Promoting Responsible Consumer Lending

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National Financial Service Federation Ltd

Submission
to

The Standing Committee of Officials of Consumer Affairs

Competition and Consumer Policy Division
Treasury
Langton Crescent
PARKES ACT 2600

on the discussion paper

"An Australian Consumer Law"

Submitted via email to
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The National Financial Services Federation welcomes the opportunity to contribute to the "Australian Consumer Law" discussion paper.

What is the National Financial Services Federation (NFSF)?

The National Financial Services Federation Limited is the peak industry body representing micro-lenders and payday lenders in Australia. It is governed nationally by a board of directors representing each of the states.

Our members are non-bank, non-ADI lenders, and their market can generally be described as loans up to $5,000 over terms of up to 2 years. The NFSF represents over 275 credit provider outlets in this segment of the finance market. All members are required to subscribe to, and abide by, the Federation's own Code of Ethics.

Over the past few years, the NFSF has been conducting research and providing submissions and recommendations at state government level. These recommendations include major credit reforms including;

1. Investigation of a "total cost of credit" cap as opposed to an unworkable capping of fees and interest rates which cannot stop debt spirals;
2. External dispute resolution as an industry requirement;
3. Membership of a professional industry body with Code of Ethics such as the NFSF as an industry requirement;
4. Licensing of all credit providers;
5. Positive credit reporting to help reduce the level of over-indebtedness being experienced by consumers;
6. Regulators working closely with industry representatives to manage beneficial outcomes rather than waiting for problems to arise; and
7. Commonwealth control and a truly Uniform Consumer Credit Code.

We have also heavily campaigned against the interest rate caps in the New South Wales and ACT (legislated in Queensland and mooted in South Australia). We feel their implementation relied on false perceptions of the industry, its practices and returns, and have unfairly impacted on business

The NFSF has recently held seats at these conferences and committees:

1. Griffith University – Regulating the Cost of Credit 7 December 2006
2. Ministerial Payday Lending Working Party – SA, November 2006 to March 2007
3. Consumer Credit Code Amendment Bill – Ministerial Council on Consumer Affairs Roundtable Discussion April 2008
4. Roundtable Small Amount Cash Lending Inquiry – Vic, June 2008
5. Federal Industry and Consumer Group Consultation – 2008 and ongoing.
6. National Consumer Congress – Adelaide 2009

The Federation holds a wealth of industry information that can assist with the discussion to be undertaken. This information includes statistics, facts and relevant further research into the industry and represents large amounts of input from many industry stakeholders over the

past two years. The information we are able to provide will accurately reflect the realities of our industry and the members of the community who choose to be its customers.

Scope of Reply:

The NFSF reply addresses issues related to the Small Amount Loans industry segment in relation to Unfair Contract Terms and Agreed Reforms to Consumer Law Enforcements Powers. The NFSF does not represent any businesses or views regarding the proposed National regulatory regime for product safety.

Answers to the specific questions asked in the paper are tabled in Appendix A

Opening Comments

This response is written with the knowledge that the legislation in relation to the unfair terms part of this paper has been accelerated 18 months to mid 2009. We feel that this leaves minimal time for thorough analysis of submissions and that implementation is fait accompli.

The 'Unfair' model (page 30)

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.

The National Financial Services Federation's members have accumulated in excess of several 1000 years of business experience. A question which was not asked and seems lost on the author of the discussion paper (and the papers it is based on), yet raised by many of our members almost immediately, was to ask the business question as to *why do contracts now contain what appears to be unfair contract terms?*

In the majority of examples, the root cause of the apparent 'unfair terms' have evolved because businesses had suffered losses at the hands of small number of consumers acting in bad faith or attempting fraud in the past. Business owners have taken legitimate action (often legal advice) to reduce potential business losses in the future (directors of companies actually have a corporate governance responsibility to do so). Current laws and costs make it next to impossible to pursue the small minority of consumers acting in bad faith, successfully through the current court system.

We accept that some contract terms may seem 'unfair' to protect the legitimate interests of the business for the majority of consumers who do the right thing, but a balance is needed to protect the legitimate interests of the business in relation to the 'small number of consumers who act in bad faith'.

Current Unfair terms are a symptom of another problem.

In all cases, fix the root cause of the problem first, not the symptom.

There does not appear to be any added responsibility or incentive to the consumer to act with integrity – i.e. they also need to trade fairly.

Many contracts are entered into following the representations and warranties made by a consumer to a trader. The test of the proposed changes would be an equitable, fair and reasonable balance in remedies to either party where one of those parties has failed to honour an ongoing obligation. Particularly when it could be demonstrated the "supplier" (be it consumer or business) could not fulfil the obligation at the time of commencing the contract due to the failure to disclose a material fact.

These changes are telling consumers that if you act in bad faith or commit fraud, you will most likely get away with it. This is not a responsible message to be sending to consumers.

Implications of the Proposals

Compliance Costs

Such is the scope of changes being proposed, it is likely that just about any contract that currently deals with consumers on 'terms' in any industry sector will need legal advice and changes made.

The National Financial Services Federation (to reduce the costs to small amount short term lenders) has commenced a project to create 'Standard form contracts' and 'standard form' associated documents for our industry sector. The benefits, clarity, productivity gains and costs savings to lenders, consumers, compliance officers, financial counsellors and many other stake holders will be significant. 'Standard form contracts' have been very successful in other industry sectors such as real-estate.

Compliance costs will be high for individuals.

Impact on Competition

Minimal, if any.
Sole traders not involved in an industry association may find compliance difficult.

Unintentional Outcomes - a Major concern.

The National Financial Services Federation and its members are **deeply concerned** with any terms that will make it even harder to deal with the small minority of customers acting in bad faith as highlighted on page 30.

"The law may weaken the capacity of businesses to deal with a small number of consumers acting in bad faith, limiting in turn their capacity to deal fairly, cheaply and efficiently with the bulk of consumers."

Members see two clear outcomes if this pans out as true; either (as noted above in the paper)

1. the bulk of the remaining consumers will have to wear the additional 'lost costs' of the small minority by way of higher prices of the product or service. If businesses are unable to pursue these types of consumers efficiently and in a timely manner, associated costs must be increased to offset those losses,

   OR

2. Customers will be scrutinised even harder with '**consumer exclusion**' to those that might pose only a small commercial risk or be charged a financial premium to proceed.

Concept of who bears the 'risk' in the transaction must be a deciding factor as to 'fair' or 'unfair' terms.

In a transaction, regardless of industry sector, where the consumer is provided the goods or services in advance of (re)payment, clearly the risk in the transaction is with the business entity and strong enough terms must be allowed within a contract to protect the legitimate interests of the business for the small amount of consumers who do act in bad faith.

In the alternative, when consumers have paid or partially paid for the goods in advance, strong enough terms must be allowed within a contract to protect the legitimate interests of the consumer.

Thus, scrutiny of whether a term is fair or unfair must take into account the whole circumstance and the nature of the contract as to who is bearing the risk in the transaction.

What sort of contract terms might be covered by the unfair contract terms provisions?
(page 31)

Agreed, some of those terms could well do with removing, but that is only from our industries perspective.

This a very complex issue as what may be deemed unfair or banned in one industry sector could well be a very fair term in another industry sector or <u>be (un)fair depending on who bears the risk in the transaction.</u>

Example: dot point 6 page 31

"clauses that let only the supplier decide whether to renew or not renew the contact"

Consider the Finance sector:

If a lender has a consumer who is a problematic payer (for example), there is no way the lender (the supplier in this case) is going to give the consumer the option to decide if the consumer wants to renew or extend the contract. To do so would be irresponsible lending, yet the National Financial Services Federation can see examples from other industry sectors where this may be appropriate to list this term as 'unfair'.

Example: dot point 10 page 31

Clauses that allow the supplier to assign the contract to the consumer's detriment1, without the consumers consent;

Consider the Finance sector:

Does this mean credit providers Australia wide will not be able to 'assign the contract' to a debt collection agency *'without the consumers consent'*? Clearly every consumer in that situation would refuse on the basis that they would say it was to their detriment - a ludicrous situation.

Yet, in another industry sector, say for supply of specific branded goods or services being expected by the consumer, this may well be an unfair term based on the consumer expectation of brand or quality of services.

Banning certain types of unfair contact terms
(page 35)

Again – agreed. Some of the terms listed could well do with removing, but that is only from our industries perspective.

Based on only some very simple examples provided in this submission which clearly show that the consideration of terms "(un)fair" must take into account the industry sector and the whole circumstance of the nature of the contract (i.e. who bears the risk in the transaction). The National Financial Services Federation believes legislators would be making a major mistake in assuming terms may be "in all circumstances, to be unfair[2]".

[1] Page 32 references detriment are *"not limited to financial detriment"*
[2] page 35

Agreed Reforms to consumer law enforcement powers

The sharing of enforcement between the Commonwealth and the states raises the issue of interpretation and state agenda's, all resulting in potential inconsistency.

Our member's clear view on enforcement is that we only report to one enforcement agency for simplicity and clarity.

Summary

The need to consolidate consumer protection and enforcement of those laws is long overdue for both the benefit of business and consumers. The National Financial Services Federation agrees in principal to the issue of unfair terms being reviewed in contracts. However, we think that consideration must be given to the whole circumstance and nature of the contract in relation to the industry sector, before an assessment as to what is an unfair term can be made.

Recommendation:

As a balance to the proposed "cover-all unfair terms legislation", (which the National Financial Services Federation supports in principal) appropriately strong laws (remedies) need to be specifically targeted at consumers who act in bad faith or attempt fraud on a business to the detriment of the majority of consumer who do the right thing, thus reducing the cost of all services and products to the majority of consumers and possible consumer exclusion. The penalty on the consumers and traders alike should be a quick and simple process and of a criminal nature. "Naming and shaming" should be applicable to consumers as well as traders.

Only when this is done will the concept of 'Fair Trading' be fair.

Appendix A
Questions asked in the paper

Question (page 24)
Should the TPA be renamed? If so, what name should it have, if not the *Competition and Consumer Act*?

Yes.
Competition and Consumer Act is suitable.

Question (page 35)
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.

This a very complex issue as what may be deemed unfair and should be banned in one industry sector could well be a very fair term in another industry sector.

Question (page 51)

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

Careful research needs to be done in relation to business entities that may have the same name or similar trading name. This will ensure that when a 'national public warning' (public naming and shaming) is given, it is targets specifically at the company in question and does not cause market harm to an innocent similar named business entity.

Questions (page 61)
Are there reforms other than those covered in Chapters 10 and 11 that could be included in the Australian Consumer Law, based on existing best practice in existing state and territory laws? In making a suggestion, please address the following questions:

- What is the nature of the problem facing consumers that the suggested reform will address?
- What is the appropriate policy response to address these consumer issues, including non-regulatory approaches?
- What benefits would result from this change and can these be quantified?
- Is the suggested change appropriate for inclusion in a law which applies generic consumer protections on an economy-wide basis?

Not applicable, no comment.

Appendix A
Questions asked in the paper

Question **(page 65)**
Should the scope of the TPA's existing definition of 'consumer' be expanded to cover a wider range of circumstances, such as goods used in business contexts?

Not applicable, no comment.

Question **(page 65)**
Should a new definition of 'consumer' specifically deal with small businesses and farming undertakings?

Not applicable, no comment.

Question **(page 65)**
Should a new definition of 'consumer' cover commercial vehicles or vehicles purchased for a predominately commercial purpose?

No.

Question **(page 66)**

Should a new definition of 'consumer' retain the monetary limit of $40,000 or should the limit be increased? If it were increased, what would be an appropriate amount?

No.
There should be no limit for a consumer transaction. It is too prescriptive in the current modern financial market.

Questions **(page 66)**
Should a new definition of 'consumer' exclude any purchases for business purposes, regardless of the existence of monetary limits? Alternatively, should business consumers be entitled to protections available under the Australian Consumer Law, such as implied conditions and warranties? Should a new definition retain the exclusion in relation to 'resupply'? Are there other approaches to the way that 'consumer' can be defined?

Yes.
In all cases, businesses should be protected themselves by implied conditions and warranties from other businesses.

Question **(page 66)**
Are there any other definitions currently used in the TPA in relation to consumer protection issues that require modification to improve their operation?

Not applicable, no comment.

Appendix A
Questions asked in the paper

Questions (page 72)
Do businesses operating in multiple jurisdictions incur additional compliance costs as a result of different door-to-door sales regulation? If so, please provide evidence of this.
Should the Australian Consumer Law include a provision regulating door-to-door sales? If so, having regard to the principles of best practice regulation, what aspects of current regulation should this provision reflect? What other approaches might be used?

Not applicable, no comment.

Questions (page 74)
Do businesses operating in multiple jurisdictions incur additional compliance costs as a result of different telemarketing regulation? If so, please provide evidence of this.
Should the Australian Consumer Law include a provision regulating telemarketing? If so, which aspects of current regulation should this provision reflect? What other approaches might be used?

Not applicable, no comment.

Question (page 76)
Bearing in mind the principle that the Australian Consumer Law should apply to transactions in any sector of the economy, is there a need to augment the current scope of sections 53, 53A and 53B of the TPA with regard to the approaches outlined above?
Is the scope of sections 53, 53A and 53B of the TPA sufficiently broad to cover these issues?

No comment.

Questions (page 79)
Is section 64 of the TPA effective in its current form?
How could it be improved for inclusion in the Australian Consumer Law by reference to existing state and territory approaches or otherwise?

Not applicable, no comment.

Question (page 80)
Should the Australian Consumer Law include a provision regulating third-party trading schemes? If so, should this provision reflect the current regulatory approaches used in state and territory laws and, if so, how?

Not applicable, no comment.

Questions (page 83)
Do businesses operating across Australia use different terms and conditions for lay-by sales depending on whether there is regulation? If so, please provide examples of these terms and conditions. Does the level of complaints about lay-by sales received by such businesses vary across jurisdictions depending on the existence of regulation? Should the Australian Consumer Law include a provision regulating lay-by sales? If so, should this provision reflect the current regulatory approaches used in NSW, Victoria and/or the ACT?

Not applicable, no comment.

Question **(page 84)**
Should the provisions in section 51A of the TPA be extended to include presumptions in relation to 'false', 'misleading' or 'deceptive' representations for inclusion in the Australian Consumer Law?

No Comment.

Question **(page 84)**
Should the provisions of section 51A of the TPA be amended to further clarify their relationship with the accessorial liability provisions of the TPA?

No comment.

Question **(page 87)**
Are the current pyramid selling provisions in the TPA effective? How could they be improved?

Not applicable, no comment.

Question **(page 88)**
Should the claimant in an action relating to accepting payment without intending to supply be required only to prove that the supplier failed to supply the goods after accepting payment?

Should a maximum limit be imposed on the amount or percentage of the purchase price that may be taken as a deposit for goods that have been ordered, but not yet delivered?

Not applicable, no comment.

Question **(page 89)**
Is there a need to introduce a specific provision into the Australian Consumer Law to provide that a supplier must not sell goods to which more than one price is appended at a price that is greater than the lower or lowest of the prices?

Do not agree with this as it is open to abuse and corruption. TPA approach is best

Question **(page 91)**
Should the Australian Consumer Law include a provision providing for minimum standards for consumer documents? If so, what should these standards be?

Yes.

The minimum standard should be by way of industry specific "standard form contracts and associated documents". This has been very successful for example in the real-estate industry sector where a common form of contract is used regardless of the real-estate agent.

Question (page 92)
Should the Australian Consumer Law include a provision relating to the disclosure of a supplier's address in documents, statements or advertisements?

Yes.

Question (page 92)
Should the Australian Consumer Law include a provision relating to the provision of an itemised bill on request?

Yes, but allow flexibility for electronic delivery to ensure costs can be kept to a minimum.

Question (page 92)
Should the Australian Consumer Law include a provision requiring a supplier to return replaced parts along the lines of section 162 of the Victorian FTA?

No problem with this.

Question (page 93)
Should the Australian Consumer Law extend the current application of section 65 of the TPA to services?

Not applicable, no comment.