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John Hawkins
Secretary
Senate Economics Legislation
Committee
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31 July 2009

Dear Mr Hawkins,

Inquiry into the Trade Practices Amendment (Consumer Law) Bill 2009

The following submission is made on behalf of National Australia Bank Limited (NAB) in response to the Committee's Inquiry into the Trade Practices Amendment (Consumer Law) Bill.

In making our comments, we refer to our previous submission to the Federal Treasury's consultation on the exposure draft Bill. In addition, NAB has contributed to and supports the submission to this Inquiry made by the Australian Bankers' Association (ABA).

NAB fully supports high levels of consumer protection for Australian consumers. Central to everything we do is ensuring that NAB's 3.3 million customers receive fair value, choice and convenience across a wide range of consumer credit and investment products and services.

Whilst noting the policy objectives sought by this legislation, we remain strongly of the view that its practical implementation will result in adverse economic impacts by increasing operating uncertainty and costs for business that will detract from delivering better consumer outcomes. Our key concern relates to the proposed timing for commencement. For the practical reasons outlined below, we submit that the timing for commencement be 1 January 2011, to enable the considerable work required to ensure compliance with the new regime.

The wider economic conditions into which this legislation will be introduced must also be borne in mind. Credit and investment markets remain challenging, both in terms of supply and demand. Introducing further regulation that has the potential to increase operational uncertainty and prudential risk in Australia will create a higher cost environment for both domestic and international financial services providers, and will risk restricting access to affordable credit for Australian consumers.

The following concerns with the provisions articulated in the Bill remain:

Timing

The impacts of this Bill across our Personal (retail) Bank as well as in MLC and our other wealth management operations will be significant. It is likely that a majority of our contracts will be considered "standard form" under the legislation, requiring us to review and potentially amend in excess of 2000 contracts across our businesses. The process of review itself, which can only commence when the legislation is in its final form, will take some months, at considerable cost to the business. If commencement were to apply from 1 January 2010, businesses could find themselves in immediate breach, in particular with regard to the sample unfair terms included in the Bill (Section 4).

Therefore, the proposed commencement date of 1 January 2010 will be unachievable and should be extended to 1 January 2011. This would also be appropriate, as it would coincide with the introduction of new responsible lending provisions in the Consumer Credit Bills as well as the bulk of the Australian Consumer Law reforms.

In the event this extension is not applied, transitional provisions (in particular in respect of the examples of prohibited terms outlined in the Bill) will be required to give businesses sufficient time to review their contracts.

Scope/proportionality

- **Consumer contracts**

We support the decision to exclude business-to-business contracts from the scope of the Bill, in favour of application to genuine consumer contracts. In our experience, businesses possess the skills and resources that enable them to make informed decisions and judgements around standard form contracts. In fact standard form contracts are favoured in business-to-business dealings because they reduce the need for negotiation and reduce costs due to stream-lined processes, staff training and monitoring. The industry risks are ordinarily addressed in these standard form terms and the commercial price negotiated takes into account these accepted shared risks and obligations. Any extension beyond the scope of pure consumer contracts would be difficult to implement, merely serving to create uncertainty in business dealings and would potentially impact on credit availability to business.

The definition of consumer contract would benefit from a presumption to ensure certainty of whether a standard form contract is regulated or not at the time of contracting. For instance if the subject matter of the agreement is of a business/commercial nature or the party taking the contract is a business entity, a presumption should apply that it is not a consumer contract and therefore not regulated.

- **Legitimate interests**

The Bill provides that a term is unfair if it would cause significant imbalance and it is not reasonably necessary to protect the legitimate interests of the party advantaged by the term. This concept of "legitimate interests" is very unclear for the purposes of

implementation. Without clarification, the application of the presumption that a term is not reasonably necessary to protect legitimate interests unless proved otherwise destabilises the freedom of contract and certainty of contract required for efficient commerce. We would therefore request, the Bill itself rather than regulations or guidance, specify the considerations which can determine a party's legitimate interests, enabling a reasonable reliance on the clause. Examples may include:

- The profitable operation of the party's business;
- Accommodating technological change;
- Addressing material changes in economic activity;
- Maintaining effective business practices;
- Addressing changes in legislation, codes or government determinations and policies.

- **Retrospective application**

The Bill appears to have retrospective application to the entire standard form contract that pre-dates the new legislation, in the event the contract is renewed or varied post legislation.

We propose a more proportionate application that the new law only applies only to the term as varied, and not to the whole remainder of the contract.

- **Redress of loss or damage**

A section introduced into the Bill since the exposure draft would allow consumers who are not parties to an action to nevertheless access any redress awarded upon application to the Court by ASIC or ACCC.

NAB is concerned that this provision would open up businesses to disproportionate risks, creating the likelihood of a much more litigious environment for companies operating in Australia. Redress of loss or damage should be limited to the consumer affected by the contravention.

- **Enforcement and remedies**

Another new provision introduced in the Bill gives ASIC or the ACCC the right to serve substantiation notices requiring any claim or representation to be proved by supporting information and/or documentation within 21 days from the date of the notice.

As expressed in the provision, this entitlement is unlimited and could therefore apply in any circumstances. Given the response time and the consequences which flow, we consider that this entitlement should be focussed on 'reasonable enquiries' where a 'reasonable belief' is held by the regulator that the claim may not be able to be substantiated.

Risk/uncertainty

- **Detriment**

The central concept of "unfairness" underpinning the legislation requires that a court considers the extent to which the term would cause detriment, or that there is a substantial likelihood it would cause detriment.

This definition would create an unacceptable degree of risk and uncertainty for business and consumers. Crucially, it does not include the requirement for material detriment, which is a clear and reasonable test for unfairness. As recommended in the Productivity Commission's 2008 Review of Australia's Consumer Policy Framework, the concept of material detriment is clear and proportionate. We therefore recommend that the definition is amended to require proof of material detriment.

- **Presumptions**

Another central concept underpinning the legislation is the presumption that a term in a standard form contract is unfair if it is not reasonably necessary to protect the legitimate interests of the supplier. In other words, there is an automatic presumption of unfairness.

This provision, not present in any other existing unfair contracts legislation overseas, is untested and undermines fundamental principles of contract law. It will deny parties contractual certainty and will thereby attract an unacceptable level of commercial risk for suppliers. For example, in the case of a mortgage, it would mean that it will be uncertain whether the mortgage will be enforceable. This would have serious implications for prudential risk and regulation.

We therefore recommend that this negative presumption be removed, in favour of requiring a positive test of unfairness which includes a materiality threshold.

We are also concerned that the definition of "standard form contract" includes a presumption that all contracts are standard form unless proved otherwise, without explanation of what constitutes a standard form contract. A useful definition would stipulate contracts that substantially comprise terms and conditions similar to contracts entered into by the supplier for similar goods and services and which meet the elements that determine a standard form contract set out in section 7(2). The element of presumption in section 7(1) should therefore be omitted.

- **Securitisation and debt factoring**

In the "grey list" with stated examples of unfair terms, the term that captures the assignment of a contract to the detriment of another party without that party's consent, will have an unintended impact on securitisation and debt factoring arrangements. Both are vital tools in ensuring the effective flow of credit in an efficient economy. Whilst Treasury has indicated that the legislation is not intended to restrict securitization, an amendment is required to this provision. The reference to detriment should be qualified as 'material' detriment and an express carve out included, ie "unless the assignment is made in relation to the prudent management of the party's capital, for example in pursuing an asset securitization program or in connection with writing off a debt."

- **Mechanisms to amend the legislation**

The powers to amend the Bill via subordinate regulations are quite broad and, in our view, would lead to a high degree of operational uncertainty.

In respect of prohibiting the stated examples of unfair terms or "grey list" (or indeed any other term deemed unfair by regulation), there needs to be a legislative requirement for the Government to consult on these decisions prior to making regulations. In addition, as mentioned above, the intended operation of 'standard form contracts' needs to be further addressed in the Bill itself. Without some level of consultation to guide outcomes, valuable industry and consumer insight and experience will be excluded.

In the case of prohibiting a term outright via regulation, this would cause suppliers to be in immediate breach of the legislation. The ability to respond to the introduction of prohibited terms without the requirement for consultation or adequate notice of such changes will create ongoing compliance costs and contractual uncertainty. This mechanism also undermines the policy intent of the regime to consider the contract as a whole, discounting any determination of the individual circumstances or context behind the term.

Further, the power to add to the "grey list" by regulation without due consultation, will fuel additional uncertainty about what terms are fair and unfair.

Legislative consistency

NAB remains concerned that, despite the COAG agreement on a nationally consistent consumer protection framework, State-based activity has continued, in advance of national legislation. In Victoria, since June 2009, unfair contract terms provisions in its Fair Trading Act have been extended to consumer credit, requiring compliance with one system whilst preparing for compliance with another. This is creating significant and duplicating compliance efforts and costs.

If you would like to discuss further any of the issues raised in this submission, please contact me (t: 0409 436 614 e: sarah.j.ward@nab.com.au).

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