup>

**3.46** The Committee was informed that the Communications Alliance brings together working committees of industry members, consumer groups and regulators to develop these codes, and described the force of the codes as follows:

[The] codes are generally voluntary until a provider becomes a signatory to the code. However, under Part 6 of the *Telecommunications Act 1997*, once [a] code is registered by the ACMA, ACMA has powers to issue warnings to providers about breaches of the code and to direct industry participants to comply with the provisions of a code.<sup>129</sup>

**3.47** The Committee was informed that last year a code specifically relating to unfair terms in consumer contracts was registered with the ACMA. Ms Elizabeth Beal, Director of the Communications Law Centre (CLC), an independent public interest organisation specialising in communications law and policy based in Victoria, explained the background to the development of this code:

Back in 2001 the Department of Communications, Information Technology and the Arts—a Federal department—in conjunction with the Telecommunications Industry Ombudsman, jointly funded the Communications Law Centre to do some research into telecommunications consumer contracts ... We looked at complaints data from the ACCC and the TIO which indicated that consumers had experienced significant frustration and costs as a result of disputes around their contracts with telecommunications providers. The view we arrived at when doing that research was that they were heightened by the use of standard forms of agreements. That original investigation looked at contracts as well as complaints, so we analysed the contracts themselves, which is no mean feat given that they are often hundreds of pages in length.<sup>130</sup>

**3.48** Ms Beal explained that, in 2001, the CLC was commissioned to produce a report on these findings and a working party was set up in 2002, which included industry and consumer representatives and the TIO, to develop guidelines for the telecommunications industry – the *Consumer Contracts Guideline*. Ms Beal informed the Committee that when compliance with the *Guideline* was measured, it was found to be very low:

<sup>127</sup> Submission 15, Telecommunications Industry Ombudsman, p1. The TIO was established in 1993 and ‘... is a company limited by guarantee and is independent of government and telecommunications carriers and service providers. The mission statement of the TIO is to provide free, independent, just, informal and speedy resolution of complaints. In considering complaints the TIO has regard to the law, good industry practice and what is fair and reasonable in all the circumstances. Under the *Telecommunications (Consumer Protection and Service Standards) Act 1999*, all eligible telephone and Internet service providers, are required to be members of the TIO Scheme.’: Submission 15, p1

<sup>128</sup> Submission 15, p1. The Committee notes that the Communication Alliance was formerly called the Australian Communications Industry Forum.

<sup>129</sup> Submission 15, p1

<sup>130</sup> Ms Elizabeth Beal, Director and Principal Solicitor, Communications Law Centre, Evidence, 20 October 2006, p28

A couple of years later we were then commissioned by the ACA, as it then was, the communications authority, to investigate compliance with that Guideline. That did not come out of the blue. There had been some comments sought generally by the regulator from other groups, both industry and consumers, about compliance with the Guidelines, and the response was that there was systemic non-compliance. So a Guideline had been developed by industry to respond to problems that had been identified with their contracts, which had resulted from in-depth analysis from disputes and complaints data from the regulators and the Ombudsman. The industry developed its own guideline. That Guideline then was not complied with.<sup>131</sup>

- 3.49** Following a further report by the CLC in relation to the efficacy of the *Guideline*, the ACMA requested the Communications Alliance to develop an industry code. The *Consumer Contracts Industry Code ACIF C620:2005* was developed and registered with the ACMA in May 2005.<sup>132</sup>
- 3.50** The *Consumer Contracts Industry Code* addresses a number of issues of contractual fairness and includes a provision mirroring the consideration of unfair clauses which appear in Part 2B of the Victorian *Fair Trading Act 1999*. The Code also specifies terms that will be considered unfair that relate directly to the telecommunications industry.<sup>133</sup>
- 3.51** The TIO cited the *Consumer Contracts Industry Code* in the context of recent improvements in the telecommunications industry in relation to consumer contracts:

In the course of its investigations, the TIO has seen examples of these types of terms [ie those terms listed in the Committee's terms of reference] included in standard form contracts for telephone and Internet services. These types of contract terms were in widespread use during the early years of this decade. However, it appears that many service providers have amended their standard form contracts in response to part 2B of the *Fair Trading Act 1999* (Vic) and/or the ACIF Consumer Contracts Code.<sup>134</sup>

- 3.52** The Committee is also aware that the ACMA has been working with consumer groups and telecommunications service providers to make communications services contracts (including mobile phone, fixed line and internet services) fairer for consumers.<sup>135</sup> The ACMA has developed a model contract, drafted by the CLC, called the *FairTel Customer Contract*, which 'rewrites some of the unfair terms commonly found in standard contracts.'<sup>136</sup> The ACA has also published a fact sheet to provide communications suppliers with a summary of the terms

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<sup>131</sup> Ms Beal, Evidence, 20 October 2006, p28

<sup>132</sup> Submission 15, p2

<sup>133</sup> Submission 14, Communications Alliance Ltd, p1

<sup>134</sup> Submission 15, p2

<sup>135</sup> [www.acma.gov.au/acmainterwr/consumer\\_info/sfoa/contractfactsheet.pdf](http://www.acma.gov.au/acmainterwr/consumer_info/sfoa/contractfactsheet.pdf) (accessed 10 November 2006)

<sup>136</sup> The FairTel contract can be viewed at: [www.acma.gov.au/acmainterwr/consumer\\_info/sfoa/contract.pdf](http://www.acma.gov.au/acmainterwr/consumer_info/sfoa/contract.pdf) (accessed 10 November 2006). See also Ms Beal, Evidence, 20 October 2006, p31

and conditions which are considered unfair and rewrites those clauses so that the consumer is not disadvantaged.<sup>137</sup>

- 3.53** Associate Professor Zumbo highlighted the importance of model contracts to the effective functioning of unfair terms legislation:

Two features that I am thinking of that would not in any way detract from the Victorian model and would be welcomed, I think, by both businesses and consumers is that there could be some mechanism for allowing model contracts to be developed in an industry whereby the industry, with consumer involvement and the regulator's involvement, develops a model contract. That model contract is then given authority under the legislation so it could be prescribed or it could be dealt with under one of these exemptions, as I mentioned before—permitted by law, if it is mandatory—in which case if you comply exactly with the model terms. Those model terms cannot be attacked under legislation. Therefore, you are providing certainty.<sup>138</sup>

### Home building industry

- 3.54** The Committee received submissions from three building industry associations, which discuss the current regulation of the home building industry, which, they argue, adequately address the issue of fairness in consumer contracts.
- 3.55** For example, the Master Builder's Association of NSW informed the Committee that the *Home Building Act 1989* (NSW) 'has a clear consumer protection focus' and that the provisions in the Act relating to contractual agreements made it 'unnecessary for additional powers to be made available.'<sup>139</sup>
- 3.56** Master Builders Australia (MBA) explained that the *Home Building Act 1989* (NSW) includes mandatory provisions that relate to contract terms, in addition to a mandatory cooling-off period of five days.<sup>140</sup> These provisions include the clause that 'any agreement to vary the contract, plans or specifications must be in writing and signed by each party'.<sup>141</sup>
- 3.57** The MBA also expressed the view that 'any identified problem is not causing sufficient detriment in the residential building market place to justify [legislative] intervention. If there are difficulties in other sectors ... then sectoral specific legislation should be investigated...'<sup>142</sup>
- 3.58** Similarly, the Housing Industry Association told the Committee that 'the highly regulated environment for domestic building contracts has shown that there are frameworks in place

<sup>137</sup> The fact sheet can be viewed at: [www.acma.gov.au/acmainterwr/consumer\\_info/sfoa/contractfactsheet.pdf](http://www.acma.gov.au/acmainterwr/consumer_info/sfoa/contractfactsheet.pdf) (accessed 10 November 2006)

<sup>138</sup> Associate Professor Zumbo, Evidence, 20 October 2006, p55

<sup>139</sup> Submission 17, Master Builders Association of NSW, p1

<sup>140</sup> Submission 8, Master Builders Australia, p6

<sup>141</sup> Submission 8, p6

<sup>142</sup> Submission 8, p12

that not only curb what may be considered as unfair contract terms but also require [suppliers] to adopt industry best practice.<sup>143</sup>

**3.59** Mr Peter Kell, the Chief Executive Officer of CHOICE noted that in the building industry contracts are often individually tailored:

... because often in the building industry we are talking about a service that will be individually tailored and a lot of money is involved. It is a qualitatively different transaction in many cases.<sup>144</sup>

### **Insurance industry**

**3.60** The Committee received a submission from QBE Insurance Group which outlined the regulation governing the insurance industry, including the *Insurance Act 1973* (Cth), the *Insurance Contracts Act 1984* (Cth) and the *General Insurance Code of Practice*, as well as the Insurance Ombudsman Service (IOS) which provides a dispute resolution service through which policy holders may appeal policy claims and decisions and the Consumer, Trader and Tenancy Tribunal (CTTT).<sup>145</sup>

**3.61** The Committee notes that the insurance industry is also regulated by the Australian Prudential Regulatory Authority (APRA) and the Australian Securities and Investment Commission (ASIC).<sup>146</sup>

**3.62** QBE argues that a number of statutory provisions provide protection for consumers wishing to engage in a contract for insurance. It refers to a number of examples, including section 13 of the *Insurance Contracts Act 1984* (Cth) which provides that an insurance contract 'is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party ... with the utmost good faith.'<sup>147</sup>

**3.63** QBE also advised the Committee that the provisions of the *General Insurance Code of Practice*, a voluntary code that sets out agreed standards and responsibilities, also provide consumers with the assurance that signatories to the *Code* will 'conduct their services in an honest, efficient, fair and transparent manner', amongst other terms.<sup>148</sup>

**3.64** QBE argues that these regulatory mechanisms, in conjunction with the regulatory bodies governing the insurance industry, provide a 'solid base of consumer protection for policy holders across Australia.'<sup>149</sup> QBE emphasises the need for the any additional regulation to

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<sup>143</sup> Submission 10, Housing Industry Association, p3

<sup>144</sup> Mr Peter Kell, Chief Executive Officer, CHOICE, Evidence, 20 October 2003, p20

<sup>145</sup> Submission 27, QBE Insurance Groups, pp1-2

<sup>146</sup> Submission 27, p1

<sup>147</sup> Submission 27, p1

<sup>148</sup> Submission 27, p3

<sup>149</sup> Submission 27, p4

focus on those industries which require revision of their consumer contract terms, rather than across the board regulation.<sup>150</sup>

### **Committee comment**

- 3.65** In this chapter the Committee has described the current legal and regulatory framework that applies to the issue of unfair terms in consumer contracts based on the evidence provided to it in submissions and during the public hearing.
- 3.66** In the following chapter the Committee examines the views presented by Inquiry participants as to the adequacy of this framework, in order to determine whether specific purpose legislation is required in NSW.

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<sup>150</sup> Submission 27, p4



## Chapter 4 Adequacy of the current legal and regulatory framework

In this chapter the Committee examines the views presented during this Inquiry regarding the existing legal and regulatory framework laws to determine whether specific purpose legislation is required to protect NSW consumers against unfair contractual terms and provide appropriate remedies. This discussion draws on the analysis set out in the previous chapters regarding the nature of the problem (Chapter 2) and the existing legal and regulatory framework laws (Chapter 3). This chapter also describes the steps that have been taken toward the development of a national response to the issue of unfair terms in consumer contracts and notes that this process appears to have stalled.

### Limitations of the current legal and regulatory framework

- 4.1 Inquiry participants identified a number of limitations of the existing legal and regulatory framework in protecting consumers against unfair terms in consumer contracts and providing them with remedies. Those limitations include that litigation pursuant to the current statutory provisions is costly and time consuming, that there is an emphasis on procedural rather than substantive fairness and that the current remedies are not able to effect the systemic change required.

#### Focus on procedural rather than substantive unfairness

- 4.2 One of the most significant limitations of the current legal framework identified by Inquiry participants is that it focuses on procedural rather than substantive unfairness. The distinction between procedural and substantive unfairness was described by the NSW OFT as follows:

When examining unfair contract terms, a distinction needs to be made between *substantive unfairness*, in which unfairness results from the actual wording of contract terms which unduly favor the supplier or unduly disadvantage the consumer, and *procedural unfairness*, in which the circumstances surrounding the formation of a contract involve unfairness. Substantive unfairness focuses on the question of whether the supplier has included terms in a consumer contract that go beyond what is reasonably necessary to protect the legitimate interests of the supplier.<sup>151</sup>

- 4.3 The Committee notes that unfair terms in consumer contracts generally fall into the category of substantive unfairness, as it is the substantive term itself that is said to be unfair rather than the process of forming the contract.
- 4.4 Inquiry participants noted that, because the case law and legislation discussed in Chapter 3 concentrate on procedural unfairness, they are limited in their application to unfair terms. For example, the Consumer Credit Legal Centre and the Redfern Legal Centre in their joint submission noted that:

<sup>151</sup> Submission 16, NSW Office of Fair Trading, p3

The case law and legislation on unjustness and unconscionability is focused on procedural unfairness. It is very rare for consumers to obtain a remedy for a substantively unfair term in a consumer contract.<sup>152</sup>

- 4.5 Ms Gisela Ramensky a member of the Business Law Committee of the Law Society of NSW explained why the current laws do not provide sufficient protection to consumers who are signatory to standard form contracts in particular:

... most of those Acts concentrate on the procedural aspects of negotiating the contract rather than the actual substantive terms of the contract. So that you have remedies under the *Trade Practises Act* and the *Fair Trading Act* for misleading and deceptive conduct, and also for unconscionable conduct, and you have similar remedies under the *Contracts Review Act*. But when you look at the case law you can see that all the judges concentrate on the procedure of how the contract was negotiated and if that was unfair or unconscionable then the term is struck down, or there are injunctions or various other remedies.

- 4.6 Ms Ramensky, also advised that the focus on procedural unfairness limits the application of the law because it is applied to the process of contract negotiation in circumstances where the person was at a *special disadvantage*:

Unfortunately, the attitude still, even of the High Court, is that we are here to protect the vulnerable and the unconscionable conduct usually relates to people who are at a special disadvantage either because of their education, their health, their language difficulty; those sorts of issues are taken into account. But again they focus on the entering into of the contract rather than the actual terms of the contracts themselves.<sup>153</sup>

- 4.7 As noted by Mr Lynden Griggs, a Senior Lecturer with the University of Tasmania, ‘the unconscionability doctrine appears inescapably tied to find a particular aspect of disadvantage – such as age, relationship, or language. General unfairness or a lack of good faith has failed to find a common law foundation for intervention.’<sup>154</sup>

- 4.8 Ms Ramensky provided an example of procedural unfairness in a consumer contract situation (and noted that the effect of the decision is limited to the fact situation of the case – a further limitation of the current law, as discussed in paragraph 4.25-4.31):

If you are looking at a consumer contract—and I know there was a whole spate of [cases] against banks in the mid-1980s for unfair contracts, and the case of Amadio springs to mind, which was an elderly immigrant couple that could not speak English very well. They were told to sign "here" without being given any opportunity to get independent advice or to even have the contract explained to them. That does not affect all of the other banks. It does not affect all the other credit providers; it is only a one-on-one and each case is decided on its specific circumstances.<sup>155</sup>

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<sup>152</sup> Submission 21, Consumer Credit Legal Centre (NSW) Inc and Redfern Legal Centre, p2

<sup>153</sup> Ms Gisela Ramensky, Member, Business Law Committee, Law Society of NSW, Evidence, 20 October 2006, p46

<sup>154</sup> Submission 1, Mr Lynden Griggs, p4

<sup>155</sup> Ms Ramensky, Evidence, 20 October 2006, p46

- 4.9 In regard to the *Contracts Review Act 1980* (NSW) (described in Chapter 3), the focus on procedural unfairness is due to the inclusion in section 9 of the procedural circumstances in which the contract was determined. Ms Ramensky noted that, despite 2001 amendments to section 9 to refer to some aspects of substantive unfairness, including the intelligibility of the language of the contract, procedural unfairness is still the focus of the courts:

Whilst the language itself may be easily understood, the structure of the contract can often be quite complex and difficult to understand. That is now embedded in the *Contracts Review Act* but the courts are not taking that approach very much. They are still concentrating mainly on how the contract was negotiated and whether that was fair and whether that was unconscionable.<sup>156</sup>

- 4.10 In this regard, Mr Frank Zumbo, Associate Professor with the University of NSW's School of Business Law and Taxation, stated that 'while the Courts are able to consider substantive unconscionability under the *Contracts Review Act 1980* (NSW), they rarely do so without also considering the impact of procedural unconscionability.'<sup>157</sup>

- 4.11 Associate Professor Zumbo explained that, while the *Contracts Review Act 1980* was highly anticipated, its effects in relation to unfair terms in consumer contracts have been limited:

The *Contracts Review Act* was anticipated and brought about great excitement when it was introduced. It was resisted by many elements of the business community. It has brought about a positive change and behavioural change in the conduct of businesses in dealing with and removing with the more reprehensible conduct. But I am sad to say, unfortunately it has done very little to stop the widespread use of unfair contract terms in Australia or in NSW.<sup>158</sup>

- 4.12 Ms Ramensky provided the Committee with statistics relating to the use of the *Contracts Review Act 1980* which indicate the small number of times it has been invoked successfully, particularly relating to issues of substantive contract unfairness:

In 2000 there were 160 cases identified of breaches of the *Contracts Review Act* and of those, 60 were reviewed; 40 cases involved mortgage contracts of which 18 were successful and only one of those was held to be unjust solely because of the substantive terms. So out of 160 we have one case in which the courts overturned or voided the term in the contract because of the substantive unfairness of that particular term, so it is not a very high success rate.<sup>159</sup>

- 4.13 Associate Professor Zumbo noted that the same situation arises in relation to the *Trade Practices Act 1974* (Cth):

The courts focus on procedural unconscionability and not being interested directly in going to substantive unfairness as a sole issue. Substantive unfairness is relevant, but only when it is in the context of procedural unconscionability. Unless you can show procedural unconscionability and procedural unfairness, it cannot simply bring a case on the basis of unfair terms. That is the same under the *Trade Practices Act*. In cases in

<sup>156</sup> Ms Ramensky, Evidence, p46

<sup>157</sup> Submission 20, Associate Professor Frank Zumbo, p23

<sup>158</sup> Associate Professor Frank Zumbo, Evidence, 20 October 2006, p51

<sup>159</sup> Ms Ramensky, Evidence, p45

relation to the *Trade Practices Act*, in particular 51A(b) and 51A(c) the courts have been clear that you need more than an allegation that a term is unfair; you need to show that the circumstances throughout the case—the conduct—is reprehensible. Only then can you use that legislation.<sup>160</sup>

- 4.14** The *Trade Practices Act 1974* relies predominately on the demonstration of procedural unfairness during the contract negotiation process, rather than the demonstration that actual terms within the contract significantly disadvantage the consumer over the supplier. This is a result of the narrow interpretation of unconscionability to which the Courts have restricted themselves in matters of consumer contracts, where consumers must demonstrate they were at a special disadvantage during the contract negotiation. Inequality of bargaining power is not such a special disadvantage.<sup>161</sup>
- 4.15** Associate Professor Zumbo asserts that the narrow definition of unconscionability that has been adopted by the Courts ‘has meant that consumers and government enforcement agencies have been confronted with the challenge of seeking a wider judicial interpretation of the concept of ‘unconscionable’.<sup>162</sup>
- 4.16** Associate Professor Zumbo argues that without a substantial number and variety of cases of unfair terms being challenged in the Courts it is unlikely that the traditional understanding of unconscionability will be applied more broadly to include the actual terms of the contract.<sup>163</sup> Despite the potential for redress that section 51A(b) and (c) of the *Trade Practices Act 1974* provides, in practice and without a clear definition of the term ‘unconscionability’, the *Trade Practices Act 1974* has not provided protection for consumers who are signatory to contracts with unfair terms.
- 4.17** The deficiencies in the remedies currently available were summarised by the NSW OFT as follows:
- Although equity is able to grant relief, where appropriate, to a party who has suffered procedural unfairness in the contracting process, the common law is underutilised by consumers. The common law limits equitable relief to a narrow set of circumstances, and the discretionary nature of the court deters, rather than encourages aggrieved consumers to seek redress through the common law. In view of the high cost and uncertainty of litigation, consumers are understandably unwilling to risk an unfavourable determination from the court unless the contract involves large consideration. The common law alone is therefore an inadequate vehicle through which consumers can be protected from unfair contract terms.<sup>164</sup>
- 4.18** The Committee was advised that, unlike the existing law, specific purpose legislation such as that contained in Part 2B of the Victorian *Fair Trading Act 1999* focuses on substantive

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<sup>160</sup> Associate Professor Zumbo, Evidence, 20 October 2006, p51

<sup>161</sup> Submission 20, p17

<sup>162</sup> Submission 20, Attachment 1: *Dealing with unfair terms in consumer contracts: Is Australia falling behind?* (2005), p71

<sup>163</sup> Submission 20, Attachment 1, p71

<sup>164</sup> Submission 16, p8

unfairness. For example, the Centre for Credit and Consumer Law at Queensland's Griffith University stated:

Unfair contract terms legislation tends to focus on substantive unfairness, which is about the substance of the terms of the transaction, rather than the individual circumstances under which the transaction came about (the procedural issues). In its broadest sense, substantive unfairness can be assessed on the face of the contract itself, without having regard to the characteristics and actions of the parties to the contract.<sup>165</sup>

### **Court action is costly and time consuming**

**4.19** The Committee was also informed that a significant limitation on the remedies currently available in NSW which involve a consumer pursuing court action is that court action is costly and time consuming.

**4.20** For example, Ms Lyn Baker, the NSW Commissioner for Fair Trading, indicated that from the perspective of individual consumers who had signed contracts which had unfair terms, the loss suffered is generally not significant enough to warrant bringing an action in Court:

The *Contracts Review Act* provides a remedy for individual consumers with the will and the means to pursue litigation. Consumers who have entered contracts for everyday goods and services—fitness centres, mobile phones, rental cars, retail energy and so on—are not really interested in going to court to challenge unfair contract terms.<sup>166</sup>

**4.21** Mr Rod Stowe, NSW Deputy Commissioner for Fair Trading, elaborated on this point as follows:

So far as the *Contracts Review Act* is concerned, it is certainly available to consumers to pursue matters where they believe there are terms in the contract or circumstances have arisen which are unjust. As I said earlier, the consumer can pursue those matters through the courts, although it is an expensive exercise and, as I said, the evidence seems to be that this only usually arises where large amounts of money are involved.<sup>167</sup>

**4.22** Mr Stowe also noted that '[o]ne can understand that a consumer with a contract involving hundreds of dollars would not want to establish a case in the courts'.<sup>168</sup>

**4.23** Ms Ramensky also noted that a civil action is a costly exercise and service providers are generally in a better position financially to defend themselves than consumers are to prosecute them:

But these are civil actions commenced by a consumer against a corporation and, generally speaking, the corporation has far more money and resources available to defend the action than the consumer has available to prosecute it.<sup>169</sup>

<sup>165</sup> Submission 23, Centre for Credit and Consumer Law, p6

<sup>166</sup> Ms Lyn Baker, Commissioner, Office of Fair Trading, Evidence, 20 October 2006, p2

<sup>167</sup> Mr Rod Stowe, Deputy Commissioner, Policy and Strategy, Office of Fair Trading, Evidence, 20 October 2006, p5

<sup>168</sup> Mr Stowe, Evidence, 20 October 2006, p8

- 4.24 Similarly, the submission from CHOICE noted that ‘litigation is expensive, time consuming and often distressing’ and that ‘there are clear inequalities in litigants’ resources and bargaining positions’.<sup>170</sup>

#### **Limited application of judicial determinations**

- 4.25 It was also noted that cases brought in common law, equity or under the current statutory provisions are limited in their application. As the outcome of a particular case applies only to the parties to the dispute the current laws do not have the capacity to bring about the systemic change that is required.

- 4.26 For example, Associate Professor Zumbo commented on the lack of precedent value of successful cases as most decisions are limited to the facts of each individual case:

Even when you can seek to attack it and you can establish procedural unconscionability, which is extremely hard to do, even if you get a favourable result, and there are very few favourable results under the *Contracts Review Act* legislation, it applies only to that case that deals with the one consumer. It has cost a lot of money to bring that case, and because often unconscionable conduct findings depend on the circumstances, the precedent value of those cases are limited to the facts. The hope of the *Contracts Review Act* bringing about greater change has been stifled because of the limited precedent value of individual cases under that legislation.<sup>171</sup>

When I say that the precedent value is very low it is because when you look at the circumstances of each individual consumer, they are different. Even if the court found that this conduct was unconscionable, the value would typically be limited to that factual context.<sup>172</sup>

- 4.27 CHOICE made a similar point in its submission, noting that ‘under the current regimes unfairness is decided on a case-by-case basis giving no scope for systemic change. This means the opportunity to systemically improve industry practice is lost.’<sup>173</sup>
- 4.28 Ms Ramensky also noted that ‘[e]ven if the consumer is wealthy enough to prosecute such a case, it is still only an action against that one particular corporation. It does not target the whole industry.’<sup>174</sup>
- 4.29 In addition, the Consumer Credit Legal Centre and the Redfern Legal Centre in their joint submissions included among the inadequacies of the current remedies that:

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<sup>169</sup> Ms Ramensky, Evidence, 20 October 2006, p46

<sup>170</sup> Submission 19, CHOICE, p16

<sup>171</sup> Associate Professor Zumbo, Evidence, 20 October 2006, p51

<sup>172</sup> Associate Professor Zumbo, Evidence, 20 October 2006, p54

<sup>173</sup> Submission 19, p16. Similar views were expressed by the Consumers’ Federation of Australia in its submission: Submission 18, p3

<sup>174</sup> Ms Ramensky, Evidence, 20 October 2006, pp45-46

- Unjustness and unconscionability are circumstances based. This means that even if there are common unfair terms in cases this still will not provide a useful precedent.
- It is inefficient to deal with “standard form” unfair terms on a case by case basis.<sup>175</sup>

**4.30** Similarly, Ms Ramensky noted that these Acts are limited in the sense that they do not provide overriding guidance to service providers and consumers in NSW:

The only thing that is available to consumers in NSW is if they have a problem they have to sue someone and go to court. There is no over-riding authority that actually regulates various aspects of the industry.<sup>176</sup>

**4.31** The Committee notes that unfair contracts legislation addresses this deficiency because, as noted by Mr Stowe, NSW Deputy Commissioner for Fair Trading, ‘everyone has the benefit of the legislation up front’:

I think the difficulty is that these give relief after the event. What has happened is that there has been a situation where a contract has been entered into and a consumer has suffered detriment. What we have been looking at in terms of unfair contracts legislation means that everyone has the benefit of the legislation up front. It simply prevents these circumstances arising, rather than having a situation where detriment has been caused and then you have to enter into arrangements to seek relief.<sup>177</sup>

### **Limitations of industry codes**

**4.32** While industry bodies generally argued that their relevant codes and industry specific legislation were sufficient to address the issue of unfair contract terms (as discussed in Chapter 3), other’s queried their effectiveness.

**4.33** For example, Ms Ramensky noted that industry codes, whilst an important indicator of industry behaviour, were not enforceable and therefore did not always provide sufficient incentive for providers to abide by them:

Industry codes are very good. They are certainly better than not having industry codes. The difficulty or limitation with industry codes is that they are only codes and that they are not enforceable. A practical example of that is the Franchising Code of Conduct, which was a code of conduct for a very long period of time until it became enshrined in the *Trade Practices Act 1974* and it is now mandatory for all franchisors to abide by the Franchising Code of Conduct. But that is only a fairly recent amendment to the *Trade Practices Act 1974* and before that, when it was a voluntary code, some people abided by it and some people did not abide by it. There was no redress to the franchisee to force the franchisor to abide by it; it was either you want to be a franchisee in my system? Well, these are the terms and conditions. Voluntary codes of

<sup>175</sup> Submission 21, p11

<sup>176</sup> Ms Ramensky, Evidence, 20 October 2006, p44

<sup>177</sup> Mr Stowe, Evidence, 20 October 2006, p8

conduct do go some way—at least they focus the attention of the industry on the issues, but they do not go far enough because they are not enforceable.<sup>178</sup>

## Is specific purpose legislation required?

**4.34** In this section the Committee examines whether there is a need for specific purpose legislation to protect NSW consumers against unfair terms in consumer contracts. The discussion draws on the points set out above in relation to the adequacy of the existing legal and regulatory framework.

### Support for specific purpose legislation

**4.35** The majority of organisations and individuals who made submissions or presented oral evidence to the Committee argued that the current legal and regulatory framework is inadequate and that there is a need for specific legislation to protect NSW consumers against unfair contractual terms. Inquiry participants pointed to appropriate models in Victoria and the UK, which are examined in detail in Chapter 5.

**4.36** For example, in response to a question on whether specific purpose legislation such as that in Victoria and the UK should be implemented in NSW, Mr Rod Stowe, NSW Deputy Commissioner for Fair Trading, replied that there are ‘significant advantages in those forms of legislative approach.’

**4.37** Ms Baker, the NSW Commissioner for Fair Trading, elaborated:

I think the important thing about the Victorian and United Kingdom models is that they do not rely on an individual consumer going forward with litigation; they allow a regulatory authority to take action. You get a systemic change to the contract that benefits all, rather than just a remedy for the person who complained and who actually had the money to go to court.<sup>179</sup>

**4.38** The Energy and Water Ombudsman NSW expressed support for ‘the introduction of unfair terms legislation to encourage discussion of alternative options for suppliers, and to enable regulatory bodies to improve the protection afforded to *vulnerable* consumers.’<sup>180</sup>

**4.39** The Consumer Credit Legal Centre (NSW) Inc and the Redfern Legal Centre in their joint submission argued that specific purpose legislation was necessary in order to take *preventative* action in relation to unfair terms:

Specific purpose legislation is essential as the general legal remedies relating to unjustness have failed to provide any remedy for consumers in relation to unfair terms. Specific purposes legislation is required to take preventative action in relation to unfair terms. Unfair terms can be identified by the regulator and removed across many standard contracts in a whole range of consumer contracts. Consumers would

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<sup>178</sup> Ms Ramensky, Evidence, p45

<sup>179</sup> Ms Baker, Evidence, 20 October 2006, p8

<sup>180</sup> Submission 7, Energy and Water Ombudsman, p13

then have some confidence that the contracts they sign have been reviewed with any unfair terms removed.<sup>181</sup>

- 4.40** The NSW Legal Aid Commission also called for NSW to enact specific purpose legislation to rectify the ‘serious problem that faces consumers’:

Whilst the legislation will be revolutionary in its design, a strong and clear mandate by Parliament is necessary to rectify a widespread and serious problem that faces consumers in modern markets. It must be remembered that whilst the legislation will be novel in NSW, industry will be asked to do nothing more than contract on fair terms. The fact that industry has apparently been able to comply with the regulator in both the UK and Victoria is testament to the fact that such reform is workable and a proportionate response to the issue.<sup>182</sup>

- 4.41** Dr Luke Nottage, a Senior Lecturer at the University of Sydney’s Law Faculty argued that NSW should follow the example of the European Union (including the UK), Japan and Victoria in enacting specific purpose legislation:

Fortunately, the solution is simple. NSW should enact new legislation following the well-established 1993 EC Directive on Unfair Terms in Consumer Contracts. In (soon 27) European member states, this applies new substantive rules directly regulating the sorts of unfair terms that will otherwise no doubt continue to proliferate in NSW. The regime also requires mechanisms for effective enforcement. In the UK, that comes primarily through the Office of Fair Trading. Their helpful Submission to this Inquiry (No 5) shows how the regime has had enormous impact in reducing unfair terms in standard form contracts. The rules are so straightforward that hardly any cases have had to be taken to formal (and expensive) adjudication. Likewise, Victoria’s amendments to their *Fair Trading Act* in 2003, modelled on the Directive, are helping consumers there without the skies falling in on businesses. The same is true in Japan, under its *Consumer Contracts Act* of 2000.<sup>183</sup>

- 4.42** Associate Professor Zumbo emphasised that unfair terms legislation does not seek to limit the use of standard form contracts but rather to ensure that unfair terms are not included in them:

It is important to note that the issue is not about standard form contracts as a vehicle for contracting between businesses and consumers; the issue with standard form contracts is how they are used. There is no doubt that standard form contracts produce efficiencies for the business and the consumer ... It is important to say that this legislation will not outlaw standard form contracts; it will ensure that standard form contracts are fairer. Where appropriate and where useful to use standard form contracts, they should continue to be used but there is now a mechanism, if we have this legislation, to ensure a recourse against unfair terms of that standard form contract.<sup>184</sup>

<sup>181</sup> Submission 21, p11

<sup>182</sup> Submission 22, Legal Aid Commission of NSW, p22

<sup>183</sup> Submission 24, Dr Luke Nottage, p4

<sup>184</sup> Associate Professor Zumbo, Evidence, 20 October 2006, pp53-54

- 4.43** Dr David Cousins, the Director of Consumer Affairs Victoria (CAV), noted the benefits of introducing unfair terms legislation in other jurisdictions such as NSW in creating a ‘wider national spreading’ of this type of legislation:

We are conscious of the fact that we are the only jurisdiction in Australia with this legislation. We feel we have been unduly put on in some ways in that we are carrying the can for the rest of the country. It is true that Victoria is a quarter of the national economy and maybe NSW is one-third. So from our point of view it really is important for NSW to think carefully about whether it would adopt similar legislation. Certainly a lot of our work is extended nationally. All those mobile phone contracts which have been amended have not just been amended in Victoria but amended nationally.

We are also dealing with things within Victoria and I am sure there are things within NSW where this legislation would be very important that our legislation will not be touching in NSW. We are, if you like, applying what we think is good judgment in this area but that is always assisted by having other perspectives brought to play. From our point of view we would very much welcome a wider national spreading of this legislation and the impact of it and the involvement of other jurisdictions to help, if you like, interpret and apply it in the ways that it should be.<sup>185</sup>

#### **Rejection of the need for specific purpose legislation**

- 4.44** Inquiry participants that represented business or industries were united in their rejection of the need for specific purpose legislation. Among other points, it was argued that the current laws, as well as industry specific legislation and codes were sufficient to guard against unfair terms in consumer contracts.

- 4.45** The Housing Industry Association stated in its submission that it did not support specific purpose legislation, noting its potential to ‘add considerable red tape’:

HIA does not support the introduction of unfair contract term laws in NSW. It is our experience that these laws lead to virtual regulation of contracts by imposing requirements at the regulator’s opinion and without public consultation or consideration of net public benefit. Unfair contract term laws have the potential to add considerable red tape and costs as, once enacted, the regulator feels compelled to use them.<sup>186</sup>

- 4.46** Similarly, Master Builders Australia believed that additional legislation to that already in place would be unnecessarily restrictive as ‘a modern economy requires the free flow of goods, services and ideas. Constraints on economic freedoms should be closely scrutinised and be the subject of regulatory impact statements ...’<sup>187</sup>

- 4.47** Mr Ian Gilbert of the Australian Bankers’ Association (ABA), expressed concern that the regulatory impact of such legislation had not been sufficiently determined to allow the introduction of such legislation:

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<sup>185</sup> Dr David Cousins, Director, Consumer Affairs Victoria, Evidence, 20 October 2006, pp63-64

<sup>186</sup> Submission 10, Housing Industry Association, p1

<sup>187</sup> Submission 8, Master Builders Australia, p4

... the recent Commonwealth Government response to the Productivity Commission's inquiry undertaken by Gary Banks states that Governments should not act to address "problems" until a case for action has been clearly established. This should include establishing the nature of the problem and why actions additional to existing measures are needed, recognising that not all "problems" will justify additional government action. A range of feasible policy options, including self-regulatory and co-regulatory approaches, need to be identified and their benefits and costs, including compliance costs, assessed within an appropriate framework. I respectfully say that is inquiry should inform but not necessarily determine the policy parameters on this issue. The ABA is not confident that the regulatory model to which I have just referred has been fully satisfied.<sup>188</sup>

**4.48** The submission from Optus states:

Principles of good regulation suggest that new or additional regulation should be justified by demonstrable market failure or legislative failure that requires remedy and that the benefits to be derived outweigh the costs of implementation. In Optus' view, NSW consumers of telecommunications services are not subject to any substantial occurrence of unfair contract terms and there are adequate protection mechanisms in place ... [I]f additional legislation were proposed it would be very difficult to justify on cost-benefit grounds.<sup>189</sup>

## Preference for national legislation?

**4.49** The work of the Ministerial Council on Consumer Affairs (MCCA) toward national legislation has been described in Chapter 3. The majority of Inquiry participants who supported the need for specific legislation to protect consumers in relation to unfair contractual terms argued that, while national legislation was preferable, in the absence of a clear commitment or timeframe for a national scheme, states should proceed independently.

### Progress toward a national response by the MCCA

**4.50** The Committee was informed that a national response to the issue of unfair terms of consumer contracts had been in the process of development through the MCCA, but that the process appears to have stalled.

**4.51** The MCCA is made up of Commonwealth, State and Territory and New Zealand Ministers responsible for consumer affairs, fair trading and credit laws.<sup>190</sup> The MCCA meets annually to look at significant fair trading and consumer affairs issues with the aim of building a coherent approach to these issues. The MCCA has several subcommittees that meet during the year to consider particular consumer affairs matters.

**4.52** In August 2002 the MCCA directed its Standing Committee of Officials of Consumer Affairs (SCOCA) to establish a national working party to investigate ways of addressing unfair terms

<sup>188</sup> Mr Ian Gilbert, Director, Australian Bankers' Association, Evidence, 20 October 2006, p36

<sup>189</sup> Submission 9, Optus, p4

<sup>190</sup> The official website of the MCCA is at: [www.consumer.gov.au](http://www.consumer.gov.au) (accessed 10 November 2006)

in consumer contracts and to consider the implementation of ‘a more nationally consistent and effective regulatory regime.’<sup>191</sup> The working party comprised:

... representatives of each State and Territory fair trading agency and was jointly chaired by Queensland and Victoria. Representatives of the Commonwealth Treasury, the Australian Competition and Consumer Commission and the Australian Securities and Investments Commission were observers.<sup>192</sup>

**4.53** The NSW OFT advised the Committee that in August 2003 the MCCA had agreed to the development of consistent State and Territory legislation to address unfair terms in consumer contracts ‘subject to the completion of a regulatory impact statement confirming the need for such regulation.’<sup>193</sup> Regulatory impact statements (RIS) are required for all regulatory proposals which would affect business or impact on competition.<sup>194</sup>

**4.54** In January 2004 a discussion paper was prepared discussing the need for legislation to address the issue of unfair terms and the most appropriate model to address it and inviting submissions. The views expressed in the 74 submissions received were taken into account in drafting the RIS.<sup>195</sup> The RIS was then provided to the Commonwealth Office of Regulation Review, which provides advice on whether regulatory impact statements meet Council of Australian Government (COAG) guidelines.

**4.55** Ms Susan Dixon, the Director of Consumer and Protection and Community Access, NSW OFT, explained the significance of a RIS and the role of the Office of Regulation Review in relation to this proposed piece of legislation:

That regulatory impact statement has to cover things such as justification for government intervention, cost and benefits of all the different options and ways in which that intervention may take place. It has to be assessed by the Office of Regulation Review as meeting the guidelines before a ministerial council can agree to take action. It has never really been tested; what happens is, the Office of Regulation Review does not say that a regulatory impact statement is adequate. We do not know what would happen if the ministerial council decided to go ahead and do something anyway. But in the spirit of federalism we would prefer to meet the requirements. That is what has been negotiated. In the end, it does seem to come down to a subjective judgment between the parties as to what is sufficient when establishing consumer detriment and what is a sufficient cost benefit analysis to undertake. The Office of Regulation Review has one opinion and the ministerial council seems to have another opinion.<sup>196</sup>

**4.56** Ms Baker, the NSW Commissioner for Fair Trading advised the Committee that, despite extensive consultation with the Office of Regulation Review during 2005 and 2006, ‘the draft

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<sup>191</sup> Submission 16, p2

<sup>192</sup> Submission 16, p2

<sup>193</sup> Submission 16, p2

<sup>194</sup> Submission 16, p2

<sup>195</sup> Mr Stowe, Evidence, 20 October 2006, p11

<sup>196</sup> Ms Susan Dixon, Director, Consumer Protection and Community Access, Office of Fair Trading, Evidence, 20 October 2006, p11

regulatory impact statement has not yet been assessed as meeting the COAG requirements. The Ministerial Council has now considered whether jurisdictions should pursue reform on an individual basis.<sup>197</sup>

- 4.57** Mr Stowe, NSW Deputy Commissioner for Fair Trading, explained that, despite attempts by consumer affairs agencies and ministers to negotiate with the Office of Regulation Review, the process was stalled at the RIS stage:

In 2005 and 2006 we have been negotiating with the Office of Regulation Review on having that RIS approved. Despite those negotiations, to this point we have not received the approval of the Office of Regulation Review. That has been a stumbling point. This matter has been raised by Ministers at the Ministerial Council. The Federal Minister took up the matter with the Office of Regulation Review, but they are insisting that the RIS still does not comply with the Council of Australian Government's arrangements.<sup>198</sup>

- 4.58** Dr Cousins, Director of CAV, speculated that there may have been some debate at the national level over the usefulness of specific unfair terms legislation:

In terms of the regulatory impact statement that was mentioned, yes, a lot of work has gone into that statement. From our perspective we think there has been a bit of a philosophical view on the Canberra side that has questioned the necessity for this legislation. For example, one of the issues has been a point that has been made that unconscionable conduct provisions could be sufficient to, in fact, deal with the sort of issues that unfair contract terms deal with. I think it is very clear that the AAPT case that we took would never have succeeded under unconscionable conduct provisions at all. That conduct was not covered by unconscionable conduct provisions.<sup>199</sup>

### **Support for NSW proceeding independently**

- 4.59** Inquiry participants who expressed support for the need for specific purpose legislation to protect the interests of NSW consumers almost universally expressed support for national legislation but, given the uncertainty about whether a national response to the issue would eventuate, advocated for NSW (and other States) to enact their own legislation.

- 4.60** For example, the Consumers' Federation of Australia called for national legislation and for State legislation in its absence:

The CFA is of the view that legislation prohibiting unfair contracts terms should be implemented nationally, and is disappointed that the SCOCA process has not yet resulted in a commitment from all jurisdictions to implement legislation based on the Victorian model. In the absence of an agreement for nationally consistent legislation, we would welcome efforts that other jurisdictions, including NSW, take on an individual basis to address the issue.<sup>200</sup>

<sup>197</sup> Ms Baker, Evidence, 20 October 2006, p3

<sup>198</sup> Mr Stowe, Evidence, 20 October 2006, 11

<sup>199</sup> Dr Cousins, Evidence, 20 October 2006, p64

<sup>200</sup> Submission 18, Consumers' Federation of Australia, p4

- 4.61** The NSW OFT explained that it was supportive of national legislation but that, given the delay relating to the RIS, it was appropriate that NSW consider implementing State legislation:

Obviously, we think that national legislation is always the best option, and on the ministerial council we pursue this in a range of areas and ... we have been pursuing ... this particular matter for some time. However, because of the difficulties in achieving it we do not think that consumers should continue to suffer detriment just because jurisdictions cannot agree amongst themselves or, in this case, we cannot get something through the Office of Regulation Review.<sup>201</sup>

- 4.62** Ms Baker, the NSW Commissioner for Fair Trading also advised the Committee that she did not perceive that there would be difficulties if NSW were to enact its own legislation as Victoria had done:

In answer to your other question will there be problems if one jurisdiction acts, there have not been any problems with Victoria enacting its legislation. In fact, we have benefited from it. But we now see that if we were to join Victoria in a similar kind of piece of legislation, possibly improved after their couple of years of operation, that if you had NSW and Victoria you would have a large proportion of the national market covered and the States may then be able to follow outside of the ministerial council process. So we think there is no problem with their jurisdiction following Victoria and we firmly believe that in this particular case we are better off to act alone.<sup>202</sup>

- 4.63** Ms Elizabeth Beal, Director of the Communications Law Centre in Victoria, noted that, while national legislation would be ideal, State legislation is a benefit:

The view we have come to is that the addition of contract terms legislation at State level is of benefit. A national approach would be better. As to how that would be achieved, I would be hesitant to give a view here, because I think the more important issue is that it is recognised as having benefit. I certainly would uphold that as a good argument, but I would not want that to stand in the way of NSW improving its protection for consumers. I would not hold my breath for an amendment of the *Trade Practices Act* because it already has a wide charter, and it appears to me that consumer regulation is effectively conducted by the States in many areas.<sup>203</sup>

- 4.64** Ms Beal also noted that NSW legislation ‘... is likely to have the fastest benefit to consumers of NSW because industry that operates in Victoria—of course, not all of industry does—has already got implementation and education under way.’<sup>204</sup>

- 4.65** It was noted by Ms Ramensky that if NSW were to enact unfair terms legislation, it may even provide an impetus for legislation at a national level:

Given that most of these corporations trade across Australia and they are not confined to a particular State, I think it would be very good if we had a national front to regulate unfair contracts. But having said that, I think that if NSW did it there

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<sup>201</sup> Ms Baker, Evidence, 20 October 2006, p12

<sup>202</sup> Ms Baker, Evidence, 20 October 2006, p12

<sup>203</sup> Ms Elizabeth Beal, Director, Communications Legal Centre in Victoria, Evidence, 20 October 2006, p30

<sup>204</sup> Ms Beal, Evidence, 20 October 2006, p34

might be more force and more persuasion on the Federal Government to take up the cause and to look at the issue.<sup>205</sup>

**4.66** Mr Griggs from the University of Tasmania similarly stated that '[p]referably legislation would be introduced nationally, but if this is not feasible, a uniform approach between the States may force the Commonwealth hand.'<sup>206</sup>

**4.67** The Committee notes that several other Inquiry participants also called for NSW legislation in the absence of national legislation, including the Consumer Credit Legal Centre (NSW) Inc, the Redfern Legal Centre and the Legal Aid Commission of NSW.<sup>207</sup>

**4.68** The Committee notes that, as a matter of policy, there seems to be some existing support from the NSW Government for reform in the area of unfair terms in consumer contracts. In this regard the Committee cites the submission from the NSW OFT which states:

Prior to the March 2003 election the NSW Government made two commitments relating to unfair terms in contracts in its policy document, *A Fair Go For All: Labor's plan for fairer trading*. These were to:

- Review the existing legislation governing contracts to enable fairer access by consumers to the court system in relation to unjust contracts; and
- Legislate to make contracts involving the provision of goods and services fairer and more transparent ('plain English'). This will especially benefit consumers using mobile phones, funeral services, care hire and introduction agencies.<sup>208</sup>

**4.69** In relation to this policy, the NSW OFT advised the Committee that it commenced a review of the *Contracts Review Act 1980*, but that the review was later held back in deference to the work of the MCCA (discussed earlier in this chapter).<sup>209</sup>

### **Arguments against NSW proceeding ahead of national legislation**

**4.70** The view that NSW should not implement its own legislation, and that it was more appropriate to wait for national legislation on this issue, was expressed by several Inquiry participants from the banking and finance sector and the home build sector.

**4.71** For example, Mr Gilbert of the ABA noted that if specific purpose legislation were inevitable the preference of the ABA is that it be on a national basis because of the difficulties service providers face dealing with different legislation in each jurisdiction:

The difficulty for banks, being nationally operating organisations, is if different jurisdictions legislate otherwise than nationally, which means that our members have

<sup>205</sup> Ms Ramensky, Evidence, 20 October 2006, p50

<sup>206</sup> Submission 1, Mr Lynden Griggs, p5

<sup>207</sup> Submission 21, p11 and Submission 22, p21

<sup>208</sup> Submission 16, p2

<sup>209</sup> Submission 16, p2

to comply with different laws in different parts of Australia. This adds cost and uncertainty, and sometimes causes problems for customers. Those laws interact with other laws and may add to those other laws, but they use different terminology, different definitions and different expressions. Again you get uncertainty—legal uncertainty and contractual uncertainty, and sometimes confusion for customers as to what their rights really are. That is why we said in our submission that if this must happen, subject to those proper processes being taken to establish that market failure and the right solution, it should be national.<sup>210</sup>

**4.72** The Australian Finance Conference, a national finance industry association, argued that if any specific purpose legislation were to be introduced it should be at the national level:

In addition, any unilateral move by a single jurisdiction, such as NSW, to regulate for unfair contract terms in relation to consumer credit would undermine national uniformity and place an unwarranted financial and administrative burden on national financiers to provide NSW-centric documents, processes and systems. Again, these requirements will impact on the cost of credit, which will be borne by consumers. To our mind though, the reality would be that if NSW were to legislate on this topic for consumer credit it will not only be pre-empting the MCCA process, but in practice, given the size of the NSW marketplace, will force all national providers of credit to adjust to the NSW legislation. We have made similar representations to the Victorian Government which has recently been deliberating on whether to extend its current unfair consumer contract law to cover currently excluded area of consumer credit.

In conclusion, the AFC believes the UCCC adequately addresses unfair contract terms in consumer credit contracts. If there is to be any change to develop unfair contract terms law for consumer credit, we are firmly of the view the regulatory response must be national, with decided outcomes incorporated into the Code rather than left dispersed among the various jurisdictions' fair trading regimes. We would not support any unilateral action by NSW, or any other jurisdiction for that matter, to introduce additional regulation of consumer credit contract terms as it undermines national uniformity and the benefits it brings to consumers and credit providers alike.<sup>211</sup>

**4.73** Abacus Australian Mutuals - Association of Building Society and Credit Unions, expressed similar views and referred specifically to the work of the MCCA:

*Abacus strongly supports a continued focus on nationally consistent credit regulation. Uniformity across State and Territory jurisdictions is critical to the credit sector, which is very much a national industry ... In our view, MCCA's role "to consider consumer affairs and fair trading matters of national significance and, where possible, develop a consistent approach to those issues" provides the best forum for consideration of consumer contracts, particularly in relation to consumer finance. A national approach reduces scope for 'jurisdiction shopping', ensures consistency for consumers across the nation and reduces scope for expensive and duplicative processes in different States and Territories. Credit unions and building societies, as smaller, member focused organisations, would be concerned were NSW to pursue reforms to deal with credit contract terms outside the established national template and Ministerial Council format.<sup>212</sup>*

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<sup>210</sup> Mr Gilbert, Evidence, 20 October 2006, p39

<sup>211</sup> Submission 4, Australian Finance Conference, p2

<sup>212</sup> Submission 25, Abacus Australian Mutuals, p2

## Committee comment

- 4.74** It is clear from the views expressed in submissions and during oral evidence that there is strong support for specific purpose legislation to be introduced in NSW to protect consumers against unfair contract terms. The submissions presented from the NSW Legal Aid Commission, community legal centres and several legal academics describe the inadequacies of the existing legal avenues for redress.
- 4.75** It was impressed upon the Committee that the existing laws, with their focus on procedural unfairness, cannot adequately assist consumers who are party to contracts with unfair terms. Issues regarding unfair contract terms relate mainly to the substantive terms of the contract rather than the process through which the contract was formed. This procedural focus, coupled with the expense of bringing cases to trial, represents a significant barrier to consumers who are seeking to rectify the situation they are in due to an unfair contract term.
- 4.76** In addition, it was made clear that the exiting laws, developed as they have in a piecemeal way and without the specific focus on unfair terms in consumer contracts, cannot provide the kind of systemic guidance and preventative measures that specific unfair terms legislation, and an appropriately resources regulatory body to implement it, can.
- 4.77** The Committee notes the information provided to it in relation to the various codes of practice and specific legislation that certain industries operate under (as described in Chapter 3). The Committee also notes the views generally presented by Inquiry participants from the banking, finance, telecommunications and home building sector that the current regulation is adequate and that further regulation would impose an unnecessary burden on businesses. The Committee is also aware that unfair contract terms are more or less problematic in different industries.
- 4.78** While codes such as the *Consumer Credit Code* provide useful guidance in terms of contract fairness, they are limited in their application to specific industries and generally do not specifically and/or comprehensively address the issue of unfair terms. Evidence presented during this Inquiry identified only the telecommunications industry's *Consumer Contracts Industry Code* as specifically addressing the issue of unfair terms in consumer contracts.
- 4.79** The Committee is sensitive to the amount of regulation to which each industry must be accountable. Nonetheless, the Committee believes that no industry displays exemplary behaviour in relation to fair contract terms and there is a need to provide a form of unfair consumer contract terms legislation that covers all sectors. The impact of unfair contract legislation on businesses is further examined in Chapter 6.
- 4.80** Inquiry participants expressed a preference for a national scheme to protect consumers in this area. Even those who objected to the need for specific purpose legislation at all argued that a national response was the most desirable. However, the Committee was advised that progress on developing a national response has stalled. While the precise reasons for this were not made clear, the Committee notes that it is at the regulatory impact stage that the process has come to a halt.
- 4.81** Given the lack of any indication that a national response is immanent, or even likely, the majority of Inquiry participants strongly argued for NSW to follow Victoria's lead and enact its own legislation. The Committee concurs with the views expressed and therefore

recommends that the NSW Government seek an amendment to the *Fair Trading Act 1987* (NSW) to establish a scheme for the protection of consumers against unfair terms in consumer contracts.

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### **Recommendation 1**

That the NSW Government seek an amendment to the *Fair Trading Act 1987* (NSW) to establish a scheme for the protection of consumers in relation to unfair terms in consumer contracts.

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- 4.82** In the remaining chapters the Committee examines the options available to NSW in formulating specific purpose legislation to address the issue of unfair terms in consumer contracts. The discussion in this chapter has referred to both the Victorian and UK schemes as models the Committee should consider, and they are examined in detail in Chapter 5. The Committee also notes that New Zealand is currently investigating the need for a legislative response to this issue.
- 4.83** In Chapter 6 the Committee examines the views presented during the Inquiry as to the most appropriate legislative model for NSW. In the main, Inquiry participants expressed their support for the model adopted in Victoria. Inquiry participants also drew the Committee's attention to several issues important to the formulation of a new scheme for NSW and these issues are also examined in Chapter 6.

## Chapter 5 Specific purpose legislation in other jurisdictions

The terms of reference require the Committee to examine the effectiveness of specific purpose legislation in other jurisdictions.<sup>213</sup> A number of jurisdictions have implemented specific legislation to address unfair terms in consumer contracts, including Victoria, Canada, Japan and the United Kingdom (UK). New Zealand is currently considering implementation of unfair contract terms legislation.<sup>214</sup> This chapter focuses on the Unfair Terms in Consumer Contracts Regulation 1999 (UK) and Part 2B of the *Fair Trading Act 1999* (Vic).

### United Kingdom

5.1 The UK has had legislation dealing with unfair contract terms since 1977. The *Unfair Contract Terms Act 1977* (UK) (UCT Act) regulates contracts by limiting the inclusion of terms that exclude liability for death or injury and liability for breach of the implied terms as to title or description. Under the UCT Act these terms have no effect. This Act also prevents the inclusion of contract terms which significantly imbalance the obligations of one party over the other.<sup>215</sup> In 1994, following the European Union, the UK introduced a regulation to deal specifically with unfair terms in *consumer* contracts.

#### Unfair Terms in Consumer Contracts Regulations (1999)

5.2 In April 1993, the Council of the European Communities adopted a Directive on *Unfair Terms in Consumer Contracts*, which required Member States to prevent the use of unfair terms in consumer contracts and ensure that unfair terms in consumer contracts were not binding.<sup>216</sup> In the UK this directive led to the Unfair Terms in Consumer Contracts Regulations 1994, which was later superseded by the 1999 version (UTCCR).

5.3 Under the UTCCR, if a contract term is found to be unfair, it is not legally binding on the consumer and, if a trader refuses to accept that a term is unfair, a consumer can take legal action.<sup>217</sup>

5.4 The Director of the UK Office of Fair Trading (UK OFT) is responsible for determining whether or not contract terms may be considered unfair and can instigate legal action to stop the use of a certain term in consumer contracts. However, 'cases are normally resolved informally, when the UK OFT accepts an undertaking in lieu of court proceedings.'<sup>218</sup>

<sup>213</sup> The terms of reference are set out on page iv.

<sup>214</sup> Submission 6, New Zealand Ministry of Consumer Affairs, p6

<sup>215</sup> [www.bailii.org/cgibin/markup.cgi?doc=/ew/other/EWLC/2005/292\(Appendix%20B\).html&query=unfair+contract+terms&method=all](http://www.bailii.org/cgibin/markup.cgi?doc=/ew/other/EWLC/2005/292(Appendix%20B).html&query=unfair+contract+terms&method=all) (accessed 3 November 2006)

<sup>216</sup> [www.consumersfederation.com/documents/MediaPack05.pdf](http://www.consumersfederation.com/documents/MediaPack05.pdf) (accessed 10 October 2006)

<sup>217</sup> Submission 16, NSW Office of Fair Trading, p15

<sup>218</sup> [www.consumersfederation.com/documents/MediaPack05.pdf](http://www.consumersfederation.com/documents/MediaPack05.pdf) (accessed 10 October 2006)

***Definition of 'unfair'***

- 5.5 The UTCCR defines an unfair term as one which 'has not been individually negotiated, is contrary to the requirement of good faith, and causes a significant imbalance between the rights and obligations of the parties to the detriment of the consumer.'<sup>219</sup> This definition reflects an emphasis within the regulation on standard form contract terms, as individually negotiated terms are outside the ambit of the UTCCR.
- 5.6 Mr Frank Zumbo, Associate Professor with the University of NSW's School of Business Law and Taxation, advised the Committee that Schedule 2 of the UTCCR sets out an extensive list of the kinds of terms that may be considered unfair and includes guidance on unfair terms in particular industries:

In fact, the United Kingdom legislation provides in the schedules a list of terms that that legislation believes to be unfair. We have a very extensive list of terms that the United Kingdom regulation provides as being an example of "unfair". Also referring to the United Kingdom, they have guidance on unfair terms in a number of industries: tenancy agreements, health and fitness, consumer entertainment, car, home, contracts, holiday, caravan, and so forth.<sup>220</sup>

***Implementation***

- 5.7 The UK OFT advised the Committee that, since 1994, it had considered over 1000 standard form contracts across a wide range of industries for unfair terms. It estimates that, between the years 2000 and 2005, over 2,000 terms were amended.<sup>221</sup>
- 5.8 The UK OFT also advised that it produces a bulletin which publicises the list of terms which are considered to be unfair, and where possible, amendments to that term; as well as a guide to unfair contract terms.<sup>222</sup>
- 5.9 In its submission, CHOICE appraised the Committee of its research of the UK OFT's Annual Reports over the last three financial years which showed that the most common successfully challenged unfair terms were those relating to:
- Exclusion or limitation of liability for breaches of contract, particularly liability for poor service, work or materials
  - Terms requiring consumers to pay financial penalties
  - Terms imposing unfair financial burdens, consumer declarations and unreasonable ancillary obligations and restrictions, and
  - Failure to use plain and intelligible language.<sup>223</sup>

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<sup>219</sup> Submission 20, Associate Professor Frank Zumbo, Attachment 2, p3

<sup>220</sup> Associate Professor Frank Zumbo, Evidence, 20 October 2006, p58

<sup>221</sup> Submission 5, UK Office of Fair Trading, p2

<sup>222</sup> Submission 5, p2

<sup>223</sup> Submission 19, CHOICE, p20

- 5.10** The UK OFT outlined in its submission the general principles it follows in relation to the enforcement of the UTCCR including that action be ‘necessary and proportionate where there is evidence of a breach and of potential consumer harm stemming from the breach.’<sup>224</sup> The UK OFT explained that businesses are given an opportunity to ‘put matters right’ before it considers legal action.
- 5.11** Since the UTCCR came into force in 1995, only one case has been taken to court.<sup>225</sup> The action, against First National Bank was initially unsuccessful; however it was later successful on appeal, where the Court of Appeal ‘ruled unanimously in the Director General’s favour ... that FNB was acting unfairly by charging debtors interest on debt already the subject of a court order to pay by instalments.’<sup>226</sup>

### Comment on the UK regulation

- 5.12** Several Inquiry participants commented on the effects of the UTCCR which was generally viewed as a positive piece of legislation for the United Kingdom.
- 5.13** For example, Associate Professor Zumbo suggested that the UTCCR successfully targets unfair terms without impinging on ‘the use of terms reasonably necessary to protect the legitimate interests’ of a service provider.<sup>227</sup>
- 5.14** Ms Susan Dixon from the NSW OFT told the Committee that the UTCCR appears to be a successful piece of legislation:
- Certainly there has not been any criticism that the [UTCCR] legislation has had any kind of disadvantage to industry or to consumers. It seems to be pretty much accepted that it is a successful piece of legislation.<sup>228</sup>
- 5.15** Similarly, the Consumers’ Federation of Australia, the national peak body for consumer groups in Australia, noted that the UTCCR ‘has a history of successful operation and has conferred proven benefits on consumers and on the marketplace generally.’<sup>229</sup>
- 5.16** In its submission, CHOICE noted that the key distinction between the UTCCR and Part 2B of the Victorian *Fair Trading Act 1999* is that the UTCCR applies to all consumer contracts, including finance contracts (which the Victorian legislation excludes). CHOICE also noted that ‘terms within credit contracts feature amongst the highest proportion of terms found to be unfair by the [UK] OFT.’<sup>230</sup>

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<sup>224</sup> Submission 5, p1

<sup>225</sup> Submission 5, p1

<sup>226</sup> [www.crw.gov.uk/resources/oft309\\_bulletin9.doc](http://www.crw.gov.uk/resources/oft309_bulletin9.doc) (accessed 3 November 2006)

<sup>227</sup> Submission 20, Attachment 2, p4

<sup>228</sup> Ms Susan Dixon, Director, Consumer Protection and Community Access, Office of Fair Trading, Evidence, 20 October 2006, p9

<sup>229</sup> Submission 18, Consumers’ Federation of Australia, p20

<sup>230</sup> Submission 19, p21

- 5.17** In its submission, the Housing Industry Association (HIA) noted that, while it opposed the introduction of unfair contract terms legislation generally, the UTCCR model was its preference, as it requires the examination of the contract as a whole, providing context to the various clauses, and because ‘only a court can determine if a contract term is unfair.’<sup>231</sup> The HIA believes that this provides companies with the freedom to engage in individually negotiated contracts without fear of censure and, additionally, requiring formal legal proceedings provides both parties the opportunity to make submissions to the issue.<sup>232</sup>

## Victoria

### *Fair Trading Act 1999 (Vic), Part 2B*

- 5.18** Victoria enacted fair trading legislation in 1999, in the form of the *Fair Trading Act 1999*. In 2003, this Act was amended to include a new Part 2B which set out provisions relating specifically to unfair terms in consumer contracts. The amendment was the outcome of an inquiry initiated by the Victorian Minister for Consumer Affairs, the Hon Marsha Thomson MLC.<sup>233</sup>
- 5.19** Dr David Cousins, the Director of Consumer Affairs Victoria (CAV), told the Committee that, in his view the unfair terms amendments were important for a number of reasons, including that it provides a standard which industry broadly can look to, as it is not limited to various sectors:

Our view on this legislation is that it does set a general standard of behaviour for business. We feel it is quite important, being general legislation applying right across the board. One of the things in the consumer affairs area has been a piecemeal and ad hoc adoption of legislation to deal with particular problems over time. I guess over the past few years even in the realms of the Ministerial Council and the heads of officials meetings there have been discussions about a range of areas, such as hire cars, even entertainment providers, fitness centres and so on. The problems in those industries we felt could be dealt with by this particular general legislation on unfair contract terms.<sup>234</sup>

- 5.20** Dr Cousins explained that, unlike the UK scheme, the Victorian legislation addressed terms in individually negotiated contracts, as well as standard form contracts:

I have to say that our legislation in Victoria does not just relate to standard contracts. It relates to individually negotiated contracts, which is a difference from the United Kingdom.<sup>235</sup>

- 5.21** CAV summarises the effect of the legislation on parties who have entered into a contractual agreement as follows:

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<sup>231</sup> Submission 10, Housing Industry Association, p4

<sup>232</sup> Submission 10, p4

<sup>233</sup> Dr David Cousins, Director, Consumer Affairs Victoria, Evidence, 20 October 2006, p61

<sup>234</sup> Dr Cousins, Evidence, 20 October 2006, p63

<sup>235</sup> Dr Cousins, Evidence, 20 October 2006, p65

- consumers can take action if they believe their contract is unfair
- businesses must ensure that their contracts comply
- unfair terms in consumer contracts are void
- Consumer Affairs Victoria can determine that a term is unfair
- it is an offence to use a prescribed unfair term in a consumer contract.<sup>236</sup>

**5.22** Penalties for the use of an unfair term in a consumer contract include that the term will be deemed void and the rest of the contract may only continue to bind the parties if it is capable of existing without the unfair term.<sup>237</sup>

***Definition of ‘unfair’***

**5.23** Part 2B defines an unfair contract term and prescribes injunctions to prevent continued use of unfair terms. Section 32W defines unfair terms as those which are ‘contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the rights and obligations arising under the contract to the detriment of the consumer.’<sup>238</sup>

**5.24** The definition of ‘unfair’ was elaborated on by Dr Elizabeth Lanyon, the Chair of CAV’s Unfair Contract Terms Taskforce, who appeared at the Committee’s hearing:

A term can be unfair if the consumer just cannot understand it. If a potentially onerous term is not brought to the consumer's attention, or is couched in such legalese that they do not understand its implications, then it is unfair. Convolution liability waiver clauses are an example of that. How can the consumer understand what it means?<sup>239</sup>

**5.25** Dr Lanyon explained that section 32X, which provides a number of factors to assist a court or the Victorian Civil and Administrative Tribunal (VCAT) in deciding if a term is unfair, was derived from Schedule 2 of the UK regulation:

The 13 terms are modelled on the list that was part of the pre-1999 United Kingdom situation, elevated to factors in our legislation. I think they provide a broad spectrum of the kind of fairness issues that regularly crop up across the board. They have been very helpful to us in directing us to terms which shift the balance between consumers and suppliers, and they are very helpful to point to. They are not exhaustive. One particular issue that we are seeing a lot, which presumably has come to the fore because of the Australian situation and just time moving on, is direct debits. There is nothing particularly about direct debits in that list but the use of direct debits and the

<sup>236</sup> Consumer Affairs Victoria: [www.consumer.vic.gov.au](http://www.consumer.vic.gov.au) (accessed 8 September 2006)

<sup>237</sup> *Fair Trading Act 1999* (Vic), Part 2B, sections 32V-Y

<sup>238</sup> *Fair Trading Act 1999* (Vic), Part 2B, section 32W

<sup>239</sup> Dr Elizabeth Lanyon, Chair, Unfair Contract Terms Taskforce, Consumer Affairs Victoria, Evidence, 20 October 2006, p67

way they work is cropping up across a range of industries. We had to deal with that through the generic test. I think the 13 factors are very useful.<sup>240</sup>

- 5.26** Section 32V of Part 2B states that the only consumer contracts to which it does not apply are consumer credit contracts or those required or expressly permitted by law.

### *Implementation*

- 5.27** Dr Cousins explained how Part 2B had been introduced and implemented, noting that the UK, having already implemented unfair contract terms legislation, provided a useful example:

We recognised right at the outset that this was novel legislation for Australia; it was not novel by any means in terms of looking at Europe. The UK had 10 years experience of this legislation. So we looked closely at the European experience and the UK and we took, I suppose—I would not say a cautious approach but we were concerned that this legislation may have just snuck up on business to some extent and we wanted to adopt an approach which was one of educating businesses to the requirements of the new legislation as much as possible. We were at pains, for example, to talk to business groups; we held a conference; we, in fact, invited people out from the UK to talk at that conference about their experience of unfair contract terms legislation.<sup>241</sup>

- 5.28** Dr Cousins informed the Committee that CAV developed a taskforce specifically to manage the unfair terms legislation, headed by Dr Elizabeth Lanyon, who had expertise in commercial law:

Dr Lanyon has had a great deal of experience in commercial law, and that is a very important aspect in dealing with companies in their situation to actually understand from a commercial point of view the realities of the marketplace; so not just necessarily applying a piece of law as a regulator in a very arbitrary way but doing it in a much more sophisticated and considered way.<sup>242</sup>

- 5.29** CAV placed emphasis on making sure service providers were aware of the effects of the legislation, providing guideline documents and presenting information at industry conferences:

Aside from the conference, we issued guidelines documents and we have done a lot of speaking at conferences; we have engaged with lawyers, who are very important, obviously, in advising business groups and so on about the new legislation. Three years down the track I think a lot of that has borne fruit.<sup>243</sup>

- 5.30** Dr Cousins highlighted a number of factors that were important in the implementation and education process undertaken by the CAV, including the assessment of terms in relation to the contract as a whole, ‘in context’:

One of the experiences we learnt there was that it really is necessary when you are looking at these contract terms to, in fact, view the whole contract, not just individual

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<sup>240</sup> Dr Lanyon, Evidence, 20 October 2006, p68

<sup>241</sup> Dr Cousins, Evidence, 20 October 2006, p61

<sup>242</sup> Dr Cousins, Evidence, 20 October 2006, p62

<sup>243</sup> Dr Cousins, Evidence, 20 October 2006, p62

terms; terms have to be seen in the total context. I think we also learnt from the UK experience where theirs was more a scattergun approach.<sup>244</sup>

- 5.31** Dr Cousins also advised that the process of education had been about negotiating with industry, as well as informing them of the new legislative requirements:

We have made the point to business in Victoria that this is legislation that is passed by Parliament; it is not discretionary for business to decide whether they do comply or not. We certainly start from that point of view. On the other hand, there is a lot of judgment involved in actually administering the legislation and as a regulator I think we feel that we must make as clear as we can to business our view of what the legislation is about. We are certainly willing to engage in a dialogue with business to understand business' perspective, both parties knowing that the judge, as to what is fair or unfair, will ultimately be the courts.<sup>245</sup>

- 5.32** The CAV has also adopted a targeted industry approach. By ascertaining which industries CAV had been receiving high number of complaints about, it was then able to address the businesses operating in those industries:

What we did was look at the areas where consumer affairs had high volumes of complaints and concerns about contract terms ... So we adopted that sectoral or industry approach and some of the industries we nominated right at the outset that we were going to deal with were mobile phones, but there were others that had been of concern to us: things like fitness centres and Internet providers—building has been another one. Those are the areas where we have focused our attention.<sup>246</sup>

- 5.33** Dr Lanyon noted that this kind of approach required a two stage process, including education to target specific industries, as well as a more generic form of education aimed at suppliers generally and addressed through fair trading congresses and other CAV publications. Dr Lanyon noted that this was a key part of the process as it aimed to ensure lawyers were familiar with the legislation so when smaller service providers approached them they were able to provide accurate advice.<sup>247</sup>

- 5.34** Dr Cousins discussed the impact of Part 2B on industry and the potential costs to businesses, which, he believed, had not been overly onerous:

Our experience is, and I guess we can only go on what business feeds back to us, is that there have not been major costs on business. In fact, the reality has been that business does from time to time review and change contracts. And the process of taking account of the Victorian legislation in many cases has actually just been absorbed as part of the normal process of change and reviewing contracts. We have been looking recently at building contracts and, indeed, one of the major building associations in Victoria has been in the process of amending its contracts. And so on top of that, and as part of that process, we have been highlighting to them the unfair

<sup>244</sup> Dr Cousins, Evidence, 20 October 2006, p62

<sup>245</sup> Dr Cousins, Evidence, 20 October 2006, p66

<sup>246</sup> Dr Cousins, Evidence, 20 October 2006, p62

<sup>247</sup> Dr Lanyon, Evidence, 20 October 2006, p69

contract terms and how we think those terms should be changed to comply with that.<sup>248</sup>

**5.35** Dr Lanyon provided the example of the processes CAV had used to ensure that the hire car industry was well informed of the changes under the new legislation:

One example I will take is hire car arrangements. The first thing we did was to analyse our data and then we contacted the major five hire car companies—Avis, Budget, Thrifty, Europe Car and people who have motor homes, Brits Maui backpacker—and we dealt with them in relation to the contracts so that we could understand exactly what the issues were and got the outcomes. We then produced guidelines that are more specific than the general guidelines called Unfair Terms in Vehicle Hire Contracts, which take a typical set of issues from the front page right to the back. The education campaign we went through with that is to use our Victorian Automobile Chamber of Commerce [VACC] specific committee and work with it to ensure that smaller hire car companies—a whole lot of two-man regional small businesses—were also provided with that information both through the VACC's committee and information but also through a direct mail-out to the database of all those companies.<sup>249</sup>

**5.36** Dr Cousins provided an additional example of the way CAV had worked with the mobile phone industry, an industry which had been the subject of a number of complaints:

In the case of mobile phone contracts we looked at the major operators in that industry, for example, and some of those contracts were in excess of 500 pages. These were massive documents that consumers, of course, never got to see in many cases—in most cases, in fact, because the operators were legally only required to provide a summary document. So we went through those documents; looked at them as a whole and identified terms that we thought were unfair in the context of our legislation, and we brought those terms to the attention of the organisations concerned and we sought to have a dialogue with them about those terms. In many cases organisations recognised our point of view; often we recognised the point of view that was put to us by the organisations concerned.<sup>250</sup>

**5.37** Ms Elizabeth Beal, Director of the Communications Law Centre (CLC), an independent public interest organisation specialising in communications law and policy based in Victoria, explained the Centre's role in assisting CAV to implement its legislation, including the review and identification of unfair terms in mobile phone contracts:

The process involved us analysing contracts. It involved acquiring the contracts that were in use in Victoria at that time. We did the first batch of analysis on mobile phone contracts. We were asked to review the main providers and I think there were about seven providers at that time. We read all the different contracts that they offered and provided opinion on terms that we believed breached part 2B of the new legislation. We then provided that analysis in document form with pages and pages of analysis and with quite alarming findings.<sup>251</sup>

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<sup>248</sup> Dr Cousins, Evidence, 20 October 2006, p63

<sup>249</sup> Dr Lanyon, Evidence, 20 October 2006, p69

<sup>250</sup> Dr Cousins, Evidence, 20 October 2006, p62

<sup>251</sup> Ms Elizabeth Beal, Director, Communications Law Centre, Evidence, 20 October 2006, p31

- 5.38** Ms Beal noted there was substantial non-compliance with the unfair terms legislation and that ‘there was a reluctance to acknowledge the jurisdiction of the State regulator’:

The findings were that there was not compliance. We had some limited dealing with the industry in that process, but we tried to leave that to the regulator down the track. The limited dealing that we had in just acquiring the contracts and some discussion about understanding of the terms—which ones were in place et cetera—revealed that there was reluctance to acknowledge the jurisdiction of the State regulator. That attitude has clearly changed over the past few years. There has been a battle on the part of Consumer Affairs Victoria, when dealing with the telecommunications industry, to gain recognition of the Act and the need to adhere to it, which I found surprising. But it was clearly apparent in both the consulting work that the centre does on various committees with industry and regulators.<sup>252</sup>

- 5.39** Dr Cousins explained that the process of assessing consumer contracts for terms which would contravene Part 2B had demonstrated to CAV the amount of unfair terms that were prevalent in many contracts, but that through the process of identification and subsequent negotiation, hundreds had been amended, with (as for the UK, to date) only one instance resulting in legal action:

Our experience is many hundreds of terms have been amended as a result of the work that we have done and amended on a voluntary basis by businesses. Again it is also true that we have only taken action in the tribunal on one occasion and that was in relation to the AAPT case and that arose on the basis that the organisation decided that its best approach to us was not to talk to us. So the only real option available to us in that case was to go to the [Victorian Civil and Administrative] Tribunal and have the tribunal make a declaration that, in fact, terms that we considered were unfair, from the administrator's point of view, were in fact unfair.<sup>253</sup>

- 5.40** The result of this action was that, while the case was ongoing the service provider amended the contract so that the relevant terms were amended; nonetheless the VCAT also found the terms to be unfair under Part 2B, confirming CAV's position:

[VCAT] found that the key terms that we were objecting to were unfair. As it happened half way through that case the company had amended those terms any way, but our action was quite successful. The case was quite important because, if you like, it gave some judicial validation of the legislation that we have. Some of the issues around the interpretation of things like good faith and so on were clarified by Justice Morris of the Supreme Court in Victoria and also head of the Victorian Civil and Administrative Appeals Tribunal.<sup>254</sup>

### *Negotiation*

- 5.41** Dr Lanyon highlighted the need for balance and compromise in the search for a ‘standard of fairness’ to which both industry and CAV could agree:

<sup>252</sup> Ms Beal, Evidence, 20 October 2006, p31

<sup>253</sup> Dr Cousins, Evidence, 20 October 2006, p62

<sup>254</sup> Dr Cousins, Evidence, 20 October 2006, p62

The way that I illustrate this is to say that this is about a standard of fairness... There is obviously a spectrum between the very fair and the very unfair. In some cases we have got to a point where we say, "We say that that further step would be a fairer outcome" and business might say, "No, that is where we are going to part company." In that circumstance, we might say: We will either take that to court, or we will not. It is like an ordinary commercial negotiation, with the two sides sitting across the table, except that in a sense we represent the consumer. In any robust discussion or commercial negotiation, both sides are trying to achieve an outcome. One side may not necessarily agree with the other, and will make various decisions about where to leave it.<sup>255</sup>

- 5.42** Dr Cousins explained that CAV had addressed the majority of clearly unfair terms in contracts, in an effort to address the most objectionable terms first and to negotiate on other terms as part of the education process:

In mobile phone contracts, and it is only a guesstimate at the number, we would have identified 200 terms that were suspect. So we really dug in, if you like, on 18 terms that we eventually took to court. There is a sense of the 80:20 rule here; if we can achieve 80 per cent by dealing with those 20 per cent of terms that are really objectionable, then that seems a sensible thing to do. Why prolong arduous discussions and negotiations for very marginal benefit? So there is a bit of cost-benefit application in our approach.<sup>256</sup>

### **Comment on the Victorian scheme**

- 5.43** Several Inquiry participants commented on the definition of unfair terms contained in section 32W (described at paragraph 5.23).
- 5.44** For example, the Australian Bankers' Association (ABA) expressed its view that an important consideration was missing from the definition of 'unfair term' in section 32W, in relation to business efficacy and depositor protection.<sup>257</sup> The ABA submission explained that contractual terms should take into consideration the need for businesses to function in accordance with the principles of 'efficiency and efficacy.'<sup>258</sup> This principle is particularly important for banks, the ABA argued, because they are 'prudentially supervised institutions and have a legal responsibility not to put depositors' funds at risk'.<sup>259</sup>
- 5.45** Further, the ABA argued that the definition in section 32W should qualify the reference to 'all circumstances' as part of the test of unfairness to recognise that business has a 'legitimate interest in conducting its business efficiently, properly, efficaciously, in accordance with the law and with certainty'.<sup>260</sup>

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<sup>255</sup> Dr Lanyon, Evidence, 20 October 2006, p66

<sup>256</sup> Dr Cousins, Evidence, 20 October 2006, p66

<sup>257</sup> Submission 12, Australian Bankers' Association, p13

<sup>258</sup> Submission 12, p13

<sup>259</sup> Submission 12, p13

<sup>260</sup> Submission 12, p14

- 5.46** The Housing Industry Association (HIA) asserted that the definition was too broad to apply effectively to HIA contracts, which could not be treated in a similar manner to contracts provided by large corporations. The HIA argued that circumstances specific to the HIA contractual process should be taken into account when considering whether or not a term could be called unfair and that, under the current definition, they are not.<sup>261</sup>
- 5.47** Participants also commented on the efficacy of the Victorian scheme, the majority of whom thought it was a successful piece of legislation, citing the ability of consumers to address unfair contract terms without litigation or reliance on industry self-regulation and the implementation strategy adopted by Consumer Affairs Victoria.
- 5.48** Ms Lyn Baker, the NSW Commissioner for Fair Trading, told the Committee that specific unfair terms legislation provided a solution to the problem of unfair terms in consumer contracts by requiring regulatory agencies to both identify unfair terms and negotiate with industry to amend them:

Legislation that prohibits unfair contract terms, like that in Victoria and the United Kingdom, provides a different solution. It gives regulatory agencies, like the Office of Fair Trading, a role in identifying unfair terms and negotiating with the industry to change them for the benefit of all consumers.<sup>262</sup>

- 5.49** Ms Baker and Mr Rod Stowe, Deputy Commissioner from the NSW OFT, were very supportive of the operation of this legislation in both jurisdictions, but particularly in Victoria, with which they were naturally more familiar. Mr Stowe told the Committee Part 2B of the *Fair Trading Act 1999* (Vic) had already had some impact on NSW in that national service providers who have had to amend standard form contracts would have done so for all jurisdictions, not just for Victoria:

We certainly believe that it is a useful start, and if we were looking at drafting national legislation that would be the basis for it ... In fact, because of the Victorian legislation already impacting upon traders and service providers who operate nationally, there are people here in NSW who are already getting the benefit of the work the Victorians have done. There is no indication that it is causing dramatic inequities or bringing commerce to its knees, as some people have suggested.<sup>263</sup>

- 5.50** Ms Baker also emphasised to the Committee the importance of providing recourse that does not require the consumer to bring the case to court, as exists under the UTCCR and Part 2B of the *Fair Trading Act 1999* (Vic):

I think the important thing about the Victorian and United Kingdom models is that they do not rely on an individual consumer going forward with litigation; they allow a regulatory authority to take action. You get a systemic change to the contract that benefits all, rather than just a remedy for the person who complained and who actually had the money to go to court.<sup>264</sup>

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<sup>261</sup> Submission 10, Housing Industry Association, p4

<sup>262</sup> Ms Lyn Baker, Commissioner, Office of Fair Trading, Evidence, 20 October 2006, p2

<sup>263</sup> Mr Rod Stowe, Deputy Commissioner, Policy and Strategy, Office of Fair Trading, Evidence, 20 October 2006, pp9-10

<sup>264</sup> Ms Baker, Evidence, 20 October 2006, p9

- 5.51** Ms Beal of the CLC also highlighted how important unfair terms legislation had been to the better protection of consumers of the telecommunications industry in Victoria. She noted that previously the CLC was reliant on common law principles, which were not an effective way of ensuring self regulation occurred within the industry:

That played a key role in leverage for consumers to get some better protection in terms of regulatory guidance for the way that contracts could be drafted. We were forced to rely on common law principles, such as, What is conscionable conduct? When is a term that requires prior notice given to the party about to sign the contract? Those types of principles are very difficult to put into a self-regulatory framework and to argue. Once the implementation of the Victorian legislation took place, that provided some leverage and was often referred to as a benchmark during the drafting of the code.<sup>265</sup>

- 5.52** Ms Beal was emphatic about the level of improvement that had occurred in telecommunications contracts since the introduction of unfair contract terms legislation in Victoria:

Absolutely, yes, clearly. I have gone on the record as saying that and that has been our experience in consistently tracking the contracts, having been commissioned by Consumer Affairs Victoria to analyse the contracts. That involves detailed reading in full and analysing the contracts. We have done that three times since the legislation was introduced—a couple of times in relation to mobile phones and once in relation to Internet service provider agreements.<sup>266</sup>

- 5.53** Similarly, the Telecommunications Industry Ombudsman (TIO) believes that the adoption of unfair terms legislation in Victoria, in conjunction with the ACIF Consumer Contracts Code (discussed in Chapter 3 of this report), had 'led a number of the larger telecommunications providers to amend their standard terms and conditions pre-emptively'. However the TIO noted that smaller service providers were, in the TIO's experience, still using unfair terms in standard form contracts.<sup>267</sup>

- 5.54** Associate Professor Zumbo noted the importance of being able to address an unfair term specifically, without voiding the entire contract, something which is possible under both the UK and Victorian legislation:

It is targeted. It is surgical. It deals with an identifiable issue. It does not unsettle the certainty of the contract beyond that term. The two pieces of legislation, the Victorian legislation and the United Kingdom legislation, suggest that the removal of the unfair term will not affect the ability of the rest of the contract to continue, if it is able to continue.<sup>268</sup>

- 5.55** Dr Cousins also noted that there was some benefit to industry through the implementation of unfair contract terms legislation, in that it had provided an opportunity for businesses to review their contracts and improve them:

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<sup>265</sup> Ms Beal, Evidence, 20 October 2006, p29

<sup>266</sup> Ms Beal, Evidence, 20 October 2006, p29

<sup>267</sup> Submission 15, Telecommunications Industry Ombudsman, p3

<sup>268</sup> Associate Professor Zumbo, Evidence, 20 October 2006, pp54-55

The other thing is that some of these big standard contracts are often in a bit of a mess and this process has actually been a discipline for business to have a look at their contracts. The contracts have often been so long and complicated that their employees do not have a clue what is in them. If you have a 500-page contract it is not just consumers who might be confused or not understand what is there but it is also the business employees. So in a sense I am saying there have been benefits for business, as I see it, and it is not just simply an easy proposition of saying "Well, on the one hand there might be some benefits for consumers, and on the other hand there will be some costs to business, and we need to weight it up." I think it is a much more complicated situation that depends on each individual case and so on.<sup>269</sup>

- 5.56** Dr Cousins told the Committee that CAV had successfully implemented the legislation and that, while education and promotion are an ongoing process, he believed it was important for other states to start implementing similar legislation and also taking on the role of educating service providers:

Looking at the three years, I am quite pleased with our approach to implementation in this area. I think we have done a terrific job. If we had more resources, of course we would be able to put still more effort into communication and education. Having said that, and the resources that we have in that area, we have reprioritised from other areas. I am also satisfied that we have had sufficient resources to do the task that we have had to do. We just do not want to do the task for Australia as a whole. We are happy to do the task for Victoria and to take on some of the national issues as part of that but we are looking for other jurisdictions to come up to the bar.<sup>270</sup>

- 5.57** Ms Baker, the NSW Commissioner for Fair Trading, advised that the NSW OFT was most impressed with the level of negotiation that had occurred in both Victoria and the UK:

What we are most impressed with, in particular regarding the Victorian experience, is the way they are achieving the system of change, which is not to prosecute but to negotiate with industry and get them to change their contracts voluntarily, which is a huge benefit to everyone but does not result in incredible prosecution costs. We have been very impressed with the achievements they have made in a short space of time.<sup>271</sup>

- 5.58** Associate Professor Zumbo told the Committee that the work done by the UK OFT and Consumer Affairs Victoria should inform any step toward unfair contract terms legislation in NSW:

We have a model in Victoria and in the United Kingdom that is working and there is no reason why it could not work in NSW. It does not cause business uncertainty. In fact, it provides certainty because you know that if you are complying with this regime your terms will not be challenged. You can provide even further certainty by allowing model contracts or codes, for example, to be registered. It is a win: win for business, consumers and the State of NSW.<sup>272</sup>

<sup>269</sup> Dr Cousins, Evidence, 20 October 2006, p63

<sup>270</sup> Dr Cousins, Evidence, 20 October 2006, p69

<sup>271</sup> Ms Baker, Evidence, 20 October 2006, p10

<sup>272</sup> Associate Professor Zumbo, Evidence, 20 October 2006, p59

- 5.59** Ms Dixon, Director, Consumer Protection and Community Access, at the NSW Office of Fair Trading (NSW OFT) explained that the UK and Victoria had been identified by the Ministerial Council on Consumer Affairs (discussed in chapter 4) as both had an effective implementation strategy:

Really Victoria and the United Kingdom have been singled out by the Ministerial Council when its working party was doing its research as the ones that were most relevant to the Australian situation, the Australian law, the way operates. They seem to have the most effective implementation strategy, as we have just been talking about.<sup>273</sup>

- 5.60** In conclusion, Dr Cousins told the Committee that the experience had been positive and, importantly CAV was able to address unfair contract terms in consumer contracts, which had not been possible prior to the introduction of Part 2B of the *Fair Trading Act 1999* (Vic):

The only thing to sum up our experience is that we feel the experience has been positive. After three years the world has not caved in. It did not cave in after 10 years in the United Kingdom. I think we are dealing with things that are not dealt with satisfactorily by the existing law, and that has been fairly demonstrated. I would urge you to look at our experience, as you will. I am sure you will do that critically. From our point of view, we see it as being very positive. In many ways we are a national economy these days, and this sort of legislation should be national in character.<sup>274</sup>

- 5.61** Some participants, however, did not see a need for specific purpose legislation and believed that the implementation of Part 2B of the *Fair Trading Act 1999* (Vic) was an unnecessary additional piece of regulation.

- 5.62** Master Builders Australia (MBA), for example, told the Committee that specific unfair terms legislation is an unnecessary complication in an ‘already overregulated industry sector’ and may constitute a ‘blow to economic freedom.’<sup>275</sup> The MBA explained that there are a number of provisions of specific building legislation (see chapter 3) which duplicate the effect of Part 2B of the *Fair Trading Act 1999* (Vic) and are particularly confusing for the sector as it is regulated by Consumer Affairs Victoria ‘without due consideration of the interrelationship between the two sets of consumer protection arms’.<sup>276</sup>

- 5.63** Similarly, Mr Ian Gilbert of the ABA told the Committee that the banking industry was not clear on what the ramifications of unfair contract terms legislation in Victoria might be. He explained that it was too soon to know the full impact such legislation would have for the banking sector:

One of our members has described the Victorian legislation—which is really only three years old; I think it was passed this month three years ago—as a sleeping giant. They do not know where it is going to take them in terms of their contracts and agreements with customers.<sup>277</sup>

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<sup>273</sup> Ms Dixon, Evidence, 20 October 2006, pp10-11

<sup>274</sup> Dr Cousins, Evidence, 20 October 2006, p72-73

<sup>275</sup> Submission 8, Master Builders Australia, p10

<sup>276</sup> Submission 8, p9

<sup>277</sup> Mr Ian Gilbert, Director, Australian Bankers’ Association, Evidence, 20 October 2006, p40

## New Zealand

- 5.64** The Committee was advised that the Ministry of Consumer Affairs (MCA) in New Zealand is also considering the sufficiency of its current consumer protection law. The MCA advised the Committee that part of the review was the consideration of specific unfair consumer contract terms legislation.<sup>278</sup>
- 5.65** New Zealand is currently in a situation similar to that of NSW. Under Part 1 of New Zealand's *Fair Trading Act 1986* (NZ), 'misleading and deceptive conduct, false representations and unfair practices are prohibited.'<sup>279</sup> While unfair contract terms are not specifically prohibited, the MCA notes that they are covered by 'general contract law, such as the *Contract Remedies Act 1979* (NZ) and common law.'<sup>280</sup>
- 5.66** The MCA notes that under specific unfair consumer contract terms legislation the Commerce Commission, the agency responsible for the enforcement of the *Fair Trading Act 1986* (NZ), would be able to 'take enforcement action ... as well, individual consumers would be able to take a dispute about an unfair term in a contract to the Disputes Tribunal ... on their own behalf.'<sup>281</sup>
- 5.67** The MCA provided the Committee with an overview of the responses to its recent discussion paper 'that compared redress and enforcement initiatives from Australia, Canada, the United Kingdom and the United States.'<sup>282</sup> The MCA received 27 submissions with a range of responses covering similar issues to those received by this Committee, with less cohesion, however, around the need for specific unfair contract terms legislation. The MCA will conduct further analysis of the proposals, along with consultation with relevant stakeholders before any recommendation it makes that the *Fair Trading Act 1986* be amended to include unfair consumer contract terms.<sup>283</sup>

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<sup>278</sup> Submission 6, New Zealand Ministry of Consumer Affairs, p1

<sup>279</sup> Submission 6, p2

<sup>280</sup> Submission 6, p2

<sup>281</sup> Submission 6, p2

<sup>282</sup> Submission 6, p1

<sup>283</sup> Submission 6, p4



## Chapter 6 Specific purpose legislation for NSW

In this chapter the Committee examines the views presented during the Inquiry as to the most appropriate legislative model for NSW. In the main, Inquiry participants expressed their support for the model adopted in Victoria. Inquiry participants also drew the Committee's attention to several issues important to the formulation of a new scheme for NSW, which are also examined in this chapter.

### Consistency with the Victorian model

- 6.1** The Victorian model was favoured by the majority of submission makers and witnesses that advocated for the introduction of specific purpose legislation in NSW. The Victorian scheme is described in Chapter 5, where the views of Inquiry participants as to the advantages of the scheme are also examined.
- 6.2** For example, the NSW Legal Aid Commission expressed its support for the Victorian legislation, noting that it (as well as the UK model) '... has had significant practical success across various industries in alleviating unfair terms in contracts.'<sup>284</sup>
- 6.3** CHOICE also expressed support for the Victorian (and the UK) approach '... of combining an expanded regulatory and enforcement jurisdiction with clear administrative guidance.'<sup>285</sup>
- 6.4** The Telecommunications Industry Ombudsman (TIO) advised the Committee that he welcomed other States adopting similar provisions to Part 2B of the *Fair Trading Act 1999* (Vic) in order to provide an equality of protection for all consumers in Australia.<sup>286</sup>
- 6.5** A number of Inquiry participants emphasised the need for consistency between jurisdictions in implementing specific unfair terms legislation, particularly in the absence of a national scheme.
- 6.6** For example, Ms Elizabeth Beal, Director of the Communications Law Centre in Victoria, argued that '... the advantage of consistency outweighs any advantage that might be gained from looking at another model.'<sup>287</sup> Ms Beal commented that consistency was important because conflicting requirements are burdensome on industry:

... I really would make a strong argument for consistency. Australia is a small population. I have some sympathy with the arguments of industry that overregulation becomes burdensome, particularly when you have conflicting requirements in different jurisdictions. Telecommunications is a major one where we need consistency to make it effective, but I am sure other industries would be similarly frustrated to have new consumer protection legislation around contract terms with which they were

<sup>284</sup> Submission 22, p18

<sup>285</sup> Submission 19, p17

<sup>286</sup> Submission 15, p3

<sup>287</sup> Ms Elizabeth Beal, Director, Communications Law Centre, Evidence, 20 October 2006, pp31-32

required to comply, and it was a different model to the one they had already worked towards complying with in Victoria.<sup>288</sup>

- 6.7 Associate Professor Zumbo of the University of NSW's School of Business Law and Taxation also advocated for consistency with the Victorian legislation to avoid unnecessary costs on businesses by requiring them to comply with different obligations in different jurisdictions:

... in the interests of consistency, I would argue that we should be as consistent as is possible with the Victorian legislation. We do not want to impose unnecessary costs on business by having slight nuances on aspects of the legislation. We would want to have the same consistency of legislation, where possible. I would suggest we can totally replicate the Victorian legislation.<sup>289</sup>

- 6.8 In addition, the Committee refers to the discussion in Chapter 4 regarding the preference for national scheme which largely reflected a desire for consistency across Australian jurisdictions.

#### **Committee comment**

- 6.9 The comments noted above, as well as the discussion of the benefits of the Victorian model in Chapter 5 of this report, provide strong arguments for NSW to adopt a scheme similar to Part 2B of the *Fair Trading Act 1999* (Vic).

- 6.10 The Committee therefore recommends that the NSW Government model its amendment to the *Fair Trading Act 1987* (NSW) in order to incorporate a scheme for the protection of consumers in relation to unfair contract terms, on Part 2B of the *Fair Trading Act 1999* (Vic).

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#### **Recommendation 2**

That the NSW Government model its amendment to the *Fair Trading Act 1987* (NSW), to establish a scheme for the protection of consumers in relation to unfair terms in consumer contracts, on Part 2B of the *Fair Trading Act 1999* (Vic).

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- 6.11 In undertaking this Inquiry the Committee has had the benefit of the views of Consumer Affairs Victoria, whose representatives appeared before the Committee at its public hearing. It is clear that it would also be beneficial if the NSW Government could draw on the experience of the Victorian Government when it develops and implements a new scheme for NSW.

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#### **Recommendation 3**

That the NSW Government, when developing the amendment to establish a scheme for the protection of consumers in relation to unfair terms in consumer contracts, consult with the Victorian Government to draw upon its experiences in designing and implementing Part 2B of the *Fair Trading Act 1999* (Vic).

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<sup>288</sup> Ms Beal, Evidence, 20 October 2006, pp31-32

<sup>289</sup> Associate Professor Frank Zumbo, Evidence, 20 October 2006, p55

- 6.12 The Committee notes that any improvements that could be made to the model used in Victoria, without creating substantial inconsistencies between the jurisdictions, should be examined. Inquiry participants drew the Committee's attention to several issues important to the formulation of a new scheme for NSW, including improvements to the Victorian scheme, and these issues are examined in the remainder of this chapter.

## Scope of the scheme

### One-size-fits-all?

- 6.13 The Committee notes that, as discussed in Chapter 3, concern was raised by some industry representatives who participated in this Inquiry that a 'one-size-fits-all' regulation would be inappropriate as some industries are sufficiently regulated, or do not have a significant problem with unfair terms.
- 6.14 The NSW Deputy Commissioner for Fair Trading, Mr Rod Stowe, argued that it would be 'detrimental' to develop legislation specific to different sectors:

We would think that that is a detrimental approach. Regulating individual industries is costly and it takes time, and there is additional cost to industry in having to comply. One of the advantages of having unfair contract terms in a similar way to the Victorian and UK legislation is that it operates across industries and operates much more effectively I think.<sup>290</sup>

- 6.15 The Committee concurs with the Deputy Commissioner for Fair Trading that new unfair terms legislation in NSW should apply across the board. While the Committee acknowledges that the issue of unfair terms is more problematic in some industries than others, it considers that the consumers should be able to avail themselves of the new scheme in relation to contracts relating to *all* industries. The Committee's endorsement of the Victorian model reflects this view.

### Inclusion of consumer credit contracts?

- 6.16 The Committee heard some evidence that consumer credit contracts, which are not included in the kinds of consumer contracts addressed by Part 2B of the *Fair Trading Act 1999* (Vic), should come under the purview of the NSW scheme.
- 6.17 In the UK, consumer credit contracts come under the Unfair Terms in Consumer Contracts Regulation (1999). However, the Victorian legislation expressly notes in Section 32V that Part 2B does not apply to terms in a contract to which the *Consumer Credit (Victoria) Act 1995* (Vic) applies.<sup>291</sup>

<sup>290</sup> Mr Rod Stowe, Deputy Commissioner, Policy and Strategy, Office of Fair Trading, Evidence, 20 October 2006, p12

<sup>291</sup> *Fair Trading Act 1999* (Vic), s 32V

- 6.18** The Committee notes that the *Consumer Credit (New South Wales) Act 1995* (NSW), which has the same provisions as the Victorian legislation, is in force in NSW. The Act is template legislation, adopted in Queensland, with each State and Territory following suit.<sup>292</sup> The Act enforces the *Consumer Credit Code* (discussed in Chapter 3), sections 70 and 71 of which enable a court to reopen unjust transactions and potentially relieve the debtor from the part or all of the agreement.<sup>293</sup>
- 6.19** The Committee notes, however, that this form of relief is similar to the *Contracts Review Act 1980* (NSW) in that it provides legal recourse for a consumer willing to engage in litigation, but no measure of protection against an unfair term in itself.
- 6.20** In response to a question as to whether she believed that consumer credit contracts should be included in unfair consumer contract terms legislation, Ms Lovric of CHOICE replied:
- Yes, absolutely. Looking at evidence from the United Kingdom Office of Fair Trading—and they do collect statistics on the numbers of complaints—consistently over the last three years complaints about consumer credit contracts feature among the top three complaints, which seems to indicate that there is a need for it.<sup>294</sup>
- 6.21** The NSW Legal Aid Commission in its submission also expressed support for the inclusion of *all* consumer contracts, including consumer credit contracts, in any proposed legislation for NSW.<sup>295</sup>
- 6.22** While the Committee did not receive a great deal of evidence on whether consumer credit contracts should be incorporated into the NSW scheme, the Committee believes that this issue should be examined during the process of developing a model for NSW.

### **Inclusion of small businesses?**

- 6.23** The Committee also heard some evidence that small businesses should come under any unfair contract terms legislation introduced in NSW as, in many ways, they are as vulnerable as consumers. The Committee notes that small businesses are not included under Part 2B of the *Fair Trading Act 1999* (Vic), or the *UTCCR 1999* (UK).
- 6.24** In its submission, the Energy and Water Ombudsman New South Wales (EWON) advised that, as the contracts offered to small businesses were often the same as those offered to individual consumers, the effects of unfair contract terms were the same if not exacerbated by small businesses' reliance on the suppliers' services.<sup>296</sup>

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<sup>292</sup> [www.parliament.nsw.gov.au/prod/parlament/publications.nsf/0/57DDC93FFDC67271CA256ECF000A57AD](http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/0/57DDC93FFDC67271CA256ECF000A57AD) (accessed 10 November 2006)

<sup>293</sup> [www.legislation.qld.gov.au/LEGISLTN/CURRENT/C/ConsumCredCode.pdf](http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/C/ConsumCredCode.pdf) (accessed 13 November 2006)

<sup>294</sup> Ms Jenny Lovric, Senior Policy and Research Officer, CHOICE, Evidence, 20 October 2006, p22

<sup>295</sup> Submission 22, p21

<sup>296</sup> Submission 7, Energy and Water Ombudsman New South Wales, p7

**6.25** EWON expressed particular concern that small businesses have no choice but to sign standard form contracts for essential services such as electricity and water but that they may be inexperienced in ‘navigating the contestable energy market.’<sup>297</sup>

**6.26** Ms Gisela Ramensky, member of the Business Law Committee of the NSW Law Society, told the Committee that a number of European countries had moved towards extending consumer protection to small businesses:

There is also a move in European countries—Switzerland, Germany and the Netherlands—to extend consumer protection to small businesses, rather than only individuals, because often there is a great imbalance in bargaining power. Lots of standard contracts involve small businesses, like franchisees, newsagents and publishers.<sup>298</sup>

**6.27** Dr David Cousins, Director of Consumer Affairs Victoria (CAV), advised that when Victoria developed its legislation it decided to move forward slowly, beginning with consumer contracts alone, but acknowledged the similarities between small businesses and consumers:

[T]he Standing Committee of Officials of Consumer Affairs has discussed that issue. I think the approach we took in Victoria was one of biting off a little bit before we took the whole apple. There was a sense that we should cut our teeth looking at consumer contracts. I think we recognised that many small business contracts had similar issues in the sense of unequalness in bargaining. For example, a small business buying computer software is not much different from an ordinary consumer in some senses. So the sort of principles perhaps in some cases are the same; in other cases they are not. Sometimes small business can be very informed in the marketplace.<sup>299</sup>

**6.28** Dr Cousins went on to suggest that the implementation of national unfair contract terms legislation, or uniform State and Territory legislation, would promote debate on this issue and assist CAV to make a more informed decision in relation to the inclusion of small businesses:

It should certainly be subject to some consideration as to whether that legislation is extended to small business. At this stage Victoria does not have a clear view on that. We want to see national legislation in place—uniform national legislation if possible. The Commonwealth has not been willing to go down that path so the next best is for us to see if we can have uniform State and Territory legislation. Part of that will surely be a debate about whether or not small business should be covered. Equally, I think at the official level in the different jurisdictions there is a view that any legislation should in future also cover credit contracts.<sup>300</sup>

**6.29** While the Committee did not receive a great deal of evidence on the issue of whether small businesses should be incorporated into the NSW model, the Committee believes that this issue should be examined during the process of developing the model for NSW.

<sup>297</sup> Submission 7, p7

<sup>298</sup> Ms Gisela Ramensky, Member, Business Law Committee, NSW Law Society, Evidence, 20 October 2006, p49

<sup>299</sup> Dr David Cousins, Director, Consumer Affairs Victoria, Evidence, 20 October 2006, p68

<sup>300</sup> Dr Cousins, Evidence, 20 October 2006, p68

### Super complaints

- 6.30** In its submission, CHOICE advised the Committee that in the UK certain bodies were able to make ‘super complaints’ to the UK Office of Fair Trading (UK OFT) and that this is an effective way of fast-tracking complaints that relate to a specific industry.<sup>301</sup>
- 6.31** In the UK, the Department of Trade and Industry may designate consumer bodies as ‘super complainants’.<sup>302</sup> A super complainant will report to the UK OFT when it believes that ‘a feature, or combination of features of a market is, or appears to be, significantly harming the interests of consumers.’<sup>303</sup> The UK OFT then considers the evidence and investigates the complaint. The UK OFT is required to publish a response within 90 days after receipt of the complaint stating what action it will take and the reasons for that decision.<sup>304</sup>
- 6.32** The Committee notes that the UK super complaints system applies to a much broader range of fair trading issues than unfair terms in consumer contracts. The appropriateness of introducing such a system in NSW is therefore beyond the terms of reference for this Inquiry; however, the Committee acknowledges the benefits the super complaints system appears to have had for consumers in the UK.

### Definition of ‘unfair terms’

- 6.33** Several Inquiry participants discussed the definition of unfair terms. The Committee notes that, as part of its consideration of national legislation for unfair terms in consumer contracts for the Ministerial Council on Consumer Affairs (MCCA), the Standing Committee of Officials of Consumer Affairs (SCOCA) drafted a proposed definition of ‘unfair’ for the discussion paper the Committee produced. In the paper, unfair terms were defined as ‘those terms in a contract which are to the disadvantage of one party but which are not reasonably necessary for the protection of the legitimate interests of the other party.’<sup>305</sup>
- 6.34** Ms Ramensky, of the NSW Law Society, told the Committee that she supported the SCOCA definition as other definitions used the terms ‘fair’ or ‘not fair’ within them, making them circular:

[Many] other definitions of unfair have used the terms "fair" or "not fair", so they are circular. The idea is to impose terms that are not strictly necessary to give you business efficacy—to pick up the term used by the speaker here. It is important to have business efficacy. It is important to have standard terms ... as long as those terms are fair and do not contain terms that are not necessary for the lender and which impose unnecessary burdens on the borrower.<sup>306</sup>

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<sup>301</sup> Submission 19, pp4-5. See also evidence presented by representatives from CHOICE at the Committee’s hearing: Ms Lovric and Mr Kell, Evidence, 20 October 2006, pp22-23

<sup>302</sup> Ms Lovric, Evidence, 20 October 2006, p22

<sup>303</sup> [www.offt.gov.uk/Business/Super-complaints/default.htm](http://www.offt.gov.uk/Business/Super-complaints/default.htm) (accessed 10 November 2006)

<sup>304</sup> [www.offt.gov.uk/Business/Super-complaints/default.htm](http://www.offt.gov.uk/Business/Super-complaints/default.htm) (accessed 10 November 2006)

<sup>305</sup> Standing Committee of Officials of Consumer Affairs Unfair Contract Terms Working Party, 2004, *Unfair Contract Terms*, Executive Summary, January 2004, p1

<sup>306</sup> Ms Ramensky, Evidence, 20 October 2006, p48

- 6.35** Associate Professor Zumbo provided a succinct definition of the way an unfair term could be identified within a consumer contract:

Ultimately, if there is a significant imbalance between the rights and obligations of the parties, to the detriment of the consumer, you have an unfair term.<sup>307</sup>

- 6.36** To this notion of imbalance, Associate Professor Zumbo added that if a term ‘is not reasonably necessary to protect the interests of the supplier ... that then takes you into the realm of unfairness,’ and that:

If you can draw a spectrum, there is a point at which you can protect your legitimate interests, either because you have money that you have borrowed from someone else or because you take telecommunications services from another provider and there are costs and you are able to pass those costs on.<sup>308</sup>

- 6.37** Mr Stowe, the Deputy Commissioner for Fair Trading, also emphasised the element of imbalance between the consumer and the supplier in determining if a contract term was unfair and noted the lack of opportunity for the consumer to negotiate or even closely examine many contractual terms:

The problem we are concerned about with unfair contracts is the fact that there is an element of significant imbalance in the rights and obligations of the parties which is detrimental to the consumer. ... We are not given an opportunity to vary those terms and conditions if we are not happy with them. It is not until we run into some difficulty and have a close look at the contract that we realise that perhaps we have signed up for something that was unfair and imbalanced in the way the contract terms operate.<sup>309</sup>

- 6.38** Mr Ian Gilbert of the Australian Bankers’ Association (ABA), argued that an unfair term must be considered in context:

A fundamental concern for the ABA is that unfair contract terms legislation is premised on the apprehension of unfairness of any particular term without any analysis of whether the term as applied results in unfairness. This then becomes an abstract exercise devoid of context and raises serious questions about the nature of the perceived problem. The ABA’s submission seeks to tease out the context, particularly in relation to banking, of contractual terms and their importance in ensuring that banks fulfil their legal responsibilities to the community.<sup>310</sup>

## **Role of the regulatory body and implementation**

- 6.39** Ms Lyn Baker, the NSW Commissioner for Fair Trading, informed the Committee that the NSW Office of Fair Trading (NSW OFT) has the ability to administer a new scheme to deal with unfair terms in consumer contracts:

<sup>307</sup> Associate Professor Zumbo, Evidence, 20 October 2006, p57

<sup>308</sup> Associate Professor Zumbo, Evidence, 20 October 2006, p57

<sup>309</sup> Mr Stowe, Evidence, 20 October 2006, pp6-7

<sup>310</sup> Mr Ian Gilbert, Director, Australian Bankers’ Association, Evidence, 20 October 2006, p36

No statutory body would be required. Like the *Fair Trading Act* unfair contract terms legislation would be generic and administered in the same way as that Act.<sup>311</sup>

- 6.40** The importance of providing the NSW OFT with adequate resources to successfully implement a new scheme was raised by some Inquiry participants. For example, Associate Professor Zumbo noted that additional resources would be required to implement the legislation:

Obviously if this legislation was to come into effect in NSW you would need the Office of Fair Trading, the Fair Trading Commission, to give more resources. I do not think any regulator would ever say they have enough resources. It is a question of priority. Most agencies would set out priorities, about what is more important. If this contract affected only one individual, and that is it, they are unlikely to vote the same resources that they would if it was clear that the clause, the contract term, was widespread throughout the whole industry. It is about prioritising your resources to get the maximum effect for the benefit of consumers.<sup>312</sup>

- 6.41** Mr Lynden Griggs, a Senior Lecturer with the University of Tasmania, similarly stated that '[r]esourcing is necessary for the Consumer Affairs department to allow monitoring and empirical evidence obtained of industries where there are systemic problems with unfair terms.'<sup>313</sup>

- 6.42** The NSW Legal Aid Commission also called for a '[w]ell resourced, committed regulator who can put into effect the objects of the proposed legislation'.<sup>314</sup>

- 6.43** The NSW Commissioner for Fair Trading also identified the importance of the regulatory body required to oversee new unfair terms legislation being able to prosecute, an important feature of the Victorian scheme:

The point really is to have the teeth available to prosecute, to assist in being able to negotiate the outcome. You could ask us why do we not just go and try to convince them to change their contracts. We do not have the legislative base, and that is why we think Victoria has been successful. It has the teeth in its legislation, but it has taken a very educative approach to it. We think that is impressive.<sup>315</sup>

- 6.44** The Legal Aid Commission expressed support for 'a specialist jurisdiction be established to deal with the litigation; perhaps connected to an existing tribunal such as NSW Consumer Trader and Tenancy Tribunal.'<sup>316</sup>

- 6.45** Several Inquiry participants noted the importance of an education strategy to accompany the implementation of a new scheme, to ensure consumers and businesses are aware of their new

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<sup>311</sup> Ms Baker, Evidence, 20 October 2006, p13

<sup>312</sup> Associate Professor Zumbo, Evidence, 20 October 2006, p56

<sup>313</sup> Submission 1, Mr Lynden Griggs, p5

<sup>314</sup> Submission 22, p21

<sup>315</sup> Ms Baker, Evidence, 20 October 2006, p10

<sup>316</sup> Submission 22, p21

rights and responsibilities under the scheme. For example, Mr Stowe, the NSW Deputy Commissioner for Fair Trading noted that a education strategy would be required:

Certainly in Victoria they had significant education activity before the legislation commenced. They had seminars with industry to explain to them how they propose to enforce the legislation. We would have a similar view if we were to have a similar legislation in NSW. We are well aware of what we are going to do.<sup>317</sup>

**6.46** Ms Ramensky expressed support for the educative undertakings of the Consumer Affairs Victoria:

They have quite a widespread education function. Their focus is on educating corporations on what their duties are. There are lots of media releases. They are currently taking on the travel industry, the car hire industry, residential leases and a number of other industries in a systematic way. That seems to be working quite well.<sup>318</sup>

**6.47** Ms Lovric from CHOICE emphasised that improvement of industry practice was the key to protecting consumers from unfair terms, rather than consumers being more aware of their rights:

I think that that really must be counterbalanced with the idea of improving industry practice. We seem to have an increasing onus on the consumer to take responsibility. I think one of the issues with the standard form contracts is that consumers may well be educated in how to read a 100-page contract; perhaps a more cost-effective thing to do would be to educate industry to write better contracts that have fair terms in them instead. I think there is only a certain amount that educating consumers can do, and I think that should be applauded and welcomed where possible, and perhaps it may be more beneficial to look at industry practice at the same time.<sup>319</sup>

**6.48** Ms Beal also advised the Committee that an effective auditing process would be required to ensure the effective implementation of unfair contract terms legislation:

... what you might learn from the [Victorian] experience is the auditing process. The introduction of the legislation certainly has not been enough. It has required, in my view, education. The Victorian department has embarked on quite a strong campaign of education, educating industry as well as consumers, but also require compliance testing to see what is in the contracts.<sup>320</sup>

## Impact on business

**6.49** Some Inquiry participants expressed concern about the impact of new laws in this area on businesses. In this regard, Abacus Australian Mutuals noted in its submission, that regulatory reform in this area should be based on a careful cost/benefit analysis:

<sup>317</sup> Mr Stowe, Evidence, 20 October 2006, p10

<sup>318</sup> Ms Ramensky, Evidence, 20 October 2006, p50

<sup>319</sup> Ms Lovric, Evidence, 20 October 2006, pp24-25

<sup>320</sup> Ms Beal, Evidence, 20 October 2006, p31

In an environment that is increasingly conscious of the cost of regulatory burdens, *Abacus* believes any proposed regulatory reforms should be based on a careful cost/benefit analysis and be targeted at clear and identifiable goals. Regulation is a fixed cost and involves additional expense for industry. If particular contract terms are considered unfair then the industries associated with those contracts should be targeted. Reform measures should not adversely affect responsible industries or already those covered by extensive consumer protection regulations.<sup>321</sup>

- 6.50** Mr Stowe, the NSW Deputy Commissioner for Fair Trading, noted that the formulation of new scheme in NSW should include examination of the impact on stakeholders which would require consultation and a cost benefit analysis:

With the formulation of any proposed regulation in NSW we would, of course, look at the impact on stakeholders and the need for consultation and the need to have a cost benefit that justifies intervention in the marketplace. That would certainly be done as part of our normal course in developing a regulatory proposal for government consideration.<sup>322</sup>

- 6.51** Mr Stowe also noted that in other jurisdiction where unfair terms legislation has been implemented it has not created 'undue difficulty' for industry:

With regard to what we were just discussing in terms of the operation of the legislation both in the United Kingdom and Victoria, we know that this is something that industry is having to grapple with and there does not seem to be any real evidence that it is causing undue difficulty.<sup>323</sup>

- 6.52** Ms Baker, the NSW Commissioner for Fair Trading, highlighted the importance of involving industry from the start of the process:

Some may suggest this is an unwarranted intervention in the marketplace and interference with the freedom of contract, but the experience of the United Kingdom and Victoria suggests otherwise. By involving industry from the start changes result in a win-win situation in which the interests of both parties are considered.<sup>324</sup>

- 6.53** Mr Stowe also noted that negotiation with business would be one of the 'objectives' of new legislation and that:

Certainly in any second reading speech the Minister would allude to the way in which legislation would be used. It is certainly our intention that it be used in a similar way to Victoria, where the first option is negotiation with the service providers.<sup>325</sup>

- 6.54** As noted in Chapter 4, some businesses have argued that specific unfair terms legislation would create an additional layer of regulation for already heavily (and adequately) regulated industries. With regard to potential overlap with existing laws, Associate Professor Zumbo noted that:

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<sup>321</sup> Submission 25, p4

<sup>322</sup> Mr Stowe, Evidence, 20 October 2006, p15

<sup>323</sup> Mr Stowe, Evidence, 20 October 2006, p15

<sup>324</sup> Ms Baker, Evidence, 20 October 2006, p2

<sup>325</sup> Mr Stowe, Evidence, 20 October 2006, p10

... if there is a concern that unfair terms legislation would provide another layer of regulation the concerns expressed by Mr Gilbert would be allayed by provisions in the Victorian legislation. For example, section 32V... says that it does not apply where contractual terms are required or expressly permitted by law. So, if there is existing regulation that applies to the contract and terms have been included in the contract because of the legislation, that is exempted from this legislation. So we do not have an overlap. Victoria also says that a term contained in a contract because of consumer credit legislation is also not covered by the legislation.<sup>326</sup>

- 6.55** As pointed out by Associate Professor Zumbo, unfair contract terms legislation would not prevent businesses from protecting their legitimate interests:

Unfair contract terms legislation does not prevent banks from protecting their legitimate interests. If banks have a legitimate interest to protect that would be permissible under the legislation. We are not taking anything away from the ability of a supplier or a bank to protect their legitimate interests. We are concerned about providing fairer contract terms; we are not about undermining the certainty of contracts in this legislation. So any suggestions that the banks do not have the ability to protect their security are just without foundation because there is no version of this legislation that I have seen that would not allow a bank or supplier to protect their legitimate interests.<sup>327</sup>

## Other issues

- 6.56** Inquiry participants also drew the Committee's attention to a number of other issues that could be addressed in a NSW scheme. The Committee notes these views in this section.
- 6.57** For example, Ms Beal, Director of the Communications Law Centre (CLC) in Victoria, argued for a statutory requirement that particularly disadvantageous terms must be brought to the attention of the consumer:

At common law there is a requirement that if there is a particularly disadvantageous term within the contract for a party, it must be drawn to that party's attention before they sign the contract. This is an important issue to reflect in the legislation. It is one that I think is still not being adequately addressed in the telecommunications industry, particularly when the provider has the right to vary the contract and in response to that the customer has a right to end the contract. When telephone companies put up their fees, consumers have an inherent right to end the contract because it has been a unilateral change and there are different terms, but the consumers are not told about the right to get out of the contract based on that change.

All the consumer gets is a notice saying, "As of 10 October, call rates will increase by 0.2¢ a minute." So the consumer says, "Oh, I had better watch my mobile phone", rather than the provider also saying, "You have a right to end the contract", whereby the consumer may say, "In that case, I will, and I will go next door where they still have 22¢ a minute, not 25¢ a minute", which would be fair and, I think, a key issue to address in the legislation. I think contracts could still be improved by notice.<sup>328</sup>

<sup>326</sup> Associate Professor Zumbo, Evidence, 20 October 2006, p52

<sup>327</sup> Associate Professor Zumbo, Evidence, 20 October 2006, p52

<sup>328</sup> Ms Beal, Evidence, 20 October 2006, pp34-35

- 6.58** The Committee was also informed of the usefulness of model contracts as a means of encouraging businesses to adopt contracts to do not include unfair terms. For example, Associate Professor Zumbo highlighted the importance of model contracts to the effective functioning of unfair terms legislation:

Two features that I am thinking of that would not in any way detract from the Victorian model and would be welcomed, I think, by both businesses and consumers is that there could be some mechanism for allowing model contracts to be developed in an industry whereby the industry, with consumer involvement and the regulator's involvement, develops a model contract. That model contract is then given authority under the legislation so it could be prescribed or it could be dealt with under one of these exemptions, as I mentioned before—permitted by law, if it is mandatory—in which case if you comply exactly with the model terms. Those model terms cannot be attacked under legislation. Therefore, you are providing certainty.<sup>329</sup>

- 6.59** Ms Beal also discussed the benefits of model standard contracts, citing the example of the real estate industry and referring to the work of the Communications Law Centre in drafting a model contract for the telecommunications industry (also as discussed in Chapter 3):

The real estate industry is an example and there are standard contracts that operate without much trouble—so it appears from outside looking in. Why should we not have a standard telecommunications contract? Certainly the provision of a telephone service can be no more complex than the sale of a house in my view. It is something that we have attempted to give some guidance on. In fact, we drafted a model contract. We were commissioned by the authority to draft a contract, and that is still available on line. It operates in much the same way. We looked at the real estate industry when researching how to go about this. We looked at many examples in the United Kingdom in order to go about drafting a fairer contract for providers. It is just about having some fair, clear standard terms; and, with different types of services, having a schedule, like you do with real estate. Those bundled or different types of features can be scheduled at the back, but the standard agreement is contained in one place and it is a simple, easy to understand but nonetheless legally binding document so that consumers understand their legal obligations.<sup>330</sup>

- 6.60** As noted in Chapter 2 (paragraphs 2.52-2.56), one of the features of standard form contracts that lends them to the use of unfair terms, is their length and complexity. Some Inquiry participants argued for the need to address this issue.

- 6.61** For example, Ms Beal argued that the length and complexity of standard form contracts was an area that needed to be addressed:

The other area in which consumer contracts could still be improved is in the area of complexity and length. We have addressed that already during my discussion, but I think that a key area is that contracts are still very complex and lengthy—unnecessarily so, given they are basic consumer services. Model contracts are a good idea.<sup>331</sup>

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<sup>329</sup> Associate Professor Zumbo, Evidence, 20 October 2006, p55

<sup>330</sup> Ms Beal, Evidence, 20 October 2006, p30

<sup>331</sup> Ms Beal, Evidence, pp34-35

- 6.62** Ms Beal also identified the issue of terms containing cancellation or penalty fees as one that ought to be addressed:

The other area that could be improved is the provision of cancellation fees, exit fees or penalty fees that are manifestly unfair. Why should a consumer who wants to end a contract, particularly an ongoing contract such as for the supply of a landline service, although similar arguments could be made in relation to energy, have to pay a fee to get out? That is not a fee that recoups any real costs incurred by the industry. All they are doing is charging consumers a penalty because the consumer wants to end the contract.<sup>332</sup>

### Committee comment

- 6.63** The Committee notes the comments outlined above regarding the matters that should be taken into consideration by the government when developing an unfair terms in consumer contracts scheme for NSW. The Committee received a great deal of insightful and useful information regarding the nature and scope of a NSW scheme to address the issue of unfair terms in consumer contracts.
- 6.64** The Committee therefore recommends that the NSW Government, when developing the amendment to establish a legislative scheme to address unfair terms in consumer contracts, consider these and the other issues examined in this chapter regarding appropriate inclusions in the NSW scheme. The discussion in Chapter 2 of this report regarding the problems associated with standard form contracts should also be considered.

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### Recommendation 4

That the NSW Government, when developing the amendment to establish a scheme for the protection of consumers in relation to unfair terms in consumer contracts, consider the views set out in this report regarding appropriate inclusions in the NSW scheme.

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- 6.65** The Committee is particularly mindful of the concerns expressed by Inquiry participants from the business sector about the impact of a new form of regulation in this area will have. The Committee considers that appropriate consultation with the business sector during the development and implementation of new unfair terms legislation is essential to addressing these concerns.
- 6.66** The Committee recommends therefore that the NSW Government should establish a taskforce, along the lines of the one operating within Consumer Affairs Victoria (discussed at paragraph 5.28) to develop the amendment. The taskforce should include industry representatives, as well as consumer representatives and other stakeholders. The involvement of relevant organisations with expertise in this area should also be sought. In this regard the Committee notes the valuable contribution to the development and implementation of the

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<sup>332</sup> Ms Beal, Evidence, 20 October 2006, pp34-35

Victorian scheme made by the Communications Law Centre in Victoria, as described in the Centre's submission and by Ms Beal in her oral evidence to the Committee.<sup>333</sup>

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### **Recommendation 5**

That the NSW Government, when developing the amendment to establish a scheme for the protection of consumers in relation to unfair terms in consumer contracts, create a taskforce within the NSW Office of Fair trading to develop the scheme. The taskforce should include industry representatives as well as consumer representatives and other relevant stakeholders and experts.

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<sup>333</sup> Submission 11, Communications Law Centre and Ms Beal, Evidence, 20 October 2006.

## Appendix 1 Submissions

No	Author
1	Mr Lynden GRIGGS
2	Mr D NURCOMBE
3	Mr Peter HENNESSY, NSW Law Reform Commission
4	Mr Ron HARDAKER, Australian Finance Conference (AFC)
5	Ms Lynn PARKER, Office of Fair Trading, UK
6	Ms Elizabeth MACPHERSON, New Zealand Ministry of Consumer Affairs
7	Ms Clare PETRE, Energy and Water Ombudsman NSW
8	Mr Richard CALVER, Master Builders Australia Inc
9	Mr Gary SMITH, Optus
10	Mr Tom ADAMES, Housing Industry Association Ltd
11	Ms Elizabeth BEAL, Communications Law Centre
12	Mr Ian GILBERT, Australian Bankers' Association Inc
13	Mr Robert HARVIE
14	Ms Anne HURLEY, Communications Alliance Ltd
15	Mr John PINNOCK, Telecommunications Industry Ombudsman
16	Ms Lyn BAKER, NSW Office of Fair Trading
17	Mr Paul STOKOE, Master Builders Association of New South Wales
18	Ms Nicola HOWELL, Consumers' Federation of Australia
19	Mr Gordon RENOUF, Australian Consumers' Association
20	Associate Professor Frank ZUMBO
21	Ms Katherine LANE, Consumer Credit Legal Centre (NSW) Inc & Redfern Legal Centre
22	Ms Lyndsay BROOKER, Legal Aid Commission of NSW
23	Ms Nicola HOWELL, Centre for Credit and Consumer Law, Griffith University
24	Dr Luke NOTTAGE
25	Ms Louise PETSCHLER, Abacus – Australian Mutuals
26	Mr Jack HOYSTED, TTF Australia Ltd (Tourism and Transport Forum)
27	Mr Duncan RAMSAY, QBE Insurance Group
28	Mr Michael BLAY
28a	Mr Michael BLAY
29	Professor Dimity KINGSFORD SMITH & Ms Deborah HEALEY

## Appendix 2 Witnesses

<b>Date</b>	<b>Name</b>	<b>Position and Organisation</b>
20 October 2006 Parliament House	Ms Lyn BAKER	Commissioner for Fair Trading, Office of Fair Trading
	Mr Rod STOWE	Deputy Commissioner, Policy and Strategy, Office of Fair Trading
	Ms Susan DIXON	Director, Consumer Protection and Community Access, Office of Fair Trading
	Mr Peter KELL	Chief Executive Officer, CHOICE (Australian Consumers' Association)
	Ms Jenny LOVRIC	Senior Policy and Research Officer, CHOICE (Australian Consumers' Association)
	Ms Elizabeth BEAL	Director and Principal Solicitor, Communications Law Centre
	Mr Ian GILBERT	Director, Australian Bankers' Association
	Ms Gisela RAMENSKY	Member, Business Law Committee, Law Society of NSW
	Associate Professor Frank ZUMBO	Senior Lecturer, School of Business Law and Taxation, University of New South Wales
	Dr David COUSINS	Executive Director, Consumer Affairs, Victoria
Dr Elizabeth LANYON	Chair, Unfair Contract Terms Taskforce, Consumer Affairs, Victoria	

## Appendix 3 Minutes

### Minutes No 38

1:15pm, Monday 28 August 2006

Room 1153, Parliament House, Sydney

#### 1. Present

Ms Robertson (Chair)  
Mr Clarke (Deputy Chair)  
Mr Colless  
Ms Fazio

#### 2. Apologies

Mr Donnelly

#### 3. Minutes

Resolved, on the motion of Ms Fazio, that the Minutes of Meeting No. 37 be adopted.

#### 4. \*\*\*

#### 5. \*\*\*

#### 6. Receipt of new terms of reference

The Chair tabled the following terms of reference received from the Hon John Della Bosca MLC, Minister for Commerce, on 28 August 2006:

That the Standing Committee on Law and Justice inquire into and report on the incidence and impact of unfair contract terms in consumer contracts for the supply of goods and services of a kind ordinarily acquired for personal, domestic or household use or consumption, in particular:

- (a) whether consumer contracts contain terms which cause a significant imbalance in the rights and obligations arising under a contract, to the detriment of the consumer, including the incidence of:
  - i) terms which allow the supplier to unilaterally vary the price or characteristics of the goods or services without notice to the consumer;
  - ii) terms which penalise the consumer but not the supplier when there is a breach of the agreement;
  - iii) terms which allow a supplier to suspend services supplied under the contract while continuing to charge the consumer; or
  - iv) terms which permit the supplier but not the consumer to terminate the contract.
- (b) whether the use of standard form contracts has increased the prevalence of the above terms in consumer contracts;
- (c) the remedies available under common law and statute with respect to the above terms in consumer contracts;
- (d) the effectiveness of specific purpose legislation such as the UK Unfair Terms in Consumer Contracts Regulations 1999 and the Victorian Fair Trading Act 1999 (Part 2B – Unfair Terms in Consumer Contracts); and
- (e) any other relevant matter.

Resolved, on the motion of Ms Fazio, that the Committee accept the terms of reference and that, in accordance with paragraph 5(2) of the resolution establishing the Standing Committees, dated 21 May 2003 (as amended), the Chair advise the House of the receipt of the terms of reference.

Resolved, on the motion of Ms Fazio, that the Committee adopt the time line prepared by the Secretariat, subject to any changes necessary and determined by the Chair in consultation with the Committee.

Resolved, on the motion of Ms Fazio, that the Committee advertise the terms of reference and call for submissions with a return date of 4 weeks, in the Sydney Morning Herald and the Daily Telegraph, at the earliest opportunity.

Resolved, on the motion of Ms Fazio, that a press release announcing the commencement of the Inquiry and the call for submissions be distributed to coincide with the advertisements and that, in addition to other media outlets, the press release be sent to media outlets in Western Sydney.

Resolved, on the motion of Mr Clarke, that the Chair write to the agencies and groups listed on the inquiry outline prepared by the Secretariat, and any additional persons or groups identified by Committee members to the Secretariat by Wednesday 6 September 2006, informing them of the Inquiry and inviting them to make a submission.

7. \*\*\*

8. **Adjournment**

The Committee adjourned at 1:30pm until Tuesday 12 September 2006 at 9:00am.

Rachel Callinan  
Director

**Minutes No 39**

9:30am, Tuesday 12 September 2006

Room 1108, Parliament House, Sydney

1. **Present**

Ms Robertson (Chair)  
Mr Clarke (Deputy Chair)  
Mr Colless  
Mr Donnelly

2. **Apologies**

Ms Rhiannon

3. **Minutes**

Resolved, on the motion of Mr Donnelly, that the Minutes of Meeting No. 38 be adopted.

4. **General correspondence**

The Chair tabled the following correspondence:

**Received**

- From Hon John Della Bosca MLC, Minister for Commerce, to Chair, 28 August 2006, referring terms of reference for an inquiry into unfair terms in consumer contracts.

5. \*\*\*

6. **Adjournment**

The Committee adjourned at 10:30am sine die.

Rachel Callinan  
Director

**Minutes No 40**

8.45am, Wednesday 20 September 2006  
Room 1108, Parliament House, Sydney

1. **Present**

Ms Robertson (Chair)  
Mr Clarke (Deputy Chair)  
Mr Colless  
Mr Donnelly  
Ms Fazio

2. **Apologies**

Ms Rhiannon

3. **Minutes**

Resolved, on the motion of Mr Donnelly, that the Minutes of Meeting No 39 be adopted.

4. \*\*\*

5. \*\*\*

6. **Inquiry into unfair terms in consumer contracts**

Resolved, on the motion of Ms Fazio, that in order to better inform all those participating in the inquiry process, the Committee make use of the powers granted under Standing Order 233(1) and section 4(2) of the Parliamentary Papers (Supplementary Provisions) Act 1975 (NSW) to publish Submission Nos1-3 to the inquiry into unfair terms in consumer contracts.

7. **Adjournment**

The Committee adjourned at 1.30pm sine die.

Rachel Callinan  
Director

## **Minutes No 41**

8.45am, Friday 20 October 2006

Jubilee Room, Parliament House, Sydney

### **1. Present**

Ms Robertson (Chair)  
Mr Clarke (Deputy Chair)  
Mr Colless (until 3:00pm)  
Mr Donnelly  
Ms Fazio  
Ms Rhiannon (after 3:15pm)

### **2. Apologies**

Ms Rhiannon (until 3:15pm)  
Mr Colless (after 3:00pm)

### **3. Public hearing – Inquiry into unfair terms in consumer contracts**

The public, the media and witnesses were admitted.

The Chair made a brief opening statement.

Ms Lyn Baker, Commissioner and Mr Rod Stowe, Deputy Commissioner – Policy and Strategy, from the Office of Fair Trading were sworn and examined. Ms Susan Dixon, Director – Consumer Protection and Community Access, from the Office of Fair Trading was affirmed and examined.

Witnesses agreed to provide answers to two questions on notice.

Questioning concluded and the witnesses withdrew.

### **4. Deliberative meeting**

#### **4.1 Minutes**

Resolved, on the motion of Ms Fazio, that the Minutes of Meeting No 40 be adopted.

#### **4.2 General correspondence**

The Chair tabled the following items of correspondence:

##### ***Received***

- 6 October 2006, email from Mr David Tennant, Chairperson, Australian Financial Counselling and Credit Reform Association in relation to the unfair terms in consumer contracts inquiry
- 10 October 2006, from Dr David Cousins, Director, Consumer Affairs Victoria in relation to the unfair terms in consumer contracts inquiry
- \*\*\*

##### ***Sent***

- 5 October 2006, from Chair to Minister for Consumer Affairs Victoria, inviting the Director General of Consumer Affairs Victoria to appear before the Committee on 20 October 2006
- 12 October 2006, from Chair to Minister for Fair Trading NSW, advising that witnesses from the Office of Fair Trading have been invited to give evidence on 20 October 2006.

Resolved, on the motion of Ms Fazio, that correspondence be noted.

4.3 \*\*\*

4.3.1 \*\*\*

4.3.2 \*\*\*

## 5. Inquiry into unfair terms in consumer contracts

### 5.1 Consideration of publication of submissions 4-22

Resolved, on the motion of Mr Donnelly, that in order to better inform all those participating in the inquiry process, the Committee make use of the powers granted under Standing Order 233(1) and section 4(2) of the Parliamentary Papers (Supplementary Provisions) Act 1975 (NSW) to publish submissions 4–22 of the unfair terms in consumer contracts inquiry.

## 6. Resumption of public hearing for inquiry into unfair terms in consumer contracts

The public, the media and witnesses were admitted.

The Chair made a brief opening statement.

Mr Peter Kell, Chief Executive Officer and Ms Jenny Lovric, Senior Policy and Research Officer, CHOICE (Australian Consumers' Association) affirmed and examined.

Witnesses agreed to provide answers to two questions on notice.

Questioning concluded and the witnesses withdrew.

The Committee broke from 11.15-11.30am.

Ms Elizabeth Beal, Director and Principal Solicitor, Communications Law Centre, affirmed and examined.

Ms Beal agreed to provide an answer to a question on notice.

Questioning concluded and the witnesses withdrew.

The Committee broke from 12.30-1.30pm.

Mr Ian Gilbert, Director, Australian Bankers' Association, was affirmed and examined.

Questioning concluded and the witness withdrew.

Ms Gisela Ramensky, Member – Business Law Committee, NSW Law Society, was affirmed and examined.

Questioning concluded and the witness withdrew.

The Committee broke from 3.00-3.15pm.

Associate Professor Frank Zumbo, UNSW School of Business Law and Taxation, was sworn and examined.

Questioning concluded and the witness withdrew.

Dr David Cousins, Executive Director, and Dr Elizabeth Lanyon, Chair – Unfair Contract Terms Taskforce, Consumer Affairs Victoria, were sworn and examined.

Questioning concluded and the witness withdrew.

## **7. Deliberative meeting**

### **7.1 Publication of transcript of hearing**

Resolved, on the motion of Mr Donnelly, that in order to better inform all those participating in the Inquiry process, the Committee make use of the powers granted under Standing Order 233(1) and section 4(2) of the Parliamentary Papers (Supplementary Provisions) Act 1975 (NSW), to publish the transcript of hearing held 20 October 2006.

## **8. Adjournment**

The Committee adjourned at 17.30pm until 10.00am on 31 October 2006.

Rachel Callinan  
Director

## **Minutes No 42**

9.45am, Tuesday 31 October 2006  
Room 814, Parliament House, Sydney

### **1. Present**

Ms Robertson (Chair)  
Mr Clarke (Deputy Chair)  
Mr Donnelly (until 12.30pm)  
Ms Fazio  
Ms Rhiannon (from 10.15am)

### **2. Apologies**

Mr Colless

### **3. Deliberative meeting**

#### **3.1 Minutes**

Resolved, on the motion of Ms Fazio, that the Minutes of Meeting No 41 be adopted.

#### **3.2 General correspondence**

The Chair tabled the following items of correspondence:

***Received***

- 20 October 2006, email advising the Committee that a representative from the Australian Competition and Consumer Commission would not be able to appear before the Committee.
- \*\*\*
- \*\*\*

***Sent***

- \*\*\*
- \*\*\*
- 24 October 2006, letter from Chair to Hon Marsha Thomson, Victorian Minister for Commerce, thanking her for facilitating the attendance of officers from Consumers Affairs Victoria at the hearing for the Inquiry into unfair terms in consumer contracts.
- 12 October 2006, from Chair to Minister for Fair Trading NSW, advising that witnesses from the Office of Fair Trading have been invited to give evidence on 20 October 2006.

Resolved, on the motion of Ms Fazio, that correspondence be noted.

**3.3 Inquiry into unfair terms in consumer contracts**

**3.3.1 Consideration of publication of submissions 23-25**

Resolved, on the motion of Ms Fazio, that in order to better inform all those participating in the inquiry process, the Committee make use of the powers granted under Standing Order 233(1) and section 4(2) of the Parliamentary Papers (Supplementary Provisions) Act 1975 (NSW) to publish submissions 23–25 of the Inquiry into unfair terms in consumer contracts.

**3.4 \*\*\***

**4. \*\*\***

**5. \*\*\***

**6. Adjournment**

The Committee adjourned at 4.45pm until 20 November 2006.

Rachel Callinan  
Director

**Draft Minutes No 43**

9.00am, Monday 20 November 2006

Room 1108, Parliament House, Sydney

**1. Present**

Ms Robertson (Chair)

Mr Clarke (Deputy Chair)

Mr Donnelly  
Ms Fazio  
Mr Colless

**2. Apologies**  
Ms Rhiannon

**3. Minutes**  
Resolved, on the motion of Ms Fazio, that the Minutes of Meeting No 42 be adopted.

**4. Correspondence**  
The Chair tabled the following items of correspondence:

***Received***

- 6 November, from Peter Kell, Chief Executive Officer, CHOICE, providing answers to questions on notice for unfair terms in consumer contracts hearing held 20 October
- 7 November, from Rod Stowe, Deputy Commissioner, Office of Fair Trading, providing answers to questions on notice for unfair terms in consumer contracts hearing held 20 October
- 17 November, from Rod Stowe, Deputy Commissioner, Office of Fair Trading, providing further answers to questions on notice for unfair terms in consumer contracts hearing held 20 October
- \*\*\*
- \*\*\*
- \*\*\*
- \*\*\*

***Sent***

- \*\*\*
- \*\*\*

Resolved, on the motion of Mr Donnelly, that correspondence be noted.

**5. \*\*\***

**6. Inquiry into unfair terms in consumer contracts**

**6.1 Consideration of publication of submissions 26, 27, 28, 28a, 29**

Resolved, on the motion of Mr Clarke, that in order to better inform all those participating in the inquiry process, the Committee make use of the powers granted under Standing Order 233(1) and section 4(2) of the Parliamentary Papers (Supplementary Provisions) Act 1975 (NSW) to publish submissions 26, 27, 28, 28a, 29 to the Inquiry into unfair terms in consumer contracts.

**6.2 Consideration of Chair's Draft Report**

The Chair submitted her draft report titled Unfair terms in consumer contracts, Report 32 which, having been circulated was taken as being read.

The Committee proceeded to consider the draft report in detail.

Chapter 1 read.

Resolved, on the motion of Mr Donnelly, that chapter 1 be adopted.

Chapter 2 read.

Resolved, on the motion of Ms Fazio, that the following new paragraph 2.46 and quote be inserted after paragraph 2.45:

2.46 In relation to the focus of consumers on competition between suppliers and the impact of standard form contracts on this, the Committee was advised by Dr David Cousins, Director Consumer Services Victoria, that:

... the reality from the consumer side is that consumers generally concentrate on price and one or two other key things. The rest is not in the frame ...

You could say that standard contracts, in some situations, remove the element of competition on contract terms if everyone is bound to the same contract term. In reality, that may not be an important part of competition in any way. When you get down to the esoterics of it, most people are not going to compete on those terms at all. (footnote reference Page 72 transcript 20 October 2006)

Resolved, on the motion of Mr Donnelly, that Chapter 2, as amended, be adopted.

Chapter 3 read.

Resolved, on the motion of Mr Donnelly, that Chapter 3 be adopted.

Chapter 4 read.

Resolved, on the motion of Mr Colless, that Recommendation 1 be adopted.

Resolved, on the motion of Mr Donnelly, that Chapter 4 be adopted.

Chapter 5 read.

Resolved, on the motion of Mr Donnelly, that Chapter 5, be adopted.

Chapter 6 read.

Resolved, on the motion of Mr Donnelly, that Recommendation 2 be adopted.

Resolved, on the motion of Mr Donnelly, that Recommendation 3 be adopted.

Resolved, on the motion of Ms Fazio, that Recommendation 4 be adopted.

Resolved, on the motion of Mr Clarke, that Recommendation 5 be adopted.

Resolved, on the motion of Mr Colless, that Chapter 6 be adopted.

Executive Summary read.

Resolved, on the motion of Mr Donnelly, that the Executive Summary be adopted.

Resolved, on the motion of Mr Donnelly, that the report, as amended, be the report of the Committee and be signed by the Chair and presented to the House in accordance with Standing Orders 227(3) and 230(5).

Resolved, on the motion of Mr Donnelly, that the Secretariat be permitted to correct any typographical and grammatical errors in the report prior to tabling.

## **7. Adjournment**

The Committee adjourned at 9.35 am until 10.00am Monday 27 November 2006.

Rachel Callinan  
Director