

18 March 2009

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Dear Committee Members

**Submission on *An Australian Consumer Law: Fair markets - Confident Consumers*  
(February 2009)**

We welcome the opportunity to make a submission in relation to the recent paper *An Australian Consumer Law: Fair Markets - Confident Consumers* dated 17 February 2009 and released by the Honourable Chris Bowen MP, Assistant Treasurer and Minister for Competition Policy and Consumer Affairs (**Paper**).

We have focused in this submission on the proposal to extend the application of the Australian Consumer Law to the financial services industry. We note, however, that while we have considered the position of organisations in the financial services sector in relation to the matters raised in this submission, the views expressed are ours alone.

Minter Ellison welcomes proposals to implement uniform and consistent consumer protection laws in Australia. However, we are concerned that the proposals relating to financial services will lead to unnecessary and inappropriate duplication of regulation and regulators. This has the potential to create uncertainty and lead to additional costs and reduced efficiency, and stifle innovation in the financial services sector, which will disadvantage consumers as much as industry participants.

## **Summary**

Our detailed comments in relation to the application of the proposals in the Paper to the financial services industry are set out below.

In summary, we submit that there is no need for the Australian Consumer Law to apply to the financial services sector which is already subject to extensive consumer protection regulation.

Furthermore, we submit that there should only be one consumer protection regulator of financial services and products and that this should remain the Australian Securities and Investments Commission (**ASIC**). We believe that this is appropriate given the specialised nature of the

consumer protection issues that arise in the financial services sector and the unique nature of the products and services provided. ASIC has extensive experience and expertise in the sector and is therefore best placed to play this role.

We also note that it is proposed that the Australian Consumer Law will include a provision which regulates unfair terms in consumer contracts. The Paper does not make it clear whether this proposal would extend to financial services. However, we submit that given specific statutory provisions and general law duties which apply to various financial services and products, it is unnecessary and inappropriate for such a provision to apply to contracts relating to the provision of financial services and products.

### **Application to financial services**

As noted in the Paper, the consumer protection measures in the *Trade Practices Act 1974* (Cth) (TPA) do not currently apply to financial services and products. They were excluded from the operation of Parts IVA and V of the TPA at the same time that Division 2 of Part 2 of the *Australian Securities & Investments Commission Act 2001* (Cth) (ASIC Act) commenced. The purpose of these amendments was to ensure that ASIC is the sole regulator of consumer protection in relation to the provision of financial services and products.

A single consumer protection regulator is important to avoid the risk that different regulators will take inconsistent approaches in relation to the application, interpretation or enforcement of the consumer protection regime. This is particularly true for the financial services sector where there are a significant number of consumer protection provisions found outside the ASIC Act.<sup>1</sup> Other consumer protection measures can be found in diverse sources, including:

- the *Corporations Act 2001* (Cth) as it applies to financial service licensees, managed funds and other financial product issuers and dealers;
- the *Insurance Contract Act 1984* (Cth) (ICA) for general and life insurance contracts;
- industry standards and codes of practice issued by various industry associations, including the Australian Banking Association, the Financial Planning Association, the Insurance Council of Australia, the Investments Financial Services Association and the National Insurance Brokers Association; and
- regulatory guides and policies issued by ASIC.

ASIC is responsible for the administration and enforcement of the consumer protection measures in the above legislation and is therefore best placed to ensure that the consumer protection measures applying to financial service providers are administered on a consistent basis. While we acknowledge that protocols can be developed where there is more than one regulator responsible for enforcement, there remains a significant risk that compliance and enforcement policies differ in implementation if not in form. Regulated entities are then required to ensure that their conduct meets the expectations of more than one regulator. This can lead to increasingly risk averse conduct which in turn poses a threat to the competitiveness of the Australian financial services industry, to the detriment of consumers and the Australian economy.

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<sup>1</sup> There are already a number of regulators with responsibility for the financial services sector, including ASIC, the Australian Prudential Regulation Authority, AUSTRAC, the Reserve Bank (in relation to payment systems), the Australian Tax Office and Australian Consumer & Competition Commission (in relation to competition-related issues). While not ideal, the industry is able to manage this plethora of regulators because each has a specific mandate that, in the main, does not duplicate or overlap with others.

The deleterious consequences of multiple regulation are recognised in the Paper. For example, Chapter 2 of the Paper states:

'Business compliance costs are increased by the need for suppliers to comply with multiple regulatory regimes, and to operate in even slightly divergent regulatory regimes.'<sup>2</sup>

We submit that this is equally true where there are multiple regulators.

The Paper states that:

'At the national level, ASIC will have primary responsibility for the enforcement of consumer laws relating to financial services, although the States and Territories will **retain** enforcement powers in this area ...'<sup>3</sup> [emphasis added]

However, State and Territory regulators do not currently have any enforcement powers relating to consumer protection in the financial services industry. This follows from the referral of powers to the Commonwealth relating to the Corporations Act and ASIC Act.<sup>4</sup> As a result of that referral, States and Territories no longer have any legislative authority in relation to financial services and the State and Territory fair trading legislation therefore no longer apply to the provision of financial services and products.

We believe that it would be a significant retrograde step to give State and Territory regulators the ability to enforce consumer protection measures applying to the financial services industry. It would undermine the consistency of regulation of the financial services sector which is one of its strengths when compared to regulatory systems elsewhere. It could also undermine the authority of ASIC and therefore its ability to address and respond to issues arising out of the current global economic crisis.

While stating that ASIC will have primary responsibility, it is not clear whether it is intended that the Australian Competition and Consumer Commission will share this responsibility with ASIC (presumably in a secondary role).<sup>5</sup> For the reasons noted above, we submit that there should be only one regulator for the financial services sector and it should be ASIC.

The Paper indicates that necessary amendments will be made to the ASIC Act and where necessary the Corporations Act.<sup>6</sup> It appears that both the Australian Consumer Law and the ASIC Act will apply to the provision of financial services and products. We submit that there should be only one source of general consumer protection measures applying to the financial services sector. Multiple sources create the risk that consumer protection measures will diverge and become inconsistent over time. This potential already exists in relation to financial services, with consumer protection measures being found in both the ASIC Act and the Corporations Act. Any proposal for the Australian Consumer Law to apply to financial services as well would simply exacerbate the problem.

We submit that if the Australian Consumer Law is to apply to the financial services sector then Division 2 of Part 2 of the ASIC Act should be repealed and a careful examination of all other

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<sup>2</sup> Chapter 2 of the Paper on page 8.

<sup>3</sup> Chapter 7 of the Paper on page 43.

<sup>4</sup> For example, see the NSW *Corporations (Commonwealth Powers) Act 2001*.

<sup>5</sup> We note that the Productivity Commission in its report on *The Consumer Policy Framework* (April 2008) appears to advocate both regulators having a role in relation to financial services (Recommendation 4.2 and page 24 of Volume 1).

<sup>6</sup> Chapter 2 of the Paper on page 10.

consumer protection measures applying to financial services and products should be undertaken with a view to eliminating any possible overlap between the Australian Consumer Law and other measures.

### **Unfair contract terms**

We submit that it is not appropriate for new general regulation of unfair contract terms to apply to financial services and products as financial service providers are already subject to significant laws regulating their conduct.

Examples of specific requirements applying to financial services and products include:

- various conduct and disclosure requirements apply to issuers of financial products (including product disclosure statements, provision of post-acquisition information, handling application monies and cooling off);
- a duty of utmost good faith which applies to insurance contracts (under the general law and Part II of the ICA);
- restrictions on remedies for non-disclosure and misrepresentation by insureds in relation to insurance contracts (Division 3 of Part III of the ICA);
- various provisions relating to terms of insurance contracts (Part V of the ICA);
- restrictions on expiration, renewal and cancellation of insurance contracts (Part VII of the ICA);
- restrictions in relation to credit-related insurance contracts (Part 8 of the Consumer Credit Code);
- prescriptive regulation of consumer credit contracts themselves (currently regulated at State and Territory level under the Consumer Credit Code and subject to a separate reform process);
- directors of life insurance companies are required to give priority to the interests of policy holders ahead of shareholders (under Division 2 of Part 4 of the *Life Insurance Act 1995* (Cth));
- fiduciary and equitable duties applying to trustees of superannuation funds and responsible entities of managed investment schemes and specific statutory duties applying under the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**) and Chapter 5C of the Corporations Act – in particular:
  - the SIS Act implies covenants requiring trustees and directors to act honestly and in the best interests of members (section 52);
  - the Corporations Act requires responsible entities and directors to act honestly and in the best interests of members, to give priority to member interests and to treat members of the same class equally and members of different classes fairly (sections 601FC and 601FD); and

- the Corporations Act requires registered managed investment scheme constitutions to meet certain requirements aimed at ensuring that members are treated fairly (section 601GA);
- the SIS Act and Chapter 5C of the Corporations Act also regulate the terms of constituent documents for superannuation funds and managed investment schemes and impose various restrictions in the way superannuation trustees and responsible entities of registered schemes deal with members;
- financial advisers are required to have a reasonable basis for advice and to provide appropriate disclosure in financial services guides and statements of advice (Part 7.7 of the Corporations Act); and
- financial services licensees are required to act efficiently, honestly and fairly under section 912A(1)(a) of the Corporations Act in addition to other statutory duties imposed by section 912A(1).

We therefore submit that financial services and products are already appropriately regulated and consumers of financial services and products already have many remedies available to address any instance where a financial service provider might deal with them unfairly. Subjecting financial service providers to additional unfair contract terms regulation would simply create uncertainty for the industry with little or no resulting consumer protection benefit.

The Paper notes that business has not identified any major cost associated with unfair contracts provisions in Victoria or elsewhere.<sup>7</sup> We do believe, however, that imposing such regulation on financial services businesses will have a significant impact on the way that they manage their business. Unlike some other sectors, financial service providers are required to have robust internal complaints systems and to participate in independent external complaints handling bodies. The financial services industry therefore already deals with client complaints and concerns in an appropriate manner. Adding a general and broad obligation such as the one proposed will simply lead to more conservative and risk averse behaviour when dealing with complaints. While this may sound attractive from a consumer perspective, what it means in practice is that less regard is able to be given to the merits of a complaint. An unfair contracts terms regime increases uncertainty for industry and therefore reduces its ability to handle complaints in a reasonable manner. This in turn increases costs and has the potential to reduce innovation.

We also note that the application of unfair contracts regulation to financial services and products may itself be quite uncertain for the following reasons:

- Firstly, in relation to insurance contracts, section 15 of the ICA relevantly provides that an insurance contract is not capable of relief under any other law relating to harsh, oppressive, unconscionable, unjust, unfair or inequitable conduct by an insurer, other than relief in the form of compensatory damages. On its face, it would appear that this provision would preclude any unfair contracts regulation applying to insurance contracts. However, the reference to compensatory damages in section 15 may give some scope for the unfair contracts proposal to apply to insurance contracts.

It is clear from the Australian Law Reform Commission Report on Insurance Contracts (No. 20) that section 15 was included in the ICA to ensure that laws relating to unfair

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<sup>7</sup> Chapter 6 of the Paper on page 30.

contracts should not apply to insurance contracts. The Commission's rationale was that laws allowing for judicial review of contracts should not apply to insurance as the ICA implies a duty of utmost good faith in insurance contracts. We submit that this rationale remains true today.

The reference to compensatory damages was a later amendment to section 15. The Report of the Government Working Party on Consumer Credit Insurance recommended the amendment to clarify that damages for misleading or deceptive conduct under section 52 of the TPA should be available in relation to insurance contracts. It was not intended that relief under unfair contracts legislation should become available as a result of this amendment. To avoid any uncertainty regarding the possible interaction between section 15 of the ICA and the proposal to regulate unfair contracts, we submit that insurance contracts should be explicitly excluded from regulation of unfair contracts under the Australian Consumer Law.

- Secondly, in relation to managed investment schemes and superannuation funds, the regulation of unfair contracts will place into sharp relief the vexed question whether a contract exists between the member and the trustee or responsible entity, in addition to their rights as a beneficiary under trust law. This is an important but currently unresolved question. It has some significance when trying to determine the extent to which rights of trustees and responsible entities can be supplemented by statements in relevant disclosure documents, such as the product disclosure statement. However, in the main any question relating to rights of members that could be answered by reference to contract law can also be answered by reference to existing consumer protection law, principally the prohibition on misleading or deceptive conduct. However, the application of unfair contracts regulation may mean that the courts will need to grapple with this question and in the meantime product issuers will face considerable uncertainty whether the regime applies to them. For the reasons noted above, we submit that it should not in any case.

### **Other proposals and questions**

We provide the following comments and responses in relation to certain other aspects of the Paper in relation to financial services:

- We are concerned about the proposal to ban early termination fees as we are concerned that this could cause uncertainty and significantly reduce the fee options available to consumers of financial products. Withdrawal and termination fees are not uncommon in the financial services sector and we submit that in the absence of any demonstrable cause for concern in relation to such fees, they should not be banned. Furthermore, some products offer alternative fee arrangements whereby a lower upfront fee can be charged with an early termination fee being payable if termination occurs within a set period. We submit that such fees are inherently fair in these circumstances and therefore should not be automatically banned.
- We note that door-to-door sales and telemarketing of financial products is already regulated under Division 8 of Part 7.8 of the Corporations Act and submit that no

additional regulation is required. As noted above, the Corporations Act also imposes a cooling off obligation in appropriate circumstances.

- As noted in the Paper, Parts 7.7 and 7.9 of the Corporations Act already require regulated documents to be clear, concise and effective and set standards regarding the minimum information required when offering financial products. These requirements are currently being considered by the Financial Services Working Group. Consequently, no additional regulation is required in the Australian Consumer Law.
- Sections 949A and 1018A of the Corporations Act already regulate advertisements of financial products and no additional regulation is required. In particular, we submit that as financial product issuers are required to ensure that a product disclosure statement is provided to retail clients before a product is issued, there is no need to require advertisements to include the issuer's address.
- Section 1017F of the Corporations Act requires financial product issuers to provide retail clients with transaction confirmations in appropriate circumstances. Transaction confirmations are required to contain specified information which is appropriate for the particular product. There is therefore no need to require financial product issuers to provide an itemised bill on request.

We would be very happy to discuss any of our submissions in further detail with the Standing Committee. Please direct any questions to Richard Batten on (02) 9921 4712.

Yours faithfully

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