REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO UNFAIR TERMS IN CONSUMER CONTRACTS

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At Sydney on Friday 20 October 2006

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The Committee met at 9.00 a.m.

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PRESENT

The Hon. C. M. Robertson (Chair)

The Hon. D. Clarke
The Hon. R. H. Colless
The Hon. G. J. Donnelly
The Hon. A. R. Fazio
Ms L. Rhiannon

CHAIR: Welcome to the first public hearing of the Standing Committee on Law and Justice inquiry into unfair terms in consumer contracts. As this is a public hearing it is permitted to be broadcast. Broadcasts must focus only on witnesses and committee members. Witnesses, members and their staff are advised that any messages should be delivered through the attendants or the Committee clerks. I also advise that under the standing orders of the Legislative Council any documents presented to the Committee that have not yet been tabled in Parliament may not, except with the permission of the Committee, be disclosed or published by any member of such Committee or by any other person. The Committee prefers to conduct its hearings in public; however, the Committee may decide to hear certain evidence in private if there is a need to do so. If such a case arises I will ask the public and the media to leave the room for a short period. I ask that everyone turn off their mobile phones for the duration of the hearing as, even when they are turned to silent, they interfere with the *Hansard* recording equipment. I very much welcomed the witnesses from the Office of Fair Trading.

LYN BAKER, Commissioner for Fair Trading, PO Box 972 Parramatta 2124, and

RODNEY KELVIN STOWE, Deputy Commissioner for Fair Trading, PO Box 972 Parramatta 2124, sworn and examined:

SUSAN FRAZER DIXON, Director, Consumer and Protection Community Access, Office of Fair Trading, PO Box 972 Parramatta 2124, affirmed and examined:

CHAIR: In what capacity are you appearing before the Committee, as an individual or a representative of an organisation?

Ms BAKER: As a representative of the Office of Fair Trading.

Mr STOWE: As a representative of the Office of Fair Trading.

Ms DIXON: As a representative of the Office of Fair Trading.

CHAIR: Are you conversant with the terms of reference of this inquiry?

Ms BAKER: Yes, I am.

Mr STOWE: I am.

Ms DIXON: Yes.

CHAIR: If you should consider at any stage that certain evidence you wish to give or documents you may wish to tender should be heard or seen only by the Committee please indicate that and the Committee will consider your request. Would all of you or one of you like to make an opening statement?

Ms BAKER: Yes, I would like to make an opening statement, please. Firstly, I thank the Committee for the opportunity to appear at this hearing on behalf of the Office of Fair Trading. Fair Trading, as you know, has made a submission to the inquiry and my colleagues and I are happy to answer questions about the submission. By way of background, in 1980 New South Wales enacted the Contracts Review Act. It was the first jurisdiction to introduce legislation dealing generally with harsh and unconscionable contracts. That Act contains a long list of matters to be considered by the court when determining whether a contract or a provision of a contract is unjust. That list has been reproduced in whole or in part in subsequent legislation: for example, the unconscionable contract provisions in the Trade Practices Act and the Fair Trading Act and the unjust contract provisions of the Uniform Consumer Credit Code. New South Wales was a pacesetter in this regard but after a quarter of a century consumers are still faced with contracts containing unfair terms. 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.

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. 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. I understand my colleagues from Victoria will appear before the Committee this afternoon, so there is no need for me to describe their compliance strategy. However, I was impressed by one point they made about the value of involving companies at senior management in the discussion with Government about unfair contract terms. They related that they would often present their own contracts to very senior levels of a company and ask them whether they would find such conditions easy to sign up for if they were asked to do so. Often the contract has been drawn up by lawyers, not necessarily considering the issues of balance

I would like to use a practical example to illustrate a point. Unilateral change clauses are frequently criticised. They may say something like this, "And the company may, at any time, vary or add to these conditions as it deems necessary." 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.

Pay TV contracts are a very good example. One company had a unilateral variation clause giving the supplier an unlimited right to vary the services and the price. This meant that a consumer who signed up for a $30-a-month deal to primarily have available a range of channels, including a lot of sport channels, could find himself paying $50 a month for reduced sport channels and increased lifestyle and comedy channels. The whole reason that the consumer got the pay TV contract was to watch sport, but it could be unilaterally changed so that the consumer did not get what he had contracted for. After negotiation the unlimited right to vary clause was amended and now, if subscription and service fees for the basic package are varied by more than the consumer price index during the fixed term, the consumer can terminate without penalty. As well, the contract terms now allow the consumer to terminate the contract without penalty if the channel is withdrawn or if there is a material change to a feature or functionality during the fixed term. Negotiations with the company allowed that contract to become more balanced.

In August 2003 the Ministerial Council on Consumer Affairs 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. Draft regulatory impact statements proposing national regulation have to go to the Commonwealth Office of Regulation Review for assessment and advice as to whether the draft meets the requirements set out in the Council of Australian Governments [COAG] principles and guidelines. To date, despite extensive consultation with the Office of Regulation Review during 2005 and 2006, the draft 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. The Office of Fair Trading in New South Wales very much welcomes this inquiry into this matter as very timely.

CHAIR: We have an extensive list of questions. The Committee has agreed that if we do not get through all the questions we will give them to you.

Ms BAKER: Fine.

CHAIR: How frequently does the Office of Fair Trading receive complaints relating to consumer contracts with unfair terms, and how big a proportion of all your complaint is that?

Ms BAKER: 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.

The Hon. DAVID CLARKE: Could you give an estimate?

Ms BAKER: I do not think we could even give an estimate.

The Hon. AMANDA FAZIO: Because it is not defined?

Ms BAKER: It is not defined, yes.

The Hon. AMANDA FAZIO: If you get this uniform unfair contract term legislation that *Choice* is running a campaign about, would you then change your collection of statistics to reflect that?

Ms BAKER: Yes, we would.

Mr STOWE: Yes, most certainly.

The Hon. DAVID CLARKE: What kind of terms do the complaints concern?

Ms BAKER: One example would be fitness centre contracts. Some contracts contain clauses enabling the centre to terminate membership agreements upon breach of the contract by the member regardless of how minor the breach. A breach, which could be insignificant, could allow the trader to terminate the contract. Other contracts make it very difficult for consumers to cancel a membership while requiring them to keep paying by direct debit for services they are not using.

Mr STOWE: We have had specific complaints about that conduct in the fitness industry.

The Hon. DAVID CLARKE: Do you get many complaints about a change in price without notification to the consumer?

Mr STOWE: They certainly happen with many contracts, particularly in relation to credit and some of the other industries that come to our attention.

The Hon. DAVID CLARKE: What about situations where there is a suspension of services while the consumer continues to pay? Is that frequent?

Mr STOWE: It certainly happens.

Ms DIXON: The fitness industry is a good example. The consumer does not realise there is a minimum contract term and that they have to notify the company that they wish to end their membership. They are on a direct debit, so they keep paying or the company makes it very difficult for them to cancel. They might have to fill out a particular form in a particular office on a particular day, and it just drags on and on. Meanwhile, the money is still being paid automatically.

The Hon. DAVID CLARKE: Are there many contracts that allow only the supplier to terminate?

Mr STOWE: They certainly exist and we are aware of that. As the commissioner said, we do not have specific data on how frequently those matters are raised.

CHAIR: Do you know what sort of words they use to describe that in the contract—we can pull out but you cannot?

Mr STOWE: We can provide examples.

CHAIR: Please take that question on notice.

Mr STOWE: We are happy to do that.

The Hon. RICK COLLESS: Is there any anecdotal evidence of the incidence of those different types of complaints? Are they frequent or infrequent?

Mr STOWE: We are aware of the conduct that Ms Dixon talked about in the gym industry. That is a specific matter brought to our attention, particularly where companies have engaged in promoting membership for 12 months and, having not read the fine detail, consumers have thought that after 12 months they could walk away. They do not realise that the payments continue to be made

directly from their bank accounts. That is one issue that we know has specifically caused concern. Our colleagues in Victoria have looked at numerous industries where they have detected significantly unfair terms. I am sure the Committee will hear later this afternoon about some of the matters they have examined in great detail.

The Hon. RICK COLLESS: Has the incidence of those complaints increased over the past two years?

Mr STOWE: Certainly the case of using standard form contracts has increased.

Ms BAKER: I preface my response by referring to the attempts nationally to get the regulatory impact statement up and running. All jurisdictions have had the same issues we are facing here, in that no States have good information specifically about the conduct. However, 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.

Mr STOWE: That is particularly true of the deregulated industries such as electrical retail and telephones. For the first time consumers have found they have a choice of provider and they are asked sign up to a contract.

The Hon. RICK COLLESS: Would they all fall into that general category of the standard form contract?

Mr STOWE: Yes.

The Hon. RICK COLLESS: How do you respond to those allegations?

Mr STOWE: We take a number of steps. First, we encourage the consumer to raise the issue directly with the service provider to see whether it can be resolved. 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. If the consumer does not want to go down that path, we would then try to resolve the complaint directly with the service provider and the consumer. We have considerable success in doing that. It is often at that point that we detect contractual terms that we regard as unfair.

We are not empowered to direct the trader to take a course of action in those negotiations. 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. When it is a small amount, the consumer is probably not likely to want to get involved in litigation. Our examination of contract review cases has indicated that, generally speaking, they have been for high-value contracts, usually in relation to mortgages and land sales. One can understand that a consumer with contract involving hundreds of dollars would not want to establish a case in the courts.

The Hon. RICK COLLESS: Do you find that most people would take it up with the supplier initially, if they have a concern about the contract?

Mr STOWE: Yes.

The Hon. RICK COLLESS: And that it is only when negotiations fall down with the supplier that they come to you?

Mr STOWE: Yes, generally speaking that is true. There is a significant number of people—you would be surprised—who do not raise the matter initially with the trader and come to us first. That is the advice that their training provides: in the first instance, talk to the trader. It may be something that can be resolved. It could be a communication problem.

The Hon. GREG DONNELLY: In terms of the lodging of complaints, it might be helpful if you explain to the Committee the process of how those complaints are lodged. Do you operate a call centre or a 1 800 number? Just give us an overview of that because I think it would be helpful.

Ms BAKER: Okay. We deliver our services in both of those ways. We have an integrated call centre which was established only last year. It handles about 1.5 million customer contacts a year. People who ring that call centre could be ringing—just give you the breadth—about a home building matter, a retail tenancy bond, a shopping problem or a register of encumbered vehicles [REV] matter. It is an integrated call centre. Our whole business is attached to that call centre and those people assist consumers in the same way as our fair trading centres do.

There are 26 fair trading centres around the States so people can that come to the counter and lodge complaints there, and they can also lodge complaints online through our customer assistance system. The principles of the way we handle those complaints, regardless of which service channel, is the same. I think Rod has described it broadly already. We first of all try to help the consumer to help themselves, so we will actually say, " Have you spoken to the trader? What did they say?" In some cases of course the person has spoken to the trader and has run up against a brick wall. In that case, our staff they make a call to the trader and try to broker a deal. In the majority of cases we do not, as Rod said, have any legislative backing to make the trader do something, but in a large percentage of cases we do achieve a resolution.

The Hon. GREG DONNELLY: I am interested in your comment that people contact you with complaints, and it is a significant number of contacts over the course of the year. Do you have any idea of the proportion of those who may contact the centres at the various contact points seeking advice in advance of prosecuting a consumer contract? Are there people who are ringing up and saying, "I am looking for advice about whether or not I should enter into such an arrangement, and how I should scrutinise the terms of what is being proposed."

Mr STOWE: That certainly happens, but not with the regularity we would like. That is one of the messages that we try to get across to people. We are more than happy to assist consumers either when they look at entering a contract or when they ran into some difficulty. I do not think we could give you a proportion of them.

Ms BAKER: Another arm of our service is in fact information and education. We run a lot of seminars for seniors, juniors and regular people about their rights and obligations in the marketplace. But, yes, we would like people to be more proactive, sure.

The Hon. GREG DONNELLY: With respect to the standard form of contracts, you have given some examples of the burgeoning of certain industries or sub industry group since the 1980s. Are standard form contracts within a particular category generally are quite similar? For example, with mobile phone contracts, are they generally the same? In the fitness industry, are they generally the same, or is it more a situation that there is a whole variety of contracts within these subgroups?

Mr STOWE: It is probably safe to say that in some categories there is similarity between providers. It is true to say that standard form contracts have some advantages: it is much easier to produce, there is more certainty, and there are some cost savings which could possibly be passed on to consumers as a consequence of using standard form contracts. The problem that arises, though, is that there is not an opportunity for a consumer to actually negotiate the terms of the contract. It is a take-it-or-leave-it situation. 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.

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. That is what we find in those sorts of contracts. We frequently run up against them in our

everyday lives. How many of us have actually bought air tickets on the Internet? We just click that we have read the terms and conditions. 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.

The Hon. RICK COLLESS: We click the terms and conditions in those situations. Does that come under the general heading of a standard form contract?

Mr STOWE: Yes, it certainly does.

The Hon. AMANDA FAZIO: One category I am particularly thinking about is mobile phone contracts. Unfortunately, I have been obliged to sign mobile phone contracts on behalf of my children, who are too young to sign them.

The Hon. RICK COLLESS: Haven't we all?

The Hon. GREG DONNELLY: Who pays the bill?

The Hon. AMANDA FAZIO: The person who signs the contract pays the bill. The issue that I have been concerned about there is that there seems to be no information provided by the retailers to people for whom English is not their first language. The mobile phone contracts I have seen in the information I have obtained from mobile carriers has only ever been in English, yet the contracts are quite detailed. Things like the amount of money they have to pay and the difference between whether they are paying for a handset or a monthly plan, are they issues that consumers raise with you? Have they actually signed some of these pay TV or mobile phone contracts and they are not making an informed choice when they sign because the information provided to them is not in the language that they speak most frequently?

Mr STOWE: It certainly comes up in complaints we see. Again, it is very difficult for us to give you any statistical analysis of that, but that certainly comes up and service providers are not obliged to provide contracts in community languages. However, there is a Telecommunications Ombudsman who is the industry ombudsman and does provide significant information for consumers in community languages, which is helpful. But as I alluded to earlier, what we do find is that consumers rarely go to regulators and get information before they enter into a contract. They see the thing they want and they sign themselves up for it. It is only later on that they come to organisations like us, or the ombudsman, for assistance.

Ms BAKER: I could add that the issue you have raised is a subset of the broader issue. 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 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.

The Hon. AMANDA FAZIO: I was going to make the comment. You might need to take a magnifying glass to look at some of the mobile phone standard contracts.

Ms BAKER: Yes.

The Hon. AMANDA FAZIO: There is barely enough space to sign or put your signature in a contract, let alone read the fine print which is ultra fine.

Ms BAKER: Yes.

The Hon. RICK COLLESS: And usually in a light blue colour so that you cannot read it anyway, even if you can see it.

The Hon. GREG DONNELLY: I have a question in terms of the regulatory mechanisms that are relevant to these sorts of consumer contracts. With respect to the Commonwealth Trade Practices Act that is relevant in this area, is that receiving a review, has it received a review, or is it

planned to be reviewed in the future to deal with the sorts of issues that we are discussing this morning?

Mr STOWE: No, not that we are aware of.

The Hon. GREG DONNELLY: So you are not aware that there are any plans under way? Given that mobile phone contracts are signed today in New South Wales that are identical presumably to ones in Western Australia, South Australia and the Northern Territory at Telstra shops, you are saying that the Commonwealth is not actually looking at this, as far as you know.

Mr STOWE: No. The Commonwealth has responsibility for telecommunications in general and they do have some regulatory regimes. Ms Dixon might wish to allude to some of the ways in which they do that, such as the codes and the like.

Ms DIXON: With mobile phone contracts and other consumer contracts in telecommunications, there is quite a complex regulatory regime at the Commonwealth level. But over the years it has gone through a process. They start out with a code of conduct that is voluntary for the industry to comply with, which has suggestions about fair contract terms. They reviewed that and discovered that people were not complying with the voluntary code, so then they had a mandatory code, which still was not being complied with. I think they are now at the stage where they have a regulatory standard that says you are supposed to not use certain terms in consumer contracts. So there is that activity going on at the Commonwealth level with telecommunications contracts in particular. But generally speaking, no, the Commonwealth has not given any indication that it is going to amend the Trade Practices Act to cover unfair contract terms.

The Hon. GREG DONNELLY: Could you comment on the New South Wales Fair Trading Act and the New South Wales Contracts Review Act?

Mr STOWE: The New South Wales Fair Trading Act mirrors the provisions in the Trade Practices Act. 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 disadvantage 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 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.

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. The Supreme Court and District Court have jurisdiction in those matters, although the Consumer, Trader and Tenancy Tribunal does have jurisdiction in respect of certain types of contractual matters. A consumer can also use the defence of the Contracts Review Act if a matter is brought against them in terms of breach of contract.

The Hon. DAVID CLARKE: Do you think that the various Acts—the Commonwealth Trade Practices Act, the New South Wales Fair Trading Act and the New South Wales Contracts Review Act—provide consumers with adequate recourse should they believe themselves to be signatory to a contract with unfair terms?

Mr STOWE: 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.

The Hon. DAVID CLARKE: Does your office believe that models such as part 2B of the Victorian Fair Trading Act and the United Kingdom Unfair Terms in Consumer Contracts Regulation 1999 better protect consumers from unfair contract terms than legislation currently in place here in New South Wales?

Mr STOWE: We certainly believe there are significant advantages in those forms of legislative approach. As the commissioner said, the Ministerial Council on Consumer Affairs has embarked upon a course of supporting the development of legislation that pretty much builds on that legislation.

Ms BAKER: 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.

The Hon. DAVID CLARKE: It is a big difference, is it not?

Ms BAKER: It is a huge difference, yes.

CHAIR: What are the benefits of the standard form contracts to consumers themselves? I understand from what you are saying that there are considerable benefits for the mass market, but what are the benefits for consumers themselves in the process?

Mr STOWE: There are probably three things. 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 information so consumers are put on notice about important issues. They are the sorts of advantages that exist in terms of standard contracts. As we discussed earlier, there are a number of disadvantages as well.

The Hon. GREG DONNELLY: The United Kingdom legislation is a 1999 Act, so it has been in place for some time. Presumably there has been some review of how the legislation has performed and some judgments made about it. Are you aware of the judgments and considerations that perhaps the Parliament has made in terms of the legislation, about whether it is working and is appearing to be effective in dealing with some of the issues we have been discussing this morning?

Ms DIXON: I do not know whether there have been any parliamentary reviews, but the regulators are required to produce regular information about the way in which the Act has been administered and the results it has achieved. They also publish bulletins, I think every six months or so, which are available on the United Kingdom Office of Fair Trading web site. They contain many lists of contract clauses which have been identified as unfair and have been negotiated to be amended in a whole range of industries. I was going to do some analysis of this but, I must say, I was daunted by the amount of material so I have not actually added it up. But they do have thousands of cases of contract terms that have been amended. Certainly there has not been any criticism that the 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.

The Hon. DAVID CLARKE: Is the definition of "unfair" contained in the Victorian and United Kingdom legislation sufficiently precise, in your view, to avoid the need for legal action to prove that a contract is unfair?

Mr STOWE: 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. 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. In fact, because of the Victorian legislation already impacting upon traders and service providers who operate nationally, there are people here in New South Wales 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.

Ms BAKER: 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.

CHAIR: If a new law were to be put forward, or amendments were made to the fair trading law with regard to this issue, do you think it would be advisable for that new legislation to make a statement about the negotiation potential? Would it be advisable to have that in the legislation as a statement?

Ms DIXON: It could be an objective of the legislation.

Mr STOWE: 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.

CHAIR: As an upfront statement, do you believe that the business community would find it a more acceptable process than from the history of the submissions? Would the business community find also the implementation of such a law more acceptable, to know that it was an upfront statement?

Mr STOWE: Possibly so. 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 New South Wales. We are well aware of what we are going to do.

Ms BAKER: 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.

The Hon. GREG DONNELLY: Is there any evidence of any national companies that obviously operate throughout the Commonwealth that write contracts differently to meet the Victorian legislation's standard? Outside Victoria, where obviously similar standards do not exist, do they have different arrangements for consumers? If there are examples, could you nominate them?

Mr STOWE: No, the more common experience would be that the service provider or trader concerned would amend their contract so it applies right across the nation. Obviously it is easier for them to do it that way.

Ms BAKER: We are already benefiting. Some contracts in New South Wales are already benefiting from the Victorian.

The Hon. GREG DONNELLY: Do you look at any other benchmarks in other jurisdictions around the world? The United Kingdom one has been covered. Are there any jurisdictions where there is consumer legislation that is seen to be of a standard which is quite regulatory?

Ms DIXON: On unfair contracts?

The Hon. GREG DONNELLY: Yes.

Ms DIXON: The United Kingdom legislation was introduced in response to a European Union directive. So there was legislation throughout the European Union. Really Victoria and the United Kingdom have been signalled 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 it operates. They seem to have the most effective implementation strategy, as we have just been talking about.

The Hon. AMANDA FAZIO: In your opening statement you talked about the national initiative to try to get uniform terms for unfair consumer contracts. You are probably aware that the Australian Consumers Association, *Choice*, is running a campaign on that?

Mr STOWE: Yes.

The Hon. AMANDA FAZIO: Can you elaborate on why there has been such a delay? The association is saying that it should all have been finalised by December 2005, but that the draft regulatory impact statement has yet to be released. Can you explain? Getting your perspective in more detail will help the Committee to understand the evidence from the association.

Mr STOWE: The chronology is: in August 2002 the Ministerial Council on Consumer Affairs directed the standing committee to look into this potential legislation for unfair contract terms. A year later, August 2003, the ministerial council agreed that it should look to develop such proposals, based upon a successful regulatory impact statement. In January 2004 a discussion paper was prepared and issued to the public. Some 74 submissions were received as part of that process. Those submissions were taken into account when work started on a regulatory impact statement [RIS], which was submitted to the Office of Regulation Review.

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.

CHAIR: Can you explain the Office of Regulation Review?

Ms DIXON: The Office of Regulation Review is about to change its name, but I cannot remember what it is going to be called. It should be the Office of Better Regulation, I think. It is part of the Productivity Commission, it is a Commonwealth body. The Council of Australian Governments has something called the principles and guidelines on national standard setting by ministerial councils and national regulatory bodies. It requires that if you are going to propose regulations that operate on a national basis, you have to prepare a regulatory impact statement. 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 if 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.

The Hon. AMANDA FAZIO: In effect, has the Victorian Government just gone off on its own because it felt the needs of consumers far outweighed the deliberation right of the Office of Regulation Review to deliberate on this matter for years on end?

Ms DIXON: Victoria introduced legislation in 2003, and it was done as a consequence of a review, a national competition policy review of their fair trading legislation. There was a community panel of wide-ranging representatives who recommended that unfair contract terms legislation be introduced. They already had it in place, pretty much, when the national process began. The question of the Office of Regulation Review was not relevant to Victoria at the time.

The Hon. DAVID CLARKE: It has been suggested that unfair consumer contract terms legislation is a national issue and that it may pose difficulties if the State decides to go it alone. Do you have a view on that? Is there value in New South Wales enacting this legislation without national agreement?

Ms BAKER: We do have a view. 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 clearly, from what Rod said, we have been pursuing it in 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.

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 New South Wales 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 this jurisdiction following Victoria and we firmly believe that in this particular case we are better off to act alone.

The Hon. DAVID CLARKE: So you are suggesting that the Victorian legislation of the Fair Trading Act is something we should be looking at very seriously and possibly following?

Ms BAKER: Yes.

Mr STOWE: That would be our recommendation to government, but, of course, it would be a policy decision of the Government to take that action.

The Hon. DAVID CLARKE: It has been suggested that this idea of one-size-fits-all regulations would be inappropriate. Do you think there should be legislation specific to different sectors developed?

Mr STOWE: No. 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.

The Hon. DAVID CLARKE: So the one-size-fits-all route is the way to go, more or less?

Mr STOWE: As I said, that would be the recommendation that the Office of Fair Trading would be making to government. But it would be a policy decision of the New South Wales Government, of course, to make that decision.

The Hon. AMANDA FAZIO: Can I just follow up on something I wanted to clarify? I think you said that in Victoria in 2003 they introduced the legislation in response to a national competition policy review of their legislation and yet now it is the Office of Regulation Review that sits within the competition watchdog that is holding up similar changes being enacted nationally. Has there ever been any comment from them? That would seem to be a very inconsistent position for them to have taken.

Mr STOWE: I think we would make the comment that this particular regulation proposal has been subject to extraordinary scrutiny and I think Dr Cousins might have some comments about the consistency of the Office of Regulation Review and looking at other proposals that do not seem to have had the same amount of scrutiny. You might like to raise that with him this afternoon.

The Hon. GREG DONNELLY: Can I just ask the question about the educative role and function, which seems to me to be pretty important because in the end people have to accept some responsibility for the decisions they make? Could you just give us a bit of an overview of the program of activity by the department that exists in regard to educational consumers, with some particular comment about the education of young people in terms of their responsibilities and obligations?

Ms BAKER: We run a wide range of programs. We have a very good web site which attracts a lot of hits. We have community liaison offices throughout the State and throughout metropolitan Sydney who run targeted seminars for specific groups of people, including young people but also seniors—landlords, tenants and the like—because we cover such a broad base of legislation. In the case of young people, we are quite active. Rod can pick up anything I forget here, but we have got "Money Stuff", which is a separate web site attached to our web site, which is an interactive web site for young people where it focuses on the three biggest consumer issues facing young people today—and it faces them at increasingly younger ages—and that is mobile phone contracts, renting a shared house and buying a car. It is an interactive educative tool to help young people see the pitfalls of each of those types of contracts.

We are also active in schools in terms of financial literacy. We focus very much on getting people young as well as trying to cover all the other groups in society. I might add, just in case there is confusion, that general form of consumer education would be quite separate from the education program we would be talking about if we got this kind of legislation. Then we would be going specifically to industry to inform and educate them on their side about how to improve their contracts.

Mr STOWE: One of the strengths of the Money Stuff program that the Commissioner alluded to is that it has been developed in such a way that it fits into several areas of the New South Wales secondary curriculum so teachers can actually use the resource in teaching particular subjects in relation to maths, commerce and the like. It links very nicely into students' regular studies. We encourage students to access it by an award we give to schoolchildren during Fair Trading Week that is called the Money Stuff Challenge, and we give prizes for those who do it. As Lyn said, we are very active in the schools: we have got a Revved Up program where we have our staff go in and speak to students about making car purchases and the things that they need to look out for.

The Hon. AMANDA FAZIO: There is a statutory body to cover the motor vehicle repair industry. If specific unfair terms legislation were to be enacted in New South Wales would a statutory body be required to administer the Act or would this be undertaken by the Office of Fair Trading?

Ms BAKER: 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.

The Hon. AMANDA FAZIO: The other issue that concerns me about this inquiry was that people who may hear that we are having an inquiry into unfair contracts may then think, "I did enter into one" or "I did have an issue about an unfair contract". Is there a time limit for them to raise those issues with the Office of Fair Trading or with the Consumer, Trader and Tenancy Tribunal [CTTT]?

Ms DIXON: If the unfair contract has led to a dispute with a trader, they could make a complaint, as we discussed before, and the office could intervene and try and negotiate a resolution to that complaint, and there is no time limit on that. But if they needed to go to the Consumer, Trader and Tenancy Tribunal there is a three-year time limit from the time that the problem emerged.

The Hon. RICK COLLESS: An issue that I have had a few calls about is out and out scams, particularly in the racing industry. I think there has been a plethora of them. Do you have a role in actually tracking down the perpetrators of those scams and do you ever have any success in catching them?

Mr STOWE: Yes, we certainly get those complaints. As recently as yesterday ASIC had a warning about consumers getting involved in those racing systems. These are these computer-type programs that people are encouraged to buy which will help them predict the successful outcome of races, and they are very expensive. The complaint that we get from people is that they are harassed into taking out these types of contracts for these sorts of services and inevitably they are not successful. Unfortunately, our experience is that a lot of them are run out of north of the border and our colleagues in the north are the ones who usually have to deal with those matters because that is where the operations are happening.

I do not think they happen so much in New South Wales. We are certainly aware of them and where we can act we will. It is something that we share, of course, with ASIC because they have got responsibilities for investment matters.

The Hon. RICK COLLESS: Is it a situation where the same people are behind the different schemes that are run? Is there an organised sort of approach to it, do you know, or are they just one-off things that people dream up?

Mr STOWE: I do not know that we are qualified to say. We would have to take that on notice.

Ms BAKER: We have staff who participate in the Australasian Consumer Fraud Task Force, which comprises all of the Fair Trading agencies such as ASIC, ACCC, et cetera, and they have been quite successful in identifying and closing down scams, but I am really not across that particular scam that you are talking about. Our officers may be able to provide for the information.

CHAIR: You do not know if they operate off a standard form. Do they click an agreement?

The Hon. RICK COLLESS: I am not sure how they get involved in it?

Mr STOWE: They usually advertise in various publications or direct marketing where people are communicated with over the phone and are then induced into purchasing the products. I am not too sure about the other, Chair.

The Hon. RICK COLLESS: I actually followed up with ASIC and got the contact details of the company secretary and so on, and it was impossible to track him or her down.

The Hon. AMANDA FAZIO: Can I follow up on people entering into contracts over the phone because that seems to be happening increasingly and I think it would have a considerable impact in terms of unfair terms of contract matters? That is where people may be sent an offer by a bank to take out a new credit card and they are then followed up with a phone call. They are asked to actually agree to accept the card, not by signing a signature but by agreeing over the phone. The other one is that some of the phone and electricity companies ring up people and ask them to change or switch their supplier by entering into a verbal contract over the phone. Do those forms of entering into contracts cause more problems in the Office of Fair Trading and how confident are you that the consumer actually gets the material? I think they actually say, we will post the material to you and you have X number of days to cancel if you are not happy once you get our fine print multi-page, impossible to read document. How would that impact if we brought in this legislation?

Ms DIXON: The direct commerce provisions under the Fair Trading Act cover unsolicited approaches by telephone of contracts signed or entered into over the phone and that gives you a five-day cooling off period after you have received the written contract and the information. I must say that I have not really heard that there has been a lot a problem with people not being able to cancel contracts under that legislation. Energy suppliers are covered by the marketing code of conduct, which is administered by the Department of Energy, Utilities and Sustainability and they also have the Energy and Water Ombudsman to go to if they have problems, but they have a 10-day cooling off period once they have signed a contract.

If there were a problem with an unfair term in contracts over the phone, it would be dealt with in the same way as any other contract. People identify unfair terms usually when they have got some other problem—the service is no good or the goods have not been delivered or something like that and it is only at that point that they actually look at their contract and then they might identify other terms in the contract. Usually you can solve the immediate problem for them and the benefit of the unfair terms contract legislation would be that the regulatory authority would then be able to look at that contract and look at other contracts in that industry and negotiate a change for everybody.

The Hon. AMANDA FAZIO: I want to follow up another issue that might seem a bit out there but I understand that there is a clause or part of the contract that when people buy the Apple iPods, the MP3 players where under the terms of purchase they are only allowed one free call to the Apple help line to get the things set up and running. People encounter so many problems in actually trying to get the things to work with the iTune software that they have to download. I understand that all consumer bodies in the States have designated Tasmania to try to sort this out because it is such a difficult problem. Would that sort of issue be seen as an unfair term in a contract, that software is

provided to support an electronic device that is fraught with problems yet the terms of sale only allow one free call to the help line?

Mr STOWE: Possibly so. Again, the basic definition, as we said earlier, of an unfair contract term is where there is an imbalance in the terms of the contract which has some negative impact on or detriment to the consumer. It would appear that is a situation that falls within that category.

The Hon. AMANDA FAZIO: I think a lot of young people would like us to introduce this sort of legislation.

The Hon. DAVID CLARKE: Of all the consumer product and service industries, which ones are using contracts with unfair terms the most?

Mr STOWE: Certainly the telecommunications industry is one that comes to mind. We have certainly had some concerns about car rental contracts. I point to our submission where we go into some detail about some of the industries where we have some real concerns.

The Hon. GREG DONNELLY: I ask a related question. Given that the Internet is used now so regularly by people to purchase both goods and services and that a number of those goods and services are purchased from businesses domiciled overseas, in fact they are overseas businesses and companies, what kind of difficulties does that create for government departments in being able to deal with these sorts of issues? How do you cope with that because this will continue into the future?

Mr STOWE: They certainly provide significant challenge for law enforcement agencies such as our own and, as the commissioner said, we really rely upon co-operation with other jurisdictions. There is ICPEN, which is—

Ms BAKER: The International Consumer Protection Enforcement Network.

Mr STOWE: —responsible for dealing with these matters in relation to fair trading and consumer issues. What happens is that regulatory agencies around the world work together collectively to address those problems. If we have problems with Canadian lotteries, for instance, we look to our Canadian colleagues to shut down those sites that might be promoting them. I think that we are looking more and more to international co-operation to deal with those sorts of problems that arise.

CHAIR: What areas or people in the State would be uncomfortable if this legislation comes forward? Who perceives that this has the potential to hurt them?

Mr STOWE: I am not aware of any individual or organisation that has approached the Office of Fair Trading specifically about this matter. There may be some of those submissions that were received by the working party that would be relevant, but I cannot give you an answer off the top of my head. I am not aware of any specific organisation that has come to the Office of Fair Trading that has said it has got concerns about the potential of this legislation.

CHAIR: Who do you think should do regulatory impact reviews on this?

Mr STOWE: With the formulation of any proposed regulation in New South Wales 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.

CHAIR: Fair Trading comes within the law and justice portfolio—that is at this Committee. This particular Committee has an oversight role in relation to the Motor Accidents Authority, and as a parliamentary committee it sits down every year and in very finite detail goes through where it is going, if it is moving towards what it should be doing in the processes and whether it is working. In the past three or four years it has become a valuable tool for both the Motor Accidents Authority and the Parliament. Are there any areas within Fair Trading—and this is what put it to my mind with follow-up on this issue, if not annually but even if it was in the future—that there would be

advantages for the operation of legislation to be reviewed not necessarily regularly but on and off by a committee like this to make recommendations? I know that is a bit of a heavy question. Do you want the politicians to get involved in your business? That is what I am saying in a roundabout way. Would it be of use?

Mr STOWE: At the moment a number of the statutes we administer are subject to a statutory review so we regularly have to prepare a report which is submitted to the Parliament for scrutiny on whether or not the legislation is meeting the original objectives. So I suppose to some extent the work we do is subject to parliamentary scrutiny. Similarly, we are required to regularly review regulations under our legislation, and we do regulation impact statements, which are available to the public and subsequently made available to the Legislation Review Committee. So I suppose there is already some parliamentary oversight of our activities.

Ms BAKER: Which is quite regular, given that we have 40 or so pieces of legislation. There is always one or more of them in review mode.

CHAIR: You were given some questions on notice. As we are preparing the information that we gather today and from submissions, I hope that you will be willing to accept questions from the Committee in relation to that.

Ms BAKER: Of course, that is not a problem.

(The witnesses withdrew)

(Short adjournment)

JENNY AMANDA LOVRIC, Policy Officer, CHOICE Australian Consumer Association, 57 Carrington Road, Marrickville, and

PETER RICHARD KELL, Chief Executive, CHOICE Australian Consumer Association, 57 Carrington Road, Marrickville, affirmed and examined:

CHAIR: In what capacity is each of you appearing before the committee? Are you appearing as individuals or as a representatives of an organisation?

Mr KELL: As a representative of CHOICE.

Ms LOVRIC: I am appearing as a representative of CHOICE.

CHAIR: Are you both conversant with the terms of reference for this inquiry?

Mr KELL: Yes.

Mr KELL: Yes, I am.

CHAIR: If either of you should consider at any stage that certain evidence you wish to give or documents you may wish to table should be heard or seen only by the Committee, please indicate that fact and the Committee will consider your request. Would either or both of you care to make a brief opening statement?

Mr KELL: We would simply like to thank the Committee for the opportunity to appear today. This is an issue that we have been very interested in for quite awhile. We see it as a very important area of reform within the consumer protection arena, and we will be happy to take questions.

CHAIR: Thank you very much. I will ask the first of the formal questions. Does the Australian Consumers Association receive complaints concerning unfair terms in consumer contracts? If so, to what terms do those complaints relate?

Mr KELL: Yes, we do receive complaints about unfair terms in consumer contracts. Just before outlining the nature of some of those complaints, I should note at the outset that we are not a casework body and we do not take legal action on behalf of consumers. We typically refer complaints to other bodies that might be able to do that. I would also note that most consumers rarely say, "I am concerned about a particular term in a contract." They more often say, "I have been ripped off, " or "I have had this terrible experience," or "My holiday was ruined," or something like that. So that sometimes it can be a little tricky to determine whether there was a particular provision in a contract that created the problem.

Having said that, we receive complaints in relation to telecommunication companies—I am thinking of some I have seen within the last few days. We received a complaint in the last few days from an individual whose father was a member of a gym and the father had become seriously ill. He went along to the gym to seek termination of his father's gym contract and presented the medical evidence of his father's illness. The gym operator essentially said, "No. We have no need to do that. Our right is to continue to charge for the duration of the 12 months.

The Hon. DAVID CLARKE: Which gym was that?

Mr KELL: I cannot remember but we are following up on that one, let me assure you. Car hire is a classic one. It is a good example of the sort of purchase that a consumer makes that happens infrequently and often at quite a bit and is from where they normally live. So they can be more vulnerable in those sorts of situations. iPods—

CHAIR: Could you pick up some of the issues in relation to car hire?

Mr KELL: It is often the ability of the car hire company to levy after the event additional charges for what, they argue, are damages or problems that have arisen with the car. We have seen that occur to the extent of thousands of dollars after the event—bills appearing on people's credit cards in situations where it is extraordinarily difficult for the consumer to challenge it because they are in Sydney and they have gone over to Perth and rented a car. They are not about to jump on a plane and go back there. That is a classic example.

Ms LOVRIC: Another one is where the clauses within the contract may allow the supplier to request immediate return of the vehicle without notice for even a suspected breach of the contract.

CHAIR: A better offer.

Mr KELL: Another example is the ability of the supplier to vary the vehicle without notice. You think you are getting a nice big six-litre car and you end up with a fairly tinny little thing that can barely push along the highway. We have certainly come across those cases. I had a very recent personal example: I copped an earful from my father-in-law about it after his trip to Tasmania. Another classic example is financial services. We have recently done a big story on credit cards. I should have brought along the most recent addition of *Choice* magazine. It contains a couple of nice case studies. A good one is someone who was 10¢ short, making a small error on the cheque that they wrote to pay the balance of their credit card account. As a result of the terms and conditions in the account they ended up paying double the rate of interest they otherwise would have for a deficiency of 10¢ on the payment of more than $1,000. When they approached the bank pointing out that it was only a minor error the bank said, "Sorry, off you go." We intervened on behalf of the consumer in that case and got the refund. But that should not have to happen.

The Hon. DAVID CLARKE: With an apology as well?

Mr KELL: Unfortunately, no.

The Hon. DAVID CLARKE: Are you able to say what bank that was?

Mr KELL: I am happy to check that out for you. I will take that on notice.

The Hon. DAVID CLARKE: Are most of these complaints about the supply of services or goods?

Mr KELL: That is an important question. As 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. So in many cases it is services, yes.

The Hon. GREG DONNELLY: The Office of Fair Trading witnesses explained that there has been a real burgeoning over the last 2½ decades primarily because consumer contracts are being written in a number of areas that previously did not exist. There has been an explosion of issues flowing from that. We quizzed them about specific records about the number of complaints. They said their record-keeping system at the moment did not enable them to be to definitive about that. Does the ACA keep records that could validate that over the last 2½ decades there has been a real increase in consumer complaints in regard to consumer contracts specifically? Has there been a significant increase?

Mr KELL: We could not provide you with the exact figures going back 2½ decades but I am happy to look at exactly what we can provide to you on that question. Our view is that they have been going up all the time. I do not want to sound as though I am trying to dodge the issue but had we had this area clearly in our mind 10 years ago we might have formulated a complaints category of unfair contracts but we did not have that. We may have to extract more generalised information about consumer complaints about products and services and look at to what extent they might have arisen from poor contracts.

Ms LOVRIC: This is precisely the issue. There has been no remitting on fair terms thus far. People have basically been told that there is nothing you can really do about this. That is precisely why we need that sort of legislation.

Mr KELL: You end up in the classic misleading and deceptive territory, the after the event territory. One of the problems is that with some of these sorts of contracts the conditions are in the information that is provided to consumers but it is on page 10 in small print. So you can argue a case that the consumer has not been misled because the condition is on page 10. That is often the proposal that is put to us.

The Hon. DAVID CLARKE: Do the types of complaints you get include something like change in price without notice to the consumer?

Ms LOVRIC: That is a fairly common one. It may well come under a fairly general term along the lines of, "We can change any terms and conditions from time to time as we see fit".

The Hon. DAVID CLARKE: And one-sided penalties for consumers for breaching the contract? Are they quite common?

Ms LOVRIC: That is certainly the case. A classic case probably would be banking penalties and fees. As we outlined earlier, a very minor breach may incur a significant fine or penalty which will subsist.

The Hon. DAVID CLARKE: What about suspending services while the consumer continues to pay? Is that something you come across frequently?

Ms LOVRIC: We have had evidence of that. Many community organisations and legal centres have reported evidence of that, most particularly in the mobile phone area or with Internet service providers. The contract may say that they can continue to charge the customer despite the service being down for an undefined period.

The Hon. DAVID CLARKE: What about situations that allow only the supplier to terminate the contract?

Ms LOVRIC: Peter outlined a few of those earlier. In the fitness area that is fairly common.

The Hon. DAVID CLARKE: You get many of those, do you?

Mr KELL: It is a regular sort of thing. On the one-sided penalties against consumers for breaching, a relatively new product is causing concerns. One of our officers is speaking at a conference today on this. So-called reverse mortgages are a product designed to allow elderly people, particularly retirees, to derive an income from a loan based on the value of their house. In some of the early examples of those sorts of products we are seeing some quite remarkable terms and conditions. We have taken that to the industry association. For example, the lender will not honour a negative equity guarantee if the borrower is in default at the time of the sale of the property. We have outlined this in our submission. In one case a lender will not cover a loan shortfall if the borrower has been in default at any time during the loan term, or the borrower will be in breach of the contract if they fail to pay a council bill at one point in time. Given that those products are aimed at elderly people, we see this is as a critical regulatory gap that must be addressed. Ultimately, they should be useful products. Many people's primary asset is their house, so we should be able to have financial products that allow them to benefit from that.

CHAIR: So, if they do not pay or take a few months to pay their rates one year, that would default the contract to the lender.

Ms LOVRIC: According to the wording in some of the contracts, yes, a minor breach is deemed to be a default, which allows the default provisions to kick in.

Mr KELL: Again, we are happy to provide a detailed article on the reverse mortgage industry and some of the contracts used in that industry.

The Hon. DAVID CLARKE: How does your association respond to allegations of providers using unfair terms in contracts?

Mr KELL: As I noted earlier, we are not a casework agency. Typically, based on our assessment of the nature of the complaint, we will do one of a number of things. We may take up the case and approach the firm directly on behalf of the consumer, as we did in the example I outlined earlier about the credit card payment. We may refer it to an agency such as the Australian Competition and Consumer Commission or the Office of Fair Trading. In some cases we may refer it to one of the centres such as the Consumer Credit Legal Centre or Legal Aid. It will depend in part on the nature of the case. In a few instances we probably will have to be realistic and tell the consumer that, given the nature of the regulatory regime, there is not an enormous amount we can do. Unfortunately, in a few cases we must say that.

Ms LOVRIC: What *Choice* also does usefully is publish information about how to solve these issues, such as taking direct action by making a complaint to the supplier. A recent article details a consumer who had a problem with a mobile phone contract. The consumer was referred back to the supplier but had no joy. The consumer then went to the supplier's retail outlet and spoke to customers who were about to sign up to the product. That quickly made the supplier change its tune and the consumer got the product back. Of course, that is not the ideal way for these kinds of issues to be resolved.

Mr KELL: Because not everyone is comfortable to do that. However, when it works, it works well.

The Hon. RICK COLLESS: Has the incidence of those sorts of complaints increased since standard form contracts were introduced?

Mr KELL: Again, I cannot provide a numerical-statistical analysis of that. Certainly, our experience is that that has been occurring over time. 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.

The Hon. RICK COLLESS: The building industry operates on standard form contracts.

Mr KELL: Yes.

The Hon. RICK COLLESS: But that is a substantially different situation from the tick the box at the bottom of the form arrangement to agree to the terms and conditions. It is that type of contract we are concerned about.

Ms LOVRIC: 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.

The Hon. RICK COLLESS: That is different from the building industry, where a solicitor reads the contract for you.

Mr KELL: It is a good point 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.

The Hon. GREG DONNELLY: Your submission argues that unfair contract terms are increasingly likely in the electronic and digital age. We are all well aware of the contract arrangements with Internet transactions. Why does the increased use of information and communication technology increase the likelihood that contracts will include unfair terms? More and more goods and services are being purchased electronically, typically over the Internet. How is that transaction medium likely to increase the potential use of unfair contract terms?

Ms LOVRIC: 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. 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.

Mr KELL: 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.

The Hon. GREG DONNELLY: This is not meant to be a naive question. Market theory would suggest that if companies were seeking to write contracts which are palpably unfair or which contain unfair terms, they would be outed. Ultimately people would not seek to do business with them and would look for a competitor offering a fairer contract arrangement. However, that does not appear to be the case in the real world. Why does the market not operate in that way?

Ms LOVRIC: 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.

Mr KELL: Competition will deliver the goods in some instances. One of the roles that our organisation obviously seeks to play is to highlight instances where companies are behaving unfairly or offering a clearly inferior product. We seek to have an impact as often as we can in those sorts of cases. However, 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 happened 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.

The Hon. AMANDA FAZIO: I raised with the representatives from the Office of Fair Trading the delay in introducing national uniform legislation on unfair contracts. The September 2006 issue of "Campaigns Update" refers to unfair contracts. Earlier this morning we heard that the Victorian Government introduced its legislation, which is seen to be model legislation, in 2003 in response to a national competition review of its then existing legislation. Yet, the regulatory office that is holding up the regulatory impact statement on unfair contracts, the Productivity Commission, is part of this national competition process. Do you have any understanding of what the major delay is, why the impact statement has been found to be unacceptable, or do you have any suggestions as to what might be the case?

Mr KELL: I hope it will not come as a surprise to the Committee to hear that we have put that question to the Productivity Commission on a few occasions now. We have also expressed some frustration at the slowness of the manner in which the Office of Regulation Review [ORR] within the Productivity Commission seems to be dealing with the issue.

The response we get from the ORR and some of the State-based fair trading agencies seems to involve a bit of buck-passing in both directions, and, to be honest, we found that quite disappointing. I wish I could give you a clear answer as to the one factor that is delaying that outcome. At times there does seem to be a tendency on the part of the ORR to seek empirical evidence of a sort that would be very difficult to gather—almost evidence of how much this is going to save before it has actually come into place. I think that while it is important to gather evidence in that area, you have to be realistic as well. So that has been put up as one reason. But, overall, we cannot see why it should not have gone through a lot faster.

CHAIR: In your view, specific legislation and getting some consistency in standard contract processes is important?

Mr KELL: Yes. Are you referring to consistency nationally?

CHAIR: Perhaps the Committee would recommend consistency nationally, but we are looking at New South Wales issues.

Mr KELL: We think it would be very important to see it introduced in New South Wales.

The Hon. GREG DONNELLY: With regard to model legislation, reference has been made to the United Kingdom legislation, which we understand has some real similarities with the Victorian legislation. You have obviously looked at both. Would you care to comment about those Acts and aspects of them that you think we should look at in terms of recommendations we might make with regard to the New South Wales legislation?

Ms LOVRIC: I think they are fairly similar. We have not gone into a great analysis of the differences and the definition of "unfair terms", and so on. They are fairly similar in that they empower the regulator to make some findings on unfair terms. One of the distinct differences between the two, I suppose, is that the United Kingdom regime allows credit contracts to fall under its purview, which is not the case with the Victorian legislation. But we believe there are some moves to incorporate consumer credit contracts under its purview.

The Hon. GREG DONNELLY: If I could interrupt. Do you have a view that the New South Wales legislation, to the extent that it is being looked at, should contemplate that—?

Ms LOVRIC: 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.

The Hon. GREG DONNELLY: And you have identified similar issues in the Australian context?

Ms LOVRIC: Certainly. We have given some of the examples today, and some are outlined in our submission and in the submissions of other consumer bodies. Yes, that is the case.

The Hon. AMANDA FAZIO: May I ask about the super complaints concept you have developed. In a submission you suggest that legislation should include a list of bodies authorised to make super complaints. Obviously you would regard that as being a class action type of representative body or a body such as yourself. Can you give us a little more detail? Can you also tell us how you think a regulator might deal with bodies that would make super complaints?

Ms LOVRIC: We are happy to give you some information on the super complaints jurisdiction within the United Kingdom, but I will outline it briefly. In the United Kingdom, the Department of Trade and Industry can designate certain bodies to be super complainants. A super complaint is defined roughly as where any feature or combination of features of a market for goods and services may, or appears to, significantly affect the interests of consumers. So that will kick in the jurisdiction for someone to make a super complaint. Certain bodies can apply to become super complainants, and there are very strict guidelines and guidance about what kind of organisations can become designated complainants.

The nice thing about the super complaints jurisdiction is that in many ways it fast-tracks a complaint mechanism for a complaint that comes within those guidelines. Under the United Kingdom model a super complainant will submit a complaint following particular guidelines, and the commissioner or the regulator has a fixed period within which to respond to that complaint and then take action. There are certain actions they can take once they have responded to the complaint, which may be to send it to, for example, the competition commission there; to undertake a market study, which may in fact lead to more recommendations or enforcement proceedings by their own regulation system or another regulator; or it may lead to a campaign, for example, a consumer industry education campaign.

The Hon. AMANDA FAZIO: What sort of bodies in the United Kingdom have been deemed to be super complainants?

Ms LOVRIC: Bodies such as the Citizens Advice Bureau, which is like a collective of community legal centres in Australia; the organisation called WHICH?, which in some ways is a fairly similar organisation to CHOICE; and I think some industry bodies. The equivalent in New South Wales, I suppose, would be the Energy Water Ombudsman. That kind of organisation would represent the interests of consumers.

Mr KELL: The onus is on those bodies to present quite substantial evidence when they are making a complaint. It is not a role that can be treated in a flippant manner; it is quite a serious responsibility on their part if they wish to lodge such a complaint. But ultimately in some ways it aims to improve the ability of the regulatory system to deal with systemic complaints, complaints that affect groups or classes of consumers, and in that way hopefully make the regulatory system more efficient. At the end of the day, you have budgetary constraints on regulatory agencies. They need to be able to have as much impact as possible. So if they can deal with complaints that they can see will have a wider impact across the community, that has to produce a better outcome.

Interestingly, the first super complaint that our counterpart body in the United Kingdom, WHICH?, made was about the poor practices in dentistry in the United Kingdom. So it is not purely an unfair terms issue; it stretches more broadly. I think that in the few years they have had that power they would not have made more than two or three super complaints. I am not sure that I am entirely attracted to the term, but they are using that term for the moment.

The Hon. DAVID CLARKE: How many complaints does your organisation receive per year?

Mr KELL: We field about 60,000 queries a year, and a goodly proportion of them are complaints. But I am happy to provide you with the exact figure.

The Hon. DAVID CLARKE: So, in a way you would be taking some of the load of the Office of Fair Trading, would you not?

Mr KELL: We would potentially in terms of not so much the issue of rectifying the market problem but in assisting with the exercise of risk identification. Really, at the end of the day, you want to address your regulatory resources to areas of genuine risk in the marketplace. That risk assessment exercise is always a difficult one. Having worked in a past life in a regulator I can tell you it is always difficult to sort of work out where are the risks going to emerge. If you can have some bodies that are providing evidence-based assistance in risk assessment then you are already a couple of steps ahead of the game.

The Hon. DAVID CLARKE: That is a remarkable workload that you have got. Did you say 60,000?

Mr KELL: Yes, queries of one sort or another.

The Hon. DAVID CLARKE: What sort of staff backup do you have?

Mr KELL: We have a consumer services section. These days, of course, the big issue is emails. So it is not only calls, as I am sure you would all appreciate, it is a lot of emails as well.

The Hon. RICK COLLESS: Is there an upward trend in that number as a result of some of this standard form contract stuff?

Mr KELL: I think it is a whole range of issues kicking into this area: things like just the general way in which the whole telecommunications industry is unfolding and the range of products you have there these days. You can point to that as one reason it is a source of complaint.

The Hon. DAVID CLARKE: That is a remarkable service that you are providing, that you are dealing with so many complaints and enquiries from the public.

Mr KELL: Yes. As I said, not all of that 60,000 are actual complaints about firms. I am happy to check the actual number on that for you.

The Hon. GREG DONNELLY: Can I ask a question, which I think is very important in terms of the issue, and that is the education of consumers to be able to be, shall we say, more thoughtful and perhaps even savvy in terms of the way in which they consider entering into these kinds of contracts for goods and services? Do you have a view, certainly from a general society point of view, that we do a reasonable job or a good job or a poor job in regard to the education of people in regard to their patterns of entering into these sorts of contracts?

Mr KELL: It is quite mixed, I would say.

The Hon. GREG DONNELLY: Specifically, these consumer contracts in these areas of hire purchase like car hire, gymnasiums, mobile phone contracts—things which obviously have expanded quite rapidly as purchases in the past couple of decades?

Mr KELL: We try to do a bit, obviously, at *Choice* to inform people about what their rights are and what some of the dangers and pitfalls might be in some of these areas. I would give credit to some of the fair trading agencies as well that put out some excellent brochures and information in some of these areas also. My overall estimate though would be that the sort of educational work is really quite uneven, uneven both in terms of it might be one group of people up here that gets it but people down here miss out, or it might be something that exists for a year or two, a particular educational program, and then withers away.

Certainly, in relation to financial literacy that is an area where at the Commonwealth level there has recently been a program initiated to try and get that introduced into schools in a more consistent way across the country. That is still at a relatively early stage, but so that you do not get that issue of one school having a very good program and another school having nothing at all, which I think in some ways is an unfortunate outcome.

The Hon. GREG DONNELLY: Do you have a general view about the sorts of standards of the curricula using, say, upper high school education in terms of these areas? Do you have knowledge of this and can comment on it?

Mr KELL: I would not claim to have good knowledge of the core curricula. I am aware of some individual programs, which are very good, that are run at particular schools at particular times. There is an excellent one I have seen on how to buy a car, which is run by a financial counselling service in New South Wales out at Ryde for some of the schools around there, that also covers some of the issues around the insurance contract, the credit contract, all that sort of thing; how much will you actually pay in interest as distinct from the value of the car. It would be terrific if something like that was rolled out more broadly, but obviously the curricula is already a very full thing.

Ms LOVRIC: Can I just add something to that just in terms of the onus being on the consumer to perhaps get more information? 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.

The Hon. AMANDA FAZIO: Can I just ask you about a couple of issues? One is about this newer trend by some of the energy providers and also credit card providers to have consumers enter into contracts over the phone, where they have to record an agreement over the phone, and then they are posted out information and they have a cooling-off period to read the information and ring up and change their mind. Do you think that that is a fair sort of procedure for consumers to have to deal with and do you think that that could be better regulated with unfair contracts legislation?

Ms LOVRIC: There are a few answers to that. The issue that springs to mind with that kind of contract formation is that is an issue about procedure so perhaps already we have legislation in place that would cover unfair processes in forming contracts. One of the issues with this area is that we have the Trade Practices Act and we have common law remedies like unconscionability or undue influence, which will impact on the conduct of the parties in the formation of a contract. So perhaps there is some remedy there.

The issue, of course, with unfair terms is whether the substantive term within the contract itself is what renders that contract unjust. Clearly, where there is no capacity to read the terms of the contract or negotiate or where the cooling-off period is not substantial, then that could lead to significant detriment to consumers, and that is something that should be remedied.

The Hon. AMANDA FAZIO: The other issue was, just going back to this super complaint concept, can you explain how that would fit in in New South Wales in terms of the role of the super complainant and the role of the Office of Fair Trading?

Ms LOVRIC: In the UK it sits side-by-side. We have one department which designates certain bodies to be super complainants and then the complaint is made to the Office of Fair Trading, so it would be to the regulator here, the Office of Fair Trading in New South Wales.

Mr KELL: It would mean that in the UK example, say if it was *Choice*, *Choice* would not be undertaking any of the roles of the Office of Fair Trading in terms of remedying the market problem, but rather would be providing Fair Trading with a substantive complaint typically covering a systemic issue where Fair Trading would have to respond within a particular time frame and within a particular set of criteria in terms of publicly dealing with the complaint, how soon they dealt with it, what sort of responses they put in place.

Ms LOVRIC: One of the niceties of that kind of jurisdiction is that it actually is a very clear manifestation of consumer participation within the Fair Trading jurisdiction. So it accepts that there are consumer bodies that genuinely do represent the interests of consumers and are well placed to recognise where there are systemic issues, where the regulator itself may not have that role. So it is a recognition that there are bodies that can represent the interests of many consumers more systemically.

The Hon. AMANDA FAZIO: You mentioned in your opening statement the issue of iPods and iTunes softwear. I know that nationally it is a major problem and Tasmania has won the lottery and is trying to work with Apple to try to redress these issues. Is that the sort of issue that a super complainant would take up?

Mr KELL: It could well be an example of the sort of issue where a body such as Choice collects evidence from a range of complainants about a persistently poor practice on the part of a supplier, maybe in relation to after-sale service and customer relations in complaint handling to say, "Look, we have evidence here of 100 people who have had this really poor example. We have documented it for you. Here it is. We are presenting it in a formal way to the regulator."

The Hon. RICK COLLESS: Do you think that these standard form contracts are written to be unfair or is it a matter of incompetence on the matter of the draughts person?

Mr KELL: Putting on an economist hat for a moment, one of the features of markets where consumers have a lot of difficulty understanding the products is that bad products drive out good. If a consumer cannot adequately tell the difference between a good product and a bad product because they are too difficult to understand and the contract is poor—

The Hon. RICK COLLESS: Which is certainly the case in the telecommunications industry.

Mr KELL: That is exactly right—then a supplier has less incentive to incur the cost of being good. "If everyone else is putting provision X in their contract that is unfair; I had better put it in as well, otherwise I am the dummy". In some cases competitive forces in a market where information is poor will actually drive you down that road. It is a classic case of the so-called market for lemons in the car industry that people will come to the view that all cars are poor quality if they cannot tell the difference between good and bad.

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?"

The Hon. RICK COLLESS: In that case it is deliberate?

Mr KELL: Sometimes it is the impression that you would be silly not to.

CHAIR: I would like to thank you for coming and giving us your evidence. A few issues were taken on notice. A letter will come from the secretariat to let you know exactly what they were.

(The witnesses withdrew)

(Short adjournment)

ELIZABETH BEAL, Director, Communications Law Centre, University of Victoria Queen Street Campus, PO Box 14428, Melbourne, sworn and examined:

CHAIR: In what capacity are you appearing before the Committee? Are you appearing as an individual or as a representative of an organisation?

Ms BEAL: As a representative of an organisation.

CHAIR: Are you conversant with the terms of reference for this inquiry?

Ms BEAL: Yes, I am.

CHAIR: If you consider at any stage that certain evidence you wish to give or documents you may wish to tender should be heard or seen only by the Committee, please indicate that fact and the Committee will consider your request. Do you wish to make a short opening statement?

Ms BEAL: I am happy to address the first couple of questions I was provided with by way of an opening, which is a description of the centre I work for and its role, if that would be of assistance.

CHAIR: That would be excellent.

Ms BEAL: I am the director of the Communications Law Centre, which is a research unit of the Law School of the University of Victoria based in Melbourne. The centre has an 18-year history as an independent, non-profit public interest centre specialising in communications law. Until about a year ago we had a dual State presence operating in New South Wales from a base at the University of New South Wales, with an office that we still have in Victoria. So just over a year ago the Sydney office was closed down, but the non-profit company limited by guarantee, which is the principal structure of the organisation, continues to exist and the centre continues with the same name, the same work and mostly the same staff operating from its sole premises in Melbourne. By way of background, there is a desire to return to having a dual State presence due to the national area that we operate in, being communications and media law.

Particular to ways that the experience of the centre might assist this inquiry, the centre has a long history of working in telecommunications so we have adopted a broad definition of communications and include within that telecommunications. Given the changing technological environment in the past five years it has been a high level of work for the centre. My time at the centre has been almost four years, but the focus on consumer contracts in the telecommunications area commenced prior to my time in a targeted way. In the past five years it is clear that the centre has been involved in a heavy way, given its size, in the area of consumer protection in telecommunications.

We have always taken the perspective of law and policy that operate in relation to the telecommunications industry, that is, what benefits the public interest and that being from the perspective of a consumer, not the broader national interest that might be by economic factors but purely from the perspective of users and consumers. We have played a role in the representation of consumers in industry groups, including the peak industry group, the Australian communications industry forum, which has had a recent name change. It was known as ACIF; it now has another title which escapes me. That is the peak body for industry self-regulation and it is charged with drafting codes that form the bulk of I suppose the co-regulatory environment that telecommunications operates in.

Within that role, ACIF is required to consult with consumers by virtue of the telecommunications Act that sets up the co-regulatory scheme. We have been one of the key players in the consulting requirements for the drafting of specific codes and that brings me to the issue of contracts. Specifically, there has been a code drafted by the telecommunications industry dealing with contract terms. I provided a short written submission to this inquiry which addressed in some way the history of that code because I believe it has direct relevance to the terms of reference from the perspective that there has been a chain of action taken by the Federal regulator and the industry in response to concerns about consumer contracts in the telecommunications industry. I am happy to take

the Committee through a step-by-step process of our involvement with that chain, if that would be useful, and the centre's impressions of how that has had an effect on consumer contracts.

CHAIR: Yes, that would be excellent.

Ms BEAL: 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. That was back in 2001 and that was a fairly in-depth study. 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.

In response, we issued a report, which was then responded to by the industry, and a working party was set up within the peak body to work on developing guidelines around consumer contracts. We were part of some consulting with those guidelines. 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.

The Hon. GREG DONNELLY: Are we talking about essentially mobile phone contracts?

Ms BEAL: No, we are talking about all types of telecommunication services: landline, internet and mobile phone.

The Hon. GREG DONNELLY: The whole scope?

Ms BEAL: The whole scope. We have analysed all and we were talking about the industry as a whole in terms of all consumer contracts. So consumer only, but contracts consumers enter into for telecommunications services, whether they are mobile or fixed, and including internet in that. There was a more in-depth review conducted by the authority and decisive action was taken by the authority with the requirement that the industry developed a code that has greater regulatory power, I suppose, than a guideline. That is formally registered with the authority. The process in drafting that code was lengthy and hard fought. Consumers fought hard to have equal representation in the process of drafting that code. It was the first time in drafting a code that occurred. I was personally a member of the drafting committee, along with some various consumer representatives from other organisations and a contingent from all the main providers.

When I say it was hard fought, it was particularly hard fought around the issues of notice to consumers, notice that would be required to be provided if a contract was to be varied by the provider. We have come to refer to that in "unfair terms" analysis as "unilateral variation clauses" and the notice that consumers get when the provider of their service is going to change the terms of their contract. It was so difficult to resolve that we resulted in having the Honourable Justice Fitzgerald mediate between the consumers and the industry. It was a very difficult issue and we reached a compromise that nobody was happy with. We have conducted a subsequent analysis of contracts since the introduction of that code, but not on behalf of the authority and not specifically for compliance with the code. That is not because we are not interested, it is because we do not have funding to do that. We do not have any funding other than for specific contracts or specific work as it comes along. Nonetheless, we have analysed contracts on behalf of Consumer Affairs Victoria subsequent to the introduction of that code. That has been for compliance with the Fair Trading Act of Victoria, particularly part 2B, which introduced fairly recently the "unfair terms" provisions for Victoria.

I note on these points that the process of negotiating the code was at the time when the Victorian Act was implemented for fair terms. 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.

In terms of our involvement subsequent to the code, as I said, we have continued to sit on representative committees or industries. We sit on Telstra's Consumer Consulting Committee, as well as the Australian Communications Industry Forum [ACIF] Consumer Council, and we are engaged in representative work with the Federal regulator, the Australian Communications and Media Authority [ACMA], on consumer issues for telecommunications. In recent years, the last couple of years, we have conducted some in-depth analysis of telecommunications contracts on behalf of Consumer Affairs Victoria. I am happy to take specific questions on other matters related to that analysis, as you see fit.

CHAIR: We are asking all witnesses about standard form contracts and who they benefit. Do you think there are benefits to the consumer from standard form contracts?

Ms BEAL: Not as far as I can see in the way they operate in the telecommunications industry, no.

CHAIR: With the introduction of a regulation to make the contracts fair, do you see that they would benefit? Have Victorians benefited since Victoria introduced its regulation?

Ms BEAL: I do not see any benefit at all for the consumer in standard forms of agreement because the idea of them is that the consumer does not have information about what they are getting into. That is the idea of having a standard form of agreement. It is: This contract is really complex, you do not need to know what it contains. Therefore, the only benefit is, in a sense, ignorance in that consumers often do not even know they are entering into a contract.

The Hon. RICK COLLESS: Are you saying that is deliberate on the part of the providers of the contracts?

Ms BEAL: 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 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.

The Hon. AMANDA FAZIO: Have these contracts improved at all since the Victorian Government introduced its legislation?

Ms BEAL: 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. We have not analysed landline since the introduction of the Victorian legislation. We have not been asked to. But I would strongly put—it is not a matter for this Committee—that clearly the Federal regulator needs to do an audit.

The Hon. AMANDA FAZIO: Dealing with the period since the Victorian legislation came into effect, are you aware of any instances where, say, the one service provider is using a different contract in Victoria to that being used in other States?

Ms BEAL: I am not aware of that. I would think it unlikely. We mostly obtained consumer contracts from the providers directly, although in respect of the last batch of analysis which we finished in August 2006, the contracts were obtained for us by Consumer Affairs Victoria. That agency made the request. On the previous occasions we obtained the contracts generally from the Web site or from stores.

The Hon. GREG DONNELLY: With regard to regulatory regimes, we have the Trade Practices Act at the Federal level and we have State legislation. Obviously, if they wish, the States can proceed within their jurisdictions.

Ms BEAL: I understand, yes.

The Hon. GREG DONNELLY: So far the Trade Practices Act is concerned, do you have a view that we really do need to get the Trade Practices Act to deal with some of the issues you are referring to this morning? Or should it be left to the States to essentially get on with it and adopt similar legislation to the Victorian legislation?

Ms BEAL: Either approach. I have certainly heard the view expressed. I have heard colleagues I respect within the consumer movement strongly argue for the Trade Practices Act to include some consumer contract terms. I have not, and my centre has not, engaged in any study or come to any view on that in a targeted way. 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 New South Wales 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.

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.

The Hon. RICK COLLESS: You referred to real estate contracts. Quite often telecommunications contracts are, in fact, even longer than the standard real estate contract.

Ms BEAL: They are. They are really long.

The Hon. RICK COLLESS: It is astounding that you might spend $300,000 to buy a house and the contract is 10 pages long, but to sign for a mobile phone you have to agree to a contract that is enormous.

Ms BEAL: Yes, 200 pages at times. It is absurd.

The Hon. RICK COLLESS: Do you think it is feasible to shrink that contract to a level that ordinary people can read and understand?

Ms BEAL: Absolutely, and it has been done. I have an example of the British Telecom contract here, which we looked at. I have one that we drafted. It is not as short as the British Telecom contract, but we worked hard to get it down to 20 pages.

CHAIR: Would you be able to provide the Committee with a copy of that?

Ms BEAL: Yes, surely. The model contract we drafted is available online on ACMA's web site, together with a facts sheet that we drafted in the name of a hypothetical telecommunications provider, called "Fairtel".

The Hon. GREG DONNELLY: With regard to the Victorian jurisdiction, as we understand it, Consumer Affairs Victoria undertook a review of implementation of the unfair contract terms amendments in the particular sector. Are you able to comment on that process and what it revealed, and any recommendations that this Committee might take into account in its deliberations?

Ms BEAL: 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.

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.

CHAIR: Do you do think this problem evolved because the telecommunications regulator in general was a national body?

Ms BEAL: Of course, yes. I think certainly at the heart of the issue was the fact that there is a Federal regulator. They did not want to have to then look at another whole Act. That was the complaint made by industry.

CHAIR: Were the Victorian department and Minister able to convince the telecommunications people that the Act applied to them?

Ms BEAL: Yes, not without some effort and, in fact, taking action in the tribunal.

CHAIR: But they had to recognise the problem?

Ms BEAL: Yes. I know that the director is giving evidence later this afternoon. I am sure that he would add some more. It has been an interesting experience to follow that through. What I would pass on to the Committee, to answer your question, what you might learn from the 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.

The Hon. GREG DONNELLY: Obviously we will be briefed on the Victorian legislation this afternoon, but do you have specific views on whether that is adequate as a model for us to look at? If the answer is no, what areas should we explore to improve or enhance what is applicable in Victoria?

Ms BEAL: My view is that the advantage of consistency outweighs any advantage that might be gained from looking at another model.

CHAIR: Do you think we should ask them about the little bits they might think we could improve on?

Ms BEAL: Yes. I think that is a fair question for them, but 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 required to comply, and it was a different model to the one they had already worked towards complying with in Victoria.

The Hon. GREG DONNELLY: In light of the fact that the telecommunications industry is evolving and developing and changing so rapidly, at a scary rate, and will continue to do so into the foreseeable future, to the extent that one can crystal ball gaze, should we look at things that are likely to happen or developments that are likely to occur in terms of the impact on the nature of the contracts that consumers are going to enter into in this quite dynamic industry?

Ms BEAL: The idea of being too prescriptive about contracts would be something to be alert to in the sense of changing technologies and changing ways of doing business. I could foresee problems, and there have already been problems in telecommunications when we have been too prescriptive—for instance, what notice is required to be given, notice must be given by email or notice must not be given by email. That can fall into the ineffective with technological change. I would think that the focus being on fairness around ability to exit the contract in a balanced way alongside changes that might be introduced, and 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. 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 for important.

The Hon. AMANDA FAZIO: Originally if you signed a mobile phone contract you could get just a mobile phone service. Now there are all sorts of different add-ons that are available. I am not sure if they are covered by any form of contract. You can get just a basic mobile phone, but then you can ring up the service provider and ask to have a new service provided for $3 or $4 a week, the ability to play online games for $3 or $4 week and if you add up all of these possibilities that can be tacked on to your mobile phone service it is a considerable amount on an annual basis. It does not appear to be a written contract that covers them. Can you explain that to us and how that relates to contracts? How do people break them?

Ms BEAL: They are dealt with in a couple of ways? Sometimes they are dealt with in the initial contract in that there are clauses that enable variation. As you enter into the contract you also agree that if you extend the type of service that you have by taking on these added features that certain clauses will apply, and those clauses are built into the contract. 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. That is often how they are dealt with. The contract will say that you can add other service. This will be dealt with in accordance with the schedule dealing with premium services, as they know how to find the premium services schedule that sets out the cost for those sorts of services and the conditions upon which you have entered into them. That is probably the most common way of dealing with it. We have had discussions about whether or not in some instances you have entered into a separate agreement for those add-on services, and that may well be the case in some instances.

The Hon. AMANDA FAZIO: Do you think of those issues would be clarified if we had uniform legislation on unfair clauses in contracts?

Ms BEAL: Yes, they could be.

The Hon. AMANDA FAZIO: What is the value and the number of contracts nationally for things like mobile phones, land lines and internet services, just to give us a idea of the potential problem?

Ms BEAL: The number of different contracts?

The Hon. AMANDA FAZIO: Yes. Or even generally, just to give us a benchmark.

Ms BEAL: I was going to try to look at the last report I did, but I do not have the analysis part of that report with me. We analysed internet service provider agreements. We looked at all the major providers. We looked at five providers, providing broadband, dial-up or other forms of cable. Each provider had around four or five contracts. Some had one big contract. Optus had a super contract with all the different types of services provided in different parts. Others had discrete contracts for different types of services. There would be in the nature of 25 in the Internet, more in mobile phones. We have never conducted any analysis on bundled services. Some providers deal with that by separate contract. By bundled services I mean having your landline and your mobile phone together to get a cheaper rate—those types of deals.

The Hon. AMANDA FAZIO: Every third month is free or something like that.

Ms BEAL: It is very difficult to analyse a contract but some providers do have separate contracts for those types of arrangements. I am not sure how others work it out. It seems to be a number of contracts entered into with some discount at the end.

CHAIR: The Fair Trading people from New South Wales believe that some of the fair contract issues had been spread from the Victorian experience because companies had introduced contracts across Australia. Do you know what is happening in telecommunications? Do you think there are different ones in other States?

Ms BEAL: Not that I am aware of but I have not investigated that. I am not able to answer that with any degree of certainty.

CHAIR: Are you aware of any consumers who have successfully negotiated the contract with a service provider to have certain objectionable clauses removed, or do you think this just does not happen?

Ms BEAL: I am not aware of it ever happening. Quite possibly the Telecommunications Industry Ombudsman would be useful source of information on that issue, but I have never heard of it happening.

CHAIR: Do you have any thoughts about why market forces have not influenced fair terms in contracts? I should not have said it so negatively but it would appear it has not been influenced.

Ms BEAL: 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. I listened with some interest when Peter Kell described the economic analysis to a similar question. That made sense to me. 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. 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.

Over time we have noticed a consistent improvement but not identical. They are not copying the contracts. The contracts are not identical. That is not at all the case. They are clearly individually drafting contracts to meet their own business needs or to respond to what they see as the demands of regulation. They certainly respond to regulation at times. You see the exact wording of the consumer contracts code reflected many times. Sometimes you see the exact wording of the Victorian legislation or the intent of that legislation being picked up. So they are responsive over time. They do not just keep using the same contracts; they change. The industry does not change its contracts to make it fairer for the consumer on a competition basis as far as I can tell. It probably does not affect their rate of sales. It is not as if you go and buy a phone thinking that you can get out of the contract with a lower penalty. It is much more price driven: I am going to enter into this contract because the phone is cheaper or the call rates are cheaper, not that these guys are not going to charge me such a high penalty. Often you do not even know what the penalties are.

The Hon. GREG DONNELLY: We heard from you and another witness earlier that the introduction of the legislation in Victoria has had a bit of a halo effect in that national companies have moved up to comply and that has lifted the floor across the country. If it is unlikely that there is going to be any change at the Commonwealth level why would it not be advantageous as a principle, if we can achieve, it to have something in New South Wales which is an enhancement of the Victorian position? That would leverage the position to a newer, higher base. Earlier you argued the worth of comity between the States. But if there are still some significant issues that your organisation has identified why would we not take the opportunity to leverage up a newer, higher base that, once struck, national companies would then be likely to meet all around Australia?

Ms BEAL: I can see the logic of your argument. I would be cautious about overexaggerating the halo effect of the Victorian legislation and I would be mindful of the ease with which industries other than telecommunications can create different contracts in different States. I would think that would still be possible in telecommunications.

The Hon. GREG DONNELLY: That takes us back to your original position, that you think pursuing something in New South Wales that is quite similar to that in Victoria is the way to proceed.

Ms BEAL: It is difficult to predict these things and it is not my role in the work that I do but I would imagine that is likely to have the fastest benefit to consumers of New South Wales because industry that operates in Victoria—of course, not all of industry does—has already got implementation and education under way.

The Hon. AMANDA FAZIO: Do you have any insight into why the Productivity Commission has not agreed to the regulatory impacts statement on unfair contracts? It seems to be a bit of a mystery.

Ms BEAL: No. I am aware of peers who represent consumers being concerned about that fact but I cannot offer any insight.

CHAIR: Is there anything you would like to tell us that we have not already asked you?

Ms BEAL: There are just a couple of points I will make on what could still be done to improve consumer contracts. That was a question I was given on notice, since I had put in my written submission that there had been some improvement in communications contracts as a consequence of the legislation. I was asked what other improvements might be possible. The areas of a contract that we continue to see a problem with notice provisions which ensure that a consumer has adequate notice of not only the contract but in particular burdensome terms.

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.

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.

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. Another issue I did mention but will reiterate is the contracts that have external policies or terms that are not part of the contract and are hard to find.

The Hon. GREG DONNELLY: Very good.

CHAIR: Thank you very much. Your evidence has been very important to us today. Thank you very much for making the effort to attend.

(The witness withdrew)

(Luncheon adjournment)

IAN BRUCE GILBERT, Director, Australian Bankers' Association, Level 3, 56 Pitt Street, Sydney, affirmed and examined:

CHAIR: I welcome you and thank you for appearing at this hearing for the Committee's inquiry into unfair terms in consumer contracts. We have no media are here, but there are distinct guidelines that relate to concentrating on the witnesses and committee members rather than on the people in the public gallery. If you have any messages or documents that you wish tender to the Committee, the secretariat will look after them. The Committee prefers to conduct hearings in public, but it may decide to hear certain evidence in private if there is a need to do so. If such a case arises I will ask the public and the media to leave the room for a short period. If you have a mobile phone, please turn it off because even if it is on silent it can interfere with the Hansard recording. Are you appearing as an individual or as a representative of the Australian Bankers' Association [ABA]?

Mr GILBERT: As a representative of the organisation and its membership.

CHAIR: Are you conversant with the inquiry's terms of reference?

Mr GILBERT: I am.

CHAIR: If at any stage you believe that evidence or documents you wish to tender should be heard or seen only by the Committee, please indicate that fact that the Committee will consider your request. Would you like to make a short opening statement?

Mr GILBERT: I thank the Committee for the invitation to appear at this hearing. I also thank the secretariat for providing me with a list of submissions that have recently gone on the committee's web site.

My opening statement is about the principles relating to regulation and good regulation policy. As I have stated in the submission, the existence of unfair contract terms legislation in Victoria has led to a form of pragmatism by the Australian Bankers' Association. Our position moves from an interest in national uniformity and consumer protection laws. However, I would like the Committee to understand that a desire for national uniformity by the ABA does not mean that normal regulatory policy development and processes should be overlooked or truncated. Australian governments as a whole are conscious of the need to develop sound regulatory policy derived from fact-based sources that identify a market failure and a proportionate solution that will address the failure, with the solution not necessarily being regulatory.

To summarise, 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 this 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.

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.

CHAIR: Thank you. Can you describe your organisation and its place in this world?

Mr GILBERT: This is the only world I know. The Australian Bankers' Association is a longstanding association of banks. It has 26 members and its membership comprises the four major

banks and all the regional banks, and also foreign banks and a number of wholesale banks. Our mission is to improve the economic wellbeing of Australians by fostering a banking system recognised as one of the safest, dynamic and most efficient in the world. The ABA works across a wide range of policy fronts and represents its members' interests on those fronts, of which, of course, this inquiry is but one.

CHAIR: What banking activities attract criticism over unfair terms in consumer contracts and what action has your association and its members taken about that criticism?

Mr GILBERT: That question is difficult to answer without further work. 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.

CHAIR: The Committee has heard some evidence in relation to some of the credit card systems.

Mr GILBERT: I was present for part of Peter Kell's evidence this morning. I heard him refer to an example involving the credit card. Is that what you are referring to?

CHAIR: That was one example, yes.

Mr GILBERT: He quoted an interesting example. The position from the banking industry's perspective on that is that we have a Code of Banking Practice, which contractually binds, effectively, retail banks to their customers. There is a provision in that code that says that a bank must act fairly and reasonably and ethically and consistently in its dealings with customers. We also have an independent bank code monitoring committee, a compliance monitoring committee, which is chaired by an independent person. It has a consumer representative and a banking representative. The function of that committee is to ensure that banks comply with the code and can deal with complaints from anyone if there is an allegation that a bank has breached the code.

Had I been where the Australian Consumer Association was when that customer came in, certainly I would have attempted to deal with the matter by going directly to the bank. Given the response, I would immediately refer that complaint to the code monitoring committee to have it consider that conduct, not the term of the contract. The term of the contract was about paying on time. The following conduct was about the appropriateness or otherwise having not waived the extra interest charge. Also, the customer could have complained to the Banking and Financial Services Ombudsman over that, because the Ombudsman—again an independent body set up by the banking industry and funded by the banking industry, but completely independent, and I am sure you are all aware of its existence—

CHAIR: No. I am not, other members may be.

Mr GILBERT: The Committee will find the Banking and Financial Services Ombudsman's web site on www.bfso.org.au. It is a mine of information. Had that complaint gone to the banking ombudsman, he has jurisdiction to determine a complaint on the basis of good banking practice, the law and fairness.

CHAIR: In connection with that, how does that information become available both in relation to the code monitoring committee and the banking ombudsman to the general population?

Mr GILBERT: There is a lot of information on the ABA's web site. There is also an obligation under the bank code to ensure that the code is available in branches, on display, so that people can become aware of the obligations that banks have under that code. Certainly in banking the ombudsman himself widely promotes his scheme and its availability to customers who have a dispute with their bank. The point I wanted to make was that the term, per se, dealt with paying on time. The fact that the customer missed 10¢ in the final payment, goes to how should that error be treated. I

contend that that matter deals with conduct and the code of practice and the jurisdiction of the banking ombudsman, rather than a failing in a term of a contract.

The Hon. RICK COLLESS: To follow on from that, the impression I got from Mr Kell was that by not paying the 10¢ they had, under the terms of contract, defaulted on the payment. Therefore the interest rate was duly put up by whatever the amount was. Are you saying that because he was 10¢ sort that that is an interpretation, and therefore conduct? I understood Mr Kell said that because he was 10¢ short under that agreement that it was a default in payment.

Mr GILBERT: Again, I am not fully conversant with the circumstances as to what was actually paid, whether it was the whole monthly amount, or the minimum monthly balance, that had to be paid. It was not clear from the example that was given. However, in strict contract terms that would be a default, but the question is the conduct of the organisation in dealing with that default, or that failure to pay the amount that was required on time, or the consequences of not paying the whole monthly balance leaving it 10¢ short and having interest calculated back for the whole of the month. In other words, losing the protection of the up to 55 days interest-free period. There is very much a conduct issue in my submission, rather than some failing on the term itself.

The Hon. RICK COLLESS: Within your industry, if I missed making my MasterCard payment by a day, that is considered to be a default?

Mr GILBERT: It is a failure to pay on time, in accordance with the terms of the contract, as in any other contract, whether it is a builder, a small business, or whatever. Obviously consequences flow from that. Obviously everyone is late and those sorts of things happen. It is really up to the financial institution as to what level of risk that presents in terms of its asset, which is a loan it has given to you. Obviously they would like you to remain a customer. That is really the business and commercial judgment that has to be made in all of these cases.

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 their lendings to people are safe.

The Hon. RICK COLLESS: In your opinion, do you believe that there is an imbalance in some of the standard form contracts between the capacity of the consumer to comprehend what is in that contract and the rights and obligations of the provider of the contract?

Mr GILBERT: I do not believe so. I cannot speak for other industries. However, in banking, and as our submission goes at some length to point out, banking is very much an exercise in risk management and depositor protection. In banking there are certain legal obligations that banks have that builders and other businesses simply do not have. Obviously, terms in contracts need to reflect those imperatives so that the bank is able 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.

The Hon. RICK COLLESS: Do you believe there is a need for further legislation or tightening up of regulations to improve the situation?

Mr GILBERT: Banks and other financial services providers—indeed, authorised deposit-taking institutions—are under at least two levels of regulation in this country. One is prudential regulation—that is, they have to run their balance sheets safely and securely to protect depositors. The Australian Prudential Regulation Authority is the regulator responsible for ensuring that that happens. We are also subject to market conduct regulation at separate levels: federally, through chapter 7 of the Corporations Act, which is commonly known as the financial services reform legislation, through State laws, such as the fair trading legislation, and also through the consumer credit code.

So there is a high level of regulation, and a lot of that regulation contains within it probity-type concepts. That type of regulation does not apply, for example, across the gymnasium industry or the mobile phone industry, where I believe some of the concerns lie. For our industry and with our code, I think we have those aspects pretty well covered. There may well be gaps in other parts of the business community.

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

The Hon. RICK COLLESS: Within an individual jurisdiction, New South Wales for example, do market forces operate to, say, to select between credit unions and a particular bank? In terms of these consumer contracts, are they all written in the same language, or is there a differentiation between them that attracts market forces?

Mr GILBERT: I have not surveyed contracts out there. There is certainly a clear differentiation in the community between banks and building societies; some prefer some and some prefer others.

The Hon. RICK COLLESS: Is that cost-priced, or is it contract-based?

Mr GILBERT: I suppose it is a perception by the consumer of who they best feel will meet their requirements and the type of relationship they want with the organisation. That is a very common thing, and it is something that every person does, not just with banking and financial services but with shopping and so on, with whom they choose to deal. In financial services the competition is red-hot, both on the deposit taking side and on the consumer lending side; there is an enormous amount of competition. There is a range of non-bank, non-credit union credit providers out there who are lending into a market where people who have not met banks' credit standards are being lent to—it is called the non-conforming credit market. That has been an emerging and very strong market. So there is a lot of competition. As to whether there is competition on contractual terms, it is probably less so, other than the key features of what the thing is.

As I said, our industry has a body of regulation and self-regulation around it, which is designed to stop the sorts of things I heard a little about this morning happening within our industry. I would like to add that looking at a contractual term by itself out of context really does not give you a real sense about the level of fairness about the clause. Far more relevant is the way that clause is dealt with in any particular given situation. As I said, we have a lot of conduct regulation that impacts on us.

CHAIR: Do you believe the Victorian regulations and laws conflict with the Federal regulation and your own regulatory processes?

Mr GILBERT: We are unclear. A judge of the Victorian Civil and Administrative Tribunal this year made quite a lot of comments about the difficulty he had in coming to a conclusion about what the Victorian test of unfairness actually meant. He reviewed many, many cases—

CHAIR: In relation to banking?

Mr GILBERT: It was in relation to a mobile phone company, AAPT. What I am saying is that if that judge is having difficulty understanding what the Victorian legislation means, that is a sign that there is a fairly high probability that other people, including businesses, will find that legislation difficult to understand and interpret, and apply to their own organisations. Of course, the concept of unfairness in that legislation is not necessarily the same as in other legislation in the country. So it introduces an uncertainty into what one must or must not do.

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.

CHAIR: Can you advise as to the form of contracts bankers utilise? Do they have different contracts for different risks, or do they have different ways of delivering on those contracts for different risks? Most of us here are treated very well by the banks.

Mr GILBERT: I am very pleased to hear that.

CHAIR: But there are reasons for that: we are not perceived as a risk.

Mr GILBERT: The contract will not necessarily be finessed for a particular individual's risk. The price that the individual might pay for the loan, for example, might reflect risk. For example, lenders in the non-conforming lending market put a premium onto the interest rate for risk; that is what part of the interest rate is all about. But in the consumer market the contracts themselves are generally standard form and have covered the sorts of things that regulation requires them to cover. That has added substantial complexity and length to contracts.

This morning I heard concerns expressed about the length of contract. 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. The contracts will vary according to product because the functionality of the product is different, which means therefore that some of the obligations that the bank has to the customer and the customer has to the bank will change. But in the consumer banking market all the contracts are generally standard form. There is an advantage for consumers in that because they are dealing with the one institution they may become familiar with the style of the contracts. They are actually an efficient way for customers to understand the deal.

The Hon. AMANDA FAZIO: In relation to contracts, an issue that was raised in evidence that we received this morning and an issue that has been highlighted by the Australian Consumers Association in its campaign against unfair contracts is an issue that you raise on page 3 of your submission. It relates to unilateral change clauses. You state in your submission that unilateral change clauses that affect the consumer but not the other party—not the service provider—are not necessarily unfair. That seems to be the opposite of the evidence we heard this morning. Can you elaborate on this point and explain why you think they are not necessarily unfair? Can you also explain why banks use unilateral change clauses?

Mr GILBERT: Right. The first observation I would make in response to that is that 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.

I have not had put to me—I read the ACA submission to the Dawson inquiry, and I mention that in the submission—an example of where a unilateral change provision has been exercised to seriously disadvantage or harm consumers. Bear in mind that in the consumer market if a change is made to one contract there is a change to millions of contracts. There are millions of customer relationships, and customers often have more than one relationship with their bank. The question is: What on earth would banks be doing changing a contract that would put all its customers offside, and therefore risk losing them to competitors? I mentioned earlier that the banking and financial services market is very, very competitive. It does not make sense.

The Hon. GREG DONNELLY: In terms of the standard clause contracts that we have been examining, on page 5 of your submission you say that the standard clause contracts "help to provide consistent protection for consumers". Can you elaborate on and explain that point?

Mr GILBERT: Yes. The thing about standard form contracts is that they provide consistency. 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 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. So there is some protection and familiarity in knowledge. That is a huge advantage.

The other advantage is this: Banks have to train their staff to understand what is in those contracts, what the relationship is with the customer, what the bank must do and what the customer's obligations are. 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.

CHAIR: Does the fact that you take the Victorian regulation mean that your current regulation processes cover issues that come forward under the Victorian regulation? Does it mean that with the banking regulations that are already in place your organisation perceives that you deliver what is required from the Victorian regulation or does the Victorian regulation impose further regulatory requirements upon your organisation?

Mr GILBERT: The Victorian legislation interposes a conceptual thing that, in the way it is defined, in a sense operates devoid of context. The regulation that banks are currently subject to, for example, the financial services reform legislation, requires the bank to deliver financial services efficiently, honestly and fairly—I emphasise fairly. 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.

As I mentioned earlier, the banking ombudsman who deals with customer disputes with the banks deals with that dispute on the basis of good banking practice, law and principles of fairness. To introduce yet another layer takes us back to the difficulty that I outlined before of: what does each mean, how will we manage all of those and what is the legal view? When are we confident that we have got this right, half right or totally wrong? We do not believe that overlapping—almost duplication—of regulation is consistent with good policy development.

CHAIR: You spoke about unregulated financial markets. Am I using the correct term—lending markets outside the banking system?

Mr GILBERT: Yes. I do not say that they are unregulated. I should explain that. When I said " non-conforming" that reference is to the fact that their lending standards do not conform with those that banks are required to observe.

CHAIR: So what regulatory process are they under?

Mr GILBERT: They are under the consumer credit code in the same way as banks. But they will lend, for example, to people with an impaired credit history that a prudentially regulated entity such as a bank would be very wary about doing. There is a market of customers in Australia.

CHAIR: This is your own code of practice?

Mr GILBERT: No, it is not driven by the code, it is part of the prudential obligation of banks to ensure that when they lend money that it is on as safe terms as reasonable, given competitive forces and so forth. But there is a group of lenders—and if we go down the chain and we get to the

bottom where the fringe credit providers are, which we all know about the shopfronts and the excessively high charges for short-term credit and so forth to get people from pay day to pay day—but, in between banks and that level of the market there is a very large group of what we describe, and they describe themselves, as nonconforming lenders—sub prime is the technical expression. They are lending into a market that is not prime to lending to, it is sub prime—less than.

The Hon. RICK COLLESS: What do you mean by a prime market? Somebody who is guaranteed to give you the money back eventually or is there a higher risk with those?

Mr GILBERT: There is a higher risk because there are people who have impaired credit histories: they may have come out of bankruptcy; they may have had consecutive defaults listed on their credit bureau report; they may not have sufficiently secure income cash flows to warrant servicing a loan; they may have moved house frequently; unstable employment, and those sorts of things. They are the sorts of things that a bank will look at it and say, "There is a risk here", and they may reject it. Around about 25 per cent of credit applications that banks take are rejected. Not everyone necessarily qualifies for bank lending.

That clearly has opened up a gap in the market. And where do those people go? There is a very competitive market at that sub prime level—non-conforming level. They are not regulated by APRA, as we are, but they are regulated under the credit code, as banks are.

The Hon. RICK COLLESS: Are those institutions credit unions and that type of facility?

Mr GILBERT: No. Credit unions and building societies are APRA-regulated bodies just as banks are.

The Hon. RICK COLLESS: So what sorts of organisations are they?

Mr GILBERT: These are basically companies that provide consumer finance to people who would qualify as bank customers, but a lot of them do not. There is a market there. And in one sense that is a good thing; access to credit is something that is important. But there is a different risk profile done at that level.

The Hon. GREG DONNELLY: Just seguing: I saw an advertisement the other day late at night—in fact, it was after midnight—on television. It was one of those sorts of crass, loud, colourful ads that make an offer which is almost too hard to say no to in terms of access to credit. So if you stay up late at night you see these advertisements on television.

Mr GILBERT: Our members let you get some sleep.

CHAIR: Have you got any idea what form of contract they use?

Mr GILBERT: No. But I am not suggesting that they have got unfair terms. I suppose I was trying to differentiate between a body of regulation to which we are subject and those lenders that are not subject to the same body of regulation.

CHAIR: So you are saying if somebody objects to a clause within a contract in the banking system then that particular clause will not be negotiated out because it would affect the contracts for hundreds of customers. Is that what I have interpreted you to say? If people perceive there is an unfair clause, tough.

Mr GILBERT: Not so much tough. The contracts are drawn because, as I said before, banks have a legal obligation to depositors to make sure that what they do ensures that the bank is run profitably, properly and with professional skill and so forth, and that is an obligation under the Banking Act. So those clauses in their contracts are there to deal with all of the eventualities that may arise in the course of a long-term relationship with a customer. That is really how it is done.

If a particular customer felt particularly aggrieved by a term in a contract, so much so that they felt that they really could not continue to have a relationship with that organisation, then if it is a bank they are able to move. None of the banking contracts hold customers into those contracts against

their will. If for some reason, whether it is a failure in service, whether it is something the bank has done that they disagree with or it is something they find in the contract they do not particularly like, they can move to a competitor. That is the nature of the market that banking is at the moment.

The Hon. AMANDA FAZIO: I do not think you have covered this. In your submission you stated that section 32W of the Victorian Fair Trading Act, which outlines the definitional test of the term "unfair", should be expanded to include business efficacy and depositor protection. I know you mentioned the AAPT court case about the meaning of the term "unfair" but could you elaborate on what you meant by that section of your submission?

Mr GILBERT: I understand that some representatives of consumer affairs in Victoria are giving evidence later today. I am prepared to be corrected but I do not believe our industry was consulted in the development of the amendments to the Fair Trading Act in Victoria. They may correct me on that point and I will obviously accept that answer—I do not want to mislead the Committee—but that is my understanding. The reference to business efficacy and depositor protection is really about the sorts of things that I have just been talking about: the prudential obligations of banks; that there are clauses that need to go in banking contracts that if you look at them you say, "That is a pretty firm sort of clause", but it is there for a very good reason: it is there to ensure that the asset that has been lent, or the activity that is going on—and remember, all these contracts apply across millions of people—that they are not going to result in a weakness in a bank or the banking system across the board.

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. These concepts are there for that reason: they are part of the context of banking. It is large scale, there are risks and there are legal obligations that banks have to the community in terms of deposit protection, and having those things dealt with in the way that it is done, those factors need to be considered. In suggesting those words we are putting the context into what would otherwise be a very abstract unfair terms assessment.

CHAIR: You have given us quite a few thoughts for our future deliberations. It was very important to have you here today. I hope that if the Committee has further questions of you that we can send them to you and get answers back during our deliberations, is that all right?

Mr GILBERT: I would be more than happy to assist.

CHAIR: Thank you very much for your work and for your submission.

(The witness withdrew)

GISELA RAMENSKY, Solicitor, Business Law Committee, Law Society of New South Wales, Post Office Box 6403, North Sydney, 2060, affirmed and examined:

CHAIR: What is your occupation?

Mrs RAMENSKY: I am a solicitor.

CHAIR: In what capacity are you appearing before the committee? Are you appearing as an individual or a representative of an organisation?

Mrs RAMENSKY: I am appearing as a representative of the Business Law Committee which is a subcommittee of the Law Society of New South Wales.

CHAIR: Are you conversant with the terms of reference for this inquiry?

Mrs RAMENSKY: Yes, I am.

CHAIR: If you have evidence at any stage that you wish to give, or documents you may wish to tender which should be heard or seen only by the committee, please indicate that fact and the committee will consider your request. Do you wish to make an opening statement?

Mrs RAMENSKY: I must say I have only had two days' notice that I was going to appear here so it has been a bit of a rushed job, but having had a look at the overview of the legislation which is currently in place that affects consumers in New South Wales, as opposed to what is available in Victoria, it appears to me that what we have in New South Wales is the Trade Practises Act, the Fair Trading Act and the Contracts Review Act which give protection to consumers in various degrees. However, 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.

There does not appear to be any procedure in place—in New South Wales at least—to actually attack or examine the substantive term in the contract and that is what part 2B of the Fair Trading Act in Victoria does, and that is modelled very closely on the United Kingdom Unfair Contracts Act. I think that that is a really good move because it gives Consumer Affairs Victoria [CAV] the power to actually investigate companies and to work through terms of contracts with them with a view to getting fairer terms. Various reports have been tabled about what has happened not so much in Victoria but in the United Kingdom. Since the introduction of the Unfair Contracts Act in the United Kingdom in 1997 there have been 5,000 terms in contracts that have been changed and 900 enforceable undertakings that have been given by companies.

As I understand the operation of both part 2B of the Fair Trading Act and also the Unfair Contracts Act, the Office of Fair Trading in the United Kingdom and the CAV have taken a dual role; They take an educating role of the business community as well as an enforcement role. So that it is unlike the court system at the moment. The only thing that is available to consumers in New South Wales 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.

CHAIR: I apologise for the short notice. This is a very short inquiry, being just before Parliament is to be wound up for the Government's four years, and the committee is getting the information very quickly. Currently New South Wales relies on the Trade Practises Act, the Fair Trading Act and the Contracts Review Act and you have registered that consumers need more. Do you know of any issues relating to unfair contracts terms that members of the Law Society have raised with you?

Mrs RAMENSKY: From my own personal experience as a lawyer, banking comes to mind, and I notice that the previous speaker was a representative from that industry. I have advised lots of clients on loan agreements and there are always terms in all contracts to the effect that "We reserve the right to change the interest terms. We reserve the right to change our fees. We reserve the right to this, that and the other" and it is very much a take it or leave it situation. 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 a term 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.

The mobile phone industry is another one that is subject to a lot of complaints and also car hire agreements. Basically, what happens is that if you arrive at an airport and you rock up to the Avis counter to hire a car, you do not have any opportunity to read the terms of the contract because there is a queue of 10 people behind you. They simply say, "Sign here and if you want some extra insurance, sign there." It is not until you actually have an accident or something that you must read the fine print in the contract. It is not really practical to say, "If you do not like our contract, go to Hertz next-door or go to Budget." It just does not work that way in the real world.

It would be very useful if there were a proactive approach by the Department of Fair Trading or CAV or OFT in the United Kingdom to investigate certain industries where regular complaints are made about the types of contracts. I know I have rung the ACCC and the Department of Fair Trading on several occasions when I have seen unfair contracts and they have said to me, "Send us a submission but we have to tell you that we are very busy. We have very large matters that we are investigating." I am sure that is correct. I am sure that their resources are very stretched, but I feel that they often do not have the resources or the mandate even to investigate these types of consumer claims that affect thousands of consumers.

The Hon. AMANDA FAZIO: It has been suggested that industry-specific provisions like, for example, the Australian communications industry forum code on consumer contracts protect consumers of those goods and services. Do you believe specific legislation is required to address the unfair terms in consumer contracts?

Mrs RAMENSKY: 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 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 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 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.

The Hon. AMANDA FAZIO: It has been argued that while the courts are able to consider substantive unconscionability or unfairness under the Contracts Review Act 1980 they rarely do so without considering the impact of procedural unfairness, which is the issue you talked about earlier. Do you believe this is the case and how might this focus impact on consumers?

Mrs RAMENSKY: I have some data here. 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.

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.

I know that the Contracts Review Act now has clauses that refer to the substantive unfairness, particularly also that relate to the intelligibility of the language of the contract that can be deemed to be unfair. There has been a good move in the last 15 years to have plain English contracts so they are a lot more intelligible. I know from personal experience with an insurance contract in which I was involved that it can be difficult to understand what it means because you have cross-referencing to different sections of the contract so that by the time you have found all the cross-references it is hard to remember what it was that you were actually looking up.

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.

The Hon. AMANDA FAZIO: Can you tell us what remedies are available under common law with respect to consumer contracts and what would be the advantages and disadvantages of common law as a source of remedy?

Mrs RAMENSKY: The remedies that are available are that you can sue whoever you feel has aggrieved you. If somebody has misled you, you can take an action under section 52 of the Trade Practices Act. If you feel that you were coerced into a contract or that you were at a particular disadvantage, you can take action under the Contracts Review Act. 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. Even 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.

If you are looking at a consumer contract—and I know there was a whole spate of contracts 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. There were many, many cases of unfair contracts and, of course, lots of people then thought, "This is how I am going to get out of my mortgage. I will bring a claim." There was a wonderful quote by Justice Rogers, as he was at that time, who said, "Merely being a married female is not a person of disadvantage".

Some of those cases had success and some of them did not have success, and certainly the banks became more aware that it was more than just giving a five-page or 10-page document to somebody and saying, "Sign here". They then tried to put the burden of explaining the contract onto the lawyers. Borrowers then had to get independent solicitor certificates to say the contract had been explained to them and they understood it. That was a totally unfair burden on lawyers, because how would the lawyers know whether their clients understood what was said to them. That type of thing did have effect, and it did get quite a lot of publicity. That had some consequences, but its effect was limited.

The Hon. RICK COLLESS: I go back to your comments about understanding contracts and contracts being written in plain English. I am someone who has absolutely no legal training at all. I am certainly not a lawyer. I find most contracts I have to read extremely difficult to understand. Do you think there is an imbalance between the consumer being able to comprehend what is in contracts and the rights and obligations of the organisations providing the service?

Mrs RAMENSKY: I do. But, having said that, I have seen some very plain English loan agreements that have said things like, "If you do not repay the money when it is due, we will sue you." It does not get much plainer than that. Not all banks do that, but I have seen loan agreements in language that is as direct, simple and straightforward as that. That is a very good move, and it is to be encouraged. If legislation of the type of part 2B in the Victorian Fair Trading Act were introduced, the

Department of Fair Trading here could do a systematic review of loan agreements and ensure that all, not just some, are in plain English.

The Hon. RICK COLLESS: There has been a lot of talk this morning about contracts in the telecommunications industry and mobile phone contracts being hundreds of pages long. Is there any need for them to be that long to get the legal protection sought to be achieved, or is this done deliberately to try to confuse the consumer, in the hope that the consumer will not read the contract and just tick the box and get on with it?

Mrs RAMENSKY: I do not know anyone who has ever read a mobile phone contract.

The Hon. RICK COLLESS: Nor do I.

Mrs RAMENSKY: I must confess that I personally have not read a mobile phone contract.

The Hon. GREG DONNELLY: And understood it!

Mrs RAMENSKY: I do not know the answer to the question. It is probably not necessary to have it that long. I am sure they could simplify it, the way many banks have simplified their loan agreements. But who will force them to do that?

The Hon. RICK COLLESS: Is there a need for legislation to make them do it?

Mrs RAMENSKY: In my view there is, yes.

The Hon. GREG DONNELLY: I have not done a study of the plethora of loan agreements or mobile phone contracts, but obviously the institutions providing the loan or service, or whatever the case may be, think there are things they need to cover with the client or consumer. We could debate whether all of those are needed, but at least a number of the institutions think they are unnecessary. Therefore we have these rather complex, convoluted, detailed and comprehensive legal contracts. On the other hand, the plain English version may well be of value to the punter because he or she can understand and absorb it. Is there a midpoint where we could have the comprehensiveness that would give the banks and service providers the comfort of the complexity and detail they desire, yet requiring them in conjunction to provide a simple explanation in fundamental terms in the actual contract? In other words, it would not be a plain English version per se, but a bit of a hybrid whereby the comprehensive could be read in conjunction with the plain English version on key elements.

Mrs RAMENSKY: 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. I think it is a good idea to have an outline as to what the components of the contract are, and have a summary. Many loan agreements have at the front a summary of what all the charges are, set out in tabular form. It is a very good move that that happens. Nearly all of them have that. But the rest of it can be in plain English. If it is 20 pages long and in plain English, that does not matter.

The Hon. GREG DONNELLY: Are that being written more and more in plain English?

Mrs RAMENSKY: Yes, it is.

The Hon. GREG DONNELLY: Is that with respect to particular industries?

Mrs RAMENSKY: It is certainly with respect to loan agreements, and to some extent also with the insurance contracts. Insurance contracts are another big issue, but particularly travel insurance contracts. Many people do not now take out separate travel insurance contracts because they are promised when they get their MasterCard, Visa card or Amex card that they will get free travel insurance, so they rely on that. But, of course, they never get to see the terms of the policy, and it is not until they go on holiday and something happens, and they make a claim, that the insurance

company then says, "By the way, here is the policy, and these are the 25 exclusion clauses." That also needs to be addressed, but at the moment there is no mechanism to do that.

CHAIR: Are there legal problems with defining "unfair"? I say that because the Committee has just heard some evidence from the banking gentleman about a court case.

Mrs RAMENSKY: CAV Victoria has taken on AAPT, and the judgement is still pending. It is difficult to define unfair. I came across one definition of unfair during my reading for this paper, and it says:

> Unfair contract terms are those terms in a contract which are to the disadvantage of one party and which are not reasonably necessary for the protection of the legitimate interests of the other party.

All 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. You cannot negotiate an individual loan agreement with thousands and thousands of borrowers, so it is very 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. That is a definition that has been used in the United Kingdom in relation to unfair contracts that have been investigated.

CHAIR: Though Victorian is still waiting for the judgement, do you think there would be legal problems in trying to enforce that definition? If it hits the courts, will there be a problem with interpretation?

Mrs RAMENSKY: The law is not like mathematics; it is not black and white, and even High Court judges disagree on cases. It is always a matter of interpretation, and it is always going to be a matter of degree. How do you define "disadvantage", and to what degree are you disadvantaged? Some people might say that paying 7 per cent interest is a disadvantage and we ought to pay only 5 per cent interest. So it is very difficult to get a precise, watertight definition of the word "fair" or the word "unfair".

CHAIR: That is good. That is useful, thank you. The Hon. Rick Colless raised another question this morning. Do you think that the use of long convoluted contracts with obscure language is deliberate by an occasional organisation?

Mrs RAMENSKY: I do not know. I think it is probably lazy rather than deliberate because we have a history of long convoluted legalese, if you like. 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.

The Hon. RICK COLLESS: To follow on from that briefly, again going back to the mobile phone type contracts, as I was saying before, for some reason they are extremely long and unnecessarily complex, not that I have ever read one in total. You would have to wonder why, if they are like that, somebody has not taken the opportunity to cut them down to a few pages if that is all that is required.

Mrs RAMENSKY: I do not know. I have not read one. I cannot comment on how it could be simplified, who drafted it or what terms are unnecessary. I simply do not know about mobile phone contracts. I cannot take that any further.

CHAIR: No, it was a valued question though.

Mrs RAMENSKY: In the United Kingdom they have a concept of super complaints.

The Hon. AMANDA FAZIO: We heard about that.

Mrs RAMENSKY: Are you aware of that?

CHAIR: Yes, but you tell us.

Mrs RAMENSKY: This is where industry groups can lodge a complaint on behalf of consumers affected by unfair contracts in a particular industry and have them investigated by an appropriate authority. They tend to be government instrumentalities, and the sorts of industries that are mentioned as organisations to which you could lodge such a complaint are the energy industry, the rail authority and the gas authority. They will investigate within 90 days and decide what to do; they will investigate the contracts and either make recommendations for changes or, alternatively, if they think it is not warranted they might dismiss the complaint. Contracts with government instrumentalities are very much the point because nobody negotiates with Sydney Water as to the terms of their water contract or any other authority with whom we deal regularly as to what the terms of the contract are, what are the terms of engagement, so we just all accept that. To my knowledge it has never been systematically investigated or reviewed whether those contracts are fair or not fair.

The Hon. AMANDA FAZIO: Do you support the concept of super complaints?

Mrs RAMENSKY: I think we should investigate that a bit further. As I say, I have only had two days in which to prepare for this. I attended the national conference on consumer affairs in Victoria earlier this year, and one of the speakers was a person called Allan Asher, who is the CEO of Energywatch in the United Kingdom. He said that there was a super complaint lodged against his organisation. He thought that it was good that consumers were out there keeping public authorities in check, if you like, so that they had to be accountable, as well as individual corporations. 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.

The Hon. AMANDA FAZIO: And oil companies supplying independent garages.

Mrs RAMENSKY: That is exactly right. So maybe the inquiry should extend to the protection of small businesses as well as to individuals.

CHAIR: Or ask the question for a future very long inquiry.

Mrs RAMENSKY: Indeed.

CHAIR: The only other thing about the super complaints, if you structure the super complaints system, do you think there is potential for the organisations then to be able to prioritise when individual people put in complaints and the individual complaints fall off the edge because the super complaints structure is so well organised? Do you understand what I am saying?

Mrs RAMENSKY: The way it works is that the complaint must be brought by an industry body. It is not brought by an individual.

CHAIR: That is right but the complaint system is structured for the industry body which is efficient to put all the stuff together. Do those bodies turn into the complaint taking bodies? When you set up a super complaints situation do the persons who are given the responsibility of carrying the super complaint forward to the organisation become the bodies to receive the complaints?

Mrs RAMENSKY: At first instance, yes.

CHAIR: So the individual does not necessarily complain directly any longer to the organisation or to fair trading.

Mrs RAMENSKY: No. They will lobby their industry group to lodge the complaint.

CHAIR: I was just a little concerned about the gatekeeper potential.

Mrs RAMENSKY: That is right.

CHAIR: It has been suggested that unfair consumer contracts terms legislation is a national issue and may pose difficulties if the State decides to go it alone. Do you think there is value in New South Wales putting it forward without a national agreement?

Mrs RAMENSKY: I think there is value but, as Philip Ruddock said when he spoke to our regional law society, if the legislators of Australia sat down now and thought, "What laws should we make for our community?", they would not spontaneously think of making seven different sets of laws. It has evolved historically that we have seven States or seven different sets of laws. 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 New South Wales did it there might be more force and more persuasion on the Federal Government to take up the cause and to look at the issue.

CHAIR: Do you think it should be the same as the Victorian one? If New South Wales introduced it, do you think it should be the same as the Victorian one or do you think we should work on whether or not the Victorian one should be improved? What is your opinion?

Mrs RAMENSKY: From what I have seen of the Victorian model, what I have read of it, and it has not been around for very long—it was only introduced three years ago—it seems to work quite well. The aim of it is to be proactive and to change marketplace behaviour. Rather than being reactive and only doing something where the complaint is lodged, they have two prongs to the legislation. One is to educate and to regulate and the other is to punish, if you like, for contraventions.

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. I have not looked at it closely enough to be able to identify any shortcomings or to say that we could do it better—except, perhaps, that we might consider the concept of the super complaints. I do not know enough about that to try to push it any further.

(The witness withdrew)

FRANK ZUMBO, Associate Professor, School of Business Law, University of New South Wales, Kensington, sworn and examined:

CHAIR: In what capacity are you appearing before the Committee? In other words, are you appearing as an individual or do you represent an organisation?

Professor ZUMBO: As an individual, in my private capacity.

CHAIR: Are you conversant with the terms of reference for this inquiry?

Professor ZUMBO: Yes.

CHAIR: Would you like to make an opening statement?

Professor ZUMBO: I thank the Committee for the opportunity to appear before it and to make a submission. I value that opportunity. This is an extremely important matter. I have had a longstanding interest in the matter over many years. I have researched the issue, I have been involved with regulatory bodies in Australia and spoken to many bodies overseas, I have written a number of articles in this area, spoken at length about these issues, and in my opinion there is an overwhelming case for enacting New South Wales legislation dealing with unfair contract terms. The case is a compelling one, as I explain it during the course of my evidence today. The enactment of New South Wales legislation dealing with unfair contracts is a unique opportunity to restore New South Wales to the forefront of consumer protection law in the same way that the Contracts Review Act placed New South Wales at the forefront of consumer protection in 1980. 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 New South Wales.

That reality is today we have no effective laws in New South Wales that deal with unfair contract terms. We have a Contracts Review Act that allows the courts to consider unfair contracts, and you would think that would have provided ample opportunity for the courts to look at unfair terms and although there was great excitement, as I said, in the early cases, which I refer to in my published articles, it is clear that excitement has faded away dramatically in recent years because the courts have taken a very narrow view of that legislation and not used the wide powers, and have increasingly focused on what is called procedural unfairness, procedural unconscionability, the procedure by which the contract is made and conduct that occurs during the contract or the relationship. Even then the problem with legislation of the Contracts Review Act or the relevant provisions of the Trade Practices Act is that they needed to be enforced by an individual consumer for each individual contract. The reality is, yes, you may have recourse in terms of the principal conduct, but because the courts have taken a narrow view of that legislation and focussed on the procedural unfairness it is very hard to attack unfair contract terms on the basis of substantive unfairness.

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 as 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. 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 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.

Today in New South Wales we are left to rely on self-restraint by businesses in ensuring that they have their contracts. There will be businesses that will seek to strike an appropriate balance that protected the interests of the business of being balanced towards the consumer, but, unfortunately, as we have heard today and in my experience it is clear that where there is no law, we are left with only self restraint it becomes tempting, increasingly so, when other people in the industry have very strict terms and seek to cover every possibility. We are seeing a proliferation of contract terms, which, ultimately, are unnecessary to protect legitimate interests or go beyond protecting the legitimate interests of the business. I would echo all the comments made by earlier witnesses, with one exception.

I would like to, if I could at some stage, respond to specific issues raised by Mr Gilbert. I feel that some of the points he made need clarification or comment from my position and experience. If I may be permitted to do so, I will do that now. Mr Gilbert indicated that the Victorian legislation is without context and, therefore, abstract. It is legislation that provides a framework. The alternative is to have industry-specific legislation in dealing with every single industry that would have a context. Unfortunately, that would be contrary, I believe, to the comments of Mr Gilbert about the proliferation of industry regulation. We have a general piece of legislation in Victoria. In the United Kingdom that applies to all transactions, and provides a framework. There are ways to deal with specific industry issues with different vehicles, which I will mention in a moment. But it is a framework. It is not intended to deal with every eventuality, but rather to promote fairness in contract.

We are told that mandatory codes and banking regulations are effective in the banking industry. That is obviously a matter of opinion and debate. But that is not central to the point before the Committee. But 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—sorry for being specific on the section—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.

The UK talks about exclusions where the provision or the term deals with the main subject matter of the contract or deals with the adequacy of price or remuneration. So if there is a question of price or remuneration that is not an issue under the UK legislation. So there are sufficient protections. I hasten to add that in the UK legislation there is a proviso to that exemption in regard to the term being in plain, intelligible language. 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.

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.

There was a lot of talk this morning about market forces and their ability to produce fairer terms. 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. But, unfortunately, there is not a general market in all terms and conditions of contracts. There is a market failure there simply because we do not price all the terms in a contract. Banks or other suppliers do not compete on all the terms; they compete on price. Banks can be very competitive on interest rates. Mobile phone carriers can be very competitive on prices of those services. But they do not compete, or compete narrowly, on terms. If there is no competition on terms

we are left with the situation where terms simply follow an industry leader or there is a general consensus in the industry that if there is no law against it we can have those terms in the legislation.

There was a suggestion that the judge in the Victorian case had a great deal of difficulty with the concept of unfair terms or what is meant by "unfair". One thing that needs to be clarified is that that Victorian case was the first case under the Victorian legislation. You would expect the judge in the first case to have a discussion about the meaning of a term. That discussion extended to consideration of the UK use of the word "unfair". I can tell you that the House of Lord's has not had any problems with the concept of unfair, and ultimately the judge in the Victorian case came to an understanding of what is unfair that is perfectly reasonable. The important thing about the Victorian case is that the judge had no problem finding that the individual terms before the tribunal were unfair. So there was discussion about the concept of "unfair" because it was the first case dealing with the Victorian legislation. When it came to looking at the particular terms the judge had no difficulty in finding that the terms were unfair.

They are some general comments. In relation to market failure I simply add that you also have market failure because there is no price mechanism, as I have mentioned, in some instances or there are what are called by economists information asymmetries, where the information possessed by one party is much greater than the information possessed by the other party when making a decision. The banks, the mobile phone providers and hire car companies will have complete knowledge of their terms, one would expect, but a person hiring a car will not have complete knowledge of the terms. You turn up, you sign and you do not have the ability to read the terms. Even if you have the ability to read those terms, 200 pages is a difficult ask and I am sure that not many people beyond the odd academic lawyer would read 200 pages of contract. Ultimately, as I have said, many of those terms are boilerplate terms just to provide an additional layer of reassurance, which is unnecessary because the first layer of reassurance has been enough to safeguard the legal interests of the supplier. I am sorry for those extra long comments but I wanted to address some of the broader issues.

The Hon. DAVID CLARKE: Professor, in your submission you note that the consumer's alternatives to signing a standard form of contract are inadequate. Can you explain why you believe this to be the case?

Professor ZUMBO: Firstly, because the legislation does not provide an effective recourse to justice on a particular issue. There is the question of access to justice. Organisations have deep pockets; individual consumers do not. But even when they do have the ability to challenge a matter in court the law is stacked against them in the sense that the threshold that the courts are establishing has increased in terms of having to prove procedural unfairness, that the supplier did something that was reprehensible, tricked you in some way, did not explain to you where there was a need to explain—because of age, infirmity, being drunk when you sign the contract. That is under the equitable doctrine, the doctrine of unconscionable conduct that the courts have developed over hundreds of years. But even under the legislation the courts have a very high threshold. It really has to be such reprehensible conduct. Simply complaining that the term is written against you is not enough.

In terms of self-help by the consumer, the ability of a consumer to renegotiate a standard form contract is virtually zero for the simple reason that if you go to buy a mobile phone the salesperson has no authority to change the terms of the contract. There is usually a statement in the contract that says that even if representations are made to you by a salesperson you are bound by the terms of the contract. The written contract is the entire contract. 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.

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. There are benefits for the business clearly in reducing transaction costs. There are benefits to the consumer because there is a document there. In an ideal world it would be fair, you sign and you walk away—life goes on.

You do not want to spend $500 or $2,000 to get legal advice on a contract, if, for example, the mobile phone is worth a few hundred dollars. The reality is that we are not talking about the standard form contracts being bad in themselves. The problem with standard form contracts is when they are abused, 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.

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.

The Hon. GREG DONNELLY: Associate Professor, you made the comment in your testimony just a moment ago, and others have today as well, about the litigation that has taken place in that area that has ultimately ended up in examining the issue of procedural fairness associated with the way in which the contract entered into—

Professor ZUMBO: Yes.

The Hon. GREG DONNELLY: —as opposed to the examination of specifically unfairness of the contract itself, or particular terms of the contract. I am just wondering whether that has come about because of the way in which the proceedings have transpired—in other words, when proceedings are before the tribunals or the courts—or has that come about because, in defending oneself against the matter, it has narrowed down and focused on that issue, and that was done deliberately in terms of defence as opposed to the examination of the substantive issue of the unfairness of the contract or its terms.

Professor ZUMBO: The point there is that the courts will look at the fairness of the terms only when that is accompanied by procedural unfairness. Procedural unfairness means the procedure under which the contract is made, and that will vary, depending on the particular consumer. 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.

In terms of challenging the unfair terms under the Contracts Review Act or the Trade Practices Act, there is the usual costs and access to justice and the feeling that while you may have some remote chance of succeeding, the cost is far too high and you are fighting a losing battle because the law is stacked against you. To simply go into court and say, "This term is unfair", is not enough. The benefit of an unfair contracts regime is that it allows a surgical targeting of unfair terms and in particular instances where those unfair terms arise. Inevitably, what happens with standard form contracts is that the term is used industrywide.

If you have a surgical ability to attack an unfair term or terms, you as the regulatory agency are going to have an impact beyond the one consumer. You will have an impact across the whole sector whereas even if you are successful in relation to the Contracts Review Act, the impact of that case is only on that case, on that consumer, and on that contract. So the impact is very minuscule across the industry, if at all, even if it would be registered, because the argument will always be that the case turned on its facts because that is the nature of unconscionable conduct and procedural unfairness. It therefore does not have widespread implications whereas under an unfair contracts regime, if there is a term that is clearly standard, if is targeted in one contract, it will be targeted in all contracts.

In the Victorian legislation there is the ability to prescribe a term as being unfair, which means that you can be proactive in identifying a term and saying, "You cannot use this term ever again." 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.

The Hon. GREG DONNELLY: Earlier today I put it to one of the witnesses, in response to the evidence that she gave—and I think you might have been here and heard the question—whether there was some value in the New South Wales jurisdiction endeavouring to create a piece of legislation which leveraged off the Victorian base and secured a higher base whereupon the other jurisdictions might build on top of that as part of a national process, given that I saw and some today have said that not too much was happening at the Commonwealth level. That witness suggested that in her view essentially running with the Victorian legislation as it was had the benefits of comity and it was suggested that we should move with the least line of resistance. What would you like to comment on that? Do you think that the Victorian model is adequate for us to consider, or should we be setting our eyes a bit higher on the horizon and trying to do better?

Professor ZUMBO: There are various strands to your question. I will tackle them one by one. One is that even if we do have a national regime, you will still need State legislation because the constitutional reach of the Commonwealth does not extend to unfair terms of a contract. There is no constitutional head of power that gives the Commonwealth plenary power over unfair contract terms. The Constitution gives the Commonwealth power over corporations and the Commonwealth uses that under the Trade Practices Act, but that is why we have State fair trading Acts—because there are constitutional limitations to a national provision or a national framework. That is the first point. We would need in New South Wales to have legislation anyway at some stage if there was a national regime because there would be gaps.

Secondly, 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. I have no problems in replicating the Victorian legislation totally. But the last strand of the comment is that just because we totally replicate Victoria, that does not mean that we cannot add additional features.

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.

We have a model contract framework in relation to telecommunications. That has been registered with Australian Competition Media Authority [ACMA] and what have you, so there are precedents for providing model contracts that you can get approval for from the regulator in advance. In a sense, that provides a safe harbour. If you have got that approval in advance and you are compliant with those terms, it is a safe harbour. Another suggestion is that, in addition to going down the path of the model contract, if a business is uncertain about the fairness of a contract term or terms, there should be some ability to go to the regulator and get authorisation, if I can use that language and borrow it from the Trade Practices Act, where you say to the regulator, "I have got these terms. In your opinion"—or, "in your binding opinion", perhaps or even "in your informed opinion"—"is this unfair?" It would probably be best for it to be a binding opinion and then there could be a whole process of consultation.

There are mechanisms that you can add to the Victorian legislation without detracting from the Victorian legislation, but by adding a dimension to the Victorian legislation and adding value—obviously it would be in our interests to have a national framework—the reality is that the Victorian legislation has had an impact beyond its borders. Unfortunately, New South Wales consumers cannot access those remedies unless the contract is governed by the law of Victoria, for example. The reality is that New South Wales-based businesses that operate only in New South Wales have no particular incentive, if any, if they want to engage in unfair contract terms.

The Hon. AMANDA FAZIO: Earlier you would have heard the Committee asking whether anyone knew why the regulatory impact statement on unfair contract terms has not progressed within the Productivity Commission federally. Do you have any insight on that?

Professor ZUMBO: No. I know that the Office of Regulation Review has questions about the regulatory impact statement, and those questions have been resolved. At another level, and this is a personal observation, I fear there is resistance at a Federal level to this legislation. I hope that is not the case, but whenever there is delay there is a concern that there may be some Federal resistance, for whatever reason. It may be that the Office of Regulation Review wants empirical studies pointing out how many thousands of contract terms are affected. You would have to go through every single consumer contract. It is an unthinkable task. It is possible, but very resource-intensive and unnecessary when we have ample evidence. For example, the United Kingdom has had this legislation going for many years, and every few months or so they produce bulletins of unfair terms.

There are thousands of examples of unfair contract terms. If there is any question as to whether there are examples of unfair terms, there is ample evidence of unfair contract terms that have been discovered in the United Kingdom and, more recently, in Victoria. Clearly there is evidence. But if you need evidence of all contract terms that are affected, you would be here for years and years. That would be an unnecessary delay when the case is overwhelming from the United Kingdom and also more recently from Victoria.

Ms LEE RHIANNON: In your submission you note the requirement of any unfair terms legislation should be a well-resourced government agency, to enforce the model. Do you believe a government agency is preferable over a statutory authority such as the Motor Vehicle Repair Industry Authority?

Professor ZUMBO: The preference is for one government agency to deal with it. That is not to say, as was talked about earlier this morning, that consumer complaints or consumer agencies cannot have a role; that is not to say that other authorities in specific industries cannot have a role. In the United Kingdom there are a number of industry-specific regulators that can have a role under their legislation. While we would like to see one regulator deal with the regime, the unfair term legislation, that is not to exclude the possibility that other authorities or other non-government agencies could not have a role in appropriate circumstances. It is a question of resources. One would expect that the government agencies are the most resourced, but their resources are not unlimited. If you had other agencies that held a particular interest in a matter in a particular industry that had resources, by all means they could have a role to play.

Ms LEE RHIANNON: Do you have any comment about the resources available for government agencies to undertake this work? Do you think it is adequate? Do you have any suggestions on improvements?

Professor ZUMBO: Obviously if this legislation was to come into effect in New South Wales 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.

The Hon. AMANDA FAZIO: Earlier you commented on issues raised by the Australian Bankers Association. One issue raised by the Committee was the right for unilateral change clauses in contracts. When you responded to some of the issues raised by the Australian Bankers Association, you did not touch on that. Do you want to expand a little further in relation to its statement that it did not think that it was unnecessarily unfair?

Professor ZUMBO: 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.

To say simply that there is no instance where the unilateral variation has been said to be unfair, to say there are no instances of that, I cannot agree. There will be instances where they are fair, and others where they are not. The other thing that you have prompted me about from Mr Gilbert's evidence is that I stress that an unfair contract term legislation does not affect the ability of a bank to protect its legitimate interest. The example Mr Gilbert gave was if a person defaults by a day that interest is payable. That is a legitimate protection. We could argue about the interest rate and how far it should go back, but if someone has defaulted and they know they have defaulted they have to pay the relevant fee for that default.

However, a contractual clause may not distinguish between a fair or an unfair situation; it will just be an unfair clause. If you charge interest going back to the original purchasers because you have accidentally missed out 10¢ on your cheque, that would be an unfair contract term to that extent. The bank would simply take advantage of the term; the bank would not distinguish between a legitimate and illegitimate mistake. It would say that we have a term that says we can charge interest from day one if you default; that is, you do not pay the full amount. Whether that be by 10¢ or by a day. It is the same term, but the reality is the banks will just stand by that one term and say that they are charging interest.

The ability to negotiate an exception to that, to say that you are entitled to charge interest from day one except where there is a mistake by me, the consumer, is nil. The reality is that term is unfair to the extent that it does not allow the consumer any recourse to argue that it is unfair that my 10¢ shortage has cost me an enormous interest bill, and it was an accident on my part.

The Hon. AMANDA FAZIO: In relation to unilateral change clauses in consumer contracts relating to issues other than banking, earlier the Committee heard examples in relation to mobile phone call costs or pay television packaging. Can you describe the fairness or unfairness of those sorts of provisions?

Professor ZUMBO: You would have to look at each term to make that judgment. 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. I go further, and say that if the term is not reasonably necessary to protect the interests of the supplier, the supplier has gone too far, and that then takes you into the realm of unfairness.

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. But if you then start saying, "If the mobile phone service stops completely we still charge you for that service," that goes too far. If the term said, "We will charge you for the provision of service except where there is no provision of service, and we do not charge you for that period," that is a fair term. But if you say, "The consumer will continue to be charged despite having no phone reception," that goes beyond what is necessary; it completely shifts the risk onto the consumer.

The Hon. AMANDA FAZIO: Do you think there could be some sort of objective measure that if the charges proposed to be increased are under unilateral change clauses, or over a certain percentage or something like that, there would be the possibility of the consumer opting to end the contract?

Professor ZUMBO: You can provide that. But if you start doing that in the legislation, you will end up having very long pieces of legislation because you have to deal with all the contingencies. So you provide a benchmark. If the term is not reasonably necessary to protect, or it creates a significant imbalance between the parties, to the detriment of the consumer, you provide a benchmark. That is why I suggested that you can have a model contract situation where you can deal with industry-specific issues in a model contract and you can provide for all the eventualities. That issue may not be relevant in every industry.

The issue of whether you have unfair terms cuts across all industries, but specific instances apply only to specific industries. You may need a more surgical approach to that through a model contract or, alternatively, a mechanism to pre-approve these through the regulator or the relevant authority.

The Hon. AMANDA FAZIO: Mrs Ramensky from the New South Wales Law Society spoke about a possible definition of "unfair" in terms of this sort of contract law. Do you have any comments to make about that?

Professor ZUMBO: We have a definition in the legislation, in the Victorian legislation, and in the United Kingdom legislation. 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. So there is clear guidance there. The Victorian legislation also provides guidance on specific examples of unfairness. I am sure the Victorian people will speak about the Victorian definition. The United Kingdom definition is as follows:

> A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer.

That definition is replicated, but slightly differently, in the Victorian legislation; it has been interpreted in the United Kingdom and in Victoria. We have that definition, we have the guidance from the guidelines provided by the United Kingdom and by Victoria, and we have the examples provided in the United Kingdom regulation. So there is clearly quite a lot of guidance as to what is meant by an unfair term.

The Hon. AMANDA FAZIO: Earlier we heard about the court case in Victoria between AAPT and the Victorian consumer affairs office. Are you aware of any equivalent challenges to the United Kingdom legislation, and if so could you outline them?

Professor ZUMBO: I am sorry, what challenges are you referring to?

The Hon. AMANDA FAZIO: Have there been similar court cases in the United Kingdom regarding the definition of "unfair"?

Professor ZUMBO: Yes, there have been a handful of decisions there. One is certainly in the House of Lords, and there may have been two or three others. But in the United Kingdom a lot of these cases, if not all of them, with a handful of exceptions, are dealt with through consultation between the organisation and the business involved. I am sure the Victorians will tell you what their view is. I would have thought that holding discussions between the agency and the business is probably the best way to deal with all but a handful.

The cases that have gone to court in the United Kingdom are where the supplier simply took an intractable view—was not willing to compromise and was not willing to look at the matter. In that case the regulator has no alternative but to go to court. Apart from that handful of cases, there are thousands of cases where the business has been willing to come to a compromise to address the concerns of the regulator. I am sure the Victorians will tell you of their experience where the business can meet the concerns. There may be instances where the business will not meet the concerns. In that case you have to go to court. Or, if you believe up front that there is a problem, and the Victorian legislation allows for a term to be described as unfair, you take that option up front and deal with it effectively in one go.

The Hon. GREG DONNELLY: You would have heard some of the earlier witnesses today give testimony about the issue of super complainants. To the extent that you have an understanding of these jurisdictions, can you express a view about whether that works effectively or whether there are issues with it?

Professor ZUMBO: In terms of an ITE, it is a fine idea. The super complainant, the agency or consumer association, needs to be properly resourcing its review of the complaint, dealing with it, and pursuing it. As I said earlier, there is no reason why you cannot have a number of agencies involved if they have a commitment to promoting fairness in contracts and they have the resources to assist in some way. As I said, the regulator should deal with all or most cases, but if there are others that have a deep commitment and the resources, they should be given that opportunity.

If any consumer or individual could go to court to get an injunction, that in some ways reduces the case for a super complainant. For example, under the Trade Practices Act, with one exception, any person can get an injunction to stop conduct that is in breach of that Act. So if any individual had the ability to seek an injunction to stop a breach of the unfair contract terms, the consumer agency could have that standing. It becomes a question of standing as well as resourcing, and sharing the burden in getting the message out on promoting fairer contracts. So there are a number of themes there.

The Hon. GREG DONNELLY: Are there any lessons we can learn from the United States with regard to consumers asserting rights in terms of these sorts of contracts? I know it is a completely different sort of model. Obviously it is a model in which business is extraordinarily influential and individuals have that up against them. However, it is also an extremely litigious society. Are there any lessons we can learn from the free market over there that have relevance to our deliberations in looking at what we can do in New South Wales?

Professor ZUMBO: If you are afraid that you will open the floodgates to consumers taking cases against unfair terms and that will swamp the courts, I do not think that is a concern. As we have heard today, you have 200 pages of the mobile phone contract and, arguably, it may contain a lot of unfair terms. But the point was made earlier that unless an unfair term is triggered you may not have a particular issue. So in order for consumers to be involved there has to be a problem for them that affects them immediately. When those clauses are triggered then consumers would need recourse, and the recourse is limited because they cannot surgically and directly attack the unfair terms. So, no, I do not fear a flood of consumer cases and people going to the tribunal and saying, " I do not like this term" or " I do not like that term". So long as everything is going well no-one has a problem. It is just when somebody has made a mistake and omitted to pay 10¢ on a cheque, the bank then seeks to rely on that term and the bank is being unreasonable, they go down to the tribunal. That is one instance.

The Hon. GREG DONNELLY: I was not suggesting that there was a concern about individuals pursuing matters. It was more whether through regulatory regimes—either at a State level or Federal level in the United States—there were any particular lessons we could learn about trying to create a better balance between the individual consumer and the supplier of goods or a service.

Professor ZUMBO: I had to say that the European Union, with its unfair contract term regulations and the United Kingdom's adoption of them, and the Victorian adoption are far ahead of anything that I am aware of in the United States. There may be industry-specific approaches in the United States and industry-specific regulations dealing with those issues. But this is an effective framework. It targets unfair terms directly and does not cause business uncertainty. It provides for surgical targeting of unfair terms. You can apply it across an industry. So, as a model, it is the best one I can think of at this point in time.

CHAIR: Is there anything that you would like to add?

Professor ZUMBO: No. I think I have dealt with all the issues. I simply add the comment that this is a vitally important issue for consumers. We need to get it right. 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 New South Wales. 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 New South Wales.

The Hon. DAVID CLARKE: What yardstick do you use to say that it is working in Victoria but the law is not working in New South Wales?

Professor ZUMBO: In Victoria they have the unfair contract term regime in part 2B of the Fair Trading Act. We do not have that regime in New South Wales.

The Hon. DAVID CLARKE: How does that manifest itself in a practical way?

Professor ZUMBO: In Victoria it has already led to a change in mobile phone contracts. One thing that emerges from the Victorian tribunal case is that because of the Victorian legislation the mobile phone provider in that instance and the industry have rewritten their terms. They would not have done that if that legislation did not exist. The fact that already we have had a rewriting of terms in the telecommunications industry is an incredible step forward from the time when we did not have that legislation in Victoria. In that sense, it has had an immediate impact in telecommunications. It has been more immediate than the impact that the Contracts Review Act has had since 1980 or the Trade Practices Act has had. The practice in the United Kingdom has also led to fairer contracts. So on that basis I say that Victoria and the United Kingdom are better off.

To some degree New South Wales consumers are better off because telecommunications providers are national companies. They have reworked their contracts and one would assume that they will apply those fairer contracts in New South Wales. But, as I said, if the business is operating only in New South Wales there is no incentive to apply the Victorian regime and New South Wales consumers do not have right of access to complain to the Victorian commissioner. So in that sense we are better off. The evidence is quite clear: the opening pages of the telecommunications model contract that has been registered—I am happy to provide it to the Committee—refer to the reason why the contract was developed. It says in the opening pages that it is because of what has happened in Victoria. That is clear evidence that the process of the model contract and a fairer regime for consumers is the direct result of the Victorian legislation.

CHAIR: Do you wish to table that document?

Professor ZUMBO: If you like. It is freely available.

Document tabled.

CHAIR: Thank you for your interest in this issue and for your assistance.

Professor ZUMBO: Thank you. I am happy to assist the Committee further in any way I can. If I can answer any questions, I am happy to do so. If people make any responses to my evidence, I am happy to respond to them.

CHAIR: Thank you very much.

(The witness withdrew)

ELIZABETH VICTORIA LANYON, Chair, Unfair Contract Terms Taskforce, Consumer Affairs, Victoria, 17/121 Exhibition Street, Melbourne, and

DAVID CHARLES COUSINS, Director, Consumer Affairs, Victoria, 17/121 Exhibition Street, Melbourne, sworn and examined:

CHAIR: Welcome. Thank you both for the effort you have made to appear before the Committee today. This is the only public hearing that we are having in this inquiry into unfair terms in consumer contracts. Have you seen the list of witnesses who appeared before the Committee today?

Dr LANYON: No.

Dr COUSINS: No.

CHAIR: We will share that with you. It has been very satisfying for us to get the information we require. We are very grateful to you for coming to talk to us. We have broadcasting guidelines in relation to public hearings. There are no media present so I will tell you about that if they arrive later. If you have any messages or documents that you would like to give the Committee the secretariat will assist you with that. We prefer to conduct hearings in public. However, we may decide to hear certain evidence in private if there is a need to do so. If such a case arises, we will ask the public and the media to leave the room. All mobile telephones must be switched off as they interfere with the Hansard equipment. Are you both conversant with the terms of reference of this inquiry?

Dr COUSINS: Yes.

Dr LANYON: Yes.

CHAIR: If you should consider at any stage certain evidence you wish to give or documents you wish to tender should be heard or seen only by the Committee please indicate that fact and the Committee will consider your request. Do either or both of you wish to start by making a statement?

Dr COUSINS: I will make a few opening remarks to you. Firstly, the Victorian Minister and Consumer Affairs, Victoria—the Minister being Marsha Thomson—certainly welcomes this inquiry. We have felt rather lonely over the last three years so it is very good New South Wales is looking at this area. We have provided some documents to the Committee already and we are obviously happy to answer questions and to take questions on notice if we have to. If I could make a few opening comments by way of giving a very positive background to our work in this area.

I know you have had other witnesses, and I have just been listening to Professor Zumbo, so a lot of it has probably been covered. Our legislation, which is part 2B of the Fair Trading Act in Victoria, covering unfair contract terms was adopted in October 2003 and it followed an inquiry into the Fair Trading Act, which was initiated by the Minister, who was Marsha Thomson at the time, and that review was conducted by a panel that had independent experts on it. Indeed, Dr Lanyon, I think, was a member of the panel at the time. It also had business representatives and consumer representatives. The panel made recommendations to government and one of those was the adoption of unfair contract terms legislation, which was subsequently done.

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.

CHAIR: This was before the legislation was enacted or after?

Dr COUSINS: This is subsequent to the enacting of the legislation. There was business awareness of the legislation prior to its adoption but we felt that that understanding could be much greater than it was, so it was a deliberate approach to try and build that understanding. 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. We feel there is a much greater understanding of this legislation amongst the legal community.

Our experience is that we are finding much greater understanding when we approach businesses about it. We have learnt from the UK experience. 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 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. What we did was look at the areas where Consumer Affairs had high volumes of complaints and concerns about contract terms. They might not have been expressed to us about contract terms but areas where there were high numbers of complaints, and certainly mobile phones was one of those. We adopted what we call a sectoral approach: we looked at, if you like, the whole industry and took the view that we would try and remedy problems across the board rather than just perhaps focusing on the terms that happened to relate to a firm in an industry.

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. I heard some questions earlier on about the resource requirement on this. This is novel and new work and we recognised at the outset that a degree of sophistication would be necessary for agencies to take this forward, so we established a separate task force within the organisation, led by Dr Lanyon. 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.

This particular work is quite demanding because essentially the way we proceed is perhaps triggered by complaints in the first instance, but we will review the whole of contracts. 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.

Through that process of dialogue we managed to amend those contracts in the mobile phone area and in other areas as well. In fact, I noticed some of your questions around the issue of how prevalent are unfair contract terms. 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 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. And that is indeed how the tribunal found. It 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.

I know Dr Lanyon is going to fill in the gaps for me but I want to say a bit more about impact. Our view of 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.

Indeed, to give an example, hire cars has been one of the areas particularly in our focus. We have been very successful in managing to persuade major operators in that industry to change contract terms in a way which deals with many of the problems I think that consumers, and consumer agencies saw in the hire car area, thus avoiding the necessity, from our perspective, of developing what was then in train, a mandatory code. I think this is one very important aspect of this legislation. In fact, I would describe it as being light-handed. It operates if someone is going to have an unfair term, obviously, but once business knows, if you like, the legislation and knows how to operate it, it really does not have a great impact on them at all. But the legislation does serve, I think, to deal with problems that typically we have addressed in industry-specific approaches in legislation.

In relation to impacts on business and so on, because there has been a lot of discussion about "Does this impose great burdens on business?" I heard the issue of the regulatory impact statement mentioned earlier on, so that will look at costs on business and so on. 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 contract terms and how we think those terms should be changed to comply with that.

In many cases it has been our experience that particularly senior management are shocked when they see the sort of things that we have pointed out to them about what is in their contracts. Their contracts have often been written for them by lawyers who have been very keen to protect the interests of those suppliers, and they have written things in those contracts that businesses say to us they would never implement. We say "Why is it written down there if you would never use it?" We have pointed out the unfairness of what is written down there and it has not really been an issue at all for senior management to amend those contracts. A case in point was a meeting we had—and I will not mention the organisation—with the chief executive officer of the organisation around the table and it was exactly that experience of him saying "That's ridiculous. We would never do that." Why is it there?

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.

I will quickly finish with some comments on the national side of things. 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 New South Wales is one-third. So from our point of view it really is important for New South Wales 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 New South Wales where this legislation would be very important that our legislation will not be touching in New South Wales. 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.

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. That I think demonstrated, if nothing else, that that particular argument is really not valid. I think I have said enough and I am sure Dr Lanyon with fill in the gaps.

CHAIR: Did you want to make a statement, Dr Lanyon?

Dr LANYON: No, thank you.

CHAIR: I will start by asking a sideways question in relation to the questions you have been sent. We had representatives from the Australian Bankers Association here today, who informed us that they were pragmatic about the Victorian laws? What do you think that means?

Dr LANYON: In its submission to the national working group the ABA did not formally oppose the introduction of unfair contract terms. I think that is its position. It has simply taken the role of pointing out its concerns about how that might operate, particularly in the credit area. The Victorian unfair contract terms legislation at the moment does not apply to credit contracts.

Dr COUSINS: I see that comment as being a positive comment. I think we have to get beyond the sort of theoretical and esoteric debates about whether or not there is such a thing as an unfair contract term and whether or not we should be interfering in the process of contracting between suppliers and buyers. The fact is we do that. The fact is we are dealing with real world pragmatic or practical problems.

The Hon. DAVID CLARKE: Dr Cousins, how many complaints relating to consumer contracts with unfair terms does your office receive?

Dr COUSINS: The numbers are very small but they are growing as awareness of unfair contract terms legislation is growing. I do not take a great deal from that, in the sense that in terms of the complaints that we get—when I say that they are small, in terms of our logging of complaints and so on, when complaints come in, we do not immediately review them and say, "Yes, that is an unfair contract term issue". That often emerges later from a much more detailed analysis. We, under the legislation, can investigate in response to a consumer complaint, so when I say the numbers are small, I really have in mind that situation. So as to the order of magnitude, we would say only about 300 complaints we would initially tag as unfair contract terms matters, but I think in reality there are more.

The Hon. DAVID CLARKE: Over what period of time is that 300?

Dr COUSINS: That would be on an annual basis, roughly over the last year, and we get, at the moment, about 18,000 complaints in total a year. I have to say as well that we do not consider that complaints are in any way a good indicator of consumer detriment, if you like. We have just passed legislation in Victoria in relation to funerals. We would have probably half a dozen complaints at the most a year, so that is not the key driver, I do not think.

The Hon. DAVID CLARKE: That seems a very small number of complaints a year, does it not? You do not put that all down to your legislation, do you?

Dr COUSINS: No, not really, at this stage. That number would not have changed very much from when we did not have the legislation. We just probably had not thought at all of tagging complaints of unfair terms contracts at that stage.

Dr LANYON: It is just that consumers, when they ring up with a complaint, will say, "I am complaining about X supplier" or "Somebody has let me down about this", so they might not self-identify it as being an unfair contract term. When we go back over the data, as we did with PAY TV, we took the number of complaints and we drilled down into the complaint and we said, "Okay, it looks like it is an issue about overcharging, or non-supply or something problem. What is at the heart of that and how can we deal with it?" When we took that example we saw that what we said was an unfair term lay at the base of some of the issues. It is about the difference between consumers understanding and saying, "I am ringing up about an unfair term" versus "I am ringing up about Telstra".

The Hon. DAVID CLARKE: So the figures could be a lot larger, could they not?

Dr LANYON: We think that is a huge underestimate. Also, work we have just done on consumer detriment says, in any event, probably only about 6 per cent consumers who are suffering some problem will go to an Ombudsman or Consumer Affairs. The next X per cent, 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.

The Hon. DAVID CLARKE: But you get 18,000 complaints a year?

Dr LANYON: Yes.

The Hon. DAVID CLARKE: What would most of those complaints relate to?

Dr COUSINS: Quite a range of things. We have a big role, as you do up here in New South Wales, in residential tenancy—but household goods, and building is big and real estate agents. We cover quite a range.

Dr LANYON: A huge number of goods and services complaints, just generic things such as curtains and carpets.

The Hon. DAVID CLARKE: I think you said that the incidence of these complaints has not really increased since the introduction of Part 2B, or decreased?

Dr LANYON: No, 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.

The Hon. DAVID CLARKE: Does part 2B address the possible imbalance that may exist in standard form contracts, in your view?

Dr COUSINS: I think that is primarily what it is aimed at. Standard form contracts are obviously an efficient way to operate in complex market situations, but that does not mean that those contracts are unnecessarily balanced in a fairness sense.

The Hon. DAVID CLARKE: So it aims at that, but you believe it has addressed the problem.

Dr COUSINS: I think it goes a substantial way. I have to say that our legislation in Victoria does not just relate to standard contracts. It relates also to individually negotiated contracts, which is a difference from the United Kingdom.

Ms LEE RHIANNON: I was interested in your comments on the attitude of business to the development of these changes. You spoke about costs being absorbed. Overall I got the impression that business has been okay with the changes. Has there been any resistance?

Dr COUSINS: Oh yes. The discussions that we have with business have been very robust but productive. 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.

Ms LEE RHIANNON: In terms of the disputed contract, you mean?

Dr COUSINS: Yes, in terms of the decisions of the Victorian Civil and Administrative Tribunal and the courts. In relation to particular situations, they will ultimately provide us with the sort of precedents that both business and ourselves will need to take account of.

Ms LEE RHIANNON: In these negotiations with business do you ever hit the wall where you disagree at the end of the day and they are not happy with what you do?

Dr LANYON: Not that they are not happy with what we do but that we do not necessarily come to a meeting of minds on where the balance should be struck. The way that I illustrate this is to say that this is about a standard of fairness. What we find is that everybody in a room will agree that a certain course is fair and at the other end of the spectrum it is pretty easy to see—say from the AAPT case that there are some clauses that everybody would agree are unfair, perhaps except for AAPT itself—but then in the middle, where do you strike a balance? 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.

Ms LEE RHIANNON: And then see how it plays out?

Dr LANYON: Yes.

Ms LEE RHIANNON: Maybe you are right, and maybe it works out.

Dr LANYON: What we always say to business is: "We are leaving this issue on the table", or, "At the moment it looks okay, but we might come back and look at it again if we get more complaints and something comes up that we did not really think about at the time." Down the track, say for something like an Internet service provider contract, or an online auction contract, things will evolve that we will understand more about. It might also be the case with mobile phone contracts, with the 3G Next generation things. Some things in the contract relating to content may become more problematic down the track when we understand the implications.

Dr COUSINS: 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.

Ms LEE RHIANNON: Dr Cousins, you mentioned summaries, and the fact that with many long contracts, maybe all contracts, there was no obligation for the consumer to be shown the full contract. Is that still the case?

Dr COUSINS: That is my understanding of the situation. Under the telecommunications legislation there is a requirement that a summary of the contract be available. But I doubt whether

most consumers have ever seen their mobile phone contracts—though in one case it went to 500 pages.

Ms LEE RHIANNON: In a place like New South Wales that is just coming to grips with this issue, and has the opportunity to learn from how it is working in other places, is it appropriate to just leave it at that, or should there be a requirement that consumers be given a full contract, and in terms that a lay person can understand?

Dr COUSINS: I take the view that consumers should have ready access to contracts. But Commonwealth telecommunications legislation operates here, and we are not overriding that.

Ms LEE RHIANNON: I was not talking about just telecommunications matters, but other areas as well.

Dr LANYON: As an operational matter, part of our negotiations with companies is always to say, "Have we got the full contract in front of us?" Then we make the point that the consumer should have the full contract in front of them. One aspect of unfair terms is that the term may not be unfair in itself, but it may be unfair not to bring it to the consumer's attention. Some terms are completely unfair whether the consumer knows about them or not. However, some terms may not be unfair if the consumer knew about them and explicitly assented to them. Quite often we find there are bits of paper, which purport to be contract terms, which consumers get only after the event. Sometimes contracts refer to other bits of paper that are said to be terms. That often happens in the fitness industry, so that people sign an application form and agree to be bound by terms and conditions that they may in not in fact get, or rules of the centre that they do not get, and all those sorts of things.

Ms LEE RHIANNON: When the legislation went through in 2003 did it have the support of both major parties?

Dr COUSINS: I am stretching the memory. There were no particular objections that I recall from the Opposition at the time.

The Hon. GREG DONNELLY: An earlier witness spoke about the need to try to get contracts written in plainer English, and that it was not a matter of ensuring there was a summary of the contract provisions but ensuring that the contracts were struck in language that is much easier for the lay person to understand. I am wondering whether that is part of your discussion with the people and organisations you are dealing with so that they will consider drafting contracts in plainer English next time they come to a redraft of contracts.

Dr LANYON: I often look at motorcar auction contracts and hire car contracts, and some of those were very densely written and convoluted. We encourage people to use plainer English. Part of our Fair Trading Act deals with 10-point font and legibility. As part of our contract analysis we always pay some attention to that. When it comes to unfair terms, we say that a term is unfair if it has the object or effect of doing something not contemplate. If the consumer cannot understand the clause because it is so dense and confusing, it may have the effect of denying rights. 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. Convoluted liability waiver clauses are an example of that. How can the consumer understand what it means?

Dr COUSINS: If we do not understand the term, it is a fair bet that ordinary consumers will not understand it. That is a test that we have applied with some provisions, particularly liability clauses that Dr Lanyon mentioned. We have been very successful in amending clauses for things like the Australian Grand Prix event which were very hard to understand. Aside from not being particularly balanced, it was virtually impossible for ordinary people to understand the terms.

The Hon. AMANDA FAZIO: Earlier today we had evidence in particular from the Australian Consumers Association about its belief that there was value in having a body dealing with super complaints, such as that implemented in the United Kingdom. Did Victorian consider that concept when dealing with this issue of unfair contract terms? If so, why was it decided not to follow that strategy?

Dr COUSINS: I do not think it was part of the discussion at the time, and it was much broader than just unfair contract terms. Of course, there is a lot of interest in national consumer policy. We are going to have a Productivity Commission review. In fact, the Ministerial Council has a review of National Consumer Policy under way. The issue of super complaints is something we will look closely at. It is a good idea. Basically, it gives consumer organisations an opportunity to put significant issues to regulators, for regulators to make sure they investigate within precise timeframes. The super complaint idea tends to be one that relates to a broader set of issues; for example, the United Kingdom investigated home credit in the context of a super complaint from the National Consumer Council given to the Office of Fair Trading. That is a broader issue, which the regulator has been forced to confront through the idea of a super complaint.

The Hon. AMANDA FAZIO: Part 2B of your Act currently only addresses the unfair terms in consumer contracts. Earlier today we also heard from someone about the merits of amending that legislation to include small businesses that may also be subject to unfair terms in standard form contracts. Have you given any consideration to that issue?

Dr COUSINS: Yes, certainly, and again the 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.

I suppose that is a roundabout way of saying that I think our experience has led us to a view that there have been significant benefits for consumers from the application of unfair contract terms legislation. 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 officials level in the different jurisdictions there is a view that any legislation should in future also cover credit contracts.

The Hon. AMANDA FAZIO: Section 32X of the Victorian Fair Trading Act 1999 provides 13 terms which may be considered unfair. How does that compare to the list of terms that are considered unfair in the British legislation? Do you think that your 13 terms provide adequate direction?

Dr LANYON: 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 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.

The Hon. GREG DONNELLY: In the consultation leading up to the creation and implementation of the Victorian legislation, did you identify issues that could have been handled better in terms of the whole process of dealing with the stakeholders?

Dr COUSINS: As I said, the legislation originated from a review which involved business, consumers and independent experts. Looking back on it at the time, it would have been nice had there been a more fulsome public debate but over three years we have had very substantial public debate and there is wide awareness of this legislation now. So in a sense today we are not where we were three years ago.

CHAIR: How long was the review process?

Dr LANYON: It spanned a year and a bit but it covered the whole of the Fair Trading Act, including telemarketing. This was only one aspect of it.

The Hon. GREG DONNELLY: The second question goes to the implementation. With the benefit of hindsight, looking back over the first 12 months, two years, are there any issues in particular that you would have addressed differently if you had another chance at it?

Dr COUSINS: As Professor Zumbo said, regulators can always do a better job with more resources. 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.

The Hon. GREG DONNELLY: Can you enlighten us on what the education aspect of what you do involves?

Dr LANYON: 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, Europ 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 the 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.

We used that process to educate that specific group and to get a flow-down effect. When you take a sectoral approach you can have a two-stage process. We are also using a more generic education process both to target suppliers generally through the specific fair trading congresses and other CAV-targeted publications but also to get at secondary providers as in their lawyers to make sure the lawyers understand the issues so that when a small business or whatever comes to them and says to look at the terms because of the GST tweak or a stamp duty tweak or a general compliance review, which most businesses do regularly, the lawyer then says that there is this set of issues. We do that through the Law Institute of Victoria and through various education opportunities to reach those providers.

Dr COUSINS: Further in relation to hire cars, we also produced a scaled down pamphlet which we have written to all the hire car operators and we are providing them with little stamps so that they can have these pamphlets displayed on their counters. Again, it is a way to reinforce the message for them but also hopefully to educate their consumers.

Dr LANYON: We also have a regional presence throughout Victoria, and our regional offices run business charter informal arrangements with traders so that they understand broad fair trading obligations, misleading and deceptive conduct, all those things, and of course unfair contract terms are part of that. We want it to be part of a general understanding of broad compliance procedures. As well as the consumer brochure that the Director just talked about, there is an industry fact sheet and obviously quite a bit of information on our web site.

The Hon. DAVID CLARKE: When these amendments first came in what part did your office play in bringing the effect of these amendments to the attention of consumers as well as business?

Dr COUSINS: Certainly in terms of our general education information material for consumers, we have facts sheets about these. We have other publications, which talk about unfair terms provisions. Our web site is very important.

The Hon. DAVID CLARKE: That is an ongoing thing, but what about when the amendments were first passed? Was there a major campaign to advise business and consumers what they were all about?

Dr COUSINS: There was not a media campaign, if you like. It was much more direct. We held a major conference, for example, which was the launch of our education approach, I suppose. We invited representatives of all the key business groups likely to be impacted on, and also the consumer groups. Through our forums we have regular contact with all the major consumer and community groups in Victoria, through what we call our "working together forum". Through that forum we have done presentations and we have had regular discussions on the unfair contract terms. We have introduced it in that way to the consumer groups and tried to educate the consumer groups in this new law as well.

The Hon. DAVID CLARKE: So you do not really know how effective it is. If it is the case that you were educating consumers through consumer organisations, you do not really know how effective it has been. You have no idea how much of this has sunk into the minds of consumers.

Dr COUSINS: Consumers in the street, not necessarily, but that is part of the situation here. The fact is when you go and buy software and so on, you do not sit down for half a day and try to read through your contract. In a sense, as Dr Lanyon said, we are filling the place of the consumer to vet those contracts, to make sure that they are not unfair. Are consumers aware of that? Well, they are probably not aware in great detail, but I think there is a very important point here about consumer confidence in the market place and so on. I think it is very important that consumers know there is an agency that is actively looking after their interests. That is why it is very important for consumer agencies to have a high profile in the marketplace. It is not just because we like to have a high profile or are egoists, or whatever. There is a real purpose for a consumer agency to have that profile.

The Hon. DAVID CLARKE: You said earlier that in the beginning there was a lot of robust discussion with business. What is the attitude of business three years later?

Dr COUSINS: Not just in the beginning. I am sorry if I misled you on that. Those discussions go on all the time with business. Those discussions are not always robust in that sense because, often, when we point out things to business there is a very ready agreement. In fact, more so now as there is greater understanding of this legislation.

The Hon. DAVID CLARKE: There has been a change in attitude for the better, has there?

Dr COUSINS: There has been a change, yes.

The Hon. DAVID CLARKE: Your section 32ZD relates to the referral of a potentially unfair contract terms to the Victorian Civil and Administrative Tribunal [VCAT] for an advisory opinion. At any advisory provisions being sought under this section?

Dr COUSINS: No. We have not formally sought any advisory opinions at this stage. We have not had to.

The Hon. DAVID CLARKE: You have not had to?

Dr COUSINS: No. By and large, in terms of the issues that we have been dealing with, we have been able to resolve those pretty satisfactorily. I mentioned the AAPT case. That was one that we formally took to the tribunal. We did not actually seek an advisory opinion in that case; we sought declarations to prevent use of the terms. We could have sought an advisory opinion. I expect that at some point there will certainly be situations where we will have a disagreement with an industry over what we consider quite important terms. The advisory opinion option seems to me to be a very good way to deal with that; to go to VCAT and perhaps get an advisory opinion on whether or not the tribunal considers the term that we are discussing to be unfair.

CHAIR: What is the status of an advisory opinion?

Dr COUSINS: It is just that; it is an advisory opinion.

CHAIR: It is an opinion that both sides can use for negotiation purposes, is that correct?

Dr COUSINS: well, yes. It would provide a basis, if you like, going beyond the opinions of the regulator and the opinion of business.

The Hon. DAVID CLARKE: But it has no legal effect.

CHAIR: Have you structured in any oversight review or monitoring process that has given you some results that perhaps this Committee or a future government in this State would be able to utilise?

Dr LANYON: We have completed a review in the last month of secondary mobile phone providers. I have not looked at that report in detail yet, but the conclusion of the researcher was that the changes that we were able to obtain from the major telco providers had gone down to the secondary mobile phone retailers. That would be an internal document at this stage.

CHAIR: It was industry sector based evaluation.

Dr LANYON: Yes. It seems to me that is the only useful way to really gauge the success of the legislation. I suppose I can point to what I think was the submission of the Communications Law Centre to this inquiry. You saw the director today. She says that from the centre's perspective they think that there has been a noticeable improvement in mobile phone contracts that they have seen. They see quite a few cross their desk, as well.

CHAIR: I have a question in relation to the super complaints document. I got from what you said that you perceive that the complaints structure would be better for the whole of the fair trading portfolio, rather than just stuck on to one of little piece of it. Is that what you are saying?

Dr COUSINS: Yes. It would be better to apply to the whole legislation, rather than just unfair contract terms provisions. As I say, I think it would be a very worthwhile thing to look at. The experience in the United Kingdom has been very positive. Obviously, in that situation you do not want frivolous matters being brought to the regulator. I do not think that has been the case in the United Kingdom. There is clearly a limitation on who can bring super complaints forward and I think that is an important part of it.

CHAIR: I have been concerned during the course of evidence today that perhaps you could end up with a gatekeeper situation, so that individuals who had a slightly out of the ordinary issue, but a very real one, would not have the same recourse to assistance as those who fit into the super complaints.

Dr COUSINS: they would need to convince the organisation permitted to lodge super complaints.

CHAIR: The task force structure, how is it appointed?

Dr LANYON: It is not a task force in the sense of an external arrangement. The way we arrange a task force is that I am the chair of the task force. Three other officers are involved, but in any sectoral analysis we attach to the task force on the subject experts within Consumer Affairs who can provide us with a detailed understanding of the industry, the reason behind particular terms and to get a really in-depth understanding of the underlying issues. That is the way we work. That structure allows us to understand a particular industry and also to achieve consistency of approach across various issues.

CHAIR: Are there any structures in your organisation that allow for open committee consultation? Are there any groups with regular consumer representatives or industry representatives, or do you just met with these people on specific issues?

Dr COUSINS: We have a Community Partnerships Branch, whose role is to liaise continuously with major consumer and community groups. That branch is responsible for the quarterly Working Together Forums that I mentioned, where we bring these groups together.

CHAIR: Do you use any of those in your consultation processes for the review and implementation?

Dr COUSINS: We have not done that to date.

Dr LANYON: On two or three occasions we have contracted with external agencies or research bodies, such as the Communications Law Centre or the Tenants Union, to provide advice to us. We have also formed our own view based on that research. In our negotiations we have had a dialogue with individual companies because where those contracts are individual and not some sort of model of the VACC or REIV we have those individual negotiations because we do not dictate what the terms should say. We point out the ways in which we think a term is unfair and then we believe it is for that business to make its own decisions about whether it modifies or deletes, or what changes it makes. It is for the business to make the adjustments. At that point, when we are about to issue guidelines, we liaise with whatever the relevant body might be that can help us to get out the word to the smaller providers to make our points as clear as possible and as understandable as possible to the industry. The Minister and Dr Cousins say in all the guidelines that we invite comment and further consultation on the guidelines. Once they are issued there is the opportunity for the industry as a whole to come back and say, "We've got this view." Essentially, the terms of a contract are that particular entity's contract. It is not a case of across the whole industry coming to some sort of agreement. That is the role of a code or a different consultation process.

CHAIR: I was trying to get a good handle on your processes.

Dr COUSINS: Those are very important points. We have found that unfair contracts in industries where, you might say, there is high competition, let us say fitness centres, and industries where there is high concentration and may be suspect competition, maybe even mobile phones, we have been very careful when we are dealing with businesses not to in any way promote joint action in terms of arriving at contract terms. That specifically is consistent with a view about promoting competition and as being in the interests of consumers, including competition on contract terms if possible. Although, the reality from the consumer side is that consumers generally focus on price and maybe one or two other key things. The rest of it is not in the frame. I will pick up on a comment on the task force, because this has been a very important part. It has been important for business to see a focus within Consumer Affairs; where to go, if you like, to deal with us on unfair contract terms. The task force and Dr Lanyon provide a focus and that awareness. I think there is a high awareness in the business community around Melbourne of the role that the task force play and who they should deal with within our organisation on these issues.

The Hon. AMANDA FAZIO: You were talking about competition between suppliers regarding contract terms. How does that approach fit in with the approach of having model contracts?

Dr COUSINS: 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. What you are most concerned about is to promote a fair contract overall for consumers, but still maintain efficiency benefits and so on that you achieve from standard contracts.

CHAIR: Did you have anything to tell us that we have not asked you, or that you have not told us about, or words of advice?

Dr COUSINS: Encouragement, of course. 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.

CHAIR: I thank you for your commitment because I recognise that it is an incredible commitment for both of you to travel up here to speak with us. We will make sure that you get a copy of our recommendations. If we have any further queries we would be very grateful if the Committee could contact you.

Dr COUSINS: We are very pleased to be able to assist in any way we can.

(The witnesses withdrew)

(The Committee adjourned at 5.26 p.m.)