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Commissioner Robert Fitzgerald
Presiding Commissioner
Review of Australia's Consumer
Policy Framework
Productivity Commission
PO Box 1428
CANBERRA CITY ACT 2616

Dear Commissioner Fitzgerald,

Review of Australia's Consumer Policy Framework – Draft Report

The Australian Bankers' Association (ABA) is pleased to have the opportunity to respond to the draft report released for public comment on 12 December 2007 and commends the Commission on its thoughtful and thought provoking draft report.

We apologise for the delay in responding to the draft report which is, in part, a reflection of the quality and innovative approach by the Commission to this reference.

We trust that this submission, in which we have responded to each of the draft recommendations after making some introductory comments, is of assistance to the Commission.

Submission Summary

The central issues on which the ABA's members are particularly focused with consumer policy development are:

1. there are significant problems with the existing policy framework;
2. there must be, as far as possible, a nationally uniform approach to consumer policy development, implementation and administration;
3. the need for research that first establishes that there is a substantial market failure that warrants intervention;

4. consideration of alternative non-regulatory options that, if ruled out, have been discarded for sound reasons;
5. the need for open and genuine consultation with industry to assess the nature and extent of a perceived market failure and that the industry's views have been considered and presented by policy makers fully and fairly;
6. assessment of any legislative proposal for its potential efficacy in addressing the established market failure;
7. assessment of the impact of regulation on industry supported by a regulatory impact assessment that includes a rigorous cost-benefit analysis; and
8. the need to focus on policy shortcomings, nationally inconsistent regulation and enforcement before further layers of regulatory policy are added.

The achievement of these outcomes is our key objective, rather than simply the means by which they are achieved.

The ABA is pleased to see that Australia's consumer policy framework has been included on the Council of Australian Government's (COAG's) agenda with priority for COAG's Business Regulation and Competition Working Group.

The ABA is most interested in the draft report proposals concerning the framework for the regulation of consumer credit (and related matters) and the matter of unfair contract terms legislation.

The draft report deals with both the issues of the consumer policy framework and its processes in which consumer policy is developed and implemented and further substantive law reform.

The ABA's earlier August 2007 submission concentrated largely on the consumer policy framework and the difficulties ABA's members had with the policy development and "patchwork" of regulation affecting them.

The Commission's draft recommendations on changes to the consumer policy framework involve at least four discrete but interrelated aspects –

1. responsibility for the development of consumer policy,
2. a hybrid mechanism for retaining involvement of the States and Territories (jurisdictions) in policy development through the Ministerial Council on Consumer Affairs (MCCA),
3. responsibility for the legislative implementation of consumer policy depending on whether the policy is industry specific or generic, and
4. responsibility for the regulatory oversight and administration of consumer legislation, i.e. the regulator or regulators.

The primary conclusion the ABA has reached about these matters is as, a matter of priority, for the Commonwealth to assume sole responsibility for consumer

policy development, implementation, administration and enforcement of consumer policy in respect of financial services including any current consumer policy initiatives under the management of the MCCA. The Australian Securities and Investments Commission (ASIC) should become the sole regulator accordingly.

There should be a two step process going forward. Changes to the consumer policy framework mechanisms should be implemented before any substantive law reform proposals of the Commission are implemented. A further consultative process should be undertaken on any law reform proposals.

The Commonwealth should assume sole responsibility for consumer policy

In advocating that the Commission should recommend that the Commonwealth is to assume sole responsibility for consumer policy in financial services the ABA's primary objective is to ensure there is national uniformity in approach and outcomes.

However, the ABA believes that greater weight should be given in the Commission's final report to options for addressing shortcomings in the existing framework during any interim period before transfer of responsibility to the Commonwealth is completed.

Therefore, the ABA submits that the formal assumption by the Commonwealth of responsibility for these matters should include a process now where the Commonwealth undertakes and finalises all of the MCCA's outstanding consumer policy initiatives that are currently under public consultation or consideration by the MCCA.

The draft report concludes that the current consumer policy framework is flawed and should be addressed. It follows that it would be inconsistent with this conclusion to leave these uncompleted matters within that framework for completion. They should be moved straightaway to management by the Commonwealth. This particularly the case with the regulation of consumer credit and fair trading issues.

For the same reason, the ABA is not supportive of the half-way or hybrid model for the regulation of consumer credit. The processes of consultation and policy outcomes have failed industry as a recent example concerning the MCCA's approach and processes for the proposed regulation of fringe credit providers demonstrates.

Contrary to its caption, the proposed amendments are not targeted or limited to the fringe credit providers but place considerable price and conduct controls on all of the mainstream lenders. This resulted in the relatively unusual step of three key mainstream lending associations (the ABA, the Australian Finance Conference and Abacus Australian Mutuals) making a joint submission in response. When consultation was first undertaken by MCCA in 2003, the associations cautioned that care should be taken in drafting the measures to ensure that the mainstream

remained outside the scope of the fringe proposals. However, it was not until March 2007 when a March 2006 RIS (not for consultation) was placed unheralded on the uniform Consumer Credit Code (UCCC) web-site some expansion in scope became apparent. Moreover, when the August 2007 Consultation Package was placed (again unheralded) on the web-site, the expanded scope had become total. Thus in the four years since the first consultations, the policy basis had radically changed without any consultation.

Another recent example occurred shortly prior to Christmas 2007 when proposals for the national regulation of finance brokers were released by MCCA for public consultation. There are aspects of the draft proposals that are not consistent with the agreed policy settings achieved at a stakeholder roundtable in 2003 that only now are apparent. There are other aspects that industry's united voice in opposition seems unheard.

Whatever are the appetites of the jurisdictions and the Commonwealth for the Commonwealth to assume responsibility for the consumer policy framework, these issues for policy development and consultation are critical. If it is only a question of time before the Commonwealth assumes responsibility for the consumer policy framework these issues remain to be addressed in the interim.

This is why the ABA submits that an holistic approach is needed now to address the present and the future as a single package.

The Commission's proposal for a generic consumer protection law to deal with the lack of consistency across jurisdictions under their fair trading legislation is interesting. However, from the ABA's perspective, the key issue of concern is the use by jurisdictions of their fair trading laws to circumvent the Australian Uniform Credit Laws Agreement 1993. By this agreement the jurisdictions agreed, as far as possible, to ensure that laws regulating the provision of consumer credit should, as far as possible, be uniform both in substance and in their administration.

The ABA's August 2007 submission identified an example in which the ACT Parliament amended the ACT Fair Trading Act to regulate certain credit assessment practices relating to credit cards in the ACT in a nationally inconsistent way. The draft report mentions this incident. It is this fact that exemplifies the disregard for the principle of national uniformity.

More recently, the Victorian Government has proposed enacting its own legislation in relation to the same matter. The proposed legislation is not expected to be the same as the relevant legislation applying in the ACT Therefore there is there risk that further and different compliance obligations and costs will be imposed on nationally operating businesses. However, the ABA notes positively that the Victorian Government withheld this measure from its recently introduced Consumer Credit (Victoria) and Other Acts Amendment Bill 2007. It is unclear if the policy for Victoria to proceed with this unilaterally has been abandoned.

Yet a further example is the proposal by the Victorian Government to amend its Fair Trading Act (i.e. its unfair contract terms legislation) to bring credit contracts regulated under the UCCC within the terms of the Act's unfair contract terms provisions. Effectively, this would be a unilateral and inappropriate intervention by Victoria into the regulation of consumer credit which the jurisdictions have agreed is the province of the UCCC through the observance of the principle of national uniformity. Additionally, it would be another intervention that disturbs the national uniformity of national fair trading legislation.

The ABA concludes that the most efficient and effective approach to consumer policy is for the national Government to assume sole responsibility. This should be expedited as a priority and that current consumer policy initiatives by the MCCA should be taken in hand by the Commonwealth now as part of the transition.

In the case of the UCCC the ABA supports the draft recommendation that the UCCC should remain. The ABA submits that the UCCC should be re-enacted as a stand-alone Commonwealth statute in its current form (subject to any consequential amendments associated with it becoming a Commonwealth law).

The re-enacted UCCC should not be included in Chapter 7 of the Corporations Act 2001 (FSR). The FSR model was designed around investor risk and associated disclosures and conduct whereas with consumer credit the ultimate risk is borne by the credit provider.

Further, banks incurred approximately $200 million in costs in their preparations for compliance in the lead to the commencement of the UCCC in 1996 and approximately a further $50 million annually in ongoing compliance costs (1996 dollar values). The FSR has a significantly different disclosure regime for the financial services it covers that in some way reflects the risk and complexity spectrum of financial investment products and services. A change from the UCCC model to the FSR model for consumer credit would be a very significant change that would impose substantial implementation costs on banks and other credit providers with little further to show for the change. Further, the FSR is undergoing continual refinements and changes. Incorporating consumer credit within this evolving and changeable legislation would exacerbate any problems of integrating the two regimes.

The regulation of finance brokers should proceed in the same way with specific legislation at Commonwealth level dealing with the particular market failures in the finance broking industry. It is important to make the point that finance broking is not the same as providing credit. They are entirely different functions. Finance brokers are intermediaries. Credit providers assume the risk that a credit facility could fail and, in the case of banks and other authorised deposit taking institutions are subject to prudential supervision and standards.

With the Commonwealth having sole responsibility for consumer policy in financial services through Commonwealth legislation, the FSR covering retail investment products and services and a re-enacted UCCC covering consumer credit, it follows

that ASIC should assume the sole responsibility for regulatory oversight and enforcement of these regimes.

ASIC already has sole responsibility as the FSR regulator.

Therefore, in summary the ABA submits:-

1. The Commonwealth should assume sole responsibility of consumer policy, its implementation and administration and enforcement.
2. The proposed hybrid model for consumer policy development with the MCCA should not be pursued.
3. The transfer of responsibility from the MCCA to the Commonwealth should be expedited as a priority.
4. In the interim, any MCCA consumer policy processes that are yet to be implemented should be transferred to the Commonwealth forthwith for further consultation and decision by the Commonwealth.
5. The Consumer Credit Code (UCCC) should be re-enacted in its current form as a stand-alone Commonwealth statute and should not be incorporated with the provisions of the FSR.
6. There should be a separate Commonwealth act for the regulation of finance brokers.
7. ASIC should become the sole consumer credit and finance broker regulator to be nominated under the relevant corresponding Commonwealth acts.
8. Substantive consumer policy law reform should be the subject of further detailed consultation after changes to the consumer policy mechanisms have been made.

Draft Recommendations

Chapter 3 — Objectives for consumer policy

Draft recommendation 3.1

Australian Governments should adopt a common overarching objective for consumer policy:

'to promote the confident and informed participation of consumers in competitive markets in which both consumers and suppliers trade fairly and in good faith'.

To provide more specific guidance to those developing and implementing consumer policy, this overarching objective should be supported by six operational objectives.

The consumer policy framework should efficiently and effectively aim to:

- ***ensure that consumers are sufficiently well-informed to benefit from, and stimulate effective competition;***
- ***ensure that goods and services are safe and fit for the purposes for which they were sold;***
- ***prevent practices that are unfair or contrary to good faith;***
- ***meet the needs of those who, as consumers, are most vulnerable, or at greatest disadvantage;***
- ***provide accessible and timely redress where consumer detriment has occurred; and***
- ***promote proportionate, risk-based enforcement.***

ABA Response:

The ABA supports the notion of a common overarching objective for consumer policy. For reasons of consistency the ABA recommends that "fairly and in good faith" should be replaced with the relevant general obligation on licensees under Chapter 7 of the Corporations Act 2001 (section 912A(a)) so that both consumers and suppliers trade "efficiently, honestly and fairly". This change places greater emphasis on the economic and more dynamic aspects of the consumer market rather than simply the concepts of good faith and fairness.

The proposed specific guidance should include the further element that the consumer policy framework should facilitate efficiency, flexibility and innovation in the consumer market (see section 760A (a) Corporations Act 2001)

Chapter 4 — A new national generic consumer law

Draft Recommendation 4.1

Australian Governments should establish a new national generic consumer law to apply in all jurisdictions enacted through applied ("template") law arrangements. Unless otherwise appropriate, the new law should be based on the consumer protection provisions of the Trade Practices Act, as amended by other recommendations in this report, or as necessary to ensure that the new law covers non-corporate entities and accommodates jurisdictional differences in court and tribunal arrangements.

ABA Response:

The ABA refers to its introductory comments above and questions whether a "template" law arrangement with the Australian Governments is guaranteed any greater measure of success than the experience with the Australian Uniform Credit Laws Agreement 1993.

It is for this reason that the ABA has recommended that the Commonwealth should assume sole responsibility for the consumer policy framework particularly in relation to financial services. The jurisdictions should refer such power as is necessary to enable the Commonwealth to cover the field with a new generic consumer law.

It is acknowledged that it would be unrealistic for the Commonwealth to achieve the same outcome (at least in the short term) in relation to the jurisdictional arrangements for the jurisdictions courts and tribunals.

Draft recommendation 4.2

The new national generic consumer law should apply to all consumer transactions, including financial services. However:

- ***the Australian Securities and Investments Commission should remain the primary regulator for financial services; and***
- ***financial disclosures currently only subject to "due diligence" requirements should be exempted from the misleading or deceptive conduct provisions of the new law.***

ABA Response:

The current division of regulatory responsibility between financial services and other consumer goods and services should be retained. ASIC should have sole responsibility as regulator of financial services including the future regulatory responsibility for consumer credit. The Australian Competition and Consumer Commission (ACCC) should retain responsibility for the remainder. To the extent that this division is unclear it should be clarified.

In this respect the ABA requests that the reference in the draft recommendation to ASIC remaining the "primary" regulator for financial services is clarified. The ABA believes that the potential for any confusion between the roles of each of the ASIC and ACCC should be removed including in the Commission's final report.

Further, this clarification should extend to the jurisdictions' fair trading/consumer protection regulatory agencies in relation to the proposed generic consumer law. Otherwise, there is the risk of further regulator overlap, inconsistency in approach and application resulting in uncertainty for both consumers and industry.

Therefore, "template" or other generic consumer law should be quite clear in assigning regulatory responsibility so that at least in respect of the financial services aspects of the generic consumer law ASIC is the sole regulator. This is currently the case under the ASIC Act. This would leave the jurisdictions without regulator responsibility for financial services in relation to matters other than, presently at least, consumer credit.

Under draft recommendation 5.2 it is not clear whether ASIC would be the sole regulator for consumer credit to the exclusion of the jurisdictions. If the legislative model for consumer credit i.e. the UCCC, remains as it is now with the

Commonwealth assuming responsibility for future consumer credit policy in conjunction with the MCCA (at least 3 members) it is unclear where ASIC's role would be placed in this arrangement. This is discussed later in this submission.

Draft Recommendation 4.3

Responsibility for enforcing the consumer product safety provisions of the new national generic consumer law in all jurisdictions should be transferred to the Australian Government and undertaken by the Australian Competition and Consumer Commission.

ABA Response:

The ABA agrees that this recommendation reflects the appropriate allocation of regulatory responsibility for the ACCC leaving sole regulatory responsibility for financial services under the generic consumer law with ASIC.

Draft Recommendation 4.4

Beyond the enforcement of consumer product safety, Australian Governments should jointly consider the scope and means to overcome any obstacles to the introduction of a single national regulator for the new national generic consumer law, including through:

- ***arrangements to ensure that the Australian Competition and Consumer Commission (ACCC) is sufficiently resourced to assume the enforcement functions currently performed by State and Territory Fair Trading Offices in regard to their generic laws;***
- ***the introduction of a mechanism to enable State and Territory Governments to formally convey their priorities and concerns in the consumer policy area to the ACCC;***
- ***enhancements to the ACCC's reporting requirements to provide assurance that consumer policy issues, including those arising at the local level, receive appropriate attention; and***
- ***legislative changes to ensure that consumers maintain access to State and Territory consumer tribunals and small claims courts.***

ABA Response:

The ABA does not agree with the suggestion for the introduction of a single national regulator (other than ASIC) for the new national generic consumer law if that would mean that the single regulator would become the regulator in respect of financial services under the generic consumer law as well. If this were to be the intended outcome this recommendation would be inconsistent with draft recommendation 4.2.

Therefore, ABA interprets, assumes and accordingly agrees that this draft recommendation 4.4 should result in the assumption by the ACCC of the existing roles of the jurisdictions' fair trading/consumer protection agencies in respect of the proposed generic consumer law leaving ASIC with the sole regulatory responsibility to the exclusion of the jurisdictions for matters arising under the generic consumer law in relation to financial services (including consumer credit).

Draft Recommendation 4.5

Pending any across-the-board adoption of a single national regulator model for the new national generic consumer law, individual States and Territories should have the option to refer their enforcement powers for all of this law to the Australian Competition and Consumer Commission.

ABA Response:

The ABA refers to and repeats it response to draft recommendation 4.4 in opposing this draft recommendation 4.5 to the extent the single regulator model is intended to apply to financial services. It should be made clear in draft recommendation 4.2 that the "primary" responsibility of ASIC under the generic consumer law in respect of financial services means to the exclusion of the jurisdictions.

Chapter 5 — Industry specific consumer regulation

Draft Recommendation 5.1

CoAG should instigate and oversee a review and reform program for industry-specific consumer regulation that would:

- ***identify and repeal unnecessary regulation, with a particular focus on requirements that only apply in one or two jurisdictions;***
- ***drawing on previous reviews and consultations with consumers and businesses, identify other areas of specific consumer regulation that apply in all or most jurisdictions, but where unnecessary divergences in requirements or lack of policy responsiveness impose significant costs on consumers and/or businesses; and***
- ***determine how these costs would be best reduced, with explicit consideration of the case for transferring policy and regulatory enforcement responsibilities to the Australian Government and how this transfer might be best pursued.***

ABA Response:

The ABA agrees with this draft recommendation on the assumption that the COAG process and oversight would ensure that the proposed review and reform program includes consultation and engagement with banks at the inception of the

program. The ABA would welcome the opportunity to participate in the program in conjunction with its members.

Draft Recommendation 5.2

Responsibility for regulating finance brokers and other credit providers should be transferred to the Australian Government, with the regulatory requirements encompassed within the regime for financial services administered by the Australian Securities and Investments Commission (ASIC).

As part of this transfer:

- ***the Uniform Consumer Credit Code and related credit regulation, appropriately modified, should be retained. The Australian and State and Territory Governments should give priority to determining the precise requirements, and how they would be best incorporated within the broader regime, having regard to initiatives recently canvassed by the Ministerial Council on Consumer Affairs and the recent House of Representatives inquiry on home lending;***
- ***a licensing system should be introduced for finance brokers that, amongst other things, requires them to participate in an ASIC-approved alternative dispute resolution (ADR) scheme; and***
- ***a registration system should be introduced for other credit providers, not already covered by the broader licensing arrangements for financial service providers, with a condition of registration being participation in an ASIC-approved ADR scheme.***

ABA Response:

The ABA has dealt at some length with this approach earlier in this submission.

This is a complex draft recommendation that requires clarification. It raises the following questions.

1. Is the proposed transfer for regulating finance brokers and credit providers intended to mean that the UCCC, in its current form, and finance broker regulation would be included within Chapter 7 of the Corporations Act 2001 (FSR)?
2. Alternatively, in relation to the UCCC, would the UCCC be modified by the Governments for inclusion within the FSR?
3. Or, is it proposed that the UCCC would be retained as the jurisdictions' "template" legislation but with altered policy decision arrangements (see draft recommendation 6.2)?

4. Finally, would the UCCC in its current form be enacted as a separate Commonwealth statute?

To underline the importance to the ABA and its members of comments made earlier in this submission those points are repeated here in response to this draft recommendation 5.2 with that intended effect.

The UCCC was legislated in 1994 and commenced on 1 November 1996. Banks invested very substantial sums of money and resources to prepare their compliance programs for commencement. As previously mentioned estimates at the time were $200 million up front and a further $50 million recurring annually across the ABA's membership. Relatively few changes have been made to the UCCC since its inception.

The ABA repeats its opposition to any proposal that would see the UCCC amended and incorporated into the FSR and therefore attracting the FSR advisory, licensing and compliance regime.

Incorporating the UCCC in the FSR would add very substantial costs to compliance with the UCCC whereas the general view is that the UCCC has served consumers and industry well. Banks' experiences in making changes to comply with the FSR suggest that every effort should be made to avoid a repetition in the case of consumer credit regulation. In fact, the process of refining the FSR that commenced very soon after its commencement is still proceeding.

Currently, there are regulatory initiatives under consideration by MCCA in respect of consumer credit and finance brokers that are yet to be finalised. The objective should be for the UCCC to be maintained as a single piece of legislation with future policy development (including regulatory projects in train) on consumer credit to be administered under revised arrangements with Commonwealth as part of the transition process. In the expectation that the Commonwealth will ultimately have the responsibility for consumer policy the transition process should commence now with the Commonwealth managing the further development of consumer policy proposals currently initiated by the MCCA.

The hybrid model proposed by the Commission could be employed in this intervening period but this is not the preferred or, it is submitted the better way to proceed. A single approach to address all existing concerns is needed.

If the sole responsibility for the regulation of consumer credit is assumed by the Commonwealth the ABA repeats and makes some additional comments:

(1) Regulation of consumer credit should be the exclusive domain of the Commonwealth.

(2) There is no demonstrated market failure in the small business and investment credit markets that calls for regulation of these forms of credit.

(3) The regulation of consumer credit by the Commonwealth should be through a single, specific act of Parliament confined to consumer credit

and replicating as far as practicable the policy and regulatory settings of the UCCC.

(4) To the extent that Commonwealth consumer credit regulation alters the existing UCCC model then any substantive and transitional provisions should take account of banks' sunk costs of their UCCC compliance arrangements and minimise changes and costs associated with the transfer to a Commonwealth regime.

(5) Consumer credit regulation should not be regulated through the FSR because the FSR is concerned with risk of loss borne by retail clients while on the other hand credit risk is borne by credit providers.

(6) There should be a separate Commonwealth act for the regulation of finance brokers.

(7) ASIC should be the sole consumer credit and finance broker regulator nominated under the relevant corresponding Commonwealth acts.

Draft recommendation 5.2 also proposes a licensing system for finance brokers but a registration system for credit providers that are not already covered under the FSR licensing system. A condition of both the licensing and registration systems is that finance brokers and credit providers must participate in an ASIC approved alternative dispute resolution scheme (ADR).

The ABA welcomes these proposals because they would bring, relevantly, a more level competitive playing field in respect of finance broker and credit provider activities. However, for banks and other FSR regulated entities that are also credit providers the ABA submits that the assumption by the Commonwealth of regulatory responsibility for consumer credit should not mean that the regulation of consumer credit should be included in the FSR.

The ABA queries why a licensing system on the one hand should apply to finance brokers but that merely a registration system for non-FSR regulated credit providers. Is the difference because the jurisdictions have already submitted a draft finance broker bill for public comment that contemplates a licensing system but that there is not the same level of agreement amongst the jurisdictions in relation to licensing of credit providers? This would seem to be the conclusion to be drawn from the discussion at page 91 of volume 2 of the draft report.

Perhaps, the difference between a licensing regime and a registration system may not be material. This would depend on whether a registration system for non-FSR regulated credit providers contains more than simply an obligation to participate in an ASIC approved ADR arrangement.

Draft Recommendation 5.3

A single consumer protection regime for energy services should be developed and implemented under the auspices of the Ministerial Council on Energy. It should apply to all jurisdictions participating in the national energy market and be enforced by the Australian Energy Regulator.

ABA Response:

The ABA has no comments to make in relation to this draft recommendation.

Draft Recommendation 5.4

The Australian Government should remove any retail price caps applying to telecommunication products and services. Also, following the establishment of national consumer protection arrangements for energy services (see draft recommendation 5.3), participating jurisdictions should remove any price caps still applying in contestable retail energy markets.

Ensuring that disadvantaged consumers continue to have sufficient access to utility services at affordable prices should be pursued through transparent community service obligations, supplier-provided hardship programs, or other targeted mechanisms that are monitored regularly for effectiveness.

ABA Response:

The ABA has no comment to make on this draft recommendation 5.4.

Draft Recommendation 5.5

Australian Governments should take early action to provide better and uniform protection for those having a home built or renovated. Specifically, this should entail:

- ***guaranteed access for consumers to alternative dispute resolution mechanisms;***
- ***provision of greater scope to de-register builders who do not meet appropriate performance standards; and***
- ***a revamping of compulsory builders' warranty insurance to ensure that it is of genuine value to consumers and that consumers understand the product.***

ABA Response:

The ABA supports this draft recommendation 5.5.

Chapter 6 — Supporting institutional changes

Draft Recommendation 6.1

- ***As part of the transfer of greater responsibility for the consumer policy framework to the national level, the Australian Government should:***

- ***ensure that portfolio responsibility for consumer policy is readily visible, effective and influential;***
- ***put in place arrangements to promote effective coordination across other areas of government with responsibilities in the consumer policy area; and***
- ***maintain the current portfolio linkage between consumer and competition policy.***

ABA Response:

The ABA supports the principle behind this draft recommendation 6.1.

Draft Recommendation 6.2

The arrangements within the Ministerial Council on Consumer Affairs for voting on changes to consumer policy should be altered to reflect the greater proposed role for the Australian Government in the development and application of both the generic consumer law and industry-specific consumer regulation (see draft recommendations 4.1, 4.3 and 5.1-5.3). Specifically, future policy changes should only require the agreement of the Australian Government and three other jurisdictions.

ABA Response:

Depending upon the legislative model (see ABA's earlier comments and under draft recommendation 5.2) in relation to the UCCC the draft report acknowledges that the voting model proposed in this draft recommendation 6.2 assumes that members of the MCCA will be able to keep abreast of consumer issues in the consumer credit market. With ASIC as the sole financial services regulator, including possibly the regulator for consumer credit, a mechanism would be necessary to ensure that members of MCCA are sufficiently briefed on issues on which their votes are sought because the resources and expertise in relation to consumer credit will decline in the jurisdictions over time.

Rather, it would seem that the future of consumer policy in the hands of the Commonwealth, if this is to occur, would be better served by the Commonwealth exercising this role exclusively.

Chapter 7 — Unfair contracts

Draft Recommendation 7.1

A new provision should be incorporated in the new national generic consumer law that voids unfair terms in standard form contracts, where:

- ***the term is established as 'unfair': that is, it is contrary to the requirements of good faith and causes a significant imbalance in the parties' rights and obligations arising under the contract;***

- ***there is evidence of material detriment to consumers;***
- ***it does not relate to the upfront price of the good or service;***
- ***all of the circumstances of the contract have been considered; and***
- ***there is an overall public benefit from remedial action.***

Where these criteria are met, the unfair term would be voided only for the contracts of those consumers subject to detriment, with suppliers also potentially liable to damages for that detriment.

There should also be a capacity for an industry or business to secure regulatory approval for 'safe harbour' contract terms that would be immune from any action under this provision.

The operation and effects of the new provision should be reviewed within five years of its introduction.

ABA Response:

The ABA acknowledges the careful thought given by the Commission to its draft recommendation for unfair contract terms legislation.

However, as already stated, the ABA believes that substantive law reform, particularly in relation to unfair contracts legislation, should be considered in a next step after the consumer policy framework mechanisms and responsibility for policy development have been settled and implemented.

In the interim, the ABA makes the following comments in relation to the draft recommendation.

(1) The discussion in Volume 2 of the draft report (pages 116 to 120) provides a relatively weak case of market failure in Australia for legislative intervention on contractual terms that are perceived as unfair.

(2) The incidence of contract terms perceived as unfair seems to have occurred more in industries unrelated to financial services (consumer credit is mentioned but there is no analysis of whether the concern arose in the mainstream or the fringe or predatory sectors of the consumer credit market).

(3) The content of contracts between banks and other financial services providers and consumers is heavily regulated. Legislation includes for example the FSR, the UCCC, the ASIC Act and the Privacy Act. For ADI's and other prudentially supervised entities there are prudential considerations required by the Australian Prudential Regulation Authority that are factored into their contracts with consumers.

(4) Banks have led the way for almost 20 years in providing ADR services for their customers. The Banking and Financial Services Ombudsman Scheme (BFSO) is able to determine disputes, where a customer has incurred a financial loss, according to law, applicable codes of practice, good banking practice and fairness.

(5) In 2003 the ABA amended its Code of Banking Practice (Code) to make specific provision for fairness in dealing with customers. Clause 2.2 of the Code provides that in dealing with its customers a bank should act "fairly and reasonably… in a consistent and ethical manner" having regard to the conduct of the parties and their contract.

(6) It is noted in the Commission's draft report that self regulation is an important aspect of the consumer policy framework. The Code is a key aspect of banks' self regulation. Further, the Code provides standards of good banking practice upon which the BFSO may rely in dealing with a customer's dispute.

(7) Fees and charges are required to be disclosed by banks and other financial services providers under the FSR, the Code and the UCCC before or at the time that a consumer enters the contract.

(8) Standard form contracts are a critical compliance mechanism for banks and other financial services providers to ensure that they are compliant with the plethora of laws relating to the content and operation of their consumer contracts.

(9) In relation to consumer credit contracts, ultimately the risk under the contract lies with the credit provider. Therefore it should be expected that contracts relating to the enforcement and recovery of loans should be robust but always compliant with the terms of relevant legislation (for example the UCCC's default provisions).

Accordingly, the ABA believes that a generic law containing unfair contract terms provisions should recognise the existing legislative and self regulatory framework affecting banks and other financial services providers and exclude financial services from its coverage.

Chapter 8 — Defective products

Draft Recommendation 8.1

Australia's consumer regulators should:

- ***raise awareness among consumers and suppliers about the statutory rights and responsibilities conferred by the implied warranties and conditions in the generic consumer law; and***
- ***where appropriate, take specific enforcement action against misleading marketing and sale of extended warranties.***

ABA Response:

The ABA has no comments to make in relation to this draft recommendation.

Draft Recommendation 8.2

Consistent with the recommendations in the Productivity Commission's recent consumer product safety report, Australian Governments should, as soon as practicable:

- ***commission a study to assess product-related injuries;***
- ***develop a hazard identification system for consumer product incidents;***
- ***introduce mandatory reporting requirements for product recalls; and***
- ***require suppliers to report products associated with serious injury or death or products which have been the subject of a successful product liability claim or multiple out-of-court settlements.***

ABA Response:

The ABA has no comments to make in relation to this draft recommendation.

Draft Recommendation 8.3

Drawing on the mechanisms *proposed in draft recommendation 8.2, Australian Governments should monitor any possible impact of the recent civil liability reforms on the incentives to supply safe products.*

ABA Response:

The ABA has no comments to make in relation to this draft recommendation.

Chapter 9 — Access to remedies

Draft Recommendation 9.1

To facilitate more effective referral of complaints to the right body and sharing of information on complaints:

- ***all consumer regulators should participate in the shared national database of serious complaints and cases, AUZSHARE; and***
- ***the Australian Competition and Consumer Commission should provide an enhanced national web-based information tool for guiding consumers to the appropriate dispute resolution body, as well as providing other consumer information. It should be subject to consumer testing to ensure that it is easy to use and has the appropriate content.***

ABA Response:

The ABA supports the AUZSHARE proposal on the understanding that the shared national database is used only for the sharing of fraudulent, scamming and other unlawful conduct.

The second proposal involving the ACCC developing a guidance tool for consumers to find the appropriate dispute resolution body is a positive initiative but should take account of:

1. the existing free call entry point facility for consumers who have a dispute with a financial services organisation through which the consumer's dispute is referred to the relevant ADR scheme;

2. the separate role of the ACCC and the ASIC's roles as the financial services regulator, the risk of consumer confusion and the need for there to be no overlap of function i.e. that guidance tool should not cover ADR schemes operating in the financial services sector;

3. the current, well advanced project to merge three key financial sector ADR schemes into a single scheme with a single entry point for consumers to have their disputes addressed.

4. the Federal Treasurer's recent announcement that ASIC would establish a consumer hotline facility for complaints about banking services that will ensure there is a single point of entry for complaints. Consumers will either get the right advice from ASIC or will be directed to the agency that can best provide assistance; for example, the ACCC on competition issues, the Banking and Financial Services Ombudsman or State regulator.

Draft Recommendation 9.2

Australian Governments should improve the effectiveness of alternative dispute resolution (ADR) arrangements for consumers by:

- ***extending the functions of the Telecommunications Industry Ombudsman to all telecommunications premium content services, pay TV and other associated services and hardware;***
- ***establishing a national energy and water ombudsman that incorporates relevant existing State and Territory ADR bodies;***
- ***encouraging further integration of financial ADR services, which would involve:***
  - ***consolidating the existing financial ADR services into a single umbrella dispute resolution scheme for consumers, but with the option for those services of retaining their independence as arms within it;***

- ***adopting a common monetary limit on consumer disputes they can consider;***
- ***requiring that any new industry ADR services, including for credit, should be part of this scheme; and***

- ***ensuring there is an effective and properly resourced ADR mechanism to deal consistently with all consumer complaints not covered by industry-based ombudsmen.***

ABA Response:

The ABA wishes to comment on the further integration of financial sector ADR services.

The Commission would be aware of the project, which is well advanced, for the merger of Banking & Financial Services Ombudsman (BFSO), Financial Industry Complaints Service (FICS) and the Insurance Ombudsman Service (IOS). The expectation is that the merger will be implemented by 1 July 2008. The merged schemes will provide a single entry point for consumers having disputes with any of the financial institutions that are members of the merged scheme. The scheme itself will refer the dispute to the appropriate dispute resolution mechanism within the merged scheme.

ABA members are fully supportive of the merger proposal.

The merger is a sizeable project and the experience gained will serve further integration of other financial services ADR schemes as and when those opportunities present themselves.

The ABA does not consider it feasible for all ADR schemes within the financial services sector to be merged at once. The current BFSO, FICS and IOS merger in the first instance will capture a very significant part of the ADR services operating in the financial services sector.

The BFSO, FICS and IOS merger is a good example of the market responding to consumer interests and to those of industry as well. Australian Governments should stand aside and allow these measures to be taken in accordance with market needs and to provide support or assistance when requested.

The Commission's layered system of redress described in its draft report draws a clear distinction between the lower cost of operating ADR schemes compared with tribunals and Courts. The processes of resolving disputes in ADR schemes differ significantly from the processes adopted by the more formal tribunals and Courts. For example, Courts and some tribunals are confined to an application of the law in determining a dispute. The BFSO may take account of the law and also applicable codes of conduct, good banking practice and fairness in resolving a dispute. Therefore, it should be recognised, as a principle, that an ADR scheme is

not a Court. For example, in the case of the BFSO a decision by the BFSO is binding on a bank only if the complainant agrees with the decision of the BFSO. Otherwise, the complainant is free to pursue their remedies in any other forum they wish.

Against this backdrop the ABA does not support increasing monetary limits across all ADR schemes in the financial services sector. ADR schemes are not well suited for resolving high quantum disputes that require the evidentiary and determinative powers of the courts. Their flexible and negotiation-based processes are, however, well suited to address complaints and disputes involving modest financial claims. This consideration will be particularly relevant in the merged BFSO, FICS and IOS scheme.

Another consideration is that various financial services products and services are inherently different in relation to the financial risk/objective that they have been purchased to cover. Products and services differ significantly in terms of average account balance, sum insured or funds under advice. This means that it is not appropriate to apply an artificial "one size fits all" upper limit across all ADR schemes.

Further, FICS' thresholds have recently been reviewed and increased (except for managed investment schemes). It would be somewhat artificial to realign FICS' thresholds simply to establish a single threshold for the merged ADR schemes. It is also important to note that while a financial jurisdictional threshold applies for ADR schemes, members are free to allow disputes involving higher amounts to be resolved by the scheme if they wish. This flexibility allows the schemes to address those higher monetary claims for which their processes are well suited.

The ABA is supportive of changes that will reduce complexity of procedures in tribunals and small claims courts. The proposal that judgements could be based on written submissions is helpful. However, the ABA believes that any relevant written submissions should be sworn.

Conferring power on regulators to bring representative actions on behalf of consumers requires careful consideration.

Under the BFSO Terms of Reference (Clause 9) the Ombudsman must report all systemic issues and serious misconduct to ASIC. A systemic issue is defined as one that will have a material effect for individuals or small businesses beyond the parties to the dispute. Serious misconduct is conduct which may be fraudulent, grossly negligent or involve wilful breaches of applicable laws.

Under ASIC's Regulatory Guide 139.62 an ASIC approved ADR scheme is required to identify systemic issues in cases of serious misconduct and refer these matters to the relevant scheme member for response and action and to report the relevant conduct to ASIC.

Further, under the FSR, licensees are obliged to notify ASIC if the licensee breaches, or is likely to breach, certain obligations under the FSR (see Section 912D).

Draft Recommendation 9.3

Australian Governments should improve small claims court and tribunal processes by:

- ***introducing greater consistency in key aspects of those processes across jurisdictions, including:***
    - ***common higher ceilings for claims;***
    - ***uniform subsidy rates for consumers seeking redress for small claims;***
    - ***equal availability of fee waivers for disadvantaged consumers; and***
- ***allowing small claims courts and tribunals to make judgments about civil disputes based on written submissions, unless either of the disputing parties requests otherwise.***

ABA Response:

The ABA refers to its comments made in respect of draft recommendation 9.2.

Draft Recommendation 9.4

In the light of the Victorian Law Reform Commission's current inquiry and recent decisions by the Federal Court of Australia regarding third-party financing of private class actions, the Australian Government should assess whether further clarification or amendment of the legislation to facilitate appropriate private class actions is required, taking into account any risks of excessive litigation or other unintended effects.

ABA Response:

The ABA supports the proposed assessment by the Australian Government and submits that the views of the private sector, in particular the financial services sector, are obtained and taken into account.

Draft Recommendation 9.5

A provision should be incorporated in the new national generic consumer law that allows consumer regulators to take representative actions on behalf of consumers, whether or not they are parties to the proceedings.

ABA Response:

The ABA refers to its comments in relation to draft recommendation 9.2.

Draft Recommendation 9.6

Australian Governments should provide enhanced support for individual consumer advocacy through increased resourcing of legal aid and financial counselling services, especially for vulnerable and disadvantaged consumers.

ABA Response:

The ABA supports increased funding for the resourcing of legal aid and financial counselling services in relation to their service delivery. In particular, financial counselling services provide an important facility for consumers in financial difficulty and provide an effective line of communication between a bank and the customer concerned. Further, financial counsellors in their day-to-day activities play an important role in helping to raise the level of financial literacy in the community, which is deserving of support.

The ABA does not support funding as proposed in draft recommendation 11.3 for the reasons stated in the ABA's response to that draft recommendation.

Chapter 10 — Enforcement

Draft Recommendation 10.1

The new national generic consumer law should give consumer regulators the capacity to:

- ***seek the imposition of civil pecuniary penalties, including the recovery of profits from illegal conduct, for all relevant provisions;***
- ***apply to a court to ban an individual from engaging in specific activities after the court has found that a breach of consumer law has occurred;***
- ***issue notices to traders requiring them to substantiate the basis on which claims or representations are made; and***
- ***issue infringement notices for minor contraventions of the law.***

ABA Response:

Subject to the resolution of the issue of whether ASIC or the regulators of the jurisdictions should be responsible for the administration of the regulation of consumer credit, the financial services sector is comprehensively covered by ASIC's regulatory jurisdiction.

ASIC has power to seek the imposition of civil penalties.

The ABA would not support additional powers being conferred upon other regulators seeking the imposition of civil penalties on financial institutions that are subject to ASIC's jurisdiction. ASIC should be the sole regulator in relation to financial services. This will avoid consumer and industry confusion and remove the potential for inconsistent and possible conflicting decisions of other regulators seeking to intervene in the financial services sector.

Draft Recommendation 10.2

The Australian Government should commission a review by an appropriate legal authority of the merits of giving consumer regulators the power to gather evidence after an initial application for injunctive relief has been granted, but prior to substantive proceedings commencing.

ABA Response:

As the prime financial services regulator ASIC has information gathering powers under the Corporations Act and the ASIC Act. The ACCC has similar powers under its own statute.

The ABA submits that should the Australian Government commission the proposed review the views of the private sector, and in particular the financial services sector, are obtained and taken into account.

Draft Recommendation 10.3

Australia's consumer regulators should be required to report on the nature of specific enforcement problems, their consequences, steps taken to address them and the impact of such initiatives. Such commentary should be informed by surveys of targeted stakeholder groups.

ABA Response:

The ABA supports this recommendation.

Chapter 11 — Empowering consumers

Draft Recommendation 11.1

When imposing information disclosure requirements on firms, Australian Governments should require that:

- ***information is comprehensible, with the content, clarity and form of disclosure consumer tested, and amended as required, so that it facilitates good consumer decision-making; and***
- ***complex information is layered, with businesses required to initially provide only agreed key information necessary for consumers to plan***

or make a purchase, with other more detailed information available by right on request or otherwise referenced.

Consistent with these principles, reform of mandatory disclosure requirements in financial services should be progressed as a matter of urgency.

ABA Response:

The ABA supports in principle this approach to future mandatory disclosure requirements imposed on financial institutions.

The Commission should also take account of the extensive work that is being undertaken by the financial services sector on improving consumer financial literacy in making this recommendation.

In 2004 after the commencement of the FSR financial institutions had significant concerns with its mandatory disclosure requirements including the utility of these disclosures to consumers, legal uncertainty surrounding the disclosures and the significant size and complexity of disclosure documents.

Since then the Australian Government has undertaken a major FSR refinement programme which to a large extent has relieved some of the more onerous and questionable mandatory disclosure requirements.

The ABA is supportive of ongoing reform of mandatory disclosure requirements in the financial services sector in relation to certain outstanding matters and welcomes the recent Government announcement to advance further reforms.

However, the ABA wishes to make the point that in going ahead with these reforms particular account should be taken of the compliance costs incurred by financial services institutions to date and any additional compliance costs that may be incurred in order to meet any reformed mandatory disclosure requirements.

Any amendments to mandatory disclosure provisions should be made through existing legislation, for example the FSR, and should be undertaken ahead of the drafting of any new national generic consumer policy legislation.

In supporting, in principle, further streamlining of product disclosure for the financial services sector we note the recent announcement by the Federal Government on 5 February of the establishment of the Financial Services Working Group which is pursuing this task. Therefore, the recommendations of the Commission in respect of financial services should be referred to the Working Group for its consideration.

A clear case for reform of one mandatory disclosure requirement concerns the mandatory comparison rate (MCR) that is contained in the UCCC. The

Commission has acknowledged that this disclosure is not serving its intended purpose and is apt to confuse consumers. This means it continues to be an unnecessary compliance cost imposed upon credit providers. The ABA recommends its abolition as part of the reform of mandatory disclosures contemplated by draft recommendation 11.1.

Draft Recommendation 11.2

Australian Governments should commission a cross-jurisdictional evaluation of the effectiveness of a sample of consumer information and education measures, and the prospects for improving them. The evaluation should be targeted at high cost measures and/or those that deal with high risk issues for consumers.

ABA Response:

The ABA supports this draft recommendation.

Draft Recommendation 11.3

The Australian Government should provide modest additional funding to support:

- ***specified research on consumer policy issues, distributed on a contestable basis;***
- ***the basic operating costs of a representative national peak consumer body; and***
- ***the networking and policy functions of consumer groups.***

Such additional funding should be subject to appropriate guidelines and governance arrangements to help ensure that it is used effectively.

ABA Response:

In response to draft recommendation 9.6 the ABA supports increased funding for the direct service provision to consumers by financial counselling case worker services and legal aid. This funding goes to the obvious areas of need at grass roots level within the community.

In relation to the question of public funding of consumer advocacy bodies, the Commission observes that input on the needs of consumers is already an integral part of economic policymaking. Further the Commission states that is unclear to what extent, if any, consumer policy development has been hampered by insufficient consumer input. This invites further consideration of this question.

It can be observed that national consumer concerns and access to advocacy are well supported already through consumer organisations (e.g. Choice), consumer

affairs jurisdictions at State and Federal level, ombudsmen, Code compliance monitoring committees, and consumer consultative committees.

Research on consumer policy issues should be conducted by relevant government regulatory or other agencies such as the Commission. In the case of the financial services sector this should be performed by ASIC.

Concluding comment

We trust these comments on the draft report are helpful in the Commission's formulation of its final report.

Should you wish to discuss any aspect of this response we would be happy to oblige by contacting the writer.

Yours sincerely

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Ian Gilbert