Australian Credit Forum submission on new Australian Consumer Law proposal

1. The Australian Credit Forum (ACF)

a. The Australian Credit Forum (ACF), formerly known as the Australian Credit Managers Forum, is an organisation that was founded 30 years ago, or thereabouts. Its purpose is to monitor developments in law, credit practice, business practice to the extent that credit related matters are affected and make submissions on those developments. The Forum's membership is predominantly senior credit managers and people from associated professional areas, such as accountants, lawyers, insolvency practitioners, mercantile agents, credit training and reporting agencies in both consumer and commercial areas, in Australia and New Zealand.

b. The ACF has been involved regularly in the development of the development and reform process for insolvency. As a national body for senior professionals in credit management and related disciplines we have an active agenda in ensuring that the legislative and regulatory framework for insolvency continues to improve so that it is equitable, efficient and effective.

c. As a body representative of senior credit management professionals, persons having day-to-day exposure to the workings of insolvency law, the ACF expresses its view that consultation of the ACF by the Committee would have facilitated development of the proposals. Information about the ACF can be viewed on its website www.Australiancreditforum.com.au .

2. The ACF Approach to this Submission

a. The ACF principally responds to that part of *An Australian Consumer Law*, Chapter 6, page 35 which states that views are sought on whether the types of terms set out should be banned in the initial text of the Australian Consumer Law.

b. However, there are other concerns which the ACF has which are now briefly set out.The starting point is the concept of an unfair contract term (see *An Australian Consumer Law*, Chapter 6, page 30):

> **A term is 'unfair' when it causes a significant imbalance in the parties' rights and obligations arising under the contract, and it is not reasonably necessary to protect the legitimate interests of the supplier.**

c. The model then provides (see *An Australian Consumer Law*, Chapter 6, page 32) that remedies will only be available where the claimant (an individual or a class) shows detriment to the consumer (individually or as a class), or a substantial

likelihood of detriment, not limited to financial detriment. In the Forum's view it is difficult to see how a supplier would ever be able to take themselves outside the reach of this new law. Proving a negative is notoriously difficult and the concept of "detriment to the consumer" is very much going to be a matter of judicial interpretation. This test will introduce considerable uncertainty into the law and inevitably lead to disputes and litigation as the content of phrases such as "detriment to the consumer", "significant imbalance in the parties' rights and obligations" and "reasonably necessary to protect the legitimate interests of the supplier" will be entirely different, depending on whether a person is a supplier or a consumer. They all involve value judgments which it is not self-evident that judges are the best-equipped to make. It is difficult to see why COAG wishes to introduce a law which promotes uncertainty with the concomitant increase in disputation, litigation and cost to the wider Australian community.

d. The other part of the model is that the provision will relate only to standard form, non-negotiated contracts. However, should a supplier allege that the contract at issue is not a standard form contract, then the onus will be on a supplier to prove that it is not. *An Australian Consumer Law*, chapter 6, page 32 goes on to state:

> Reversing the onus of proof in relation to whether the contract is in a standard form or not, will ensure that the potential for abuse of this provision is minimised. This would also allow a court examining a contract to consider whether the contract is, in effect, in a standard form, regardless of the use of devices like an acknowledgment by the consumer that the contract has been negotiated, or the inclusion of trivial 'negotiated' terms.

e. The previous criticism again applies. Notwithstanding the recognition that standard form contracts can provide significant cost savings (see *An Australian Consumer Law*, Chapter 6, page 30) which, it is submitted arise from the certainty of the settled nature of the contract terms, COAG is promoting a law which will require a court, rather than the parties, to work out the legal framework which regulates their transactions.

Should some types of terms be banned?

3. *An Australian Consumer Law*, Chapter 6, page 35 seeks views on whether the types of terms set out below should be banned in the initial text of the Australian Consumer Law.

a. Terms retaining title for suppliers in goods that cannot be removed from consumers' premises without damage; terms allowing suppliers to repossess such goods.

b. Terms denying the existence or validity of pre- or post-contractual representations made to consumers; 'entire agreement' terms; terms deeming something a fact.

c. Terms under which consumers acknowledge that they have read or understood the contract.

d. Conclusive evidence terms.

e. Terms that are void under laws that imply certain terms into contracts; terms that otherwise limit suppliers' liability for their negligence.

f. Flat/fixed early termination fees and those requiring the paying out of the contract.

g. Terms requiring consumers to pay more than suppliers' reasonable enforcement costs reasonably incurred (what I call `indemnity costs provisions').

h. Terms requiring consumers to pay deposits or pre-payments that do not leave a substantial amount of the price to be paid on delivery/installation/performance.

i. Terms allowing suppliers to retain, debit or set off disputed amounts.

j. Terms mandating arbitration of disputes or otherwise inhibiting access to courts or tribunals.

Retention of title clauses

4. *An Australian Consumer Law*, Chapter 6, page 35 talks about " … a term that enables suppliers to enter a consumer's home and remove fixtures (for example, carpets or other types of fixed floor coverings, swimming pools or bench-top stoves)". This is an example of a lack of precision, if not downright error, in the paper's expression of legal principles. In the ACF's view, it is not the only error of legal principle and in its view such errors necessarily vitiate the validity of the any proposal having such a flaw in its foundation.

5. In reality, the current Australian legal situation is that no retention of title clause can legally extend to what the law treats as fixtures. That is because the title which is retained under retention of title is the title to goods. Once goods become fixtures they are no longer goods and title has passed. The ACF considers it would be wrong to proscribe retention of title provisions on the basis of flawed legal analysis. The ACF affirms the commercial usefulness of retention of title provisions and points out that they will be regulated in the new *PPSA* regime. That ought to be sufficient regulation.

Terms denying the existence or validity of pre- or post-contractual representations made to consumers; 'entire agreement' terms; terms deeming something a fact

6. *An Australian Consumer Law*, Chapter 6, page 35 states:

> Terms that:
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> - deny the existence or effect of oral representations;
> - require the consumer to agree, for instance, that no representations have been made that are not in the written contract;
> - specify that the only valid representations or waivers of the supplier's rights are those in writing signed by a senior officer of the supplier; or
> - state that the written document contains the entire agreement of the parties,
>
> can be said to have the object or effect of deterring or preventing consumers from pursuing claims based on oral or implied representations, agreements or terms.

7. The ACF strongly disagrees with any proposal to proscribe such terms. Firstly, it is not considered unfair for a contract to specify that representations, waivers and amendments must be in writing and signed by a senior officer of the supplier etc, if there is no implication that these are the *only* valid representations/waivers/amendments, and if the term does not otherwise seek to deny the validity of oral or implied representations/waivers/amendments/terms.

8. Secondly, it has been the case under the common law system for centuries that parties will orally negotiate the terms of their agreement with the intention that it be brought into writing and that the written agreement is the only agreement that is binding. Part of the benefit of that practice is the promotion of certainty in commercial dealings. It is also the case that not every statement made during the course of a negotiation is promissory or intended to be a term of the agreement. The existing framework of misleading and deceptive conduct adequately deals with that type of aberrant behaviour, that is, misleading and deceptive conduct.

9. The provision that the only valid representations or waivers of a supplier's rights are those in writing by a senior officer of the supplier is required for the protection of the supplier's legitimate interests. Having established appropriate policies and procedures, a

supplier's interests are that those procedures and policies be observed, not waived or varied by an employee not having authority to do so. It is inappropriate and dangerous to the supplier for the delivery driver to be held to have renegotiated prices, credit terms or whether the correct goods have been delivered.

10. It is entirely appropriate that consumers should be deterred from pursuing claims based on conversations with supplier's employees who do not have the appropriate authority to bind the supplier.

Terms under which consumers acknowledge that they have read or understood the contract

11. *An Australian Consumer Law*, Chapter 6, page 36 states:

> Whether a person has read a contract is an objective matter of fact and it is not unfair to require consumers who have, in fact, read the contract they are about to sign, to acknowledge that fact. There is often no legal advantage to be gained by including such a requirement as the law has always regarded the question of whether a person has read the contract that they have signed as immaterial to the question whether they are bound by it.[1] However, whether consumers have understood the contract (that is, its meaning and effect) is not an objective matter and cannot be resolved simply by requiring consumers to acknowledge that they have understood the contract, even if they have also said that they do understand the contract. It is impossible to know, without searching inquiry, whether their understanding is correct. Further, where consumers have not, in fact, properly understood their contracts, then these terms seek to deny that fact.
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> For consumers claiming that unusual terms were not brought to their attention, nor their nature and effect explained to them before they signed the contract, these terms have the object or effect of deterring or preventing them from pursuing such claims. Such terms can constitute an unfair limitation on a consumer's right to sue the supplier and on the evidence a consumer can lead in proceedings on the contract.

12. In the ACF's view there is no reason to argue with the statements set out in the first two sentences of these reasons. However, in the ACF's view the remainder of the reasoning makes frightening reading as it completely abrogates any responsibility of a consumer for his or her own actions. It is the consumer's responsibility to read the provisions. If they choose not to read them, why should they be excused from compliance? If they do not understand the provisions, then they should seek advice. It would be more appropriate for that advice to be sought from consumer advice agencies than the seller,

[1] *L'Estrange v Graucob* [1934] 2 KB 394; *Toll (FCGT)N Pty Ltd v Alphapharm Pty Ltd* [2004] 219 CLR 165.

given the conflict of interest the seller inevitably has. It should not be the obligation of a seller to explain contract terms to a buyer beyond the essentials of identity of the item to be sold, its price, the time for payment and the date of delivery.

13. It is the experience of the ACF members that it is common practice to place a notice prominently on contract terms to draw consumer's attention to contractual clauses such as real estate charging clauses, although there is presently no legal obligation so to do.

14. The ACF also points out the current practice of plain legal English drafting of agreements and the availability of translation services for those for whom English is not their first language. The idea that the provisions of a contract can be set at nought because at the end of a "searching enquiry" (presumably by a judicial officer) a tribunal determines that the consumer did not understand a complex commercial agreement completely undermines the concept of certainty which is the foundation of Australian business transactions. Decades of experience in suing debtors leads the members of this ACF subcommittee to conclude that a debtor's understanding of a contract when entered into and profits are expected is quite different from the understanding subsequently “recalled” when the venture has either not turned out as hoped or financial circumstances have worsened.

15. It is not unfair to prevent consumers bringing evidence about what they thought the contract meant if that is to be the new test, as that substitutes their understanding of the contract for that of the tribunal in objectively determining the meaning of the contract. The contract is no longer bilateral in obligation, but unilateral and determined by the party with the least understanding. One only needs to state that proposition to appreciate its absurdity.

Conclusive evidence terms

16. *An Australian Consumer Law*, Chapter 6, page 37 states:

> It is not unfair for suppliers to stipulate that certain things they generate (for example, statements of amounts owing) are prima facie evidence of their contents, particularly where such matters are primarily in the knowledge of the supplier. However, it may be considered that it can never be fair to stipulate that such things are conclusive evidence of their contents, because such terms have the object or effect of deterring or preventing consumers from pursuing claims based on conflicting evidence, and, axiomatically, have the object (if not, in practice, the effect) of limiting the evidence that consumers can lead in proceedings on the contract.

17. In modern Australian law the foundation of conclusive evidence clauses is often said[2] to be the decision of the High Court of Australia in *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643. Of that case, Young CJ in Eq (as he then was) said in *Wily v Terra Cresta Business Solutions Pty Ltd* [2006] NSWSC 1042, at par. 64:

> 64 A clause such as cl 24.1 is often referred to as a Dobbs' clause because of the decision of the High Court of Australia in *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643. There the High Court said that it was competent for parties to agree to have their dispute as to the quantum of their liability decided by arbitration and it was also competent for them to agree that the amount might be fixed by the certificate of one of them, or a third party, and in some cases not to be able to be challenged. It is a very useful clause to shorten commercial litigation. However, the abuse of the Dobbs' clause is something that courts have had to guard against.

18. Young JA went on in that case to make some useful general observations about Dobbs clauses which I set out below:

> 65 There were a number of cases before me in the early 1990s when I made it quite clear that if a party was to rely on a Dobbs' clause it must comply strictly with the provisions. The latest of these cases was *Shomat Pty Ltd v Rubinstein* (1995) 124 FLR 284.
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> 66 In *State Bank of New South Wales Ltd v Chia* (2000) 50 NSWLR 587 at 609 Einstein J agreed with that approach, but he indicated that whilst one must strictly construe the relevant charge and the certificate, one cannot go overboard with it, and one must interpret the clause and the certificate in a fashion which does not frustrate its purpose[3].

19. An extensive consideration of Dobbs clauses is to be found in the judgment of Young J in *Shomat Pty Ltd v Rubinstein* (1995) 124 FLR 284, where his Honour affirmed his previous opinion (see *National Australia Bank Pty Ltd v Sampson*, unreported, 9 September 1991, Supreme Court of NSW) that such clauses should be strictly construed. Young J held that the certificate issued under a Dobbs clause must ex facie comply with the requirements of the clause. His Honour specified three ways relevant to that case in which a Dobbs statement did not comply with the clause under

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2 See Einstein J in *State Bank of New South Wales Ltd v Chia* (2000) [2000] NSWSC 552 (29 June 2000) at par. 243; Young CJ in Eq in *Wily v Terra Cresta Business Solutions Pty Ltd* [2006] NSWSC 1042, at par. 64.

3 The clause in *Chia* was as follows:

> *(Statements) any written statement signed by any authorised officer or employee of the Mortgagee or produced by any computer operated by the Mortgagee and bearing the Mortgagee's name for the amount owing or due in respect of the moneys hereby secured and interest thereon and produced at any time, shall, in the absence of any manifest error, be conclusive evidence that such amount is due and owing and conclusive evidence of any other matter contained in such statement and the Mortgagee shall not be required to produce any of its books of account or any other records or any copies thereof to the Mortgagor or any other person unless the Mortgagee be ordered so to do by a Court or Tribunal.'*

consideration. First, a statement issued pursuant to a Dobbs clause will fail if it requires a `certificate' to be produced and what is produced is, in fact, a `statement'. Second, it will fail if the position of the person who signs the certificate is not identified as within the class of persons authorised by the clause to do so. Third, the certificate must state the date on which the money is said to be due and owing and the amount secured by any mortgage. Furthermore, Young J was of the view that it was a pre-condition for the proper operation of a Dobbs clause that such clauses be prepared by a properly qualified official with due care and proper investigation[4].

20. Conclusive evidence or Dobbs clauses take effect as conclusive evidence of the matters stated in them in the absence of manifest error, but they cannot be conclusive against a claim of equitable set off which operates to absolve the appellant in whole or part from liability[5].

21. The Courts have, in appropriate cases, set aside under the *Contracts Review Act* 1980 (NSW) conclusive evidence clauses[6]. Conclusive evidence clauses can be used for facilitating proof of the following facts without the need to produce all the source documents:

    a. The amount of a debt.

    b. That goods itemised on identified invoices were ordered by the debtor.

    c. That goods itemised on identified invoices were delivered.

    Where those matters are not seriously in dispute there is a community interest in not wasting expensive court time proving matters in an adversarial way.

22. The rationale for proscribing conclusive evidence clauses (" *... because such terms have the object or effect of deterring or preventing consumers from pursuing claims based on*

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4 *State Bank of New South Wales Ltd v Chia* (2000) 50 NSWLR 587 at par. 245, per Einstein J

5 *Long Leys Co Pty Ltd v Silkdale Pty Ltd* (1992) NSW ConvR 59, 476 at 5, 482 Sheller JA, with whom Priestley and Meagher JJA agreed; *State Bank of New South Wales Ltd v Chia* (2000) 50 NSWLR 587 at par. 261, per Einstein J.

6 *Cook v Bank of New South Wales* (1982) 2 BPR 9580; *National Australia Bank v Sampson (No. 2)* Unreported Young J 9 September 1999; and *Shomat v Rubenstein* (1995) 124 FLR 284, Young J 4 December 1995

conflicting evidence, and, axiomatically, have the object (if not, in practice, the effect) of limiting the evidence that consumers can lead in proceedings on the contract. ") seems to be based on a misunderstanding of the nature and purpose of such clauses. The objective of a conclusive evidence clause is to confine consumers to only pursuing claims where there is a genuine dispute, a real conflict. That is, a consumer cannot simply put the supplier to proof of every transaction even if they are not genuinely in dispute. Thus, if by way of defence a consumer simply pleads either "The goods (ie, all goods for which the supplier is claiming recovery of the price, as distinct from specific identified goods) were not ordered or not delivered" the supplier can prove its case by reliance on a certificate under the conclusive evidence clause without having to adduce evidence of all the underlying documents. However, if the consumer wishes to dispute delivery of specific identified goods (and the consumer is the one best placed to give knowledge about his, her or its own particular circumstances) then evidence can be by consumers about procedures for receipt of goods or their circumstances on the particular day the supplier alleges the goods were delivered (for example, they waited all day for the delivery but no goods were delivered). That would be sufficient to demonstrate "manifest error" so that in respect of the particular disputed transaction the supplier would either have to adduce evidence of that delivery (to be weighed by the tribunal of fact) or, by simply relying on the conclusive evidence certificate, be subject to certain defeat on that issue. A conclusive evidence clause only goes to evidence, not rights. If the consumer has evidence supportive of a genuine dispute the conclusive evidence clause will not prevail.

23. It is the ACF's firm view that no good reason has been demonstrated for banning conclusive evidence clauses and good cost-benefit reasons have been provided to allow their continued use.

24. Confining disputes to those issues which are really in dispute between the parties, rather than ambit claims, is consistent with the 21st century case management practices of all Australian courts. Governments of all persuasions recognise the need to contain the cost of providing the court system as a forum for disputes between citizens and have implemented legislative reform to give courts power over parties to effect that objective. Thus, section 56 of the NSW *Civil Procedure Act* 2005 provides:

> 56 (1) The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.

25. Consistent with that purpose section 56(3) of the Act imposes a duty on parties to civil litigation to assist the court in achieving that overriding purpose in the following terms:

> "(3) A party to civil proceedings is under a duty to assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court."

26. The use of conclusive evidence clauses facilitates achievement of the just, quick and cheap resolution of the real issues in dispute between parties. To proscribe conclusive evidence clauses as recommended by COAG will allow consumers to dispute all components of a supplier's claim requiring proof of all matters, rather than those matters which are really in dispute.

27. Given the constraints on all government budgets, particularly those for the civil justice system, it is difficult to understand why COAG would recommend a change in the law which will have as its inevitable effect an increase in the cost of civil justice. This will occur in two ways. Firstly, by requiring suppliers and their lawyers to adduce evidence in a formal way of all matters included in the supplier's claim, rather than confining that evidence to the issues really in dispute. Of course, when the supplier succeeds in those increased costs will be passed on to the consumer under the costs rules which generally provide that the loser pays. Secondly, the court system will see an increase in trial times due to the need to adduce evidence about all matters in the claim rather than those which are really in dispute. The lengthening of trial times will inevitably require additional resources at additional cost.

Terms that are void under laws that imply certain terms into contracts; terms that otherwise limit suppliers' liability for their negligence

28. *An Australian Consumer Law*, Chapter 6, page 37 states:

> In existing consumer laws, for example Part 2A of the Victorian FTA and Division 2 of Part V of the TPA, there are set out a range of terms that are to be implied into contracts for defined sales of goods and services (for example, implied terms requiring goods to be of merchantable quality and services to be rendered with due care and skill).[7] Such terms cannot be excluded and, in relation to sales of consumer goods and services, they cannot be limited. Exclusions and limitations, even for consequential/economic loss, are void and it is also an offence to purport to exclude or limit the terms.
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> Many terms that exclude or limit suppliers' liability for loss or damage suffered by the consumer from the suppliers' acts or omissions attempt to cater for the statutory terms with words such as 'to

[7] It is also unfair under Part 2B of the Victorian FTA to purport to exclude or limit the statutory terms, as such exclusions or limitations have the object or effect of limiting consumers' rights to sue suppliers (see section 32X(k) of the Victorian FTA).

> the extent permitted by law', or other words that only indirectly refer to consumers' statutory rights. Such caveats do necessarily have the effect of altering the situation because most consumers will not know what that 'law' is. While such terms give the appearance of complying with the law, they signify nothing to consumers who are ignorant of their rights.[8]
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> In the same vein, it may be considered that it is invariably unfair to exclude or limit the liability that suppliers would otherwise have for their common law negligence. However, given the small amounts ordinarily at stake in a consumer contract, it is not considered unfair for the supplier to limit its liability for consequential/economic loss as a result of its negligence.

29. While the ACF is not persuaded of the correctness of the statement of the legal effect of the words "to the extent permitted by law", it generally agrees with the observations made. However, the ACF considers that the reasons advanced are not of sufficient weight to justify banning such clauses. There is no reason convincing to the ACF why the clauses should not be allowed to be used free of proscription.

Flat/fixed early termination fees and those requiring the paying out of the contract

30. The purpose of these clauses is to bring certainty thereby avoiding needless disputation and litigation. As can be seen from the statement of reasons in the Paper, there are many factors which simply cannot be estimated with any accuracy at the commencement of the contract. Fixed pre-estimates are used to avoid disputation and bring certainty. They have the distinct advantage of being known at the beginning of the contract and the consumer can make an informed choice whether to enter into the contract or not, knowing that if they seek to break the contract by getting out early, there will be a cost. It is difficult to see any unfairness to a consumer entering into a contract in those circumstances. They will pay no more than they agreed to pay because of the application of the present value discount calculations.

31. In the ACF's view, no persuasive reason has been demonstrated for banning such clauses.

[8] They will also not prevent liability-exclusion clauses from constituting false or misleading representations concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy, contra section 12(k) (now section 53(g)) of the TPA: see *Trade Practices Commission v Radio World Pty Ltd* (1989) ATPR 40-973.

Terms requiring consumers to pay suppliers' enforcement costs on an indemnity basis

32. *An Australian Consumer Law*, Chapter 6, page 40 states:

> Terms requiring consumers to pay suppliers' enforcement costs on an indemnity basis, or that simply require consumers to pay suppliers' enforcement costs, may be considered always to be unfair because they require, or could require, consumers to pay for unreasonably or inefficiently incurred costs. Further, they provide no incentive for suppliers to be reasonable or efficient.[9]

33. Again, these reasons seem to be based on a misunderstanding of the relevant law. Part 42 rule 42.5 (b) of the NSW *Uniform Civil Procedure Rules* 2005 relevantly provides that *"If the court determines that costs are to be paid on an indemnity basis ... all costs (other than those that appear to have been unreasonably incurred or appear to be of an reasonable amount) are to be allowed*". Legal costs can only be enforced through the legal system and, if not agreed to by the consumer, will be assessed by an independent third party assessor who will apply the above rules to exclude any costs which have been unreasonably incurred or appear to be an unreasonable amount, even if on an indemnity costs basis.

34. At a more fundamental level, a party to a contract should not be out of pocket as a result of a breach of obligations by the other party. That is the reason for indemnity costs provisions. To deprive a supplier of their benefit is to act unfairly to the supplier.

Terms requiring consumers to pay deposits or pre-payments that do not leave a substantial amount of the price to be paid on delivery/installation/performance

35. Clauses such as this are designed to protect the supplier against the risk of credit default, contract default (including the fickleness of human nature) and insolvency of the consumer as buyer in circumstances where all the risk is borne and financial outlays made by the supplier. Without such a provision the buyer can cancel right up to the time of delivery and leave the supplier with the unsatisfactory remedy of pursuing the buyer for breach of contract through the court system. In a state such as New South Wales,

[9] A term requiring a party to pay 'all' costs would normally be subject to an implied qualification that such costs be properly incurred, that is, reasonably and in good faith: see for example, *Elders Trustees & Executor Co Ltd v Eagle Star Nominees Ltd* (1988) 4 BPR [97256] at 9208 per McLelland J, who said: 'This is in my view so obvious that it did not require expression …'

where claims under $10,000.00 are brought in the Civil Claims Division of the Local Court and there is a very restrictive cap on legal costs (around $600.00 maximum) that is a disincentive to suppliers to pursue their legal rights because they'll be worse off for doing so. That is because the supplier will not be able to find a solicitor who can run a breach of contract case in the Small Claims Division of the Local Court for the $600.00 which can be recovered when successful. Thus, even though the supplier wins, it loses financially. That is unfair to the supplier. It is because of deficiencies in the common law and statutory position that suppliers seek to protect themselves and secure their position by provisions such as this.

36. Such clauses should not be banned.

Terms allowing suppliers to retain, debit or set off disputed amounts

37. *An Australian Consumer Law,* Chapter 6*,* pages 41-42 states:

> Terms allowing suppliers to retain amounts paid by consumers to defray unpaid amounts, or to debit consumers' accounts for unpaid amounts, or otherwise to set off amounts owed by consumers against amounts owed to consumers, are common.
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> While such terms are unremarkable when applied to amounts that are indisputably owed, this is not the case when amounts allegedly owed by consumers are genuinely in dispute. In permitting a supplier to retain, debit or set off a disputed amount, such terms effectively permit the supplier to decide that it has not breached the contract, as claimed by the consumer, allowing the supplier unilaterally to determine whether the contract has been breached or to interpret its meaning.
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> Such terms can have the effect of being unfair if they do not make reasonable allowance for:
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> - amounts genuinely in dispute (either the amount allegedly owed by the consumer or an amount alleged to be owed by the supplier); or
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> - genuine disputes over the adequacy of the performance of the contract. For instance, a reasonable dispute-resolution process, including the holding of disputed amounts in trust or the suspension of the right to set off or debit pending the outcome of the process could be provided.

38. What the proposal does not say about such clauses is how they would work in practice. Does a consumer merely need to incant the ritual words "I have a genuine dispute" to invoke the ban? To do that is to defy common sense and human nature. Decades of experience of acting for both suppliers and building sub-contractors (in their upstream relationships with head contractors) makes the chairman of this ACF subcommittee confident that every dispute would be vigorously asserted to be "genuine".

39. It is simply a matter of which way the money flows and the ACF does not consider that any convincing reason has been demonstrated for banning such clauses.

Terms mandating arbitration of disputes or otherwise inhibiting access to courts or tribunals

40. *An Australian Consumer Law*, Chapter 6, page 42 states:

> Some existing consumer laws include provisions that prohibit the use of terms which purport to limit or prevent consumers from exercising their right to take legal action.[10] Terms requiring disputes to be privately arbitrated instead of, or before, litigation in a court or tribunal (including terms allowing suppliers to nominate arbitration) can have that object or effect, and may be particularly unfair where consumers are required to pay their portion of the arbitrator's costs as a condition of the arbitration. Such terms will, in many cases, effectively preclude consumers from any dispute resolution process.

41. The ACF agrees generally with these observations, particularly having regard to the cost of arbitration procedures where the venue and transcription services have to be paid for by the parties themselves. The ACF considers there are strong public policy reasons why access to the courts should never be excluded and we want to avoid the US situation and the proliferation of referrals to private arbitration.

Other matters

42. The above list does not deal with all the terms characterised as "problematic" on page 31 of *An Australian Consumer Law*. One in particular which causes considerable concern and for which the ACF could discern no evidence or reasoning in its favour is the consideration of a proposal which would proscribe clauses which allow the supplier to assign a contract to the consumer's detriment, without the consumer's consent. In the ACF's view such a proposal amounts to an unwarranted fetter on the freedom of an entity to deal with its assets. The right to receive debtors is an asset and the debtor's obligation to pay does not need to be confined to a particular entity. Such a clause would prevent the transfer of a debtors ledger on the sale of a business, the factoring of debts and the simple assignment of debts. It is difficult to see what consumer detriment there would be from an assignment except more efficient collection of debtors by

[10] Section 32X(k) of the Victorian FTA refers to terms that have the object or effect of limiting consumers' rights to sue suppliers.

organisations which specialise in that activity. It is to be hoped that viewing such activity as a detriment is not being encouraged by COAG.

43. Because of the drastic consequences on property rights and the complete absence of any justification it is the ACF's strong view that there is no reason why such clauses should be banned.