01 December 2021

The Hon. Kevin Anderson, MP
Minister for Better Regulation and Innovation
Parliament of New South Wales
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SYDNEY NSW 2000

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Dear Minister

Fair Trading Act 1947 - Disclosure of prejudicial terms relating to supply of goods or services

We write to draw your attention to some concerns our members have regarding section 47A of the *Fair Trading Act* 1947 (NSW), which is directed at 'prejudicial terms' in consumer contracts.

The essence of the concern is that this New South Wales provision overlaps in application with Commonwealth legislation directed at similar subject matter, including for example mandatory disclosure regimes and the unfair contract terms (UCT) regime. The disclosure and UCT regimes and other similar consumer protection measures are contained in Commonwealth legislation based on referrals of power by states including NSW[1].

Addressing these issues through national regimes results in universal and consistent application of such consumer protection provisions. This allows consumers across the country to be confident in, and to better understand, the relevant provisions applicable to them. It also promotes economic efficiency by enabling businesses who operate in multiple Australian jurisdictions to implement their compliance systems and processes based on one set of requirements.

Where individual jurisdictions set their own requirements that overlap with those of the Commonwealth, the potential for customer confusion, and inefficiency and complexity for industry, is heightened.

We note that the NSW Government (via the Fair Trading website) accepts that the NSW requirements "might mean no change to existing operational practices if you are already subject to disclosure obligations." This is a sensible and reasonable concession. However, we note that the page goes on to say:

> "If you operate in an industry that has existing disclosure requirements, you should check whether your existing business practices are already compliant with these new disclosure requirements. To do this, you should consider what is being disclosed, the timing of the disclosure and how it is being disclosed."

While on the face of it this might not sound unreasonable, for entities like banks it is a very large and resource intensive project to analyse their substantial ranges of products and services, and associated disclosure, contract and other documents and procedures, designed to comply with the Commonwealth requirements, and to compare and contrast them with bespoke State-based regulatory requirements to determine whether the latter require the taking of any additional steps for compliance.

For the reasons outlined above, we request that consideration be given to:

[1] The *Australian Securities and Investments Commission Act* 2001, the *Corporations Act 2001* and the *National Consumer Credit Protection Act 2010*.

1. Prescribing an exemption from section 47A under the Fair Trading Regulation:
    a. for entities such as banks, that are subject to multiple existing licensing, disclosure and consumer contract protection requirements; or
    b. in respect of particular products, currently regulated under Commonwealth law.
2. Providing further guidance to give certainty to industry that complying with Commonwealth disclosure and consumer protection measures such as product disclosure statements and consumer credit disclosures, the unfair contracts terms regime, and the Privacy Act, will be taken to constitute reasonable steps under section 47A of the NSW Act.

We set out our concerns in detail in the attached submission for your consideration.

We would welcome the opportunity to discuss these issues further. Our contact on this matter for the immediate future is Fiona Landis, who can be contacted on 0410 142 229, or fiona.landis@ausbanking.org.au

Yours faithfully

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Australian Banking Association

Fair Trading Act 1987 (NSW)

Our concern is with the application of section 47A of the *Fair Trading Act 1987* (NSW) to financial services providers. ABA member banks do not object to the content of section 47A per se. Protection of customers from unfair terms is wholeheartedly supported by Australian banks. The concern is related to the fact that Australia already has a significant and detailed consumer protection regime for financial services which NSW was instrumental in creating. Section 47A essentially replicates and potentially undermines this existing regime.

Compliance with parallel regimes creates uncertainty and inefficiency, ultimately adding cost and inconvenience for customers and providers of financial services. Avoiding such parallel regimes was, it seems to us, a key reason for the creation of the Corporations Agreement of 2002 and the National Credit Law Agreement in 2009, together with the referral of powers to the Federal Parliament that those agreements provided for. NSW was, along with the other States and Territories, involved in devising and implementing the existing Corporations Act, National Consumer Credit Protection Act and ASIC Act regimes. All of this legislation was passed in part on the basis of referred powers from NSW, and so represents the legislative authority of NSW.

Section 47A provides as follows:

> **47A Disclosure of prejudicial terms relating to supply of goods or services**
>
> (1) A supplier must, before supplying a consumer with goods or services, take reasonable steps to ensure the consumer is aware of the substance and effect of any term or condition relating to the supply of the goods or services that may substantially prejudice the interests of the consumer.
>
> (2) Without limiting subsection (1), a term or condition relating to the supply of goods or services to a consumer may substantially prejudice the interests of the consumer if—
>
> (a) the term excludes the liability of the supplier, or
>
> (b) the term provides that the consumer is liable for damage to goods that are delivered, or
>
> (c) the term permits the supplier to provide data about the consumer, or data provided by the consumer, to a third party in a form that may enable the third party to identify the consumer, or
>
> (d) the term requires the consumer to pay an exit fee, a balloon payment or other similar payment.

We set out below the reasons that lead us to believe that the protections the section seeks to provide are effectively already provided, by financial services entities like banks under Commonwealth legislation and other obligations.

The ABA proposes that, given the disclosure requirements and equivalent consumer protection provisions applicable under Commonwealth law, that the NSW Government should consider:

1. Prescribing an exemption from section 47A under the Fair Trading Regulation:
    a. for entities such as banks, that are subject to multiple existing licensing, disclosure and consumer contract protection requirements; or
    b. in respect of particular products, currently regulated under Commonwealth law.
2. Providing further guidance to give certainty to industry that complying with Commonwealth disclosure and consumer protection measures such as product disclosure statements and consumer credit disclosures, the unfair contracts terms regime, and the Privacy Act, will be taken to constitute reasonable steps under section 47A of the NSW Act.

Principle of standardised regulation

Financial services and consumer credit regulation in Australia is based on a principle of standardised regulation through Commonwealth and State cooperation. This is currently expressed through the

Corporations Agreement of 2002 and the National Credit Law Agreement in 2009. In relation to consumer credit, it goes back to the 1996 adoption of the Uniform Consumer Credit Code.

Section 47A, to the extent it was taken to apply to the banking sector, could potentially undermine this principle. It may be that NSW has genuine concerns about substantially prejudicial terms in banking documents (although none of the examples in the original consultation paper indicate this). If so, the ABA would be happy to discuss these. However, the ABA feels that these concerns should be addressed by changes to the existing Corporations Act, NCCPA or ASIC Act regulatory mechanisms so that they can be properly implemented into and coordinated with existing regimes, rather than having individual States creating new and separate State specific regimes.

Protection against prejudicial terms for bank customers in Commonwealth legislation

ASIC Act

Unfair Contract Terms

The Australian Securities and Investments Commission Act (ASIC Act) contains its own unfair contract terms regime. The objects of this regime seem closely aligned to those of section 47A of the Fair Trading Act. The ASIC Act applies to contracts that are financial products (which in the ASIC Act includes credit products), and to contracts for financial services.

The Act provides that unfair terms in standard form contracts are void.[2] The definition of unfair in the ASIC Act is broad:

> **12BG Meaning of unfair**
>
> (1) A term of a contract referred to in subsection 12BF(1) is unfair if:
>
> > (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
> >
> > (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
> >
> > (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

There is a long list of examples of unfair terms in section 12BH of the Act including:

> (a) a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract;
>
> (b) a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;
>
> (c) a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;
>
> (d) a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;
>
> (e) a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract;
>
> (f) a term that permits, or has the effect of permitting, one party to vary the upfront price payable under the contract without the right of another party to terminate the contract;
>
> (g) a term that permits, or has the effect of permitting, one party unilaterally to vary financial services to be supplied under the contract;

[2] Section 12BF(1)

(h) a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning;

(i) a term that limits, or has the effect of limiting, one party's vicarious liability for its agents;

(j) a term that permits, or has the effect of permitting, one party to assign the contract to the detriment of another party without that other party's consent;

(k) a term that limits, or has the effect of limiting, one party's right to sue another party;

(l) a term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the contract;

(m) a term that imposes, or has the effect of imposing, the evidential burden on one party in proceedings relating to the contract;

In addition, there is an indirect incentive to disclose the existence of such terms because the Act provides that in determining unfairness, courts may take into account 'the extent to which the term is transparent'[3]. The Act provides that:

> A term is transparent if the term is:
>
> (a) expressed in reasonably plain language; and
>
> (b) legible; and
>
> (c) presented clearly; and
>
> (d) readily available to any party affected by the term.

It should be noted also that the Treasury is currently consulting on exposure draft legislation that would substantially strengthen the unfair contract terms regime by prohibiting the inclusion of unfair terms in contracts and adding a civil penalty for contraventions of the prohibition, as well as increasing the scope of the regime so that it covers a significantly broader range of businesses / contracts (see Strengthening protections against unfair contract terms).

The addition of the prohibition on unfair terms and the associated civil penalty provisions will mean that breaches are subject to very substantial fines – for large entities up to $555 million per breach.

In our view, applying a similar regime to the financial sector at the State level adds little apart from increased regulatory burden as industry grapples with how one regime relates and interacts with the other.

Unconscionable conduct

Another relevant set of consumer protections in the ASIC Act is that made up of the provisions on unconscionable conduct in financial services (section 12CB). These provisions are all the more relevant and accessible following the High Court's recent decision in *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd*.[4] That the High Court has, in this judgment, effectively 'lowered the bar' for demonstrating unconscionable conduct, can be seen in this passage:

> ""Unconscionable" is the language of business morality and unconscionable conduct is referable to considerations expressed and recognised by the statute. The word is not limited to one kind of conduct that is against or offends conscience. Surely to predate on vulnerable consumers or small business people is unconscionable. But why is it not also unconscionable to act in a way that is systematically dishonest, entirely in bad faith in undermining a bargain, involving misrepresentation, commercial bullying or pressure and sharp practice, using a superior bargaining position, behaving contrary to an industry code, using significant market power in a way to extract an undisclosed benefit that will harm others who are commercially related to the counterparty? The proposition that such conduct (not all of which might be seen to be present here) is not unconscionable by an Australian statutory business standard of

[3] Section 12BG(2)(a)
[4] [2021] FCAFC 40

conscience because the counterparty to the business transaction suffered from no relevant pre-existing disadvantage, disability or vulnerability (other than, perhaps, having a decent degree of trust and faith in its business counterparty's honesty and good faith) is difficult to accept, unless one posits a narrow defined meaning of "unconscionable" that remains hinged in some way to the structural form of the equitable doctrine as expressed in cases such as Kakavas 250 CLR at 439–440 [161]. The history, text and structure of the Act is contrary to such a conclusion."

The Act prohibits unconscionable conduct and breaches are subject to associated civil penalty provisions carrying very substantial fines – as mentioned above, for large entities up to $555 million per breach.

In short, the ASIC Act contains a broad range of strong protections for consumers that address the kind of concerns that motivated section 47A of the NSW FTA.

Privacy Act

We note that one of the terms that is specified in the NSW FTA as one that may substantially prejudice the interests of the consumer is where: "the term permits the supplier to provide data about the consumer, or data provided by the consumer, to a third party in a form that may enable the third party to identify the consumer".

In our view this obligation is effectively imposed on banks under Commonwealth law. The Privacy Act 1988 requires that banks (as APP entities) comply with the Australian Privacy Principles (APPs). Among other things, an APP entity that collects personal information about an individual *must take reasonable steps either to notify the individual* of certain matters or to ensure the individual is aware of those matters.

The matters include:

- the APP entity's identity and contact details
- the fact and circumstances of collection
- whether the collection is required or authorised by law
- the purposes of collection
- the consequences if personal information is not collected
- the entity's usual disclosures of personal information of the kind collected by the entity
- information about the entity's APP Privacy Policy
- whether the entity is likely to disclose personal information to overseas recipients, and if practicable, the countries where they are located

Adding a parallel privacy requirement under State law does little for the customer while increasing the regulatory burden on the sector.

Other Commonwealth obligations for banks and financial services

In addition to the above, there are a series of general disclosure obligations under Commonwealth law that financial sector entities are required to comply with. These include requirements in the Corporations Act, the Credit Act, and for banks who are members of the ABA, the Banking Code of Practice. Many of these are extremely detailed and prescriptive – see below.

Further, in recognition of the limits of what can be achieved by disclosure, the Commonwealth Parliament has passed reforms introducing the product intervention powers and design and distribution obligations. These reforms give ASIC greater control over products that could cause consumer harm and they require issuers of financial products to consider and define appropriate target markets for their products, and require issuers and distributors to take reasonable steps to ensure that distribution is in accordance with the target market determined by the distributor.

Australian Banking Association

Finally, banks have an additional set of obligations designed, ultimately, to protect customers, set out in the banking executive accountability regime (BEAR) and the coming Financial Accountability regime (FAR).

Difficulties in practical application of paragraph 47A

Repetitive and Conflicting Disclosure Obligations

Section 47A requires disclosure of certain terms. There is a great deal of uncertainty as to how this is intended to interact with existing disclosure regimes which NSW separately imposes on financial products via its participation in the Corporations Act and NCCPA regimes.

For example:

(a) Consumer credit arrangements require the following separate and distinct disclosures:

- (i) There are a large number of prescribed precontractual and contractual disclosures, including a financial table which must appear at the front of the document;[5];
- (ii) An Information Statement must be provided;[6]
- (iii) A mandated disclosure box must be placed immediately above the place where the customer signs;[7]
- (iv) A credit provider credit guide must be provided.[8]
- (v) Key Facts Sheets may need to be made available.[9]
- (vi) Where a broker is involved, additional credit guides, quotes and credit proposal disclosure documents must be provided.[10]

(b) Financial services require the following separate and distinct disclosures:

- (i) A financial services guide, with detailed content requirements;[11]
- (ii) A statement of advice must be provided where there is personal advice, again with detailed content requirements;[12]
- (iii) Finally, a product disclosure statement must be given, again with detailed content requirements, including the requirement that it provide information about any "significant risks".[13]

These regimes have involved a lot of thought by the legislature, including the NSW legislature, as to what should be disclosed to a customer and how that disclosure should be made, and so a great many "substantially prejudicial" terms are likely to be disclosed through these existing regimes anyway. In some cases the content of these disclosure documents is strictly prescribed, and so it may not be permitted to add "substantially prejudicial term" disclosures to an existing disclosure document.

The addition of a new "substantially prejudicial term" disclosure obligation in addition to these other obligations creates a significant risk of overlapping disclosure requirements that are either repetitive or in conflict. There is currently a great deal of uncertainty about how s 47A interacts with the existing regime. For example:

(iv) It is unclear if s 47A requires additional disclosure. On one hand, because the Corporations Act and NCCPA disclosure requirements are so detailed and so prescribed, it seems that they are

[5] NCC s 16 & 17, NCCPR r 72
[6] NCC s 16(1)(b) and s 56(1)(b)
[7] NCCPR r 74, r 81.
[8] NCCPA s 126.
[9] NCCPA Part 3-2A Div 2 and Part 3-2B Div 3.
[10] NCCPA s 113, s 114 and s 121.
[11] Corporations Act s 942B;
[12] Corporations Act s 947B
[13] Corporations Act s 1013C and s 1013D.

intended to cover the field for disclosures for these products. On the other hand, the s 47A concept of "substantial prejudice" does not appear in the Corporations Act of NCCPA, and so arguably is directed at different concerns that may require additional disclosure;

(v) If additional disclosure is required, how is this to be done? For example, a consumer credit customer may already receive 5 or more separate disclosure documents as discussed above. An additional s 47A disclosure document may detract from these disclosures and confuse a customer further.

(vi) Might separate s 47A disclosure conflict with existing requirements? For example, in consumer credit, the financial table is required to be at the very front of the precontractual statement so that it is the first thing that a customer sees.[14] If a s 47A disclosure notice is given separately as a stand-alone document, does this undermine the purpose of the NCCPA disclosure? Might a customer mistakenly think it is a more important disclosure than the required financial table disclosures? More broadly, when presented with a number of overlapping disclosure documents, how is a consumer to properly assess which disclosures are more important?

(vii) Where some substantially prejudicial terms are already disclosed by the existing disclosure regimes, but a separate s 47A disclosure is also required, how is this to be done? If the s 47A disclosure must repeat disclosures that are contained elsewhere, this would be repetitive and confusing, and may also breach specific form or content requirements. If the s 47A disclosure can omit disclosures made elsewhere, then the customer has no single point of reference for disclosure of "substantially prejudicial" terms, which is also confusing. There seems to be no clear good outcome here.

Uncertainty of application

The FTA definitions and concepts behind what products are regulated are drafted with a view to normal consumer goods and services. Financial services and consumer credit products are unusual and complex products that do not easily fit within the statutory language used in the FTA. This means there is a great deal of uncertainty as to how and when the FTA actually applies to various bank products. The ABA recommendations will not fully remove all uncertainty but will reduce its scope.

For example:

(c) $100,000 price test

Under the ACL definition of "consumer" adopted by the FTA, a service is treated as a consumer transaction even if it is not for personal, household or domestic purposes, if the amount paid or payable for the service does not exceed $100,000.[15] However, this concept is not easily applied to many bank transactions. For example:

(i) In the case of a loan, does the "amount paid or payable" include the principal amount or is it limited to interest and fees? For example, in the case of a loan of $110,000, is the loan excluded from the FTA on the basis of the loan amount, or does the bank have to form a view about what interest and fees are likely to be payable?

(ii) Over what period is the amount assessed? There may be credit card or other revolving credit products where the amount outstanding at any one time is less than $100,000, but over the expected life of the product that total amount payable will be far in excess of $100,000. How are these products treated?

(iii) Payment service products may involve processing payments far in excess of $100,000, but with specific service fees that fall below that amount how are these to be treated.

[14] NCCPR r 72(5).
[15] ACL s 2. From 1 July 2021, the price threshold for the definition of "consumer" increased from $40,000 to $100,000, by way of the *Treasury Laws Amendment (Acquisition as Consumer - Financial Thresholds) Regulations 2020.*

(iv) There are some products like swaps and other derivatives, bank guarantees, stand-by letters of credit, and other products where the amount paid does not properly reflect the risk involved. For example, a bank guarantee may involve a bank obligation to pay $110,000, but if the guarantee is never called then the customer will only pay fees that are likely to be less than $100,000. Similarly, an interest rate derivative may be calculated on the basis of a notional amount of $110,000, but the actual amount paid by the customer will depend on fluctuations in the relevant rates, and the result may be that the customer is “in the money” and pays nothing at all. However, these are all sophisticated products that would not normally be thought of as subject to consumer protection regimes.

(d) Services

Section 47A applies to a supply of services to a consumer. Many common bank documents do not fit within this concept. For example, if a parent guarantees a bank loan to their adult child, then arguably the guarantee is not a “service” provided by the bank – instead, it is an obligation provided by the guarantor to the bank. Similarly, if a guarantor or a borrower gives a mortgage to a bank to secure obligations, then arguably the mortgage itself is not a “service” provided by the bank, it is the creation by the mortgagor of rights in the bank. However, there is some doubt as to this interpretation of the FTA.

ABA proposals are in line with statements by the NSW Department of Finance Services and Innovation

Material released by the Department of Finance Services and Innovation in 2018 has generally recommended that regulations be made to improve understanding of the FTA:

> *Additionally, if the regulations prescribed certain exemptions this would avoid any duplication or conflict with other legislative requirements. This could include situations where a product disclosure statement is already required for the supply of the goods or services involved.*[16]

The ABA shares the concern with avoiding duplication or conflict with other legislative requirements. While the Department’s comments specifically refer to product disclosure statements, the ABA believes they would regard this as including consumer credit under the NCCPA [and the extended definition of financial services under the ASIC Act as well].

[16] Fair Trade NSW, *Better Business Reforms Implementation Options Paper* (November 2018) at p7. See also the mention of product disclosure statements in *Better Business Reform Explained* (October 2018) at p15 (2.01).