



CONSUMER LAW CENTRE  
OF THE ACT

Submission responding to:

**An Australian Consumer Law  
Fair markets – Confident consumers**

Consultation Paper

Care Inc Financial Counselling Service  
and the Consumer Law Centre of the ACT

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## **About Care Inc. and the Consumer Law Centre**

Care Inc. Financial Counselling Service (Care) has been the main provider of financial counselling and related services to low income and vulnerable consumers in the ACT since 1983. Care's core services include the provision of information, counselling and advocacy to ACT residents experiencing problems with credit and debt. Care also runs a Community Development, Education and Research program and the ACT's only No Interest Loans Scheme.

The Consumer Law Centre of the ACT (CLC) is a project of Care offering legal assistance and advice to consumers on low to moderate incomes, mainly in the areas of consumer credit, telecommunications and utilities, general fair trading law and consumer protection.

Care responds to over 2000 new requests for assistance every year across its programs. In addition to case work, Care and the CLC work hard to advocate on behalf of the ACT's consumers, striving to improve legal protection and to raise awareness and understanding of consumers' rights in the ACT.

Care receives funding from a variety of contributors, and specifically acknowledges the funding that it receives from: ACT Government, the Department of Disability, Housing and Community Services and the Department of Justice and Community Safety; the NSW Financial Counselling Trust Fund administered by the Office of Fair Trading; and the Commonwealth Financial Counselling Program administered by the Department of Family and Community Services.

## **Summary of Care's views**

Care welcomes COAG's support for the new consumer policy framework, and the governments' commitment to regulatory reform guided by the need for a higher level of protection for Australian consumers, and based on best practice principles. Importantly, such reform should be guided by the highest denominator standards so that states and territories are not at risk of losing any protection currently enjoyed under their individual legislation. For the ACT, maintaining and strengthening the current provisions under section 28A of the *Fair Trading Act* 1992 on the regulation of credit card limit increases is of particular significance.

We strongly support the proposed regulation of unfair terms in consumer contracts and the creation of new enforcement powers seeking 'to enable proportionate responses to consumer law breaches and new redress options for consumers'. However, while we acknowledge this to be a significant step towards the development of a better consumer protection framework, we raise a number of concerns in relation to: the proposed test for unfairness; the ambit of protection offered; and the demarcation line between which contracts are and are not covered.

We also stress that the enforcement mechanisms available are only as strong as the regulator. It is important that if the ACCC and Fair Trading offices are to perform their job well, they are adequately resourced. In the ACT context, the CLC is a single solicitor practice which is not in a position to assist each consumer with each unfair contract term or to pursue the matter in court. For these reasons, it is essential that consumers have easy and accessible recourse to the regulators and mechanisms to protect their rights and access the relevant remedies.

## More detailed comments

### *Operational Objectives*

Care welcomes the Consultation Paper and the initiatives it raises. It especially endorses the six operational objectives, in particular the objective to 'meet the needs of those consumers who are most vulnerable or are at the greatest disadvantage'. However, in order to protect those consumers, it is important that the fifth objective goes beyond providing accessible and timely redress 'where consumer detriment has occurred'. It is important for the legislation to be preventive in nature, and offer this redress where consumer detriment is substantially likely to occur. For those most disadvantaged and vulnerable in our community, once such detriment occurs other financial consequences follow, and the time and effort required to rectify the consequences of the disadvantage are significantly higher.

For example, Care's and the CLC's experience suggests that once our clients become indebted, the level of debt escalates within a short period of time, leading to serious consequences and sometimes to the loss of the family home. For these reasons, we urge that remedies be available on the basis of illegality and unfairness, rather than actual detriment. While this is reflected to some extent in the proposed changes, it should also be reflected in the operational objectives.

### ***Chapter 5 – Should the TPA be renamed?***

Care does not oppose renaming of the TPA to the *Australian Competition and Consumer Act* and supports including the term 'consumer' in the name of the Act. Importantly, the name change could lead to more consumers being aware of this legislation. However, re-naming involves a commitment to a re-education campaign to ensure the public is aware of the new legislation and where to find it. Significant education, a mass public awareness campaign and adequate branding are all required.

### ***Chapter 6 – Unfair contract terms***

Care strongly supports the governments' commitment to regulate contracts and unfair contract terms. However, the following concerns should be addressed:

#### 1. Definition of a '**standard form**' contract

It is important that the definition of a 'standard form' does not exclude those contracts which are based on standard form contracts, but in which negotiation has resulted in some minor changes. For example, a contract for the purchase of a motor vehicle may involve optional warranties, insurance and upgrades. These should not preclude a contract from falling within the ambit of a 'standard form' contract. Whilst placing the onus on the supplier to prove that a contract that is 'standard form' based is in fact a negotiated contract goes some way towards protecting vulnerable consumers, it is important that the definition of a 'standard form' contract does not lend itself to being used as a loophole by unscrupulous suppliers encouraging consumers to make minor choices in an attempt to bring those contracts outside of the protection.

## 2. Definition of **'unfairness'**

The proposed test requires an exercise of discretion in balancing the rights and obligations of both parties to a consumer contract, as well as objective and subjective elements of assessing whether the term is reasonably necessary to protect the legitimate interests of the supplier in all the circumstances. Care is concerned that the test will leave it open to inconsistency and difficulty in identifying which types of contractual terms in which types of contracts are unfair. In addition, it suggests that a harsh and unfair term could be justified in certain situations where, for instance, it could be argued that 'fair price' was paid – this is a situation which could potentially lead to lack of protection from unduly harsh and unjust terms in contracts attracting innocent and unaware consumers by a seemingly lower price.

For this reason we strongly urge that a more objective test is used in determining the unfairness issue.

## 3. Available **remedies** and the concept of actual **detriment**

Care does not support the idea that actual detriment must exist in order for an unfair term to be removed from a contract. A prudent regulator should have the capacity to act preventatively in circumstances where there exists a substantial likelihood of detriment, or a likelihood of substantial detriment, to the consumers.

For instance, wide-spread sms-acceptance based contracts targeting young people and encouraging them into signing up for services that are often not fit-for-purpose or that do not respond to real needs of consumers. Unfair terms in contracts such as these should be able to be excluded without the necessity of actual detriment or a substantial likelihood of detriment. Care submits that this is not 'regulatory over-reach' – it is prudent regulation in favour of those most vulnerable in our community.

## 4. Exclusion of the **'upfront price'**

It is essential that the 'upfront price' definition is clear and specifies exactly which components of the price are 'upfront'. Are fees and charges associated with obtaining credit or delivery of a product 'upfront'? Are charges stated 'upfront' but due as a penalty for rescinding the contract included?

There should be a distinction between assessment of the adequacy of the price (to be excluded) and assessment of fairness in relation to important aspects of the price such as: manner of calculation of the price, format and terms presented to the consumer, procedures for altering the price, penalty fees and charges etc. For instance, excessively high fees aimed at penalising consumers for rescinding or ending a contract should be open to scrutiny, thus protecting those most vulnerable.

## 5. List of **banned terms**

Care agrees that all terms listed in the discussion paper should be banned, with adequate procedures designed to extend the list if and when required.

## **Chapter 7 – Enforcement powers**

Care recognises the significance of the fact that any enforcement powers are only as effective as the resources allocated to the regulator for using them. It is necessary that clear powers are given to ACCC and Fair Trading offices to intervene where necessary. We note that the current approach where the regulators require the complaints presented to them to be of a systemic nature prior to exercising their enforcement powers does not provide adequate protection to Australian consumers.

In the ACT, the CLC is a solo-solicitor service. In the recent years, a large part of the CLC's practice involved casework assistance in matters involving mortgage foreclosures. This left little resources to assist those consumers whose issues were too 'insignificant' when compared with loss of a family home. Those consumers have, on most occasions, been referred to the CLC by the regulators – because the complaints presented were not of systemic nature. It is important to remember that a significant proportion of consumers do not have the capacity or skills to commence legal action or draft court documents.

Without a pro-active and adequately resourced regulator, the remedies available are likely to be dependent on individual matters being brought before court, leading essentially to a large proportion of consumers being unable to access protections afforded to them under the new law.

## **Chapter 9 – Reforms based on best practice in state and territory laws**

Care strongly supports consolidation of state and territory laws based on best practice standards. We urge however that the highest benchmark is adopted and, once best practice model is proposed, further consultation is undertaken to ensure that the protection afforded is adequate in all respects – with scope for further increasing consumer protection where required.

## **Chapter 10 – Suggested reforms to definitions**

Care's interests are broadly limited to consumers and consumer transactions within the definition of the *Trade Practices Act*, meaning *'persons who acquire goods and services of a kind ordinarily acquired for personal, domestic or household use or consumption and not for the purpose of re-supply or for the purpose of using them up or transforming them, in trade or commerce, in the course of a process or production or manufacture or of repairing or treating other goods or fixtures on land'*.

That is not to say that reform in this area should not be undertaken by extending the definition to small businesses which, in many regards, are in the same position as consumers. Care supports extension of the definition to cover a wider range of circumstances for small business and farming.

Care also supports the inclusion of the provisions ensuring minimum standards for consumer documents as proposed in the Consultation Paper including: the requirement for consumer documents to be clear; the requirement for a business to include its address in a consumer document; and the requirement to provide receipts for itemised bills as set out in Attachment D of the consultation paper.