



**Australian Institute of Credit Management submission
regarding 'The Australian Consumer Law – consultation on
draft provisions on unfair contract terms'**

Introduction

This submission has been prepared by the Australian Institute of Credit Management (AICM) following consultation with members and the wider credit management industry.

AICM is the association for credit professionals in both commercial and consumer credit comprising both individual and corporate members from all industry sectors in Australia.

AICM's Overall position

As stated in AICM's March 2009 submission concerning consumer law reform, AICM supports a national regulatory scheme for consumer law.

However, AICM would express grave concerns at the proposed *Trade Practices Amendment (Australian Consumer Law) Bill 2009: Unfair contract and prohibited terms*.

This proposed major law reform goes well beyond the expressed intention set out in the March consultation documentation and anticipates the extension of provisions initially intended to relate to consumer transactions to embrace 'business to business' transactions. The ramifications of such legislative change to the Australian business community especially at a time of economic uncertainty and challenge are extensive. The critical concerns of AICM may be summarised as follows:

- A significant increase in the regulatory compliance burden to industry
- The potential to introduce a level of uncertainty into 'business to business' transactions in relation to the supply of goods and services on credit terms.

This aspect is of particular concern to AICM as in order to regenerate business confidence, trading on credit terms are an essential component in restabilising and rebuilding the Australian economy

- Disruption to business and an additional cost burden whilst companies determine appropriate strategies to ensure compliance

- The transitional timeframe is extremely short and arguably unrealistic

Further AICM would question the need for such reforms especially in relation to 'business to business' transactions when there is already a well established body of law that provides a means of redress and remedies for aggrieved parties. For example the current provisions of the *Trade Practices Act 1974* (Cth) in particular Part IVA Unconscionable conduct and in relation to financial services and markets Chapter 7 of the *Corporations Act 2001* (Cth) would appear to address many of the objectives espoused by government and obviate the need to extend the proposed reforms to 'business to business' transactions.

Specific Comments

Lack of clarity as to the Government's objectives

The intention to extend the unfair contracts terms amendments to 'business to business' transactions appears to be out of step with statements made by the Minister. Indeed in the press release of 11 May 2009 in which the consultative process was announced, the Minister highlighted that these reforms were designed to '...give all Australian consumers access to protection from unfair contract terms in standard form contracts...'. The incorporation of 'business' seems unnecessary and inappropriate. If ultimately Government concludes that 'business to business' contractual relationships should come within these proposed amendments then AICM would recommend that the application of the amendments be limited to the definition of consumer transactions as set out in Clause 4B (2) of the *Trade Practices Act 1974* (Cth) and limited to the value of \$40,000.

Definition of unfairness

It is AICM's conclusion that the test for unfairness is lacking in clarity and does not reflect the definition provided in earlier consultative documentation. The Exposure Draft appears to have raised the benchmark in relation to the test of unfairness by including reference to the need for a business to demonstrate that there are sufficiently compelling reasons for inclusion of a term in standard contract.

This apprehension is compounded by the lack of definition of just what constitutes a 'standard form contract'. A potential outcome of this uncertainty may be the unnecessary review of contracts which in fact would fall outside the provisions of the proposed amendments.

Upfront price

The Exposure Draft definition of upfront price excludes '...any other consideration that is contingent on the occurrence or non-occurrence of a particular event...'. AICM believes that fees and charges such as interest on overdue accounts should not render a standard form contract as being 'unfair'. As well, recovery costs incurred for the pursuit of outstanding debt is in the view of AICM a legitimate component of a 'standard form contract'. AICM is concerned that this imprecision potentially opens the way for debtors to seek to avoid legitimate obligations through subsequent challenge to enforcement remedies that have been integral to the provision of credit to customers.

Grey list

It is AICM's view that the inclusion of a 'grey list' may result in frivolous and vexatious claims and potentially inappropriate regulatory intervention. AICM would propose that should the Government conclude that a 'grey list' is an essential component of these proposed reforms then the list should be developed in consultation with industry and more importantly not included in the legislation.

Timing of the proposed changes

Whilst the Exposure Draft proposes a date of effect of 1 January 2010 there is concern that contracts entered into prior to this date and which may need to be renewed or varied will fall within the proposed amendments. This will only serve to increase the level of uncertainty and potential disruption between parties for reasons which may be no more than mischievous.

Cost to industry

As previously highlighted the potential cost to industry of these proposed reforms are incalculable. This cost will only be increased exponentially by the lack of certainty and clarity in the current Exposure Draft.

Coordination of reforms

As stated in AICM's March 2009 submission, AICM has considerable reservation that the range of reforms currently under consideration are being undertaken in an ad hoc and fragmented manner. The interaction between the Personal Property Security Law reform and the National Consumer Credit Protection Bill need to be carefully managed in order to avoid a dysfunctional outcome which potentially will increase litigation and introduce an unnecessary level of confusion into the marketplace. Such an outcome would only diminish the overall objectives of the Government's reform agenda.