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By email: [creditreview@justice.vic.gov.au](mailto:creditreview@justice.vic.gov.au)

Unfair Contract Terms Taskforce  
Consumer Affairs Victoria  
GPO Box 123  
MELBOURNE VIC 3001

Dear Sir/Madam

**The application of unfair contract terms legislation to consumer credit contracts – reverse mortgages**

Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to make a submission to the consultation paper released by Consumer Affairs Victoria (**CAV**), *The application of unfair contract terms legislation to consumer credit contracts – reverse mortgages* (the **Consultation Paper**).

**Main points**

- (i) The terms of reverse mortgage contracts demonstrate the need for unfair consumer contract terms protection to extend to consumer credit;
- (ii) Reverse mortgage contracts are a key area within consumer credit contracts where unfair contract terms are a serious problem;
- (iii) Individuals who borrow through reverse mortgage contracts are particularly vulnerable due to age, family pressures and related factors;
- (iv) The potential harm from unfair contract terms in reverse mortgage contracts is high because it involves the potential loss of the borrower's home and major asset; and
- (v) In addition to providing protection under Part 2B of the *Fair Trading Act* (the **FTA**), it is appropriate for Victoria to push for national protection against unfair contract terms in credit contracts.

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## **Is there a need for protection against unfair terms in reverse mortgage contracts?**

Consumer Action strongly supports the inclusion of consumer credit contracts (and therefore reverse mortgage contracts) in the protection from unfair contract terms in Part 2B of the FTA. We agree with many of the reasons CAV has put forward to justify the extension of Part 2B to cover consumer credit contracts.<sup>1</sup> As you are aware, CAV's research identifies credit contracts as key consumer contracts.<sup>2</sup>

Consumer credit contracts are one of the most widespread types of consumer contract. Further, the value (and therefore risk) of consumer credit contracts is often much higher than for other common types of consumer contract (eg. telecommunication contracts). Unfair mobile telephone contracts can cost consumers hundreds of, or a few thousand, dollars – unfair home loan contracts can cost consumers hundreds of thousands of dollars and result in the total loss of a consumer's asset base. Because of this, exclusion of consumer credit contract from Part 2B creates a huge gap in consumer protection.

The need to protect consumers who take out reverse mortgage contracts is particularly pressing. Reverse mortgage borrowers are typically elderly, and the age of these consumers, together with family pressure and other related factors, means that reverse mortgage borrowers are a particularly vulnerable group. This issue is discussed further below.

## **What types of unfair terms exist and who is lending under contracts with unfair terms?**

CAV has already identified types, and examples, of unfair terms in reverse mortgage contracts. We take the view that the same problem of unfair contract terms applies to other equity release products,<sup>3</sup> and any future review of unfair terms in this area should not look only at reverse mortgages but also at other equity release products.

For this submission, we undertook research in relation to reverse mortgage products offered by mainstream and other lenders. A serious potential problem for consumers is the inability or refusal of lenders to provide the contract terms to potential reverse mortgage loan applicants. Our research identified that it was usual practice for terms and conditions not to be provided to a potential consumer until after the consumer had applied for the loan. Of the major banks, two provided details of the contractual terms pertaining to reverse mortgage loans,<sup>4</sup> while others did not provide details of the terms and conditions.<sup>5</sup>

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<sup>1</sup> Consumer Affairs Victoria, *Application of unfair contract terms legislation to consumer credit contracts: Consultation paper*, 2007, page 5.

<sup>2</sup> 'Banking/Finance/Credit/Mortgage' contracts were the contracts second most recalled by consumers, and were had the fourth highest incidence of unfairness. See Consumer Affairs Victoria, *Unfair contract terms in Victoria: Research into their extent, nature, cost and implications*, 12 October 2007, pages 5 and 9.

<sup>3</sup> Eg. contracts that involve the consumer selling a portion of their property to the bank.

<sup>4</sup> The two banks for whom we could locate and access the terms and conditions were: ANZ Bank, *ANZ Equity Release Terms and Conditions*; Commonwealth Bank, *Usual terms and Conditions for Consumer Lending*.

<sup>5</sup> St. George Bank provides a reverse mortgage called *St. George Seniors Access Home Loan*. No contract terms for this loan were available on the web-page of the product ([http://www.stgeorge.com.au/mortgage/home\\_loans/stgeorge\\_home\\_loans/seniors.asp?orc=personal](http://www.stgeorge.com.au/mortgage/home_loans/stgeorge_home_loans/seniors.asp?orc=personal)), accessed 3 January 2008), in the Collins Street Melbourne branch of the bank on 2 January 2008, nor via the banks call centre (+61 13 33 30 called on 2 January 2008).

The lack of availability of details of the terms and conditions of reverse mortgage contracts at an early stage is, in our view, of significant concern. Reverse mortgages are risky and can be complex, and therefore consumers should be given as much time to consider the terms of these arrangements as possible. One reason for the lack of information is that as consumer credit contracts such as reverse mortgages are excluded from the definition of *financial product* in the *Corporations Act* and *Corporations Regulations*, Product Disclosure Statements do not have to be prepared for these products.

Of those terms and conditions we were able to access and analyse, there was marked variation in the fairness of contractual terms.

ANZ Bank's *ANZ Equity Release* contract terms contained the following extremely unfair terms:<sup>6</sup>

- 13.1 You are in default if:
- (h) you are in default under any other credit contract you have entered into with us...
- 13.2 If you are in default, subject to any *law* (including requirements as to notice), the *total amount owing* automatically becomes due and payable.

These terms permit ANZ to secure unrelated and unsecured credit contracts (eg. credit card contracts) to the consumer's house. The consumer who entered into this contract would be in default, and could therefore be evicted from his or her home, for default under unrelated credit contracts. In our view, terms such as these are manifestly unfair. It is also of particular concern to us that such terms are found in the terms and conditions of one of the 'big four' Australian banks.

The Commonwealth Bank's terms for its *Equity Unlock* loan appeared fairer.<sup>7</sup>

### **Are terms in reverse mortgage contracts more unfair than terms in other mortgage contracts?**

CAV has identified a number of key unfair terms that apply to reverse mortgage contracts. Some of these terms (eg. restrictions on who may live in the mortgaged property, and on the

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Bendigo Bank provides a reverse mortgage called Retirement Lifestyle Income. No contract terms for this loan were available on the web-page of the product ([http://www.bendigobank.com.au/public/personal/home\\_loans/home\\_loans\\_retirement\\_dbdetail.asp](http://www.bendigobank.com.au/public/personal/home_loans/home_loans_retirement_dbdetail.asp)), accessed 3 January 2008, in the Collins Street Melbourne branch of the bank on 3 January 2008, nor via the bank's call centre (+61 1300 366 666 called on 3 January 2008).

Westpac's website did not disclose the contract terms for its *Equity Access Loan* (<http://www.westpac.com.au/internet/publish.nsf/Content/PBHLPR+Equity+Access+Loan>) but this loan did not appear to be targeted to retirees; NAB's website ([http://www.nab.com.au/Personal\\_Finance/0,,85541,00.html](http://www.nab.com.au/Personal_Finance/0,,85541,00.html)) did not disclose the contract terms for its Home *Equity Line of Credit* but this loan did not appear to be targeted to retirees.

<sup>6</sup> ANZ Bank, *ANZ Equity Release Terms and Conditions*, July 2007, <http://www.anz.com/documents/AU/feecharge/EquityReleaseT&C.pdf>, accessed 3 January 2008.

<sup>7</sup> Commonwealth Bank, *Usual terms and Conditions for Consumer Lending*, part C ([http://www.commbank.com.au/personal/apply-online/download-printed-forms/UTC\\_HomeLoan.pdf](http://www.commbank.com.au/personal/apply-online/download-printed-forms/UTC_HomeLoan.pdf))

borrower moving out of the mortgaged property) appear to be distinctive to reverse mortgages. However, other unfair terms identified by CAV (such as terms giving the lender the unilateral right to change or introduce fees and charges) appear to be generic and would presumably exist in other loan contracts (such as traditional mortgages).

Thus, though the structure of the lending arrangement will necessarily mean some variation in the types of unfair terms that are used, it is not clear that particular types of contracts, such as reverse mortgages, contain more unfair than other types of contracts.

For example, although ANZ's *ANZ Equity Release* contained the unfair term of securing unrelated debts against the property the subject of the reverse mortgage, its standard consumer home loans also contain a similar provision.<sup>8</sup>

We believe a detailed comparative study of the terms of reverse mortgage contracts and other mortgage contracts would be required to determine whether reverse mortgage contracts contain more unfair terms than other types of contracts.

There is widespread prevalence of unfair terms throughout the consumer credit sector. In our view, reverse mortgages should be given priority not because reverse mortgage contracts are more unfair than other types of consumer credit contracts but because consumers taking out reverse mortgages are generally more vulnerable than other consumers.

### **Why should reverse mortgage contracts be a priority area for enforcement of Part 2B protection?**

As pointed out above, reverse mortgages should be a priority for the enforcement of unfair contract terms legislation (once the legislation is amended to include consumer credit). The reason for this is that consumers who enter into reverse mortgage contracts are particularly vulnerable.

The obvious vulnerability of consumers in the reverse mortgage market is age. Reverse mortgage products are designed for over 60s. Old age is not necessarily an aspect of vulnerability. But clearly older people are more likely than other people to have medical issues, physical disabilities, and conditions affecting the brain (eg. Alzheimers disease).

It has been noted in the United States (which, relevantly, provides more protection than Australia) that 'reverse mortgage lending is rife with the opportunity for fraud and financial abuse.'<sup>9</sup> This risk certainly applies to Australia, and must be seen as an emerging risk given that the reverse mortgage market is small yet rapidly growing.

The Australian Securities and Investments Commission's (**ASIC**) recent report demonstrated that consumers taking out reverse mortgage loans were largely unaware of the terms of their

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<sup>8</sup> ANZ Bank, *Consumer Lending Terms and Conditions*, Version 6 August 2006, clause 10.

<sup>9</sup> Loonin, Deanne and Renaut, Elizabeth, *The Life and Debt Cycle: The Growing Debt Burdens Older Consumers and Related Policy Recommendations*, Harvard Journal on Legislation, Volume 44 2007, page 198.

loan contracts.<sup>10</sup> Very few of the borrowers studied in ASIC's report considered their long-term future needs before taking out a reverse mortgage.<sup>11</sup> The report noted that financial assistance of family members was the fifth most common reason borrowers entered a reverse mortgage contract.<sup>12</sup>

There ought to be real concern about the risk of undue influence in these cases because elderly relatives are particularly vulnerable to pressure from younger relatives (eg. their children).

Our database does record a number of telephone inquiries made to us regarding reverse mortgages. We have been able to find records of five inquiries between 2004 and 2007. These records reveal the consumers taking out reverse mortgages were always over 60, and usually over 70. In all cases recorded, the loan funds were used to improve the house (eg. install a new shower), consolidate debt or assist family members (children and grandchildren). In one case, the loan provided by a well known non-bank lender was misrepresented as a reverse mortgage (it was in fact a standard mortgage) and was entered into by a 62 year old man suffering Alzheimers disease.

The vulnerability of many consumers taking out reverse mortgages is shown by the fact that many such borrowers are able to obtain finance more easily through subsidised State Government or Centrelink loans. Research from the Council of the Ageing shows that most consumers are unaware of these options.<sup>13</sup>

Many reverse mortgage lenders insist on sending the contract documents to a solicitor acting on behalf of the borrower. While this provides a degree of safety to consumers it occurs after the consumer has applied for the loan and is therefore emotionally committed to it. Independent legal advice may not be sufficient to counter-act the impact of family member pressure, mortgage broker and financial advisor pressure, and the emotional commitment consumers will have made to the loan once they have actually completed an application.

It appears from the above data that CAV is right to prioritise the reverse mortgage sector. The sector is small, and there is not enough evidence to establish that it has any more unfair terms than other sectors. However, there is a clear need to prioritise the sector because of the vulnerability of consumers in the sector.

### **What other steps can be taken to protect consumers of reverse mortgage products?**

Extending Part 2B of the FTA is an effective way of improving protection for reverse mortgage borrowers.

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<sup>10</sup> Australian Securities and Investments Commission, Report 109 'All we have is this house': Consumer experiences with reverse mortgages, November 2007, page 11.

<sup>11</sup> Australian Securities and Investments Commission, Report 109 'All we have is this house': Consumer experiences with reverse mortgages, November 2007, page 13.

<sup>12</sup> Australian Securities and Investments Commission, Report 109 'All we have is this house': Consumer experiences with reverse mortgages, November 2007, pages 11-12 (6 out of the small sample of 29 consumers took the loan to financially assist family members).

<sup>13</sup> Council of the Ageing (Victoria), *Report to Consumer Credit Fund for Credit Preferences and Credit Traps for Older People*, September 2007, page 2.

Consumer Action believes that there are measures at a Federal level that could be taken to further protect Australian consumers. We believe that as CAV and the Victorian Government are currently at the forefront of consumer protection in Australia, they can take a leadership role in pushing for such measures.

Reverse mortgages are not financial products according to the definition of *financial product* in the *Corporations Act* and the *Corporations Regulations*. Reverse mortgages are, of course, regulated by the Uniform Consumer Credit Code (**UCCC**). While the UCCC provides important protections, the absence of *Corporations Act* protection means that there is no requirement on credit providers to provide a Product Disclosure Statement (**PDS**). There is also no requirement for credit providers to be licensed.

The existence of a PDS would provide consumers of reverse mortgage products with important information at an early stage. As it currently stands, consumers usually only get disclosure information after consultations with lender's employees/agents and after they are often already 'sold' on the product. We see these two protections, ASIC licensing and early information in the form of a PDS, as important in the reverse mortgage sector. The current UCCC arrangement does not, in our opinion, provide equivalent protection. We would therefore like to see greater, more consistent national regulation of credit through ASIC. The Productivity Commission has recently commented that the need for a national approach to consumer credit is well established and should be a priority.<sup>14</sup>

Should you have any questions about this submission, please contact Neil Ashton on 03 9670 5088.



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<sup>14</sup> Productivity Commission, *Review of Australia's Consumer Policy Framework*, Draft Report, November 2007, Volume 1: Summary, page 3.