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SCOCA Australian Consumer Law Consultation  
Competition and Consumer Policy Division

Treasury

Langton Crescent

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Dear Sir/Madam

### **Australian Consumer Law Consultation**

The Australian Finance Conference ('AFC'), as a national finance industry body, takes this opportunity to comment on the *Australian Consumer Law – Fair Markets Confident Consumers* Consultation Paper (the Paper), particularly in relation to unfair contract terms, the definition of "consumer" and the post-implementation regulatory regime.

We welcome the *Australian Consumer Law* as an appropriate consumer protection policy framework based on the relevant provisions of the *Trade Practices Act*. However, careful consideration needs to be given to the scope and application of the *Australian Consumer Law* so it harmonises existing State/Territory legislation and addresses specific demonstrated market failure or consumer detriment. Individual States should not be able to achieve national legislation on State specific policy issues through this legislation. Nor should it increase the regulatory burden in areas already subject to specific legislation.

We encourage the Australian Government to develop the *Australian Consumer Law* in accordance with the Productivity Commission's (the Commission's) recommendations, particularly given the extensive consultations it undertook and the comprehensiveness of its final report.

Our particular areas of interest are discussed below.

#### **"Consumer" definition**

The discussion around the definition of "consumer" considers the scope of current legislative definitions based on purpose (consumer or commercial) and value of the goods or services. In our view, we believe it is important the definition of "consumer" be consistent with other consumer protection legislation and with international approaches to the same issue.

The Consumer Credit Code (the Code) provides a useful and nationally accepted definition of "consumer". The Code applies to "natural persons" where the purpose is "... predominantly

for personal, domestic or household purposes”<sup>1</sup>. Consequently, it uses the predominant purpose test without limiting the value of the transaction.

The current Victorian *Fair Trading Act 1999* (FTA) takes a similar approach. It defines a “consumer contract” as an agreement to supply goods and services acquired for “personal, domestic or household use or consumption”. In addition, the Victorian FTA unfair contract terms legislation, the only such legislation in Australia, is confined to consumer transactions. It does not apply to business transactions.

Secondly, the United Kingdom (UK) and the European Union (EU) have taken similar approaches in their unfair contract terms regimes. Both regimes define consumer as “*any natural person who, ....., is acting for purposes which are outside his trade, business or profession*”.

Given there is no evidence to suggest the definition of consumer should be broadened to include small business, we recommend Treasury adopt the Code approach. It would be based on the predominant purpose test and have no monetary limit.

### **Unfair Contract Terms**

The Paper proposes an unfair contract terms regime which will ban certain standard contract terms on the basis they are considered, in all circumstances, to be unfair. The AFC is of the view such an approach is unwarranted for the finance sector as it is already heavily regulated. Consumers, particularly under the Code, already have significant protection and redress. We recommend the finance sector be exempted from the unfair contract terms provisions.

We base on our view on the key criterion underpinning the proposed provision; that contract terms must be considered, *in all circumstances*, to be unfair. A term is to be deemed unfair if it causes a significant imbalance in the parties’ rights and obligations and would, if exercised, result in material detriment to consumers.

Fairness, in all *the circumstances* where credit is concerned, must consider a broad range of factors such as:

- The provision of credit creates a significant imbalance at settlement, in the consumers’ favour, as the consumer receives a substantial financial benefit, particularly where home loans are concerned, while the credit provider must rely on a contractual obligation to repay
- The adverse commercial and prudential impact resulting from uncertainty about the validity of contract terms or resulting from the later banning of certain terms necessary to protect the credit providers position
- Loans are offered over long periods of time and subject to significant market fluctuations, as evidenced by the current global economic crisis, so fairness can be dependent on particular economic conditions at any point in time
- The Code already provides for reopening of unjust transactions<sup>2</sup> and the review of unconscionable interest and other charges<sup>3</sup>
- The Code of Banking Practice also provides additional consumer protection, with redress through Alternative Dispute Resolution Schemes

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<sup>1</sup> Consumer Credit (Queensland) Act 1994, *Code Credit Code*, s.6

<sup>2</sup> The Code, s.70

<sup>3</sup> Op cit, s.72

- Credit fraud continues to grow and develop in sophistication, with such adverse impacts that credit providers may require contract terms that, on their face, appear unfair but are necessary to protect both the credit provider and the majority of customers
- Contract terms that may initially appear unfair in fact underpin competition and choice in the consumer credit market by providing access credit providers with access to funds

Consequently, the determination of fairness, in all the circumstances, will be complex and potentially anti-competitive. The determination may, in some circumstances, require disclosure of commercially sensitive information which will impact on competition if provided as evidence in a Court or Tribunal.

In addition, we believe the Code should contain all the legislative obligations relating to the provision of credit. As it is Government policy to reduce the business regulatory burden, legislative requirements impacting on the credit process should sit within the one regulatory regime. Two regimes impacting on contracts will result in uncertainty, potential inconsistency and, of course, increased costs in managing the systems and documentary requirements imposed by each statute.

For the reasons listed above, the AFC does not believe the unfair contracts regime should apply to credit providers or any other consumer service which is subject to a regulatory environment that already allows for contract reopening or a review of unjust fees and charges. The unfair contract regime should only apply where there is no other legislative protection.

Despite our view, we wish to provide general comment on the overall approach to the regime.

Many of the Paper's questions on unfair contract terms seek to identify terms that, on their face, may be viewed as unfair. Such an approach is counter to the policy position to consider contract terms *in all circumstances* before a decision can be made on fairness.

Rather than attempting to specify what may be viewed as unfair, it would be more productive to establish the principles on which a fairness decision, in all circumstances, can be based. *All circumstances* cannot be determined in advance, particularly in a complex and highly regulated commercial environment such as credit.

In establishing the principles, the Commission's observations on perceived unfair contract terms are worth noting:

- The rationale for action principally rests on the unreasonable *use* of unfair terms, not their *existence*
  - Dormant unfair terms often do not cause detriment to consumers
- Unfair contract terms have to steer a middle course, by seeking to stem acts of bad faith or otherwise inappropriate behaviour by *either* party to a contract
  - Bad faith is not intrinsic to the contract term, but is revealed by its inappropriate use
- What appear to be one-sided, rather than balanced, contracts may sometimes better protect the bulk of customers from the behaviour of the few

- Evidence about the detrimental use of unfair terms is of variable quality and largely anecdotal – robust quantitative evidence of the extent of detriment is inherently hard to gather
- Laws against unfair contract terms cannot define ‘unfairness’ precisely because it is an inherently subjective concept
- The unclear boundaries of unfairness may potentially lead to regulatory overreach
- The qualitative nature of the benefits makes it hard to determine ex ante whether a national measure would pass a cost-benefit test
- Unconscionability provisions in the generic consumer law can deal with the most egregious exploitation of contracts
- The question of net benefits appears to hinge on whether remedies for the residual misuse of terms and the gains from a consistent national approach are worth the costs
- The application of any law regarding unfair contract terms should be designed so the benefits for unfairly treated consumers are not offset by any incidental costs to consumers generally
  - The overall public interest must be considered in applying the law
- It is hard to estimate accurately the benefits and costs of introducing an unfair contracts provision
- It is likely less is at stake for consumers than some suggest, simply because most firms honour the implicit contracts they strike with their customers

In our view, a principles-based approach to contract terms is preferable to pre-determination of what is “*unfair, in the all the circumstances*”. Any approach which attempts to remove particular contract terms without a sound understanding of the industry, its commercial framework and its target market is likely to result in market distortions, weaken competition and unfairly favour consumer interests.

In addition, the Paper proposes the unfair contract term regime apply to all standard form contracts, regardless of whether the customer is a consumer or a business. No regulatory policy failure or justification is given for this extension of scope. As discussed above, the AFC is firmly of the view the Paper’s overall proposals should be for the protection of consumers only. What the Paper fails to appreciate, in the absence of any analysis, is that small business is a prolific user of standard form contracts with its customers, whether consumer or other businesses. The Paper presumes small business will benefit from the unfair contract terms regime. In our view, the opposite may well be the case.

### **Post-implementation Jurisdiction**

The AFC appreciates an Inter-Governmental Agreement will govern how the differing jurisdictions will work together to enforce the Australian Consumer Law. We believe it is paramount there also be an agreement which restricts the States from introducing additional consumer protection legislation in any other form.

National consistency can only be achieved where the States genuinely agree to the Australian Consumer Law as the one consumer protection. There has already been evidence of States introducing consumer protection legislation under other Statutes. The effect is to undermine the Government’s harmonisation and reduced regulatory burden policies.

As the Commission points out, the benefits of any regulatory regime depend on the extent to which it provides safeguards against regulatory error and ensures regulators listen to business. The business perspective is often overlooked where consumer protection is

concerned. It also has the right to be treated fairly, in all the circumstances, to ensure regulation works in the interests of all parties and the economy.

We strongly support the Commission's recommendation the new enforcement arrangements be independently reviewed, with explicit consideration of the costs and benefits given to the case of moving towards a single national regulator model. A single national consumer regulator should be considered if the review finds evidence of differing enforcement practices or divergence of jurisdictional regulation.

### **Summary**

The AFC supports the *Australian Consumer Law* as a significant step forward in harmonising consumer protection legislation. We are of the view the legislation, however, should only apply to consumer goods and services where no other legislation governs contract terms.

Our recommendations are:

- The definition of "consumer" be consistent with Code and international regulation by defining the application of the *Australian Consumer Law* to goods or services for predominantly personal, domestic or household purposes
- Consumer credit providers, regulated by the Code, be exempt from the unfair contract provisions of the Australian Consumer Law
- Under the Inter-Governmental Agreement, States be prohibited from introducing consumer protection legislation in any other form
- The new enforcement arrangements be reviewed with a view to moving towards a single, national regulatory model

Please contact me or the AFC's Legal & Market Consultant, Steve Edwards (email: [steve@afc.asn.au](mailto:steve@afc.asn.au)) should you wish to discuss our views.

Yours truly,

A handwritten signature in black ink, appearing to read 'Ron Hardaker', written in a cursive style.

Ron Hardaker  
Executive Director