

22 May 2009

The Australian Consumer Law: Consultation  
on draft unfair contract terms provisions  
Competition and Consumer Policy Division  
Treasury  
Langton Crescent  
PARKES ACT 2600

[australianconsumerlaw@treasury.gov.au](mailto:australianconsumerlaw@treasury.gov.au)

Dear Sir/Madam

**The Australian Consumer Law: Consultation on draft unfair contract terms provisions -  
submission by the Australian Securitisation Forum**

**1 Summary**

The Australian Securitisation Forum (“ASF”) welcomes the opportunity to respond to the draft provisions, and related explanatory material, on unfair contract terms outlined in “*The Australian Consumer Law: Consultation on draft unfair contract terms provisions*” (“**Draft Provisions**”) released for comment by the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, the Hon Chris Bowen MP on 11 May 2009.

We enclose the ASF’s response to the “*An Australian Consumer Law: Fair Markets - Confident Consumers*” consultation paper which was submitted to Treasury on 19 March 2009 (“**Previous Response**”).

We acknowledge that some of the issues which the ASF outlined in its Previous Response appear to have been addressed in the Draft Provisions. However, the ASF submits that the key concerns expressed in its Previous Response should be appropriately addressed in the Draft Provisions for the reasons set out in below and in the Previous Response.

**2 Key Concerns**

**2.1 The Draft Provisions erode contractual certainty. This will have a detrimental effect on the supply and cost of credit to consumers**

A fundamental principle of contract law is certainty of contract. This principle is an essential element of all commercial transactions because it allows the parties to adequately allocate and price risk in these transactions. If the application of the proposed regime is uncertain, or creates the possibility for uncertainty, it will have serious adverse

consequences not only for the securitisation industry, but also for the operation of Australian financial markets.

In order to maintain market confidence, participants must know with certainty that the rights created under each agreement and the remedies available (in the event of default, for example) are stable and that the agreed allocation of risk cannot suddenly change on the basis of an argument that an agreed, accepted and widely used contractual term is unfair.

Given this risk exists under the proposed regime, investors, if they decide to participate at all, will require appropriate financial compensation for accepting this higher degree of inherent risk. The additional costs will inevitably be passed on to end users of the credit markets in the form of higher borrower costs and a reduction in the supply of credit, the very consumers the proposed law is designed to protect.

Additionally, introducing additional elements of doubt into the reliability of payment flows will detrimentally affect credit rating agency analysis.

## **2.2 The Draft Provisions create a complex and overlapping body of consumer protection regulations**

Australian consumers are already protected by a significant body of regulations covering the contracts they enter into. This body includes:

- (a) the Victorian unfair terms regime in Part 2B of the *Fair Trading Act 1999* (Vic);
- (b) the relief against unjust contracts provided by Part 2 of the *Contracts Review Act 1980* (NSW);
- (c) the power to have unjust transactions reopened or unconscionable charges reviewed under sections 70 and 72 of the Consumer Credit Code;
- (d) the consumer protection provisions contained in Part 2 of the *Australian Securities and Investments Commission Act 2001* (Cth) and Part 4 of the *Trade Practices Act 1974* (Cth);
- (e) the financial services and credit regulation contained in Chapter 7 of the *Corporations Act 2001* (Cth);
- (f) the various consumer protection mechanisms proposed in the *National Consumer Credit Protection Bill 2009* (Cth).

The ASF does not believe an additional layer of regulation is warranted in the financial services sector. Imposing a further layer of regulation in an already overregulated industry is not only unjustified but also inconsistent with the Government's deregulation agenda and will increase the cost of doing business. The ASF would also like to understand how the Government intends the proposed unfair terms regime would work alongside these existing laws. The Draft Provisions add to an already complicated and complex regulatory regime in relation to consumer contracts. This complexity requires a heavy burden of compliance obligations on suppliers, and also increases the inherent level of uncertainty in consumer contracts (see our discussion above on the detrimental effects of this uncertainty).

### 2.3 The list of examples of ‘terms that may be unfair’ is likely to be misinterpreted. The list should not be included in the Draft Provisions

Of particular concern to the ASF is the inclusion of the lists of ‘examples of unfair terms’ in the Draft Provisions for both the *Trade Practices Act 1974* (Cth) (“TPA”) and the *Australian Securities and Investments Commission Act 2001* (Cth) (“ASIC Act”) (in section 4 of Schedule 2 and section 12BH, respectively).

These lists have been included in the Draft Provisions without any accompanying or qualifying statement. For example, the Draft Provisions do not direct the court to consider whether a term contained in the list is unfair having regard to “all the circumstances of the case” (this is to be compared to section 70 of the Consumer Credit Code which directs the court to consider whether a contract is unjust having regard to all the circumstances of the case and the factors listed in section 70(2)). The example terms are simply listed as terms that may be unfair.

The unqualified inclusion of these examples in the legislation opens up the risk that courts would consider certain terms to be unfair simply because they appear in the examples contained in the legislation.

The ASF considers the Draft Provisions dealing with assignment of contracts (TPA s subsection 4(j) of Schedule 2 and ASIC Act s 12BH(j)) as particularly problematic in this regard. We submit that these particular provisions are fundamentally inconsistent with securitisation market (and the broader financial services industry) practice, and that they are also inconsistent with the position at general law. If implemented, the proposal may result in many securitisation transactions becoming either impractical or uneconomic.

The assignment of securitised contracts typically occurs without notice to, or consent from, the relevant consumers. This is partly because the contracts are equitably assigned and because, for so long as the supplier/seller continues to operate, it is often in the best position to collect the debts on behalf of the SPV. The giving of notice typically only occurs on the occurrence of certain prescribed events (such as the insolvency of the supplier). The terms of a contract itself is not altered at the time of assignment. There are no additional rights or obligations created based on the assignment alone so the fact that an assignment has occurred should not be relevant whether or not consent of the obligor is obtained at the time of assignment.

We query what would constitute “detriment” for the purposes of this prohibition. To open up debate about whether an assignment to an SPV would or could be to the consumer’s detriment would be to create a level of uncertainty that would adversely affect in a material manner the ability of Australian business to raise securitised funding.

While the ASF acknowledges the comments in the explanatory material that the listed examples are ‘not intended to suggest or indicate a desire to prohibit the securitisation of loans’, the relevant regulators and the courts are not bound by the text of the explanatory material only by the text of the Draft Provisions. By analogy, in the context of the Anti-Money Laundering and Counter Terrorism Financing Act 2006 (Cth), the relevant regulator, the Australian Transaction Reports and Analysis Centre, has “given lesser consideration” and effectively ignored the relevant explanatory memorandum where they considered it to be inconsistent with the legislation. If the purpose of the proposal is to give the benefit of

hindsight, if it so chooses, the right to more harshly judge a contract that has a contractual right to assign and has been so assigned, then that raises significant concerns. The assignee of that contract will be disinclined to take the assignment if it increases the risk of the contract being regarded as unfair. It is the very risk that an assignee is determined to avoid. Given that securitisation typically involves an assignment of contracts to the special purpose vehicle this issue remains a significant concern despite the statements in the explanatory materials.

The ASF submits that the lists of examples of 'terms that may be unfair' should be removed from the Draft Provisions and instead contained in guidance material produced by the regulator. In this context appropriate qualifications can be placed on the examples.

#### **2.4 The application of the Draft Provisions to agreements between businesses in inappropriate and unnecessary**

The explanatory material released with the Draft Provisions provides that the national unfair terms regime '*would not be limited to consumers*', but would extend to all persons, including bodies corporate. The ASF submits that the extension of the unfair terms provisions in a consumer protection law to all businesses, regardless of their size, is not appropriate.

We refer again to Part 2, Division 2, Subdivision C of the ASIC Act which already legislates against unconscionable conduct by a person in trade or commerce. Smaller businesses are specifically addressed, for instance, in Section 12CB(2) of the ASIC Act which prescribes that the Court may have regard to '*the relative strengths of the bargaining positions of the supplier and the consumer*' (see sub-paragraph (a)) and '*whether the consumer was able to understand any documents relating to the supply or possible supply of the services*' (see sub-paragraph (c)).

The ASF repeats its initial submission that there is already an existing legislative framework which specifically contemplates protection for small businesses, and that the protection of small businesses under the Draft Provisions is therefore unnecessary. Further, the ASF remains unable to understand the legislative basis for further protection in the case of large businesses that are able to "fend for themselves". All parties to a standard contract benefit from standardisation. Business consumers in particular benefit from knowing that the same or similar terms apply across all transactions with the relevant counterparty and they have a choice as to whether they wish to accept those standard terms or choose another supplier.

#### **2.5 Retrospective application should be limited to the actual terms that are varied**

The Draft Provisions state that the unfair terms regime will apply, *inter alia*, to all standard-form contracts entered into before 1 January 2010 that contain a term that is varied on or after that date, and that from the variation day forward the regime will apply '*to the contract as varied*'. Neither the Draft Provisions nor the explanatory material make clear whether the entire contract will then fall under the scrutiny of the regime, or whether application will instead only relate to the term or terms that are varied. For the Draft Provisions to be practically workable, the extent of application needs to only the term or terms varied.

The banking sector frequently varies contracts to react to changing market conditions, which includes minor housekeeping changes. The transitional provisions enacted must provide certainty to members of the industry as to the status of contracts entered into before the legislation takes effect. This is particularly so given the enormous number of contracts that

would otherwise be affected. Accordingly, any retrospective application of the Draft Provisions should be expressly limited to the actual terms that are varied, and not the entire contract.

### 3 Supply and cost of credit in the Australian Economy

Growth of the Australian economy is dependent on healthy capital markets. Lending by Australian deposit taking institutions will not be sufficient. The structured debt (or securitisation) capital markets facilitate funding of a broad range of financial assets (including mortgage loans, rural loans, car loans and leases, equipment loans and leases and credit cards) the benefits of which feed through directly and indirectly to the broader economy.

The structured debt markets cannot operate without investors or a credit rating on the debt securities. The payment flows on structured debt securities are a direct function of the payment flows on the underlying financial assets. Introducing additional elements of doubt into the reliability of those payment flows through an unfair contracts regime will detrimentally affect the rating agency analysis of the structured debt securities and will be an additional risk factor for the investors which will they will take into account in deciding:

- (a) whether or not they are willing to invest at all; and
- (b) if they do decide to invest what price (or interest rate) they need to be paid for that risk.

This is a time when Australia needs to minimise the introduction of risks that will stifle the growth of the capital markets and increase the costs of funding. Balancing the benefits of contractual certainty with the interests of consumers is a difficult issue but in our view the introduction of legislation in its current form would create an unnecessary imbalance and detrimentally affect our national well-being.

Full details of this issue, and the ASF's other issues, are outlined in our Previous Response (a copy of which is enclosed).

The ASF welcomes the opportunity to make this submission in relation to this important area of law reform but respectfully stresses the importance of the issues raised.

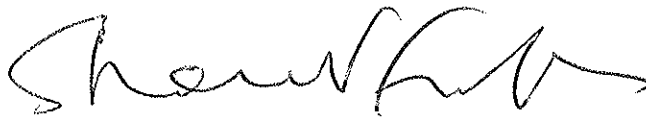
Please contact Alex Sell at the ASF on (02) 8243-3900 should you have any queries in relation to this submission.

Yours faithfully,

**For the AUSTRALIAN SECURITISATION FORUM**



**GUY VOLPICELLA**  
Chairman, ASF Regulatory sub-committee



**STUART FULLER**  
Chairman, ASF