



1 July 2008

By email: 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 – consumer leases and small-amount loans

Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to make a submission to the *The application of unfair contract terms legislation to consumer credit contracts – consumer leases and small-amount loans* (the **Consultation Paper**) released by Consumer Affairs Victoria (**CAV**),

Main points

- (i) Consumer Action generally supports CAV's analysis of unfair terms in consumer lease and small amount loan contracts;
- (ii) The terms of many consumer lease and small-amount loan contracts are very unfair. However, Consumer Action believes unfair contract terms are also present in mainstream contracts;
- (iii) Unfair contract terms requires a different level of analysis compared with analysis of compliance with the *Uniform Consumer Credit Code (the Code)*, and thus while transgression of the Code is an indicator of unfairness, unfairness is a new test;
- (iv) In many instances, consumers who enter into consumer leases and small-amount loans have other options available to them, and it is important that education and information is provided to these consumers to ensure they have access to the information and support to enable them to access alternative options;

Consumer Action Law Centre
Level 7, 459 Little Collins Street
Melbourne Victoria 3000

Telephone 03 9670 5088
Facsimile 03 9629 6898

info@consumeraction.org.au
www.consumeraction.org.au

- (v) It is appropriate for Victoria to push for national protection against unfair contract terms in credit contracts and to work to ensure that consumer protection provisions contained in the Code are retained in a Federal system regulating consumer credit.

Unfair terms in small-amount loan contracts and consumer lease contracts

Consumer Action supports the inclusion of consumer credit contracts (and thus consumer lease and small-amount loan contracts) in the protection from unfair contract terms in Part 2B of the *Fair Trading Act (Vic) 1999* (the **FTA**). We agree with many of the reasons CAV has put forward to justify the extension of Part 2B to consumer credit contracts.¹ CAV's research identifies credit contracts as key consumer contracts.² Small-amount loans in particular have grown quickly in recent years,³ and the industry is likely to continue to grow quickly in the absence of regulation. It is also clear that many vulnerable and disadvantaged clients obtain credit through small-amount loan and consumer lease contracts.

Unfair terms in consumer lease and small-amount loans

In its consultation paper, CAV identified a number of unfair terms in consumer lease and small-amount loan contracts. Consumer Action agrees that the terms identified by CAV are unfair terms.

While we do not intend to respond to each and every unfair term that CAV identified in the consultation, we disagree with CAV in relation to assignments of contracts – we believe that where a lender has a right to assign a contract to the detriment of a consumer but the consumer does not have an equivalent right to assign, this causes a significant imbalance in the rights and responsibilities of the parties and is therefore unfair.

The test of unfairness and the Uniform Consumer Credit Code

We note that the consultation paper frequently referenced the *Uniform Consumer Credit Code* (the **Code**) when considering whether a term was unfair. We think that the analysis of whether or not a term is unfair should be separated from any analysis of whether or not the term complies with the Code. The fact that a term transgresses the Code may be indicative of unfairness, but we feel that it is important to emphasise that the test for unfair contract terms is distinct and cannot be conflated with other legal issues such as Code compliance.

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

² '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.

³ Wilson, Dean, *Payday Lending in Victoria – A research report*, Consumer Law Centre Victoria, July 2002 (funded by the Victorian Consumer Credit Fund), page 34; Roger Ouk, *The Ramifications of Regulating Payday Lending in Victoria*, undated, page 3. Industry sources have suggested the payday lending industry has grown tenfold between 1998 and 2006 – see Lateline, *Pay day loans on the rise*, Australian Broadcasting Corporation, 16 June 2008.

Unfair terms in mainstream consumer credit contracts

Based on the consumer lease and small-amount loan contracts that Consumer Action has seen to date, it appears that these contracts are, in general, more unfair than mainstream consumer credit contracts.

Nonetheless, Consumer Action has seen very unfair terms in mainstream consumer credit contracts. For example, in a variation dated 24 May 2008 to the terms and conditions of National Australia Bank (**NAB**) clients' Personal Transactions and Savings Products contracts, NAB inserts terms that:

- i. Extinguish all rights consumers have to make a claim against NAB in respect of incorrect information if they do not regularly check their account balances;
- ii. Allow NAB to combine or set-off the balance of 2 or more of any type of accounts, credit facilities or other products held by the accountholder with NAB, even if they are held at different branches or in joint names. NAB may do this without notice.

Thus, while consumer lease and small-amount loan contracts are a priority, we believe there are equally unfair terms in mainstream consumer credit contracts, which should be addressed by CAV. We will provide CAV with a complaint about the above NAB terms separately (as they also apply to non-credit contracts).

Alternatives to consumer leases and small-amount loans

Consumer Action is also concerned that many consumers who are entering into consumer leases and small-amount loans are not using social sector support available to them. For instance, both Centrelink and a number of charitable organisations provide small-amount loans for low (or no) interest. The amounts advanced under these schemes would be sufficient to buy many of the essential household items (such as whitegoods) that are often financed through consumer leases.

In addition, consumers of small-amount loans often borrow to pay for essential services (eg. utility bills). Under the *Energy Retail Code*,⁴ the *Electricity Industry Act 2000* (Vic), the *Gas Industry Act 2001* (Vic) and the *Water Customer Service Code*⁵ providers of electricity, gas, and water to Victorian consumers must have financial hardship policies. Under such policies, providers are obliged to offer alternative payment arrangements (such as installments) and other assistance to consumers experiencing financial hardship. The practical outcome of this is that no consumer should need to take out a small-amount loan to pay electricity, gas or water bills because under the hardship schemes they could negotiate a payment plan under which they repay their debt in small amounts over a longer period of time.

⁴ Version 4, October 2007.

⁵ *Customer Service Code: Metropolitan Retail and Regional Water Businesses*, version of 11 July 2007.

In Consumer Action's view, CAV should be proactive in promoting alternative forms of finance and hardship relief for marginalised consumers and should take steps to ensure that from a whole of government perspective these sources of finance work to achieve their aims.

National unfair terms legislation

Consumer Action believes that unfair consumer terms legislation could be introduced at the Federal level to protect all Australian consumers. This is particularly the case given the widespread agreement among stakeholders that credit should be regulated by the Federal Government and the ongoing consultation and law reform to this end.

There are two Federal reforms we believe could assist in protecting Australian consumers. Firstly, all the consumer protection provisions currently in the Code should be retained when the regulation of consumer credit is transferred to the Federal Government. Secondly (and despite the more limited recommendations of the Productivity Commission),⁶ the Federal Government should implement laws to prohibit unfair consumer contract terms based on the Victorian model.

Consumer Action recommends CAV and the Victorian Government use consultative leadership to bring about the timely transfer of consumer credit to the Federal Government (while ensuring that consumer protection provisions are retained) and to encourage the adoption of a uniform national unfair consumer terms law that includes consumer credit.

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



Gerard Brody
Director – Policy & Campaigns



Neil Ashton
Policy Officer

⁶ Productivity Commission, *Review of Australia's Consumer Policy Framework*, No. 45 30 April 2008, Summary, pages 33-36