SECURITIES & DERIVATIVES INDUSTRY ASSOCIATION

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22 May 2009

The Australian Consumer Law:
Consultation on draft unfair contract terms provisions
Competition and Consumer Policy Division
Treasury
Langton Crescent
PARKES ACT 2600

By email: australianconsumerlaw@treasury.gov.au

Dear Sirs or Mesdames,

The Australian Consumer Law: Consultation Paper on Draft Unfair Contract Terms 11 May 2009

The Securities & Derivatives Industry Association is the peak body representing the interests of wholesale and retail market participants in Australia. SDIA was formed in 1999 at the time of the demutualisation of the Australian Stock Exchange. Currently we have 66 member organisations, which account for some $4bn worth of trading daily on the ASX, which is approximately 98% of the market by value. In addition we have over 1300 individual members and are working to build the profession of stockbroking. Our member firms employ in excess of 25,000 people, and have hundreds of thousands of clients, both retail and wholesale.

With our unique coverage of the industry, we are ideally placed to comment on the impact of the proposed Unfair Contract amendments to the *Trade Practices Act* and the *ASIC Act*.

More time required

These provisions are going to cause significant changes to the way our Members do business. This is not to say that our Members routinely enter into contracts with clients that are unfair. The provisions may mean that hundreds of thousands of otherwise fair contracts may need to be amended for unclear purposes.

A useful example of the need for further consultation is the Government's new Consumer Credit legislation. For the last 18 months or so, the Federal

Government has stated that it intended to launch its new Consumer Credit legislation on 1 July 2009. This package includes the new provisions on **margin lending**. However, due to unforeseen consequences, including drafting issues, and the mechanics of implementation (including re-licensing by ASIC), to its credit the Government has announced that the legislation will not come into effect until 2010.

With this recent experience in mind, it is hoped that the Government will not pass this legislation until all the legal and practical implications are considered. To do otherwise would be to invite serious issues and problems to arise which may not yet have been foreseen. These issues would then require corrective legislation, regulatory measures or refinements in the coming years, which would not be a good regulatory outcome for business or consumers.

This significant Consultation Paper was released on 11 May for comment by 22 May 2009, the **9th business day after its release**. This has left insufficient time for Members to properly consider the proposals. Accordingly, apart from noting below that a number of our Members' contracts are mandated by regulatory requirements or market practice, we are not in a position to make a fully considered submission at this stage.

Mandatory or Industry Standard contracts ought to be excluded

In a number of areas, our Members are already required by law, exchange operating rules or industry custom to adopt standard form contracts with mandatory provisions that cannot be amended.

On the **Wholesale** side, our Members commonly use standard form agreements for OTC dealings such as :

- ISDA (International Swaps and Derivatives Association) Master Agreements, and
- AMSLA (Australian Master Securities Lending Association) Agreements published by ASLA (Australian Securities Lending Association), which is the standard legal agreement used in Australia to document securities lending transactions.

While the terms of ISDA's or AMSLA's can be negotiated between the parties, they remain the industry standard. It seems inappropriate that they should be caught by the new provisions.

On the **Retail** side, our Members are subject to several mandatory requirements under ASX Operating Rules, including :

- Client Agreements for Warrants, Options, Warrants and Partly Paid Securities, with terms prescribed by ASX[1]

[1] ASX Market Rule 7

- Client Sponsorship Agreements for CHESS sponsored clients[2], and
- Compulsory T+5 close-out requirements in client agreements[3].

Where a Member is simply using the industry standard agreement or provisions mandated by regulators like ASX, this situation should be excluded from the provision of any new Unfair Contract provisions.

These provisions are going to cause significant changes to the way our Members contract with their clients. A proper cost-benefit and legal analysis needs to be completed for a proper response to be made. The stockbroking and investment banking industries are not in the habit of entering into unfair contracts with clients. We are already highly regulated, by ASIC, ASX and/or RBA, and standards are high.

We sincerely hope that a proper consultative process will be undertaken by Government before the new provisions on Unfair Contracts are finalized and implemented.

Yours faithfully

DW Horsfield MSDIA
Managing Director/CEO

[2] ASTC Settlement Rule 7
[3] ASTC Settlement Rule 10.11.12