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Review of Australia's Consumer Policy Framework
Productivity Commission
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Productivity Commission Draft Report December 2007 – Review of Australia's Consumer Policy Framework

Thank you for the opportunity to comment on the draft report. AFC supports the introduction of a consistent consumer policy framework with national approach and acknowledges the Productivity Commission's review as an important undertaking that can form the basis for vital reforms to Australia's consumer regulatory framework.

By way of background, AFC is a national finance industry association whose 60 plus member companies include a range of financial institutions and manufacturers in their functional capacities as financiers and credit providers. AFC members operate across all segments of the Australian consumer and commercial credit markets. Accordingly, our main focus of our comments is on the recommendations in the Draft Report relating to financial services and credit.

General Comments

AFC suggests that to ensure an efficient and effective Australian regulatory framework, particularly for credit and financial services the main aims are:

- greater consistency in, and simplification of, the current patchwork of consumer protection regulation. This is particularly evident in the context of the range of often inconsistent regulation that applies to providers of financial services and credit;

- comprehensive, ongoing and effective consultation between government, regulators, industry and consumers regarding issues that affect financial services. This is to ensure that any reforms address real and not merely perceived needs and that they address them in a manner that achieves the policy outcome in a way that is commercially realistic; and

- adequate funding to ensure that objective and rigorous research is carried out in relation to consumer issues and on what is the most appropriate form of regulation for particular issues.

There is a need for further effort towards generally reducing fragmentation of legislation which impact on consumers and business. For example, other laws where consolidation would provide significant benefits are privacy, data protection and related marketing laws (encompassing, at the Federal level, the Privacy Act, the Spam Act and the Do Not Call Register Act and, at the State and Territory level, various privacy legislation and legislation dealing with telephone marketing). We acknowledge the Australian Law Reform Commission's current review of privacy laws.

Over the last two decades AFC has observed a welcome trend in finance and credit-related legislation towards a national uniform approach. Unfortunately, we have also observed a less welcome layering of regulatory responses. Overall, there has been a tendency to enact new legislation to address a policy concern rather than devote resources to enforcing existing legislation. The effect of this is that business needs to comply with an ever-growing multiplicity of regulation that does not take account of existing regulation, or give sufficient guidance as to compliance. An instance of this with the latter is the interaction between the Anti-Money Laundering and Counter-Terrorism Financing Act and the Privacy Act (not to mention Anti-Discrimination laws), where the dictate to business is to simply comply with both, despite competing policy and legislative expression. As for the former, this is most starkly seen when the policy response is for disclosure to consumers. The Productivity Commission has made specific recommendations about disclosure, but difficulties can be avoided in many instances by policy development that is done having regard to existing regulatory requirements, as well as normal business operating practices.

Before moving to specific comments on the draft recommendations, AFC would like to make the following higher level comments:

Consumer Protection, Consumer Affairs or Fair Trading – Ministers and Focus

The Draft Report refers several times to the Ministerial Council on Consumer Affairs (MCCA) including its medium-term scale back as the range of functions move to the Commonwealth. Criticism of its functioning is implicit in some areas and explicit in relation to consumer credit and finance broking, principally the time taken to implement agreed policy positions. A feature of the portfolio is that it is usually relatively junior and has one of the highest turnovers in the Ministry. In addition, depending on the jurisdiction, the portfolio can sit below quite diverse Cabinet functions: Treasury, Commerce, Attorney-General or Justice, each with differing policy emphases from social

justice to "killer toys" or business facilitation. These features make consistent policy development and execution most difficult. Should the states and territories retain a role going forward, a suggestion would be to have the same Cabinet portfolio link across all jurisdictions so that the senior (and usually more stable, in terms of turnover) Ministerial Council could maintain oversight and purpose in the policy directions taken by its junior.

Financial Services – Terminology and Semantics

Over the last 15 years or so the terminology of "financial services" has moved from vogue for superannuation and managed investments to include insurances and more recently has semantically drifted towards also covering credit and finance. This is sometimes unhelpful and confusing from both policy and community expectation perspectives as one set of services involve consumers giving the financial institution their money in the hope of a future return or service while the other set involves the opposite: the financial institution providing its money to the consumer in the hope of future return.

Refinements aside, what is appropriate policy for disclosure, process, practice and redress for a 'financial product' under the Corporations Act need not be appropriate policy prescriptions for consumer credit and finance more generally.

Particularly in relation to redress and remedies, this distinction among "financial services" is most important as a mechanism to reasonably and appropriately protect a consumer in relation to his or her superannuation may be quite unreasonable and inappropriate when similarly applied to repayment of a car loan.

ADR membership needs to be seen in this light. Historically these schemes were established either as part of a self-regulatory or co-regulatory regime (ie. to obviate the need for prescriptive regulation) and/or for reputational reasons. The structure was subsequently extended to cover those sectors where government was either mandating a particular product (eg. occupational superannuation) or providing prudential support (eg. ADIs, managed funds, insurance). In an area as regulated as consumer credit, it will be a matter of fact whether a contract was compliant or a practice legal or not; if the threat of free, non-binding on the customer ADR means that a complaint is settled more in the favour of the complainant than would otherwise be the case in the absence of ADR, that is a cost that will be borne by the wider market. AFC believes that such membership should be voluntary not compulsory. That said, many AFC members are already in such schemes. While philosophically opposed to this social engineering, in practice we do not believe it presents a problem other than costs.

Business Protection

Australia does not have a history of protecting businesses as if they were consumers. The initial protections in the Trade Practices Act (and similarly the various Fair Trading Acts) apply to goods and services for any purpose up to $40,000, those for normal household and domestic use without limit and commercial trucks. AFC believes that this should remain the scope for the proposed generic consumer law rather than that Act's

unconscionable conduct provisions (all transactions to $10 million with all but listed companies). Moreover we believe that the Corporations Act's Retail Client extension based on sector and number of employees (up to 20 generally but up to 100 for manufacturing), should be avoided. The Australian Bureau of Statistics defines a small business as businesses employing up to 19 persons. In its 2001 report Small Business in Australia (ref. no. 1321.0), this amounted to 1,074,900 of the 1,114,500 Australian businesses. Adding the 5,000 businesses in the Manufacturing Sector employing between 20 and 99 persons, takes the proposed coverage to 1,079,900 or 96.9% of the private sector. This is a major policy change.

Specific Comments on draft Recommendations

Draft Recommendation 4.1
Australian Governments should establish a new national generic consumer law to apply in all jurisdictions, enacted through applied ("template") law arrangements. Unless otherwise appropriate, the new law should be based on the consumer protection provisions of the Trade Practices Act, as amended by other recommendations in this report, or as necessary to ensure that the new law covers non-corporate entities and accommodates jurisdictional differences in court and tribunal arrangements.

Draft Recommendation 4.2
The new national generic consumer law should apply to all consumer transactions, including financial services. However:

- *the Australian Securities and Investments Commission should remain the primary regulator for financial services; and*
- *financial disclosures currently only subject to "due diligence" requirements should be exempted from the misleading or deceptive conduct provisions of the new law.*

AFC supports the proposal to have one Trade Practices Act-based law applying to both financial services and non-financial services activities. This would be a more efficient approach than the status quo, especially given the similarities of relevant provisions of the current Acts.

AFC believes the issue of administration of the law requires further consideration by the Productivity Commission. We believe the Commission should develop recommendations about the roles, responsibilities and interactions of the Commonwealth regulators and those of the States and Territories. On the one hand, we believe there is a level of confusion by consumers and business as to who is the responsible regulator to whom they should turn to or be answerable to; this is compounded by the advent of external dispute resolution schemes. Yet, on the other hand, there could be merit in multiple regulators in the sense of key ones which set administrative policy and those who carry it out. AFC believes this issue will require further consultation as the administration of a national law goes to the heart of that law's success.

Draft Recommendation 5.1

CoAG should instigate and oversee a review and reform program for industry specific consumer regulation that would:

- *identify and repeal unnecessary regulation, with a particular focus on requirements that only apply in one or two jurisdictions;*
- *drawing on previous reviews and consultations with consumers and businesses, identify other areas of specific consumer regulation that apply in all or most jurisdictions, but where unnecessary divergences in requirements or lack of policy responsiveness impose significant costs on consumers and/or business; and*
- *determine how these costs would be best reduced, with explicit consideration of the case for transferring policy and regulatory enforcement responsibilities to the Australian Government and how this transfer might be best pursued.*

In principle, AFC supports CoAG overseeing a review and reform program for industry specific regulation and the repeal of unnecessary regulation with a particular focus on requirements, which apply in one or two jurisdictions only. In general it is recommended that focus be given to 'fix' current policy shortfalls and jurisdictional inconsistencies before introducing new policy to avoid overlap/duplicated legislation.

Draft Recommendation 5.2

Responsibility for regulating finance brokers and other credit providers should be transferred to the Australian Government, with the regulatory requirements encompassed within the regime for financial services administered by the Australian Securities and Investments Commission (ASIC). As part of this transfer:

- *the Uniform Consumer Credit Code and related credit regulation, appropriately modified, should be retained. The Australian and State and Territory Governments should give priority to determining the precise requirements, and how they would be best incorporated within the broader regime, having regard to initiatives recently canvassed by the Ministerial Council on Consumer Affairs and the recent House of Representatives inquiry on home lending;*
- *a licensing system should be introduced for finance brokers that, amongst other things, requires them to participate in an ASIC-approved alternative dispute resolution (ADR) scheme; and*
- *a registration system should be introduced for other credit providers, not already covered by the broader licensing arrangements for financial service providers, with a condition of registration being participation in an ASIC approved ADR scheme.*

AFC appreciates the significant role of and efforts by State and Territory governments and regulators in the context of credit regulation. The Uniform Consumer Credit Code has been operating very effectively for over a decade. However, existing State and Territory-level credit regulation arrangements suffer from shortcomings. The Draft Report highlights a number of these. Those of particular concern to nationally operating credit providers include:

- *jurisdictional fragmentation* - from the beginning of the Consumer Credit Code jurisdictions reserved their right to implement non-uniform requirements in a number of areas, including interest rate caps, licensing of credit providers,

jurisdiction and access to remedies. Further, jurisdictions have also implemented different requirements with regard to other credit matters despite the uniformity agreement (for example, the ACT's amendments to its Fair Trading Act to address the issue of credit card over-commitment and Tasmania's amendments to the provisions dealing with the application of the Code). This has resulted in a range of differences in how a supposedly 'Uniform' Consumer Credit Code applies in the various States and Territories;

- *lack of responsiveness* - the jurisdictions current arrangements make it difficult to respond to market changes within a reasonable timeframe. There also appears to be a lack of effective internal debate and agreement amongst the jurisdictions - and a lack of full consultation with industry and consumers - before reform proposals are finalised, which may mean they are not examined as thoroughly as should be the case. This appears to be demonstrated by the flaws in the Fringe Lending - Consumer Credit Code Amendments proposed recently, which have been the subject of much criticism.

As AFC has often identified with the UCCC, the stresses on the current "uniform" arrangements are difficult enough (and are contributing to calls for Commonwealth regulation). National consistency of legislation and administration is most important. It is a national market for credit. Governments, consumers and industry have a common interest in ensuring that the law applies in the same way regardless of the location of the customer or the service provider. What has been lacking to date is a meaningful and recognised process for policy development and stakeholder consultation. This issue is at the forefront of current measures by banking and finance industry associations with the Ministerial Council on Consumer Affairs. We are endeavouring to achieve a robust process for the development of consumer credit regulatory policy within the current framework. Ideally, AFC would wish to see this process through before final consideration of changing the jurisdiction of the UCCC.

However, should the UCCC become a law of the Commonwealth, AFC fully supports the Commission's proposal that national credit legislation should incorporate an 'appropriately modified' version of the Consumer Credit Code rather than credit being merely made subject to the provisions of Chapter 7 of the Corporations Act. Our key reasons for this view are:

- First, the products are quite different. In the case of credit, the primary risks lie with the financier, not the consumer.
- Secondly, the UCCC as a law has operated very efficiently and effectively for mainstream financiers, despite reservations about the efficiency of developing policy responses to changes in the market.
- Thirdly, the cost of changing to federal regulation could be significant unless the Commonwealth adopted the UCCC exactly as it is currently legislated through the Queensland Parliament. Therefore, the foreshadowed 'appropriate modifications' must be minimal and only aimed at addressing the current policy divergences between the states and territories.

- Fourthly, for the Commonwealth to make the UCCC a statute of Commonwealth Parliament, there will need to be developed comprehensive administrative arrangements to allow parties to exercise statutory rights and ready access to judicial and quasi-judicial fora, and to provide compliance processes for regulators.

Given the finance broking industry bodies have sought it, AFC agrees with the need for a licensing regime of finance brokers being national in its focus, allowing a licensee to trade across all state and territory borders and to comply with one set of regulatory requirements. The recently released draft Finance Brokers Bill is currently proposed to be introduced in NSW and other jurisdictions would introduce similar but not necessarily identical provisions. This raises serious concerns about the lack of uniformity in legislation and its administration leading to unnecessary compliance costs for Government and business as well as possible confusion and delays. If State regulation of finance brokers is to proceed, AFC supports national template legislation and opposes any scope for individual states and territories to vary any of the substantive provisions of the template, as has occurred at the margins with the UCCC. As an aside, AFC has major concerns particularly about the scope of the draft bill on which we have made a detailed submission. Any move to Federal jurisdiction must also be accompanied by comprehensive industry consultation.

A minor point on expression in relation to this Draft Recommendation, is that finance brokers are not credit providers; the phrase should be "…finance brokers and credit providers…" not "other credit providers".

AFC does not support the need for mainstream credit provider to be licensed or registered in order to provide their money to consumers on the promise of it being repaid in the future. The existing "negative licencing" regime, which provides for Commissioners of Fair Trading etc to prohibit credit providers from trading or place conditions on their behaviour, has worked well for more than a decade with little action required to be taken by officials. However, should policy determine that credit providers need that level of regulation, AFC supports, in part, the recommendation for registration of credit providers. Registration is a preferred regulatory response to implementation of a licensing regime. AFC does not support the concept that the mere fact of holding a Australian Financial Services Licence should provide an exemption. As we have noted earlier in this submission, the risks are different between financial services and credit. Under current financial services law, a licence authorises the licensee to engage in particular conduct/business – it does not authorise a licensee to provide all financial services.

Draft Recommendation 7.1

A new provision should be incorporated in the new national generic consumer law that voids unfair terms in standard contracts, where:

- *the term is established as 'unfair': that is, it is contrary to the requirements of good faith and causes a significant imbalance in the parties' rights and obligations arising under the contract;*

- *there is evidence of material detriment to consumers;*
- *it does not relate to the upfront price of the good or service;*
- *all of the circumstances of the contract have been considered; and*
- *there is an overall public benefit from remedial action.*

Where these criteria are met, the unfair term would be voided only for the contracts of those consumers subject to detriment, with suppliers also potentially liable to damages for that detriment.

There should also be a capacity for an industry or business to secure regulatory approval for 'safe harbour' contract terms that would be immune from any action under this provision.

The operation and effects of the new provision should be reviewed within five years of its introduction.

There are a number of key issues with the proposed implementation of a national law to void 'unfair' terms in standard form contracts. Firstly, the Commission acknowledges that the evidence of abuse of 'unfair' terms is not clear - the issue should therefore be researched further to ensure any such law is in fact necessary. Secondly, the concept of an 'unfair' term can be very uncertain. When operating in conjunction with existing restrictions (for example, for Code-regulated contracts are subject to re-opening under the unjust contract provisions of the Code) it can also become overly burdensome.

AFC does not support the "Unfair Contract term" proposals, so far as they relate to the inclusion of 'exception fees' or a credit provider's ability to 'unilaterally vary' its credit contracts. These are fundamentally intrinsic to a financier's ability to manage the credit and operational risk inherent in a lending portfolio. Individual negotiations with many thousands of borrowers every time a certain clause needs amending would be totally impractical. At the very least these provisions should be considered under the 'safe harbour' contract terms proposal.

If such a law is implemented, there are the following additional issues:

- any such prohibition would need to recognise that a customer's ability to switch to alternative products, services or providers should reduce the likelihood of unfairness;
- there should also be recognition that there may be a necessity for terms that, at first sight, appear possibly unfair. For example, they may be necessary for efficient compliance with laws (for example, recent significant Federal anti-money laundering laws have resulted in various financial services providers including new terms to facilitate compliance and limit liability) or in order to maintain uniformity of contracts to ensure efficient delivery of products and services (for example, unilateral rights of variation are often necessary for this purpose);
- the Draft Report suggests that the unfair terms provisions would not apply to upfront prices of goods or services. However, these may not be the only matters that should be excluded from their application. A thorough assessment of other types of terms it may be appropriate to exclude is needed - for example, rights to change interest rates or to make changes to terms to reflect a change in the law; and

- we agree with the need for a process to allow organisations to apply in advance for "safe harbour" for their standard contracts. However, this process must not be inappropriately onerous as it would then have little value. Also, it must be quick and commercial-in-confidence, otherwise the bureaucracy on an authorised safe-harbour process risks stifling product development, competition and consumer choice.

Outside of the Commonwealth context, AFC believes that if unfair contracts law was proven warranted, such provisions for consumer credit should be included in the UCCC rather than be left to the vagaries of the range of Fair Trading Acts

Draft Recommendation 9.2
Australian Governments should improve the effectiveness of alternative dispute resolution (ADR) arrangements for consumers by:

- *extending the functions of the Telecommunications Industry Ombudsman to all telecommunications premium content services, pay TV and other associated services and hardware;*
- *establishing a national energy and water ombudsman that incorporates relevant existing State and Territory ADR bodies;*
- *encouraging further integration of financial ADR services, which would involve:*
  - *consolidating the existing financial ADR services into a single umbrella dispute resolution scheme for consumers, but with the option for those services of retaining their independence as arms within it;*
  - *adopting a common monetary limit on consumer disputes they can consider;*
  - *requiring that any new industry ADR services, including for credit, should be part of this scheme; and*
- *ensuring there is an effective and properly resourced ADR mechanism to deal consistently with all consumer complaints not covered by industry-based ombudsmen.*

As noted above, AFC believes that in relation to credit, participation in an ADR scheme should be voluntary. We nonetheless see merit in the consolidation of the financial services external dispute resolution schemes, as long as the requirements for those already participating in schemes are not exacerbated. We also urge the Commission to factor into its findings the steady progress on convergence already planned by key existing financial services ADR schemes. Finally there must be mechanisms to ensure efficiency and competitive pricing – to avoid the economic problems of a monopolistic position.

Draft Recommendation 9.3
Australian Governments should improve small claims court and tribunal processes by:

- *introducing greater consistency in key aspects of those processes across jurisdictions, including:*
  - *common higher ceilings for claims;*
  - *uniform subsidy rates for consumers seeking redress for small claims;*
  - *equal availability of fee waivers for disadvantaged consumers; and*

- *allowing small claims courts and tribunals to make judgments about civil disputes based on written submissions, unless either of the disputing parties requests otherwise.*

AFC supports this recommendation. There are potentially significant saving in costs and time. Additionally, the introducing of greater consistency among these jurisdictions would be most welcome. AFC has one qualification to its support. While allowing submissions to be made in writing, this could have a detrimental effect on those 'less literate' in the community. Given that Australian consumers and business increasingly ignore state and territory boundaries, there should also be consistent options developed for the conduct of hearings by telephone and/or video-conference. This would allow access to tribunals wherever a consumer or business is located in Australia without the cost of travelling and without the difficulties for many of preparing reasoned and articulate submissions.

Draft Recommendation 9.6
Australian Governments should provide enhanced support for individual consumer advocacy through increased resourcing of legal aid and financial counselling services, especially for vulnerable and disadvantaged consumers.

In principle, AFC supports a Government funded arrangement of consumer advisory bodies with a focus on education for consumers in conjunction with more financial counsellors. As part of this the Commission should also recommend the establishment of educational and quality standards for financial counsellors to meet, consistent with recommendations made during the recent Victorian Credit Law Review. Those standards should be developed in consultation with key stakeholders, including industry. The continuing concern regarding financial literacy should make this a priority.

Chapter 10 – Enforcement Powers
Draft Recommendation 10.1
The new national generic consumer law should give consumer regulators the capacity to:
- *seek the imposition of civil pecuniary penalties, including the recovery of profits from illegal conduct, for all relevant provisions;*
- *apply to a court to ban an individual from engaging in specific activities after the court has found that a breach of consumer law has occurred;*
- *issue notices to traders requiring them to substantiate the basis on which claims or representations are made; and*
- *issue infringement notices for minor contraventions of the law.*

Draft Recommendation 10.2
The Australian Government should commission a review by an appropriate legal authority of the merits of giving consumer regulators the power to gather evidence after an initial application for injunctive relief has been granted, but prior to substantive proceedings commencing.

Draft Recommendation 10.3

Australia's consumer regulators should be required to report on the nature of specific enforcement problems, their consequences, steps taken to address them and the impact of such initiatives. Such commentary should be informed by surveys of targeted stakeholder groups.

AFC is cautious about any increase to current enforcement powers, but if the Commission's recommendation is intended to monitor the effectiveness of enforcement measures, then that is to be supported. We have seen state and territory legislation, which has had adequate enforcement powers, amended to enhance the deterrent provisions when more resources to enforce the current provisions would have been more effective. This is reflected in the tendency for a new law rather than relying on or testing existing law. A more appropriate approach at least initially is to rely on the existing comprehensive powers that the regulators currently have available, or adoption of existing state powers such as those within the UCCC's in the federal sphere, but without increase.

An issue the Commission should consider is that regulation be actually enforced by regulators. Too often in our experience, a new regulatory measure is enacted with expectation that whatever the mischief was has now been addressed. There is a lack of accountability on regulators to enforce, or at least engage in meaningful compliance programs. Lack of enforcement results in an anti-competitive outcome, with most businesses complying, but many do not in the knowledge that the risk of being found in breach is low.

Draft Recommendation 11.1
When imposing information disclosure requirements on firms, Australian Governments should require that:

- *information is comprehensible, with the content, clarity and form of disclosure consumer tested, and amended as required, so that it facilitates good consumer decision-making; and*
- *complex information is layered, with businesses required to initially provide only agreed key information necessary for consumers to plan or make a purchase, with other more detailed information available by right on request or otherwise referenced.*

Consistent with these principles, reform of mandatory disclosure requirements in financial services should be progressed as a matter of urgency.

AFC recommends 'Mandatory Document Disclosure' changes under FSR continue under the Corporations Act rather than introducing a new process. The cost and operational impact of any roll back and/or new regulatory requirements needs to be rigorously considered including consumer testing and a RIS.

The same tests as those proposed by the Commission should in particular be applied to statutory/administrative mandated disclosure statements and advice. Also, before imposing new disclosure requirements, Australian Governments should be required to undertake a disclosure impact statement to test how the mandated disclosure will work in practice and in the context of other mandated disclosure requirements.

Draft Recommendation 11.3
The Australian Government should provide modest additional funding to support: the basic operating costs of a representative national peak consumer body;

In progressing this Draft Recommendation, efforts should be made to ensure that the body is representative of and accountable to consumers.

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We would be pleased to provide further input or information as required.

Yours truly,

Ron Hardaker
Executive Director