



Australian Institute of Credit Management

Submission regarding Australian Consumer Law: Fair Markets – Confident Consumers

Introduction

This submission has been prepared by the Australian Institute of Credit Management (AICM) following consultation with members and the wider credit management industry.

AICM is the association for credit professionals in both commercial and consumer credit comprising both individual and corporate members from all industry sectors in Australia.

It has been estimated that some 150,000 people work in a range of financial management roles underpinned by an understanding of credit management which goes beyond the traditional role of an accounts receivable officer. These personnel will potentially be directly involved in the implementation of the proposed reforms to consumer law.

AICM's Overall position

AICM has consistently supported a national regulatory regime for consumer law. AICM would submit that this would result in minimised compliance costs, enable clarity for consumers, sellers/suppliers and providers and should be complimentary to the reforms being proposed in the Personal Properties Securities consultative Bill introduced by the Attorney-General in May 2008 and the reforms being developed by Senator Sherry, Minister for Superannuation and Corporate Law in relation to consumer credit.

Specific comments

Consistency with the Personal Property Security law reforms

AICM is concerned that there appears to be a level of inconsistency between the proposed consumer law reforms and the Personal Property Security law reforms (PPS).

Given the wide ranging nature of the PPS reforms and their direct relevance to consumer protection it would be disappointing if the proposed consumer law did not take into account the PPS reforms.

In particular issues such as:

- commonality of language
- consistency in application of securitisation for example in relation to retention of title clauses

Cost savings together with enhanced consumer awareness would be the outcome of dialogue between the different agencies responsible for these two sets of legislative reform.

Consistency with financial services and credit reform

AICM would also recommend that the reform of the consumer credit law be closely monitored again with objective of common outcomes of purpose and language for the reasons set out above.

Application law scheme

AICM would propose that the model for introducing the proposed Australian Consumer Law should be a single legislative instrument rather than the application scheme as proposed in the paper.

AICM believes that this would significantly contribute to effective and efficient compliance by business together with enabling greater and more importantly, deeper understanding by consumers of their rights and entitlements.

Definition of consumer

The proposed use of the *Trade Practices Act 1974* (TPA) definition of consumer represents a significant broadening of the application of the concept of who is a consumer and would encompass business to business transactions which have previously been outside the scope of existing law.

Whilst it may be argued that there are sound reasons for extending the operation of the concepts broadly defined as consumer protection to embrace small business and possibly partnerships on the basis of fairness and equitable practice the need to more widely embrace business to business transactions would seem to impose additional costs on business for a limited return.

The issue of whether or not farming should be included needs to be considered in the context of how the farming sector has been restructured. In many circumstances farming is now undertaken on a large scale by 'big' business and does not align with the stereotypical depiction of a farmer. In this circumstance it would seem to be unnecessary to include farming within the definition of consumer.

A threshold issue is that the definition of consumer should be consistent across all three legislative reforms otherwise there is a serious risk that a situation of genuine uncertainty may arise which would impede the implementation of the objectives of the reform programs.

Renaming the TPA

Renaming the TPA to the *Competition and Consumer Act* is supported. A name such as that suggested would clearly indicate to the broader community the role and purpose of the legislation.

Unfair contracts

Whilst AICM does not support the use of contractual arrangements that would result in an imbalance in the parties' rights, AICM would express reservation at some of the conclusions reached concerning unfair contracts.

Retention of title (ROT) clause

AICM is somewhat uncertain as to whether the examples of ROT clauses provided in the paper would be enforceable. Perhaps the intention of the examples given is based upon ignorance. Irrespective of the intention, the ability to extend ROT to the concept of fixtures and fitting was extensively explored under the PPS consultative process and rejected by state and territory governments on the basis that amendments to land title legislation would be required. Under PPS a seller/supplier will be able to register a security interest and this would seem to obviate the requirement to consider ROT clauses within the unfair contracts model.

Acknowledgement by consumers that they have read or understood the terms of the contract

Whilst as the paper states '...it is an objective fact...' as to whether or not a consumer has read a contract, the concept of understanding becoming a matter addressed by law would appear to go beyond good practice as currently exercised by sellers/suppliers. AICM would recommend that instead of a seller/supplier being required to explain the terms of a contract the consumer should be advised to seek independent advice regarding the contract. This practice is usual in the banking sector in relation to lending and indeed could be extended to provide for a 'cooling off period'. This alternate scenario would contribute to transparency and accountability in consumer transactions.

Conclusive evidence terms

The exclusion of conclusive evidence terms as currently proposed would seem to potentially limit effective and efficient debt recovery and dispute resolution.

Flat/fixed early termination fees and those requiring the paying out of the contract

AICM would express caution in regard to how this type of clause should be addressed with regard to what constitutes 'unfair'. Suppliers/sellers frequently incur

considerable outlays in order to fulfil a contract. Without a provision for compensation for loss if the contract is terminated this may impede economic growth and business development – a critical issue for small business.

Terms requiring consumers to pay more than suppliers' reasonable enforcement costs reasonably incurred

Whilst a clause citing that enforcement costs should/will be reasonable is meritorious ultimately, as with a number of the terms previously considered, unless a consumer is aware of their rights and entitlements a supplier may still seek what could be construed as unreasonable enforcement costs. In the final analysis legal costs can only be determined by the legal system or an independent body (with appropriate authority). The challenge is to ensure that consumers are (as stated above) aware of their rights and entitlements.

Terms requiring consumers to pay deposits or pre-payments that do not have a substantial amount of the price to be paid on delivery/installation/performance

As stated in the paper the law currently allows for a genuine deposit which may be forfeited if the contract does not proceed. What is under consideration is what constitutes excessive and fairness for both the consumer and the supplier. Deposits/pre-payments protect a supplier against the termination of a contract prior to completion. A curtailment of the use of such a clause could result in suppliers being reluctant to enter into contracts which fail to take account of their 'up front' costs of supply.

Terms allowing suppliers to retain, debit or set off disputed amounts

AICM would recommend that in this situation there should be a dispute mechanism which would serve to confirm the validity of the dispute. Otherwise it is foreseeable that the notification of a dispute could be a means by which some consumers would seek to delay payment for legitimately supplied goods.

Terms mandating arbitration of disputes or otherwise inhibiting access to courts or tribunals

AICM agrees that consumers should be able to exercise their legal rights, however the introduction of provisions allowing for arbitration have in many instances been introduced in order to minimise costs for all parties to the dispute and to facilitate speedy resolution of disputes. The use of alternate dispute resolution has previously been supported by government as an appropriate course of action and it would seem to be unfair to deny parties access to alternate remedies.

Regulation and enforcement

Wherever possible AICM recommends that there should be consistent regulatory and enforcement provisions. This will enable clarity for all parties as to their rights and entitlements. This will be especially important where enforcement of national consumer law is shared between the Commonwealth through agencies such as the ACCC and state and territory bodies.

False and misleading representations

Given that there is an established body of case law relating to the interpretation of false and misleading representations it would seem that there is no need to expand the scope of the current TPA provisions.

Minimum standards for consumer documentation

AICM would propose that rather than a minimum standard for consumer documentation which may be difficult to establish the use of 'plain English' would be preferable as this would more readily enable understanding of terms and benchmarks may be taken from sectors such as banking and insurance.

Suppliers' address to be included in documents

Reputable suppliers are usually willing to furnish address details in advertisements, documents and statements. AICM would express a note of caution in relation to small businesses which may be conducted from a person's home and for whom the right to privacy and in some situations personal safety may be an issue. An alternative solution may be for a consumer who has a legitimate need to access such information to be able to apply to the appropriate agency giving the reasons for the need to access and provided the request was valid the contacts details would then be made available.

Providing itemised bill/invoice

AICM would support that an itemised bill/invoice be provided on request to a consumer. This will enable transparency and accountability for all parties.

Conclusion

AICM would reiterate its support consistent national consumer protection. However, a balance needs to be struck which whilst protecting consumers does not unduly impede business development and growth and recognises that unfortunately there are occasions when some consumers seek to avoid their responsibilities in relation to payment of debt. AICM is concerned that in striving to achieve equitable and fair outcomes for all parties this scenario is downplayed.

Finally AICM is particularly concerned that the national consumer law reform agenda takes into account the range of initiatives under development and that there is consistency in intent and application of the resulting law reforms.