



9 August 2014

Unfair Contract Terms and Small Business Consultation Paper
Small Business, Competition and Consumer Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Attention: Shakira Jones

By email to: AustralianConsumerLaw@treasury.gov.au

Dear Ms Jones

Extending Unfair Contract Term Rules to Financial Products and Services

The Australian Financial Markets Association (AFMA) welcomes the opportunity to comment on Unfair Contract Terms and Small Business Consultation Paper issued by Consumer Affairs Australia and New Zealand (CAANZ).

The sole focus of this submission is on paragraph 130 of the Consultation Paper which poses the question – “A final issue is whether to extend UCT provisions to contracts for financial products and services?”

The short answer to this question is that there is already an extensive consumer protection regime applying to financial products and services that encompasses small business and that it is not necessary to add cost, complexity and regulatory burden into a system where no case has been made out of market failure justifying additional regulatory intervention.

Sufficient existing regulatory protection

Under the allocation of regulatory responsibilities for consumer protection, the Australian Securities and Investments Commission is responsible consumer protection in relation to financial products and services as defined under Chapter 7 of the Corporations Act 2001.

Key components of this protection are -

1. The regulatory objects include the “confident and informed decision making by consumers of financial products and services while facilitating efficiency, flexibility and innovation in the provision of those products and services” and

“fairness, honesty and professionalism by those who provide financial services” (section 760A).

2. A financial services licensee must do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly (section 912A).
3. A financial services licensee must comply with ASIC’s requirements to provide personal and small business customers with access to the licensee’s internal dispute handling and to an ASIC approved independent external dispute resolution scheme.

Small businesses covered as “retail clients”

It is important to be aware that there is a key distinction in the scope of protection afforded under the consumer protection provisions of the ASIC Act and the Competition and Consumer Act in that it applies to not only individuals but body corporates as well that are “retail clients”.

Those small business consumers of regulated financial products and services under the Act are defined as “retail clients” with comparable protections for those individual consumers who are retail clients.

Unless one of the following factors listed in section 761A(7) of the Act applies, a small business will be treated as a “retail client” when provided with a regulated financial product or service under the Act:

- a) the price for the provision of the financial product, or the value of the financial product to which the financial service relates, equals or exceeds the amount specified in regulations [\$500,000 but variable for certain financial services] made for the purposes of this paragraph as being applicable in the circumstances (but see also subsection(10)); or
- b) the financial product, or the financial service, is provided for use in connection with a business that is not a small business (see subsection(12));
- c) the financial product, or the financial service, is not provided for use in connection with a business, and the person who acquires the product or service gives the provider of the product or service, before the provision of the product or service, a copy of a certificate given within the preceding 6 months by a qualified accountant (as defined in section 9) that states that the person:
 - i) has net assets of at least the amount specified in regulations [\$2.5 million] made for the purposes of this subparagraph; or
 - ii) has a gross income for each of the last 2 financial years of at least the amount specified in regulations [\$250,000] for the purposes of this subparagraph a year;
- d) the person is a professional investor [see section 761GA].

Case for change not made out

The Consultation Paper appears to contemplate extending the Unfair Contract Term (UCT) provisions in the Competition and Consumer Act without reference to the comparable provisions under the ASIC Act. The question posed in paragraph 130 properly infers that financial products and services are not intended to be included in the regulatory model unless a case is made to include those products and services. It follows that for those who advocate for financial products and services to be included in the regulatory model they should make that case rather than the case against change to be justified.

UCT post implementation review needed as a starting point

A regulatory impact assessment would be needed to support change. This would need to be in accordance with Office of Best Practice better regulation policy. Your attention is drawn to the stated policy objective for better regulation:

“The role of the Office of Best Practice Regulation (OBPR) is to promote effective and efficient legislation and regulation by the Australian Government, the Council of Australian Governments (COAG) and associated councils. Regulation should be effective in addressing an identified problem and efficient in terms of maximising the benefits to the community, taking account of the costs. A Regulation Impact Statement (RIS) essentially codifies good policy development.”

This statement has particular relevance under the Government’s current deregulation agenda and its commitment to cut \$1 billion of red tape every year. If no sustainable case is advanced, the result should be that financial products and services should not be included in the regulatory regime. In this context it is noted that there has been no assessment of how the existing UCT regime has operated since its introduction in January 2011 despite the substantial cost to industry and particularly the financial sector in reviewing all standard form contracts including the terms and conditions of security instruments.

AFMA supports a post-implementation assessment of the existing UCT regime which would examine the effectiveness of the regime, the experiences of businesses and their consumer customers and a costs and benefits assessment of the operation of the UCT. This post-implementation review should be used to inform the current proposals before a decision is taken to add another layer of regulation upon businesses.

Please contact me on (02) 9776 7995 or at dlove@afma.com.au in relation to follow ups on this letter.

Yours sincerely



David Love
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