23rd July 2002

Secretary
Trade Practices Act Review
c/- Department of the Treasury
Langton Crescent
PARKES ACT 2600

By facsimile: (02) 6263 3939

Dear Madam/Sir

Review of the Competition Provisions of the *Trade Practices Act 1974* ("TPA")

The Consumer Credit Legal Centre (NSW) Inc. ("CCLC") is a community based legal centre specialising in financial services, particularly matters and policy issues related to consumer credit, banking and debt recovery. It is the only such Centre in New South Wales and has been operating for over 15 years.

The Centre provides free legal advice and assistance to consumers concerning credit, debt and related matters. We also educate consumers about their rights and obligations and seek to identify and change areas of law that we see as needing improvement. Having received many complaints from consumers and expressions of concern regarding unfair contract terms, CCLC wishes to express its strong endorsement of the submission of the Australian Consumers' Association ("ACA") in relation to the review of the competition provisions of the TPA.

The expansion of the consumer credit industry has promoted a number of disturbing trends which have exacerbated the vulnerability of many consumers in what is often the largest financial transaction of their life. With this in mind CCLC, along with the Consumer Credit Legal Service (Vic) Inc, recently prepared a detailed submission in relation to the Review of the Uniform Consumer Credit Code (which we have attached for your information), highlighting our concerns with unilateral changes clauses which routinely appear in consumer credit contracts. In that submission we were (and still are) of the view that such clauses are grossly unfair and as such we strongly support that part of the ACA's submission which relates to inserting a new *Part IVB – Unfair Terms* into

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the TPA modeled on the key features of the UK *Unfair Terms in Consumer Contracts Regulations 1999*.

We believe the recommendations contained in the ACA submission will substantially enhance the position of consumers and are therefore keen to discuss our experiences in this area with you should you require additional information.

Yours sincerely
CONSUMER CREDIT LEGAL CENTRE (NSW) Inc.

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Chris Batt
Chair
Uniform Consumer Credit Code Management Committee
C/- Department of Justice and Industrial Relations
GPO Box 1244
Hobart TAS 7001

29 May 2002

Dear Mr Batt

Unilateral Change Clauses

We refer to your letter dated 12 April 2002. We welcome the Committee's decision to review unilateral change clauses in credit contracts.

This response has been prepared jointly by Consumer Credit Legal Service (Vic) (***CCLS***) and Consumer Credit Legal Centre (NSW) (***CCLC***) and incorporates the following documents:

(a) this letter;
(b) a detailed memorandum canvassing the applicable law on unilateral change clauses (***Annexure A***);
(c) relevant case studies (***Annexure B***);
(d) examples of unilateral change clauses in consumer credit contracts (***Annexure C***).

1 Background

In our experience, *every* credit contract gives the credit provider very wide powers to make unilateral changes. In particular, the "catch-all" provision is a standard term in credit contracts. The fact that such a completely one-sided term is in the contract reflects the very unequal bargaining power of consumers and credit providers.

We have also found that the unilateral change clauses in credit contracts are basically not negotiable (like almost every other term). Consumers have no choice but to accept the unilateral changes terms as part of the contract. We have not heard of a single case where a consumer was able to successfully negotiate a change in this clause.

We would argue that the catch-all and new fee unilateral change clauses are inherently unfair and unconscionable. Those particular clauses are completely biased towards the

credit provider with the consumer being significantly disadvantaged in the contractual relationship by those terms. The common law concept of a contract being a meeting of minds appears to have been ignored by institutional lenders when drafting consumer credit contracts.

The concept of particular terms or clauses being inherently unfair has been recognised in the United Kingdom (*Unfair Terms in Consumer Contracts Regulations 1999).* We submit that in the current environment this sort of approach is imperative to correct the significant imbalance of bargaining power faced by consumers.

We contend that the inclusion of unilateral change clauses in a consumer credit contract may constitute:

(a) misleading and deceptive conduct under s 52 of the *Trade Practices Act* 1974 (***'the TPA'***) and equivalent state *Fair Trading Act* provisions;
(b) unconscionable conduct under s 51AB of the TPA and equivalent state *Fair Trading Act* provisions;
(c) unconscionable conduct under s 70 of the *Consumer Credit Code*;
(d) a false and misleading representation under s 53(g) of the TPA and equivalent state *Fair Trading Act* provisions;
(c) a failure to settle the terms of the agreement with sufficient certainty to satisfy fundamental principles of contract law.

To comply with existing laws, credit providers should have removed these clauses already. The fact that they have not is indicative of the failure of the current regime to effectively protect consumers.

We conclude that unilateral change clauses in consumer credit contracts should be reviewed immediately. In particular the following types of unilateral change clauses should be immediately prohibited:

1) "Catch-all" unilateral changes
2) Clauses that allow new fees or charges to be introduced (without a valid reason such as unforeseeable changes to circumstances eg. legislation)
3) Increases in fees and charges (without a valid reason)

2. Policy considerations

Institutional lenders should not abuse the great disparity of power which exists in their favour in their dealings with consumers. The unfettered power of financial institutions to vary terms and conditions and introduce or increase fees and charges would be unacceptable in any genuine arms-length business dealing. The powerlessness of most individual consumers in these circumstances is such that they not only have no realistic prospect of negotiating the modification or deletion of such terms, but they are also unlikely to challenge them legally. With some notable exceptions, each consumer suffers a relatively small loss with each change and is therefore unlikely to undergo the trouble and expense of a legal challenge. The overall effect on the financial institution, however, is at best a shift of all business risk to the customer and at worst, "a licence to print money".

The current ability of financial institutions to make such a wide variety of unilateral changes effectively undermines the steps that have been taken in recent years to promote truth in lending. In the case of home loans, for example, consumers often make a choice based on the combined effect of interest rates, fees and features. For example, a consumer may choose a loan on the basis that there are no monthly account keeping fees. When such a fee is introduced two years into a 25 year loan on the basis of a unilateral change clause, the consumer is effectively prevented from moving by the cost of making a new loan application and possible early termination fees. The "comparison rate" is therefore very limited in its usefulness in that it only reflects the situation at the time the loan is entered into and may have no relevance to the same product within a relatively short time.

The circumstances in which a lending institution may wish to vary the terms of a loan where such a variation is a legitimate response to changes in the marketplace would be foreseeable and explicable. As such, lending institutions that wish to reserve the right to vary certain terms of loans to respond to particular eventualities should be obliged to set out explicitly in the loan agreement the circumstances in which such a right of variation is permitted. A failure to do so demonstrates at best poor drafting of the legal documents concerned and, at worst, a deliberate attempt to take advantage of those unable to stand up for their own interests and rights.

The current climate of regulation of lenders' dealings with consumers – by both government and industry dispute resolution bodies – is placing more emphasis on the fairness of an agreement as a whole, and less upon the formal construction of contracts. A clause of a contract that may be seen to have the effect of discouraging consumers to pursue their remedies may be subject to censure by a dispute resolution body such as the Australian Banking Industry Ombudsman, as well as the courts. Clear regulation on this issue, however, would produce a more effective and comprehensive result for all consumers.

3 The information you have requested

(a) *The extent to which catch-all clauses are the subject of complaint or adverse comment to your organisation*

Both CCLS and CCLC have received a number of complaints and adverse comments about unilateral changes from consumers. Most consumers are just "stunned" that the credit provider believes it "can change any thing at any time". Consumers have also asked if there are any credit providers that do not use these clauses. The answer has to be "not that we are aware of!"

It is admitted that as unilateral change clauses are simply a standard term, consumers are less likely to complain, as they know it cannot be changed. It is "take it or leave it."

A number of case studies are attached as Annexure "A", which represent the types of complaints both CCLS and CCLC receive about unilateral changes clauses.

(b) Examples of any such clauses

See Annexure "B" for examples of unilateral change clauses in credit contracts issued by Aussie Home Loans, National Australia Bank, RAMS, St George Bank, Wizard Home Loans and the Commonwealth Bank of Australia.

It can be seen that *all* of the credit contracts include wide unilateral change clauses including a "catch-all" unilateral change clause.

(c) The extent to which credit providers rely on these clauses

The extent of reliance upon unilateral changes clauses depends on the type of change. Credit providers regularly rely on unilateral change clauses to change interest rates and the amount of repayments, and to increase fees.

For example:

- credit providers will increase the amount of repayments if interest rates increase;
- credit providers have used unilateral change clauses to increase monthly loan account fees.

Credit providers *do* rely on unilateral change clauses to introduce fees and change terms and conditions. For example:

- Around 1996, Westpac notified all their home loan customers that it had decided to introduce an $8.00 Loan Maintenance Fee on all existing and new home loans. Due to pressure from consumers, Westpac did not proceed with the implementation of the fee on existing loans. Westpac was relying on unilateral change clauses in all of their customer's loan agreements to introduce the fee on existing loans.

- In 1998 the Bank of Melbourne advertised a mortgage offset facility which linked a loan account and a deposit account. The facility was advertised as being free of account keeping and transaction fees. In 2000, the Bank of Melbourne applied account keeping and transaction fees to that deposit account. See Annexure C, Case Study Number One.

- Aussie Home Loans (*AHL*) contracts previously required that applications to fix interest rates must be made in writing and signed by all borrowers. AHL unilaterally changed this requirement without notice over a year ago. The requirement was changed to be that one borrower could fix the loan interest rate over the phone.

- Westpac recently notified all credit card holders of a change to the definition of "Cash advance". This change is due to take effect on 1 June 2002. The change was presumably made pursuant to a unilateral change clause, however, no mention of this was made in the notice.

- Several banks changed the interest free period on their credit cards from 55 days down to around 44 days. Examples that we are specifically aware of are National Australia Bank and Westpac.

Unilateral change clauses in consumer lending agreements
Annexure A: research memorandum

1. Background

It is a common practice of major consumer lending institutions to include in their consumer loan contracts a clause such as the following, taken from the Commonwealth Bank's *Standard Terms and Conditions for Consumer Lending*, in this case forming the terms of a variable home loan:

> 10.4 From time to time we may:
>
> (a) change the amount of or the basis for calculating any fee or charge, change the interest or fee charging cycle, or both, and, except during any fixed interest rate period of the Loan, change any interest rate margin, any link to a reference interest rate and the basis for calculating interest;
>
> (b) impose and debit to the Loan Account any new fee or charge;
>
> (c) change the frequency of repayments;
>
> (d) change the Loan Account number (for example, when the type of interest rate applying to the Loan changes);
>
> (e) change the way we describe any reference interest rate; and
>
> (f) change any other terms and conditions.

We contend that the inclusion of such a unilateral change clause in a consumer credit contract may constitute:

(a) misleading and deceptive conduct under s 52 of the *Trade Practices Act* 1974 (*'the TPA'*) and equivalent state *Fair Trading Act* provisions;
(b) unconscionable conduct under s 51AB of the TPA and equivalent state *Fair Trading Act* provisions;
(c) unconscionable conduct under s 70 of the *Consumer Credit Code*;
(d) a false and misleading representation under s 53(g) of the TPA and equivalent state *Fair Trading Act* provisions;
(e) a failure to settle the terms of the agreement with sufficient certainty to satisfy fundamental principles of contract law.

This memorandum will take clause 10.4 as an example of unilateral variation clauses in consumer loans generally.

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The effect of clause 10.4 as a whole purports to allow the Commonwealth Bank carte blanche in unilaterally varying all or any terms of the contract. However, the Bank does not, at law, have this right. Consumer protection legislation will operate to limit the manner in which corporations may deal with consumers, and to ensure that certain terms of a contract will not be effective at law. This fact itself gives rise to a second legal issue – that of misrepresentation.

Thus, if the bank were to seek to vary a consumer lending contract in an unconscionable manner by relying upon clause 10.4, we can conceive of two distinct wrongs perpetrated upon the consumer in that circumstance:

(a) unconscionable dealing;
(b) misrepresentation.

Additionally, the inclusion of clause 10.4 may import an element of uncertainty into the terms of the credit contract which render either that term or the contract as a whole unenforceable. The issues set out above will be dealt with in detail below.

2. Unconscionable dealing

2.1 The *Consumer Credit Code*

Section 70 of the *Consumer Credit Code* 1996 operates to limit the enforceability of clause 10.4 by allowing a court to reopen and vary the terms of a contract held to be unjust. Section 70(2) lists factors which may be considered by the court in determining whether a contract is unjust. Section 72 gives a court the power to review the imposition of unconscionable fees and charges, and changes to interest rates which are unconscionable. Such provisions establish a regime equivalent to the common law and TPA prohibitions against unconscionable conduct, with the addition of certain considerations particular to the consumer credit environment.
A bank would be unlikely to obtain judicial approval for a variation to a fixed interest rate loan which recreated it as a variable rate loan. Similarly, the bank may not be allowed to increase the interest rate of a variable home loan by an outrageous margin in the absence of justifiable changes in the economy and financial services market.

2.2 The *Trade Practices Act*

Similar unconscionability principles are given statutory effect by ss 51AA and 51AB of the TPA and the equivalent state *Fair Trading Act* provisions. Note however that these provisions are concerned with the *conduct* of a person, rather than with the terms of a contract to which that person is a party.

2.3 The Code of Banking Practice

The recent *Review of the Code of Banking Practice* recommends the revised Code, which shall be contractually binding on banks, incorporate a principle of "fairness" in the following terms:

> We promise that we will act fairly and reasonably towards you (our customers) in a consistent and ethical manner. In doing so we will consider your conduct, our conduct and the contract between us.
>
> Richard Viney, *Review of the Code of Banking Practice. Final Report*, RTV Consulting, October 2001, 25.

While the revisions to the Code of Banking Practice have not been finalised, it is understood that the banks have agreed to the inclusion of this principle of fairness in the Code. Disputes between banks and their small business and consumer customers would be addressed by the Australian Banking Industry Ombudsman with regard to such a principle.

2.4 The common law

More fundamentally, the very presence of such a right of unilateral variation in a contract may support a finding that the contract is inherently unconscionable on its terms. Such a finding would be independent of whether the right of variation was employed in an unconscionable manner. In *Paviour-Smith v National Mutual* (1999) 91 IR 8 at 63, the NSW Industrial Relations Commission held that the fact that a contract between an insurer and its agent was unfair to the extent that it permitted unilateral variation of its terms on the part of the insurer. It is made clear in the judgment in *Paviour-Smith* that the action in unconscionability stems not just from the unconscionable exercise of the rights granted to the insurer by the contract, but from the presence of the unilateral variation clause in the contract itself. The presence of that clause is characterised as stemming from the significant imbalance of power existing between the two contracting parties: *Paviour-Smith*, at 62-3.

Section 70(2) of the *Consumer Credit Code* is commensurate with the decision in *Paviour-Smith* in specifying that a Court reviewing a contract under s 70 is involved in a review of 'whether a term of a particular credit contract, mortgage or guarantee is unjust in the circumstances relating to it at the time it was entered into or changed'. Thus a Court's power to reopen a contract under s 70 is enlivened even where no loss or damage has been suffered by the consumer as a result of the unconscionability alleged. In such circumstances, it is most likely that the Court would be called upon to remedy the unconscionability by – where possible - severing the offending term.

2.5 The UK approach

The *Unfair Terms in Consumer Contracts Regulations 1999* (UK) (*the UK Regulations*) stipulate circumstances in which a term of a consumer contract may be taken to be unfair.

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Section 5, headed 'Unfair Terms', states:

> (1) A contractual term which has not been individually negotiated shall be regarded as unfair *if*, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.
> (2) A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.
> ...
> (5) Schedule 2 to these Regulations contains an indicative and non-exhaustive list of the terms which may be regarded as unfair.

Paragraph 1 of Schedule 2 includes the following sub-paragraphs:

> (c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realisation depends on his own will alone;
> ...
> (j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;
>
> (k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;
> ...
> (m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;
> ...
> (o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his;

Paragraph 2 of Schedule 2 states, with reference to sub-paragraph (j) above:

> (b) Paragraph 1(j) is without hindrance to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately.
>
> Paragraph 1(j) is also without hindrance to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract.

Note however that paragraph 2(b) does not entirely disable paragraph 1(j) in relation to the supply of financial services, and that the operation of paragraph 1(k) is left unfettered.

In a publication entitled *Unfair Contract Terms Guidance* (February 2001, available online at www.oft.gov.uk) (*the Guidance*), the United Kingdom Office of Fair Trading considers the application of the Regulations to standard terms found in UK consumer contracts.

The UK OFT at pp 29-31 of the Guidance pays particular attention to the insertion of unilateral variation clauses in consumer agreements, and makes extensive comments regarding its position on the legality of such terms, including the following:

> 10.1 A right for one party to alter the terms of the contract after it has been agreed, regardless of the consent of the other party, is under strong suspicion of unfairness. A contract can be considered balanced only if both parties are bound by their obligations as agreed.
>
> 11.3 A clause which allows the supplier to vary what is supplied is most likely to be considered fair if it is clearly restricted to minor technical adjustments which can be of no real significance to the consumer, or changes required by law.

At pp 112-118 of Annexure A of the Guidance, the UK OFT gives examples of terms it has considered to be in breach of the Regulations, and amendments to those terms which remedy the unfairness present in their original form.

It is submitted that a unilateral change clause such as clause 10.4 would clearly fall foul of the Regulations and the Guidance were it sought to be enforced under UK jurisdiction. It is further submitted that the UK OFT treatment of the problem of unilateral variation clauses should be considered when determining how best to balance consumer protection and the need for a flexible and market-responsive business environment.

3. Misrepresentation

While the legal effect of clause 10.4 is relatively negligible, it's practical effect in the consumer lending business is more tangible. If a customer of the bank reads the fine print in their home loan, car loan, or credit card contract, the consumer may take clause 10.4 at face value, and believing that the bank has carte blanche to change all or any terms of the contract.

The situation is analogous to that of a retailer which displays a 'No Refund in Any Circumstances' sign. Despite the clear legal right of a customer to a refund in certain circumstances, such misrepresentations – accompanied by appropriate exhortations from the retailer – have a practical effect of often denying customers refunds to which they are entitled.

In this example, the misrepresentation is that the bank has a right which it does not have, or conversely, that the consumer does not have a right which they do in fact

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possess. This misrepresentation compounds the practical and financial impediments to consumers – particularly low-income earners – in taking legal action to dispute such a change.

As shown above, s 70 of the *Consumer Credit Code* provides a remedy for the wrong of unconscionable conduct. False and misleading representations in relation to a matter that is material to entry into a credit contract are the subject of both criminal and civil sanction: *Consumer Credit Code*, s 144. Naturally, such misrepresentation may also attract the operation of the TPA and equivalent state *Fair Trading Act* provisions.

3.1 Application of s 52

In *ACCC v McCaskey* (2000) 183 ALR 159, French J held that a false representation by a mercantile agent that a creditor had a legal right to sell a debtor's house in satisfaction of a debt constituted misleading and deceptive conduct in breach of s 52 of the *Trade Practices Act 1974* (Cth): *McCaskey* at 172. Furthermore, his Honour held at 176 that such conduct founded a right to injunctive relief against the agent.

In *TPC v Radio World* (1989) ATPR 40-973, the Federal Court found that a retailer displaying a sign to the effect that customers did not have the right to a refund or exchange for goods purchased was in breach of s 52. Such a finding was made by the Court despite the fact that the offending sign incorporated parenthetical remarks acknowledging – but not specifying - rights conferred by the TPA which could not be modified or excluded.

The decisions in *McCaskey* and *Radio World* are authorities for the proposition that a party to a contract who falsely represents to the other party to that contract that a legal right or remedy is exercisable against that second party may act in breach of s 52. On these grounds, the insertion by an institutional lender into a consumer lending agreement of a unilateral variation clause would be in breach of s 52.

3.2 Section 53(g) of the *Trade Practices Act*

Section 53(g) of the TPA reads:

> A corporation shall not, in trade or commerce, in connexion with the supply or possible supply of goods or services or in connexion with the promotion by any means of the supply or use of goods or services: ...
>
> (g) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

In *Radio World*, referred to above, the Federal Court found that the retailer was in breach of s 53(g), as well as s 52, by the display of the offending 'no refund' sign. See also *Miller v Fiona's Clothes Horse of Centrepoint* (1989) ATPR 40-963.

Compare however the decision in *McCaskey*, also referred to above, where the Court declined to find a breach of s 53(g) where the matter before it was concerned not with representations about the existence, exclusion or effect of a right or remedy held by the consumer against a supplier but rather the availability of a right or remedy held by the supplier against the consumer.

McCaskey suggests that an impediment to the application of s 53(g) in the present case is that clause 10.4 confers a right on the supplier – that is, the bank – rather than on the consumer. However, any assertion of a right involves a truncation of an opposing remedy and where Part V of the TPA is expressly concerned with consumer protection it seems unclear why a court would apply s 53(g) to protect a consumer's remedy from representations which deny its existence or effect, but not to protect a consumer from a false representation as to the existence of a right which would deny a consumer's remedy. An approach which places more weight upon the misleading nature of such a clause may consider such reading down of s 53(g) as an exercise in semantics.

4. Uncertainty of terms

By the application of fundamental principles of contract law, the inclusion of a unilateral variation clause in any contract may have either of two consequences:

(a) the entire contract is rendered void for uncertainty;

(b) the unilateral variation clause is rendered ineffective and severed from the contract on the grounds of uncertainty of terms.

The submission on this point raises a commonality of interest between institutional lenders on the one hand, and their customers on the other. Customers seek the removal of unilateral variation clauses from their loan contracts on the ground that it apparently places them at the mercy of a contracting partner with unfettered power and scant obligation. This submission will show that lenders necessarily have an identical interest in removing such clauses, to ensure that contractual rights asserted against their customers are not rendered void and unenforceable.

4.1 Fundamental Principles

It is a given principle of common law contract theory that an essential element of a legally enforceable contract is that the terms of the agreement constituting the contract are able to be ascertained with reasonable certainty: See *Halsbury's Laws of Australia* [110-205] and [110-455] ff.

In *Placer Development Ltd v The Commonwealth* (1969) [21 CLR 353, the High Court was called upon to consider a clause in a contract which gave the respondent an unfettered discretion as to the amount of a particular subsidy payable to the applicant

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by the respondent. His Honour Kitto J held at 356 that the general principle governing such a circumstance is that:

> wherever words which by themselves constitute a promise are accompanied by words showing that the promisor is to have a discretion or option as to whether he will carry out that which purports to be the promise, the result is that there is no contract on which an action can be brought at all.

His Honour Windeyer J concurred at 370.

Their Honours Taylor and Owen JJ at 360 characterised the clause under consideration as being an 'illusory promise', in that no contractual obligation at all attached to the respondent by virtue of its operation. Their Honours went on to say at 361:

> obviously there is a complete absence from the clause, and from the Agreement as a whole, of any identifiable criteria by which it can be said the parties intended the amounts or rates to be determined; this is left solely to the discretion of the Commonwealth. This being so the clause amounts to no more than a promise to pay what, in all the circumstances, the Commonwealth in its discretion thinks fit and, as such, is wholly unenforceable.

It was acknowledged by the Court in *Placer* that in considering the validity of the contract as a whole, the intention of the parties to enter into legally binding relations was an important factor: Menzies J at 361, Windeyer J at 368.

It was further acknowledged that the uncertainty of a term may in some circumstances be rectified by reference to some external, objective criterion by which reasonable compliance or fulfilment of that term may be gauged - in the words of Kitto J at 357 'a general standard of reasonableness'. Where such an objective yardstick may be adduced, the contract may be interpreted as sufficiently certain to be fully enforceable: Windeyer J at 372. Without that however, a clause such as the one under consideration in *Placer* would be meaningless: Kitto J at 357.

In *Placer*, the majority of the Court – with the exception of Menzies J – held that the clause under consideration did not create any legal obligation on the part of the respondent to pay a subsidy to the applicant, due to the uncertain nature of that clause.

In *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429, the High Court considered a clause of an electricity supply contract, clause 5 of which provided that:

> if the Supplier's [the Applicant's] costs shall vary in other respects than as has been hereinbefore provided the Supplier shall have the right to vary the maximum demand charge and energy charge

The Court was called upon to determine whether such a clause was void for uncertainty. At 437 Barwick CJ made the following statement of principle:

> [A] contract of which there can be more than one possible meaning or which when construed can produce in its application more than one result is not therefore void for uncertainty. As long as it is capable of a meaning, it will ultimately bear that meaning which the courts, or in an appropriate case, an arbitrator, decides is its proper construction: and the court of arbitrator will decide its application. The question becomes one of construction, of ascertaining the intention of the parties, and of applying it.... So long as the language employed by the parties, to use Lord Wright's words in *Scammel (G.) & Nephew Ltd v Ouston* (1941) AC 251, is not "so obscure and so incapable of any definite or precise meaning that the Court is unable to attribute to the parties any particular contractual intention", the contract cannot be held to be void or uncertain or meaningless. In the search for that intention, no narrow or pedantic approach is warranted, particularly in the case of commercial arrangements. Thus will uncertainty of meaning, as distinct from absence of meaning or of intention, be resolved.

The Court in *Upper Hunter CDC* held that clause 5 was not void for uncertainty, Barwick CJ observing at 437 that while the expression 'Supplier's costs' is broad in content, 'generally speaking, the concept of a cost of doing something is certain in the sense that it provides a criterion by reference to which the rights of the parties may ultimately and logically be worked out'.

4.2 Application to clause 10.4

A term such as clause 10.4 engenders uncertainty of such a scope that it must impugn the validity and enforceability of rights purported to arise out of that clause or, potentially, out of the contract as a whole.

The discretion to vary conferred by clause 10.4 infects the entirety of the contract within which it is contained. Despite this, however, it is unlikely that a court would find the entire contract void for uncertainty. The court would acknowledge the intention of the parties to enter into legally binding relations and most likely sever the term.

Alternatively, it may be possible to argue that an external yardstick in the form of a 'general standard of reasonableness' is available to measure the actual scope of variations lawfully permitted under clause 10.4. However, to allow that clause to remain on that ground would be to presuppose and accept the necessity for the intervention of the courts to determine such a scope at each time a dispute over the operation of clause 10.4 arose. The expense and onus this places upon the customers of institutional lenders is unacceptable in the context of a consumer protection regime.

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5. Conclusion

This submission makes the following points:

(a) The broad powers asserted by clause 10.4 are restricted by common law and statutory principles of unconscionability and unfair contracting.
(b) Given that, the inclusion of clause 10.4 in an agreement constitutes misleading and deceptive conduct under s 52 of the TPA and, arguably, a false and misleading representation under s 53(g).
(c) Furthermore, the inclusion of clause 10.4 constitutes unconscionable dealing in itself, irrespective of whether the clause is employed unconscionably.
(d) The inclusion of clause 10.4 in a contract engenders such uncertainty into that contract so as to render invalid the exercise of rights purportedly conferred under that clause and, arguably, under that contract as a whole.

The current climate of regulation of corporations' dealings with consumers – by both government and industry dispute resolution bodies – is placing more emphasis on the fairness of an agreement as a whole, and less upon the formal construction of contracts. A clause of a contract which may be seen to have the effect of discouraging consumers to pursue their remedies may be subject to censure by a dispute resolution body such as the Australian Banking Industry Ombudsman, as well as the courts.

It is also important to highlight the manner in which unilateral change clauses require consumers to expend large sums of money and time to challenge the validity of contractual variations which are made unilaterally. No matter the state of the law on these issues, the funds – and legal expertise – required to bring such a challenge present a practical barrier that prevents all but a few consumers from exercising their rights against institutional lenders.

CCLS and CCLC submit that unilateral variation clauses in consumer credit contracts should be reviewed immediately. In particular the following types of unilateral change clauses should be immediately prohibited:

(a) "Catch-all" unilateral changes
(b) Clauses that allow new fees or charges to be introduced (without a valid reason such as unforeseeable changes to circumstances eg. legislation)
(c) Increases in fees and charges (without a valid reason).

Unilateral change clauses in consumer lending agreements
Annexure B: examples of unilateral change clauses

Aussie Home Loans

11. Our Changes

11.2 Perpetual can change some of the terms of your loan contract or the way it operates, or both, at any time without your consent. Those changes Perpetual can make are:

(a) changes to the amount or frequency of payment of the repayments;
(b) changes to any annual percentage rate (including any margin that is used to calculate any annual percentage rate) other than a fixed rate that applies during any fixed rate period.
(c) Changes to the manner in which interest is calculated or applied under your loan contract;
(d) Changes to the amount or frequency of payment of credit fees and charges (other than the break cost fee);
(e) Imposing new credit fees and charges;
(f) Changes to the method of regular publication of reference rates, as set out in Condition 3.2; and
(g) Changes to the provisions of Condition 11.3 (Notice of Changes), Condition 13 (Redraw Facility), Condition 16 (Multi-Credit Facility) and any definitions relevant to those Conditions.

11.5 Perpetual may waive any of its rights under your loan contract. Subject to any applicable law, a waiver by Perpetual is not a change to and does not reduce its rights under your loan contract unless Perpetual gives you written notice that it is a change to your loan account.

Annexure B: examples of unilateral change clauses

consumer credit legal service (vic)

consumer credit legal centre (nsw)

National Australia Bank

NAB Facility Agreement General Terms (3/00)

35. Variations

In addition to other changes we may make to this agreement which are detailed in this agreement, we may vary any of the other provisions of this agreement (including by changing the method by which interest is charged). (If a Consumer Credit Code applies to this agreement, we may only do so in accordance with that Code.) We must notify you of any variation before it takes effect.

Despite this clause, we may not vary the *facility limit* without your consent.

NAB Consumer Variable Rate Personal Loan (5/02)

The **Bank** may:

a) change the annual percentage rate by changing the relevant **Bank** indicator rate; and
b) change the amount, frequency or time for payment of the credit fees and charges shown in the Details (including government charges); and
c) change the method by which interest is calculated or the frequency with which it is charged; and
d) impose a new fee or charge; and
e) change the repayments – see the Details

The **Bank** may also change any of the other provisions of this agreement or any security.

Notification of change

The **Bank** will notify you of any unilateral change by the **Bank**:

f) in the relevant **Bank** indicator rate by advertising the change in a newspaper circulating throughout your State or Territory no later than the date the change takes effect; and
g) in the amount of the credit fees and charges shown in the Details (excluding government charges) by advertising the change in a newspaper circulating throughout your State of Territory no later than 31 days before the changes takes effect; and
h) in the frequency or time for payment of the credit fees or charges shown in the Details (excluding government charges) by giving you notice no later than 31 days before the change takes effect; and

i) in the method by which interest is calculated or the frequency with which it is charged by giving you notice no later than 31 days before the change takes effect; and
j) imposing a new fee or charge by giving you notice no later than 31 days before the change takes effect.

For those changes detailed in f0 and g) above, the Bank will also give you particulars of any such change before or when the next statement of account is sent to you after the change takes effect.

The Bank will notify you of any other change that the Bank may make unilaterally by giving you notice of the change not later than 31 days before the change takes effect.

The Bank may agree to change this agreement or to defer or waive any of these terms and conditions without creating a new contract.

consumer credit
legal service (vic)

consumer credit
legal centre (nsw)

Annexure B: examples of unilateral change clauses

RAMS

Home Loan Agreement – General terms 28/10/00

32 Variations

We may vary any term of this agreement. (If a Consumer Credit Code applies to this agreement we may only do so in accordance with that Code.) We must notify you of any variation of any term of this agreement before it takes effect.

ST GEORGE BANK

Residential Loan Agreement General Terms and Conditions 31/3/02

25 Changes to fees and charges

25.2 We may change the amount, or frequency of payment, of any fee or charge, or introduce a new one. We will tell you of the introduction or change to a new fee or charge before it takes effect. We will do this by writing to you or by press advertisement. However, we need not notify you in advance in relation to certain government fees and charges, if they are published by the government itself.

35 Variations and waivers

We may vary any provision of this loan agreement as we choose. (If a Consumer Credit Code or the Electronic Funds Transfer Code of Conduct applies to this loan agreement, we may only do so in accordance with those Codes). If we do, we must notify you in writing and the changes take effect from the time we specify in the notice. When we give the notice depends on the type of change we make.
A right created under this loan agreement may not be waived except in writing signed by the party or parties to be bound.

consumer credit
legal service (vic)

Annexure B: examples of unilateral change clauses

consumer credit
legal centre (nsw)

WIZARD

Wizard Housing Loan Contract

12. CHANGES WE CAN MAKE

12.2 Changes to Contract

We can change the terms of this Contract or the way it operates, or both without your consent at any time.

12.3 Types of changes we can make

Some of the changes we can make are:

(a) changes to the amount or frequency of payment of the Repayments;
(b) changes to any Annual Percentage Rate other than a fixed rate that applies during any Fixed Rate Period;
(c) changes to the amount or frequency of payment of Credit Fees and Charges other than to a fee or charge that applies when, during a Fixed Rate Period, you repay the whole of the Loan to which a fixed rate applies early, or you repay any part of the Loan to which a fixed rate applies ahead of or in addition to the Repayments; and
(d) imposing new Credit Fees and Charges.

12.8 Other changes

We will notify you when we make any other change to the terms of this Contract or the way it operates or both. We will do this either by writing to you or by newspaper advertisement or both.

Annexure B: examples of unilateral change clauses

COMMONWEALTH BANK OF AUSTRALIA

Standard Terms and Conditions for Consumer Lending

10.4 From time to time we may:

(a) change the amount of or the basis for calculating any fee or charge, change the interest or fee charging cycle, or both, and, except during any fixed interest rate period of the Loan, change any interest rate margin, any link to a reference interest rate and the basis for calculating interest;

(b) impose and debit to the Loan Account any new fee or charge;

(c) change the frequency of repayments;

(d) change the Loan Account number (for example, when the type of interest rate applying to the Loan changes);

(e) change the way we describe any reference interest rate; and

(f) change any other terms and conditions.

Unilateral change clauses in consumer lending agreements
Annexure C: case studies

Case Study Number One (CCLS ref: 5376)

Mr Z obtained a home loan from Strict Bank. In entering into this contract, he relied on the terms and conditions contained in the advertising material promoting the "Offset Loan" and advice from the branch manager. This service linked his loan account, his deposit account and an attached Visa debit card account. A term of this loan fundamental to Mr Z's entering into it was that he would not have to pay any account keeping or transaction fees on his personal current account. For 2 years Mr Z was not charged any fees on this account. However mid-way through 2000, after the merger of Strict Bank and another bank, fees and charges began to be incurred by Mr Z for his use of this account.

It appeared that by charging these fees Strict Bank unilaterally made changes to the fundamental terms of the contract it had with Mr Z for the "Offset Loan" product. More specifically this was done by the sudden imposition of fees and charges on the linked deposit account despite the clear statement by the bank that customers would pay "no account service or transaction fees" on their deposit accounts. In response, Strict Bank claimed that this statement was only a reflection of present fact and was accordingly not misleading.

Mr Z, on referral by Credit Help Line, came to CCLS who argued that Strict Bank's advertising material *was* likely to create an expectation in the mind of a reasonable consumer that the representation would apply for the entire term of the product being offered. Such a misapprehension could have easily been avoided by advertising that the customer would "*currently* pay no account keeping or transaction fees" on the deposit account. In addition to this, at the time of entering into the contract he was charged a $6 loan service fee, a fee that he believed was charged in part to offset the fact that no account fees would be charged on the deposit account. This appears to be misleading and deceptive conduct in breach of s.52 of the Trade Practices Act (Cth).

In response to these allegations, Strict Bank did not suggest that these expectations of Mr Z were unreasonable. Rather the bank relied on the strict terms of the contract that purportedly gave it the power to impose new fees. This reliance of the bank on these strict terms was arguably unreasonable.

Case Study Two (Credit Helpline ref: 24173)

Mr S and his wife wished to refinance their home loan. Upon reading the Commonwealth Bank of Australia's 'Usual Terms and Conditions for Consumer Lending', Mr S objected to the presence of clause 10.4(f), which states:

Annexure C: case studies

consumer credit legal service (vic)

consumer credit legal centre (nsw)

> From time to time we [the Bank] may:
> ...
> (f) change any other terms and conditions.

Mr S believed that, combined with paragraphs (a) to (e) of clause 10.4, the effect of 10.4(f) was to provide the Commonwealth Bank with a right to vary any and all terms of the contract in any manner. Mr S was reluctant to sign a contract giving the other party to that contract such unfettered powers to avoid its own obligations and to impose new obligations on Mr S. Mr S wanted the offending clause removed from the contract, the other terms of which appeared satisfactory to him.

Mr S sought assistance from both the ACCC and the Australian Banking Industry Ombudsman in relation to this matter, but was advised that neither body were able to assist him because he had at this stage suffered no loss.

The following extracts are taken from Mr S's complaint to the ABIO:

> Surely, the purpose of a contract is to provide certainty and security to all parties to it. The inclusion of this clause stacks the deck in favour of the bank at our expense and at the expense of every mortgage holder with the CBA. As mortgage holders, we are at the mercy of the bank because of this clause. I understand the CBA, and other banks, must retain the right to raise and lower interest rates and other interest rate dependant terms and conditions within their variable interest rate home loan contracts. However, to retain the right to unilaterally change 'any other' of the terms and conditions seems to be an unconscionable use of the power imbalance favouring the bank. How can this clause be necessary for the CBA to conduct its business?
> ...
> No doubt the CBA considers this clause justifiable in light of the risks undertaken by it. I disagree. This clause completely and utterly removes any normal business risks from the bank and allows the bank to place those risks squarely on the shoulders of its customers. There is no shared responsibility. If the banking industry takes a downturn, the bank can see to it that its customers foot the bill. It can create terms and conditions or alter existing ones to maintain or improve its profitability. This ability could be used to totally pass on any normally acceptable business risks to customers. Why should any customer be forced to place him or herself in such a vulnerable situation? As banking is as [sic. 'an'] essential service and most members of the public have no option but to borrow money at some point in their lives, I find the inclusion of this clause a total abrogation of the bank's duty to share its part of the load in the uncertainty of the future.

After seeking assistance from a number of organisations, Mr S felt compelled to accept the inclusion of clause 10.4(f) in the contract, despite his misgivings.

Case Study Three (Credit Helpline ref: 29946)

Mr B contacted Credit Helpline expressing concern about the unilateral change clause contained within his home loan contract with the Commonwealth Bank of Australia.

He was unsure whether such a right of variation was lawfully asserted by the Bank. Upon discussions with Credit Helpline staff, Mr B accepted that it was probably best to enter into the agreement despite the presence of the unilateral change clause.

Case Study Four (CCLC Ref: 12982)

Mr. V rang to complain about a unilateral change to his BankCard terms and conditions by National Australia Bank. In around January 2001, National Australia Bank notified Mr. V that his terms and conditions would be changed to the effect that the interest free period on Mr. V's BankCard would be lowered unilaterally from 55 days to 44 days.

Mr. V obtained a copy of the terms and conditions of his BankCard and agreed that there was a clause in those terms and conditions allowing terms and conditions unilaterally changed.

Case Study Five (CCLC Ref: 12924)

Ms. Z and Mr. A had a joint home loan with a mortgage originator ("L"). Ms. Z's partner fixed the loan over the phone without her permission. L fixed the rate on the instructions of just one joint borrower. The loan contract required that both parties must request the fixed rate in writing.

L claims to have unilaterally changed this requirement without notice. The matter is still in dispute.