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SCOCA Australian Consumer Law Consultation
Competition and Consumer Policy Division
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**An Australian Consumer Law
Fair Markets – Confident Consumers (“Consultation Paper”)**

GE Capital Finance Australasia Pty Ltd (“**GE Capital**”) welcomes the opportunity to provide comments on the Consultation Paper issued by the Standing Committee of Officials of Consumer Affairs (“**SCOCA**”).

1. General Comments

We begin by reaffirming that GE Capital supports any steps that can be effectively taken to ensure that consumers are protected from unfair treatment. As a credit provider, GE Capital has primarily focused on the Consultation Paper from a lending and borrowing perspective.

State and Federal governments have agreed the Commonwealth Government will assume responsibility for all consumer credit including personal loans, credit cards, payday lending and micro loans (“**National Credit Law**”). We understand that detailed plans are currently being developed under the leadership of the Commonwealth Treasury to cover the timing, form and implementation process for the new National Credit Law and that a first draft of the legislation be available for public comment by 31 March 2009 with a first stage implementation date of July 2009.

The Consultation Paper states that the text of the new national consumer law, based on the existing consumer protection provisions of the Trade Practices Act 1974 (Cth) (“**TPA**”) and extending to include amongst other things, the regulation of unfair terms in consumer contracts and new enforcement powers, to be called the Australian Consumer Law (“**ACL**”), will be finalised by 30 June 2010 and will commence in all Australian jurisdictions by 31 December 2010.

Further, we expect the Victorian Fair Trading and Other Acts Amendment Bill 2008 (VIC) (“**FTA Bill**”) to be passed in the Victorian Parliament in the next month, the Bill amends the Fair Trading Act 1999

(Vic) ("FTA"), and amongst other things, extends the operation of the unfair terms provisions of the Act to Consumer Credit Code regulated contracts.

We anticipate that the transition to and implementation of the new FTA Bill, ACL and National Credit Law will require significant planning, investment in terms of time, resources and funding by business.

It is also worth noting that the FTA Bill, ACL and National Credit Law changes are not happening in isolation. At the same time, there are fundamental reforms being made in other areas of law and regulation which affect credit providers, for example, Personal Property Security Reform, Privacy Law, Finance Broking Regulation and the EFT Code review.

GE Capital welcomes review, as it offers an opportunity to develop a regulatory regime that meets the contemporary needs and expectations of industry and consumers and indeed all stakeholders. However, at the same time, we believe it is unprecedented for so many changes of this magnitude to be proposed more or less simultaneously.

GE Capital is of the view that at a time of significant legislative change, all Regulators should take the opportunity to work together to ensure credit regulation is coherent, consistent, understandable for consumers, able to be implemented by industry in a timely and effective manner and is enforceable by Regulators.

A review of all Uniform Consumer Credit Code ("UCCC") regulated contracts will be triggered by the FTA Bill, the review will be expensive and time consuming. It is likely the review will result in the need to perform a "search and destroy" on existing preprinted materials, reprint standard form contract documents, send variation notices to existing customers, implement IT systems changes to provide, for example, for payment hierarchy payment allocation changes, retrain staff, update compliance materials and work with our suppliers and distributors. These changes will be made across all States and Territories even though the FTA Bill applies in Victoria, as we are a National credit provider and do not have State specific systems and products. This expense will be passed onto consumers. This exercise will need to be repeated for the implementation of National Credit Law and then again for the ACL.

Against this backdrop, we are concerned that in light of the current world wide economic situation and the policy initiatives of the government, considerable thought should be given to the timing and process of implementation of such significant changes to the laws and regulations impacting on credit providers and other suppliers, as this will also impact on the availability and cost of the goods and services supplied to consumers.

2. Specific Comments

GE Capital's comments are restricted to those parts of the Consultation Paper specifically relevant to GE Capital.

National approach to regulation: Referral model rather than application law scheme

GE Capital is a credit provider, it provides products in all Australian States and Territories. The cost of complying with the consumer protection laws of eight different and sometimes inconsistent State and Territory regimes as well as the new Commonwealth ACL is and will continue to be significant.

From the experience with the UCCC, it is widely acknowledged that mirror legislation does not work, as governments change and the circumstances or issues in each State can be different. For consumers, the matrix of regulation makes it difficult to understand where or how to raise issues that they may have with their consumer contract.

Accordingly, we would propose that the States delegate their legislative power to the Commonwealth, adopting the referral model rather than the currently proposed application law scheme, such that a regime consistent with the new National Credit Law is adopted. This should reduce the costs of compliance, decrease consumer uncertainty as to how they may challenge a contract they have entered into and provide for consistent enforcement of the law with a single regulator.

What sorts of contract terms might be covered by the unfair contract terms provisions?

Generally, GE Capital considers that many of the issues raised in this section of the Consultation Paper are already covered by the ASIC Act, the UCCC and other legislation or common law dealing with unconscionability and unfairness.

Application of other legislation

We note that the Consultation Paper does not acknowledge that some of the unfair contract terms discussed in the Consultation Paper are specifically allowed by other legislation. For example, the UCCC specifically provides for the credit provider to unilaterally vary the terms of a contract regulated by the UCCC. This is due to the long term nature of some credit products, for example a home loan or credit card, and the need to be able to amend the terms of the contract over its duration, and because there are already mechanisms in the UCCC that protect consumers and govern specific unilateral variations.

Accordingly, we would submit that if legislation or regulation already exists allowing a contractual term, then the application of the ACL should not invalidate that term.

Application of ACL to business

The Consultation Paper states that the unfair terms provisions will apply to all standard form (or non-negotiated) contracts regardless of whether the contracting party is an individual, small business or large corporate. This means that business to business agreements that are not negotiated will be caught regardless of the size or negotiating power of the contracting parties.

GE Capital would submit that the regulation of business to business deals without an understanding of the bargaining power of the respective parties or the nature of the contract should not fall within the ACL.

Exclusion of the upfront price of the good or service

The Consultation Paper suggests that the 'price' of an agreement will be excluded from considerations of unfairness, but that only the price paid in exchange for the 'essential features or the substance or core of the bargain' will be excluded (this is to be based on the equivalent regulations in the United Kingdom). GE Capital has previously noted that Treasury has indicated in other contexts a reluctance to impose pricing control on credit contracts. Accordingly, we would request that consideration be given to what aspects of pricing will fall outside the "core price" safe harbour and which are viewed as core elements.

This point is discussed further below with regard to early termination fees.

Transitional provisions

Given the volume of regulatory change, particular consideration must be given as to how the ACL can be implemented by business efficiently and effectively. It will be essential that the transitional provisions for implementation of the new ACL regime be made clear. For example, we would request that SCOCA consider questions such as:

1. Will the regime apply only to contracts created after the new regime begins?
2. Will the regime apply to any contracts that are varied after the new regime begins?
3. Will the regime apply retrospectively in any respect?

Examples of contract terms that might be covered by the unfair contract terms provisions

The Consultation Paper sets out examples of contract terms that might be covered by the unfair contract terms provisions, we will comment on some of those specifically relevant to GE Capital.

Unilateral variation

GE Capital would comment that it is important that unilateral variation powers are retained for lenders as they are a necessary part of being able to manage long-term ongoing credit contracts and if a more complicated process was required, the cost of implementing and managing this process would ultimately be passed on to consumers.

Clauses that prevent the consumer from cancelling a contract

The UCCC already regulates the cancelling of contracts, the terms for which are incorporated into both the credit contract and the Information Statement required by the UCCC.

Clauses that require consumers who breach a contract term or terminate early to pay penalties Flat/fixed early termination fees and those requiring the paying out of the contract

In the context of consumer credit, this may be in the form of an early termination fee and accordingly, can only be a reflection of credit provider's reasonable costs. Early termination fees are already subject to regulation by section 72 of the UCCC with regard to unconscionability, section 15 of the UCCC with regard to disclosure and the common law and GE Capital would submit that they do not require further regulation by the ACL.

Further, we note that in the "Green Paper, Financial Services and Credit Reform: Improving, Simplifying and Standardising Financial Services and Credit regulation "(June 2008), it was stated that the Government should not regulate bank fees and charges as part of the options for regulation discussed. We would agree that regulation of bank fees and charges discourages new investment, and innovation, increases compliance costs for industry and can lead to increases in prices for consumers.

3. Specific questions in paper

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

GE Capital does not have a view on what the ACL should be called, but would comment that transitional provisions must allow for significant time for current references to existing Acts in various documents continue to be valid, such that an incorrect reference to an Act or the relevant provision in the Act not make the term or document itself void.

Please set out any views on whether the types of terms described in this chapter should be banned in the initial text of the ACL.

GE Capital is of the view that no terms should be banned. In order to determine whether a term should be banned, a term would need to be examined in every context and application, both in its present and any possible future use, this would be an impossible task.

The only term in those proposed that we think could be banned in this context is a term mandating arbitration of disputes or otherwise inhibiting access to courts or tribunals. We acknowledge that no contract terms should be permitted to deny access to justice.

How can the interests of a business be safeguarded in the formal requirements for a national public warning power?

Are there reforms other than those covered in chapters 10 and 11 that could be covered in the ACL based on best practice in existing State and Territory laws?

GE Capital is of the view that regulation across all of Australia must be coherent, consistent, understandable for consumers, able to be implemented by industry in a timely and effective manner and enforceable by Regulators with a single view. If any best practice legislation is to be lifted from a State or Territory regime, it must be considered in light of those requirements.

Should the scope of the TPA's existing definition of "consumer" be expanded to cover a wider range of circumstances, such as goods in business contexts?

Should a new definition of "consumer" specifically deal with small businesses and farming undertakings?

Should a new definition of "consumer" cover commercial vehicles or vehicles purchased for a predominantly commercial purpose?

Should a new definition of "consumer" exclude any purchases for business purposes, regardless of the existence of monetary limits?

Subject to our other observations about regulating credit contracts generally, 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 UCCC provides a useful and nationally accepted definition of “consumer”. The UCCC applies to “natural persons” where the purpose is “... predominantly for personal, domestic or household purposes”. Consequently, it uses the predominant purpose test without limiting the value of the transaction. The current Victorian 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”. It does not apply to business transactions.

This approach is consistent with other jurisdictions including the United Kingdom and the European Union which both 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 a need for regulatory intervention into the commercial contract arena, and we are not aware of any isolated or systemic failures in this sector warranting the intervention of legislation, we recommend Treasury adopt the UCCC approach and exclude commercial transactions from the scope of the proposed law. Alternatively, a regulatory impact assessment should be undertaken to assess the costs versus benefits of regulating commercial transactions (particularly commercial credit transactions) given any costs associated with the reforms, which are likely to be substantial, will ultimately be passed through to the commercial customer.

In addition, GE Capital would comment that the definition of consumer for the purposes of credit contracts is already being considered in light of the National Credit Law changes in the form of the business purpose declaration. To introduce a different or expanded definition of “consumer” in the TPA highlights the problems and confusion industry and consumers face where inconsistent legislation is developed.

Should the ACL include a provision providing for minimum standards for consumer documents?

GE Capital is of the view that there is already significant legislation and common law governing minimum standards for consumer documents and that significant research is required before any such change could be implemented. To develop a minimum standard to fit all consumer documents would make the minimum standards virtually meaningless considering just how many consumer documents are used in every facet of daily life. The regulation and enforcement of this type of regulation would be near to impossible.

4. National Regulatory Regime for Product Safety

The Consultation Paper suggests that the proposed new product safety legislative regime will be applied through application legislation and enforced by the ACCC and the state and territory consumer regulators. In order for such a new regime to operate effectively and for business to be able to implement nationally consistent compliance protocols, GE Capital would submit that it will be essential that identical legislation is maintained over time and that the administration and enforcement of it continues to be the same across Australia.

5. Conclusion

As we have previously submitted, GE Capital supports measures that help to ensure that consumer credit is provided to consumers on terms and in a manner, which are fair and reasonable. We also believe that there are circumstances in which vulnerable consumers may require additional protection.

However, we submit that protection afforded to consumers in credit contracts subject to the current UCCC and other relevant laws should be carefully considered and not be invalidated or dragged into uncertainty by an inconsistent State and Federal regime. It is essential that Regulators take into account the larger picture of national credit reform, a piecemeal and inconsistent approach is costly for industry, confusing for consumers and difficult to enforce for Regulators.

We would welcome the opportunity to discuss our submissions, and would very much like to participate in any working parties, round tables, or discussion groups and otherwise assist.

Please contact me with any queries by phone or email as per the details below.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Mel Honig', with a large, stylized flourish at the end.

Mel Honig
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