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SCOCA Australian Consumer Law Consultation
Competition and Consumer Policy Division
Treasury
Langton Crescent
PARKES ACT 2600

By email: australianconsumerlaw@treasury.gov.au

RE: An Australian Consumer Law: Fair Markets Confident Consumers

Consumer Credit Legal Centre (NSW) Inc. (“CCLC”) welcomes the decision to review consumer laws in Australia. CCLC has had the benefit of reading the submissions for Legal Aid NSW and Legal Aid QLD and we endorse those submissions subject to the comments made below.

About CCLC

Consumer Credit Legal Centre (NSW) Inc (“CCLC”) is a community-based consumer advice, advocacy and education service specialising in personal credit, debt and banking law and practice. CCLC operates the Credit & Debt Hotline, which is the first port of call for NSW consumers experiencing financial difficulties. We provide legal advice, financial counselling, information and strategies, and referral to face-to-face financial counselling services, and limited direct financial counselling. CCLC took over 15,000 calls for advice or assistance during the 2008 calendar year.

A significant part of CCLC’s work is in advocating for improvements to advance the interests of consumers, by influencing developments in law, industry practice, dispute resolution processes, government enforcement action, and access to advice and assistance. CCLC also provides extensive web-based resources, other education resources, workshops, presentations and media comment.

Credit & Debt Hotline: 1800 808 488

Insurance Law Service: 1300 663 464

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Introduction

CCLC has been concerned for some time about unfair terms in consumer contracts. CCLC has repeatedly submitted that unfair terms legislation is an essential consumer protection tool. It is essential because:

1. Consumers have little or no bargaining power to change terms in standard term contracts.
2. Consumer contracts are drafted to benefit the business not the consumer
3. Unfair terms legislation encourages best practice drafting of balanced contracts

CCLC has answered some of the questions in the paper and those answers appear below.

THE BASIS OF THE AUSTRALIAN CONSUMER LAW

Question: Should the TPA be renamed? If so, what name should it have, if not the *Competition and Consumer Act*.

The TPA should be renamed the *Competition and Consumer Act*.

UNFAIR CONTRACT TERMS

CCLC strongly supports the introduction of unfair terms legislation for Australia. The unfair terms legislation needs to be very comprehensive to ensure a level playing field.

In CCLC's view the objectives of unfair terms legislation are to:

- 1) Encourage suppliers to redraft contracts to ensure unfair terms are removed
- 2) Encourage suppliers to draft plain language contracts with only necessary terms to ensure contracts are simple and clear
- 3) Build consumer confidence in the fairness of contracts
- 4) Provide effective remedies for consumers who have been detrimentally affected by unfair terms. This must include:
 - a) Access to a free dispute resolution mechanism (External Dispute Resolution)
 - b) Access to a low cost informal court for decisions on unfair terms.
- 5) Provide a mechanism for the regulator to enforce systemic problems with unfair terms
- 6) Provide a mechanism for the regulator to provide guidance on best practice drafting to avoid the use of unfair terms

Feature 1

A term is unfair when it causes a significant imbalance in the parties' rights and obligations arising under the contract, and it is not reasonably necessary to protect the legitimate interests of the supplier.

CCLC contends that the definition of an unfair term is either (NOT "and"):

- it causes a significant imbalance to the parties rights and obligations AND/OR
- the term is not reasonably necessary to protect the legitimate interests of the supplier.

It is important that the definition of an unfair term is not so rigorous that it is very difficult to show that the term is unfair.

If a term is not reasonably necessary to protect the interests of the supplier why should it be included in the contract? CCLC is concerned that this encourages the use of unnecessary terms in contracts. Contracts are already very long and this encourages consumers not to read them.

A contract is supposed to be a meeting of minds between the parties. If both parties had the benefit of legal representation, and equal bargaining power, the terms of the contract would be negotiated. In a balanced negotiation the contract would be balanced and would only include necessary terms.

On the other hand, once a significant imbalance in the rights and obligations of the parties has been established, it seems counterproductive to allow the supplier to plead that a particular term or terms is/are reasonably necessary to protect their legitimate interests. Indeed, in such cases it may well be that what is required is commensurate rights for the consumer to produce a fair and balanced bargain.

The definition may not meet objectives 1, 2 and 3 above unless “and/or” is used to separate the two parts of the definition.

Further, we support the submission by NSW Legal Aid that term imposes conditions that are unreasonably difficult to comply with should also constitute evidence of an essentially unfair bargain.

Feature 2: Remedies will be available only where the claimant (an individual or a class) shows detriment to the consumer (individually or as a class) , or a substantial likelihood of detriment, not limited to financial detriment.

The danger with this feature is that it may leave many consumers with real difficulty in proving detriment or substantial likelihood of detriment. This may mean that the unfair terms provisions are difficult to use in practice and will therefore fail to drive improvement in the fairness of terms. As a matter of access to justice it is important that proving detriment should not be difficult or complicated. To be effective the regulator needs to be able to take action to prevent harm, not stand by watching consumers experience detriment waiting for that detriment to reach a critical mass. While we appreciate that market interference must be justified, the disruption resulting from removing an unfair and unnecessary term from a contract or class of contracts is considerably less, than the disruption created delivering a remedy to consumers who have already experienced detriment. Provided traders are given an opportunity to be heard in

relation whether a particular term meets the necessary criteria, then it is preferable that action in relation to unfair terms be taken sooner rather than later. We submit that there should be a lesser standard applied.

To ensure objectives 4, 5 and 6 are met it is necessary to:

- 1) Ensure detriment is not too difficult to prove
- 2) Provide access to justice for consumers to both External Dispute Resolution and to a low cost informal court
- 3) Ensure suppliers have adequate Internal Dispute Resolution to deal with allegations of unfair terms (or any dispute.)
- 4) Empower the regulator with wide powers to take action against systemic conduct, make compliance orders, undertakings and impose fines.

Feature 3

The provision will relate only to standard form, non-negotiated contracts. Should a supplier allege that the contract at issue is not a standard form contract, then the onus will be on the supplier to prove that it is not.

CCLC strongly contends that the unfair terms of the Australian Consumer Law should apply to all types of consumer contracts (as defined by the legislation) and not just Standard Form Contracts. Otherwise supplier's may use this loophole as a means of avoidance.

At a minimum a contract should not become "non-standard" merely because some of the terms have been negotiated and this should be made extremely clear in the drafting and explanatory memorandum. To be non-standard the supplier must establish that:

- There were bona fide negotiations covering the majority of essential terms, AND
- The parties had the benefit of legal advice, OR
- The parties regularly negotiate contracts of this nature and have had legal advice in relation to similar transactions.

If Treasury does want to proceed with the proposed extension of the coverage then there needs to be an anti-avoidance provision so the regulator can respond effectively to practices designed to escape regulation.

Feature 4

The provision will exclude the upfront price of the good.

If the unfair terms legislation is not going to cover up front price then there needs to be other consumer protection legislation that deals with exploitative pricing particularly in credit. It is accepted that a key part of responsible lending is fair pricing. Consumers must at least have access to justice when they are the victim of usury in credit.

Care also needs to be taken to carefully defined "up-front price" to exclude contingent charges such as default fees for breach of contract, which do not usually enter the initial decision making matrix and are not therefore affected by competition. Some consideration also needs to be given to whether some pricing structures are so opaque as to be inherently unfair.

Question: Please set out any views on whether the types of terms described in this chapter should be banned in the initial text of the Australian Consumer Law.

The types of terms listed on page 31 should be covered be banned.

Costs of Unfair Terms Legislation

It is nonsensical to allow the continued and ongoing use of unfair terms just because it may cost suppliers money to change their contracts. Arguably, there are suppliers out there who already use balanced and fair contracts and will remain unaffected by the change of law.

Even if suppliers will need to change their contracts, many suppliers conduct regular reviews of their contracts anyway as part of the continuous improvement of their business. As it is a cost of business to keep up with all changes in the law (which occurs regularly) the extra cost should be minimal as long as there is clear regulatory guidance.

Contracts Review Act (NSW)

The Contracts Review Act (NSW) is important consumer protection legislation in NSW. It provides remedies for NSW consumers affected by procedural and substantive unjustness. The Act has been the subject of a great deal of litigation. It has provided remedies and access to justice for many consumers in NSW. It is essential that the Contracts Review Act remains as legislation in NSW:

[Opening of Law Term Dinner, 2009, Address by the Honourable JJ Spigelman, Chief Justice of New South Wales, February 2009]

“One of the reasons why what has come to be known as subprime mortgages – which we used to call “low-doc loans” – never reached the dimensions that they have overseas is because of the particular legal regulation available in this State. The Supreme Court of New South Wales has on numerous occasions exercised the powers conferred upon it under the Contracts Review Act to set aside as “unjust” aspects of low-doc loans where a mortgage, often by an elderly person over the family home, had been advanced without any consideration of the capacity of the borrower to repay.”

One of the foundational judgments of this character, frequently applied subsequently, led to significant change in the practice of lenders with respect to controlling their brokers who originated such loans. As the Financial Review reported under the heading “Court ruling forces overhaul of low-doc lending”, the judgment led to warnings to members by the Mortgage Industry Association of Australia and to a change of practice by what was described as a \$5 billion mortgage finance company owned by major banks with respect to its brokers, leading to some 20% of the brokers being removed from their panel. This line of authority has received considerable publicity in the financial media leading to another article in the Australian Financial Review which said:

“Public awareness about the plight of families caught in the debt trap through low-doc lenders is only starting to emerge as consumer groups raise their concerns. But judges in NSW have been on to it for several years. As the number of mortgage defaults escalates, courts have closely examined the conduct of loan intermediaries in the low-doc industry – solicitors, accountants and brokers – and made a number of critical findings. Judges are increasingly prepared to look at the circumstances behind the loan documentation ...” I think it likely that the regulatory regime as enforced in this State has played a role in limiting the exposure of Australian banks and other lenders in the manner which has proven to be so disastrous elsewhere.”

Arguably, the other states and territories of Australia would benefit from this type of legislation. While we hope that the new national credit law will build on the work of the NSW Supreme Court in this area, the broad nature of the Contracts Review Act enables the law to respond as the need arises in any industry sector. The Unfair Terms provisions are essential to ensure that problematic contract terms can be dealt more effectively and efficiently than through individual litigation, but they are not a replacement for the Contracts Review Act or similar legislation designed to achieve individual address where there may be substantive and/or procedural injustice. Research is needed to determine whether the unconscionability provisions of the Fair Trading Act, the Trade Practices Act and the ASIC Act are as effective in practice as the Contracts Review Act (NSW). We submit that the provisions of the Contracts Review Act (NSW) should be incorporated into the Australian Consumer Law.

If you have any questions please do not hesitate to contact Katherine Lane on 02 8204 1350.

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