



9 April 2010

**Australian Institute of Credit Management Submission re**

**Australian Consumer Law – A guide to unfair contract terms [Draft for consultation]**

The Australian Institute of Credit Management (AICM) welcomes and supports the proposed *Australian Consumer Law – A guide to unfair contract terms* (the Guide).

AICM believes the Guide will assist with the understanding and application of the *Trade Practices Amendment (Australian Consumer Law) Act (No 1)*.

However AICM would recommend some refinements to the proposed publication which would, in AICM's view, enhance understanding.

1. The interrelationship between the new legislation and 'sole traders'

As at June 2007, there were 641,538 (32%) companies in Australia, followed by 620,037 (31%) sole proprietors, 385,801 (19%) partnerships and 364,075 (18%) trusts<sup>1</sup>.

The value of the provision of credit to the Australian economy is significant. Whilst the Australian Bureau of Statistics (ABS) does not collect official figures for the value of commercial business to business credit, using the most recent ABS Input Output Tables<sup>2</sup> together with the annual AICM National Credit Industry Survey it is conservatively estimated that commercial credit is provided to an annual value of \$600 billion. This figure does not reflect consumer credit or loans to business.

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<sup>1</sup> Australian Bureau of Statistics Counts of Australian Businesses, including entries and exits Cat No 8165 Dec 2007

<sup>2</sup> ABS Input Output Tables 2004-2005 Cat No 5209.055.001 [www.abs.gov.au](http://www.abs.gov.au)

AICM highlights these statistics to draw the authors' attention to the potential confusion which may arise in relation to unfair contract terms and the provision of commercial credit to sole traders.

Commercial credit is usually focussed on the supply of goods and/or services and embraces a myriad of sole trader customers as documented above.

In the Guide it is stated on p5

*..A contract between businesses is excluded from the scope of the provisions, except potentially in respect of a 'sole trader' who may have common business and personal interests, but only to the extent that the contract relates to goods and services acquired wholly or predominantly for the consumer's personal, domestic or household use...*

This is the only reference to the interaction between the new legislation and sole traders throughout the entire document.

As AICM members deal with sole traders on a daily basis using standard form contracts it will be difficult for them to glean any additional insight as to how the new law is proposed to apply.

It is of concern that prior to entering into a standard contract the credit provider will have to ascertain the intended use of the goods and/or services.

Equally there is the possible outcome that a sole trader may seek to use the new law to avoid their own obligations or at a minimum delay proceedings by instituting litigation on spurious grounds.

Given the volume of trade between business and sole traders AICM's concerns are heightened by the statement at p 6

*..This will also allow a court to consider whether the contract is, in effect, in a standard form, regardless of the use of measures like an acknowledgment by the consumer that the contract has been negotiated...*

If a statement such as the above is unsuitable then it may be reasonable to conclude that a statement to the effect the goods and/or services

*...acquired by a sole trader only for a business purpose...*

would be equally unacceptable to demonstrate that the contract does not relate to the supply of goods and/or services for personal, domestic or household use.

Whilst AICM appreciates that there may be some unscrupulous providers of goods and services who will seek to avoid their obligations to consumers it is conceivable that such a statement by be attractive in a commercial setting when dealing with sole traders as a means to protect the supplier.

In order to place AICM concern's in a contextual framework the following hypothetical example demonstrates how the concerns alluded to above may become manifest.

*Arthur, a sole trader whose business is painting and decorating orders a supply of paint which he assures the supplier is for business purposes. Arthur however intends to use part of the supply to paint his own home. Arthur then discovers that he has ordered the wrong colour and seeks to avoid his liabilities under the supply for business purposes by attempting to overturn the contract on the basis that the paint was actually for 'personal, domestic or household use'. Whilst Arthur may not have a substantive argument to support his proceedings the cost to the supplier in defending the matter and recovering payment may ultimately be greater than the value of the goods supplied.*

AICM acknowledges that this hypothetical example may be an extreme scenario however in the absence of more definitive information in the Guide an outcome such as outlined above is conceivable.

Therefore AICM would recommend that the Guide address the interaction between sole traders and the new law and as appropriate include examples of how the new law will work in relation to sole traders.

## 2. Enforcement arrangements

Whilst AICM appreciates that the determination of whether a contract term, or indeed the whole contract is in breach of the unfair contract terms is a matter that ultimately will need to be determined by a court, AICM would suggest that a regulatory regime which is underpinned by an educative rather than a prescriptive approach will achieve greater adherence to the new legislative framework.

The Guide does not provide sufficient clarity as to how either the ACCC or ASIC would deal with breaches other than to state that

*...the ACCC and ASIC have the power under the ACL and ASIC Act to apply to the court to seek certain orders...<sup>3</sup>*

The practice of proceeding immediately to litigation would appear to preclude the possibility of remedial action being instituted prior to the commencement of proceedings.

AICM would propose that consideration be given to encouraging the business community to take up the new legislative provisions by the use of alternate remedies in the first instance. For example, remedies such as suitable and enforceable undertakings may be more appropriate especially when there is genuine error rather than an attempt to mislead or deceive consumers.

This oversight appears to be a point difference between the usual regulatory practice of both ACCC and ASIC which endeavours to encourage good practice rather than adopting a penalizing strategy as the first form of remedy.

### Conclusion

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<sup>3</sup> The Guide p 23

AICM supports the intention behind the Guide and believes it would be a useful document. However it is AICM's view that the inclusion of the matters outlined above would enhance the Guide's utility and application.