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9 December 2016

Mr Simon Cohen
Chair
Consumer Affairs Australian and New Zealand

By upload to website::www.consumerlaw.gov.au

Dear Chair,

AUSTRALIAN CONSUMER LAW REVIEW INTERIM REPORT

Thank you for the opportunity to provide feedback on the Australian Consumer Law Review Interim Report (**Interim Report**) issued by Consumer Affairs Australian and New Zealand (**CAANZ**) in October 2016.

The Australian Finance Conference was formed in 1958 and is a non-institutionally based association of financiers. Our members include finance companies, banks, specialist equipment financiers and general financiers providing consumer and commercial credit facilities, as well as service providers to the industry: list of members attached in Appendix 2 The AFC also provides a directorate service for a number of finance product-specific industry bodies. These affiliated entities are the Australian Equipment Lessors Association, the Australian Fleet Lessors Association, the Debtor and Invoice Finance Association, and Insurance Premium Financiers of Australia. This submission is made on behalf of the Australian Finance Conference and affiliated entities, collectively referred to as the **AFC**.

AFC members provide financial services, such as, home and personal loans, credit cards, motor finance, equipment finance, inventory finance and other financial products to consumers and businesses. They provide credit facilities to consumers, subject to the holding of Australian Credit Licences as required under the *National Consumer Credit Protection Act 2009* (**NCCP**).

Our members' interest in the review of the *Australian Consumer Law* (**ACL**) arises because they finance the acquisition of goods subject to the ACL and can be held jointly and severally liable with the goods' supplier via the linked credit contract provisions[1] for breaches of the ACL. At any one-time AFC members have extended some $100 billion in finance secured over equipment.

The AFC previously made a submission dated 26 May 2016 (**AFC Issues Paper Submission**) on the *Australian Consumer Law Review Issues Paper* released by CAANZ in March 2016. Comments made in this submission supplement, and are to be read together,

[1] Schedule 2, Chapter 5, Part 5-5, Division 1, *Competition and Consumer Act 2010.*

with comments made in the AFC Issues Paper Submission, except where expressly stated otherwise. All references to page numbers are to pages in the Interim Report.

Executive Summary

The AFC considers that:

(i) the $40,000 cap on purchases of goods or services not of a kind ordinarily acquired for personal domestic or household use or consumption should be adjusted to reflect the change in the purchasing power of the dollar ($) since 1986 (Question 4);

(ii) the new cap should not, however, be calculated by simply indexing the $40,000 cap for inflation since 1986. The conceptually better approach is to identify the basket of goods and services the extension under the $40,000 cap was intended to cover. Identification should be done solely from the perspective of an individual consumer. Once the basket of goods and services is identified the dollar amount of the cap can then be calculated by reference to the change in the purchasing power to acquire the basket (recognising the relative cost of some items, such as motor vehicles, have gone down, while others have gone up) (Question 4);

(iii) if having calculated a new cap it is considered, as a matter of policy, that this dollar value is too low to enable small business to access ACL protections on items such as "high value specialised equipment" then a new small business provision should be included in the ACL to achieve that purpose. That provision will need to include a definition of "small business". That definition should be framed by reference to turnover, as is the case in the taxation system, and not by reference to employee numbers (Question 4);

(iv) it is worth re-iterating the point made in the AFC Issues Paper Submission that there no longer appears to be a policy reason to continue to give the road transport industry, regardless of size, a preferred status in accessing ACL protections over and above other industries which acquire capital equipment for use in their business;

(v) Questions 7, 8 and 9 are misconceived as they are based on a misapprehension that "a financial product" is "a good" which is supplied to consumers and hence deserving of ACL protections. A consideration of the interaction of the ACL and ASIC regimes reveals that the only "service" ever acquired by consumers, in a financial services context, is "a financial service" which is already subject to ACL protections. Accordingly, there is no gap in ACL protection in relation to financial products and these questions are moot (Questions 7, 8 and 9);

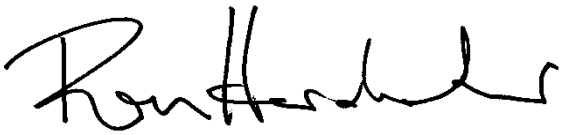
(vi) no specific industry 'lemon' laws are necessary and that relevant issues can be addressed by generic approaches to law reform, such as clarifying what can trigger a 'major failure' and industry specific compliance, enforcement and education activities, without expressing a view on the specifics of those matters at this time (Questions 14 and 15); and

(vii) the risks of introducing a general unfair trading prohibition outweigh the benefits and that any gap in protection is likely to be due to a gap in regulator oversight, rather than in the law. This, at least, appears to be the case in relation to certain activities of credit repairers (Questions 41 and 42).

The reasons why AFC has reached these conclusions and recommendations are given in the body of the submission contained in Appendix 1.

If you have any queries in relation to the AFC submission please do not hesitate to contact me on (02) 9231 5877 or Paul Stacey, Associate Director – Policy on (02) 9225 3810.

Yours truly,



Ron Hardaker
Executive Director

APPENDIX 1

Submission

1. Question 4: Should the $40,000 threshold for the definition of 'consumer' be amended? If so, what should the new threshold (if any) be and why?

1.1 Section 3 is the primary gateway to accessing the protections of the Australian Consumer Law (**ACL**). A person must acquire goods or services in the circumstances specified to step through the gateway. Section 3(1) relevantly defines the specified circumstances in relation to an acquisition of "goods" as follows:

"A person is taken to have acquired particular goods as a consumer if, and only if:

(a) the amount paid or payable for the goods, as worked out under subsections (4) to (9), did not exceed:

(i) $40,000; or

(ii) if a greater amount is prescribed for the purposes of this paragraph—that greater amount; or

(b) the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption; or

(c) the goods consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads."

1.2 Section 3(3) relevantly defines the specified circumstances in relation to an acquisition of "services" in an identical manner, save the term "service" is substituted for "goods" and there is no equivalent provision to the section 3(1)(c) inclusion of vehicles and trailers.

1.3 Thus, where "a person" acquires the goods or services in the specified circumstances highlighted above the person will be deemed, or treated as, "a consumer" in relation to those acquisitions.

1.4 As can be seen the definition of "consumer" in the ACL does not explicitly refer to a "business", whether it be large, medium or small. Businesses who acquire goods or services in the specified circumstances are able to access the protections of the ACL by virtue of the term "person". A "person" in section 3 is not limited to an "individual". Instead, the term person takes its meaning from section 2 of the *Acts Interpretation Act 1901* which *"include[s] a body politic or corporate as well as an individual."*

1.5 Thus, a business, however structured - whether it be as a sole trader, a company, a trust (or technically an individual or corporate trustee acquiring goods or services on behalf of the trust), a partnership of individuals or of companies or of trusts - will be able to access the protections of the ACL in respect of acquisitions of goods and services *provided*:

(a) the amount paid does not exceed $40,000, absent an increase in the prescribed amount; or

(b) the goods or services are of a kind ordinarily acquired for personal, domestic or household use or consumption; or

(c) in the case of vehicles and trailers these goods are to be principally used to transport other goods on public roads.

1.6 Under the ACL it is "*the character of the acquisition",* rather than *"the character of the entity making the acquisition"*, which is primarily determinative when assessing if an entity can access the protections of the ACL, subject to specific qualifications. This fundamental conceptual approach of the ACL must be remembered when considering how the ACL should apply to a business, whether it be small, medium or large.

1.7 In the Interim Report CAANZ notes:

- "the $40,000 threshold is intended to protect businesses and individuals for certain purchases of goods or services, regardless of whether it is for personal or home use" (page 24);
- "some submissions highlighted that many small and medium businesses rely on … the ACL's protections for goods and services" (page 24) (underline added);
- the reason the initial $15,000 cap was increased in $40,000 in 1986 was to take account of inflation (page 24);
- a CAANZ preference to retain a $40,000 threshold for acquisitions not for personal or home use as this is consistent with recent government decisions to increase protections for small businesses (page 26) (underline added);
- the reason why small business stakeholders consider they should have similar protections to consumers is because "they often resemble individual consumers in terms of their resources and sophistication when transacting" (page 37) (underline added);
- data from the Australian Bureau of Statistics included in the Australian Small Business and Family Enterprise Ombudsman submission "showing that 61 percent of all businesses in Australia in 2016 had no employees" (page 37)
- comments in the submission by the Law Council of Australia SME Business Law Committee that if the $40,000 limit were indexed for inflation "it would be around $100,000 in today's terms" and that a higher threshold would benefit small business "which are purchasing high value specialised equipment" (page 38) (underline added)

1.8 The AFC considers, as a matter of policy design, the primary reason why the definition of consumer includes a threshold or cap is *to extend* the ACL protections to purchases which wouldn't otherwise qualify ie because the purchase of goods or services is not ordinarily of a kind acquired for personal, domestic or household use or consumption. Logically if the extension were not subject to a cap, the extension could conceptually not be made at all as the extension would then apply the ACL to all acquisitions of whatever character, which is contrary to the very purpose of having a dedicated consumer law.

1.9 The AFC considers, as a subsequent matter of policy design, that this enlarged scope was then further extended to include businesses in addition to individuals. This was achieved by using the term "person" in subsections 3(1) and (3). But, that this enlarged scope should be limited to businesses in broadly similar circumstances to individuals vis-à-vis knowledge, negotiating power etc. This was achieved by setting a cap at a relatively small amount of $15,000 then $40,000.

1.10 Therefore, the AFC view, is that when determining whether the $40,000 threshold should remain the same, or be increased, that decision *must be made having regard to the circumstances of consumers who are individuals*. The extended scope only applies to small business by reason of their circumstances being analogous to that of individuals. Ordinary individuals do not buy "high value specialised equipment". Therefore, setting the threshold by reference to the capacity to buy such equipment, as suggested by the Law Council of Australia, is a *non sequitur*, both in terms of policy and logic.

1.11 It is evident that the purchasing power of $40,000 in 1986 was different, most probably greater, than the purchasing power of $40,000 in 2016. Therefore, the AFC considers the threshold should be adjusted to an amount which maintains that purchasing power.

1.12 However, the AFC does not think that this is best done by simply indexing the $40,000 in line with inflation. Since 1986 there has been a marked change in the relative cost of some items, in terms of purchasing power, as compared to others. The relative cost of some items is likely to be greater and for others cheaper. For example, the relative cost of non-prestige cars and consumer electronics appears to be significantly cheaper in 2016 than in 1986.

1.13 The AFC considers the conceptually better approach is for CAANZ first to determine a basket of goods and services which the extension of scope was intended to capture in 1977. The AFC then recommends that CAANZ engage an economics consulting firm to model, or calculate, the comparative purchasing power for that basket in 2016 dollars.

1.14 If having completed this exercise CAANZ sees a policy merit, which the AFC does not, in having a higher threshold for small business then it should achieve that outcome by inserting additional provisions into the ACL. In that regard the AFC strongly recommends that any definition of small business *not* be based on employee numbers. Such a test has proved problematic in other contexts and where 61% of all businesses have no employees. A more practical, objective and contemporary approach is to define business by reference to turnover as is done by the Australian Taxation Office.

2. Question 7: Should the ASIC Act be amended to explicitly apply its consumer protections to financial products

Question 8: What would suppliers of financial products need to change to achieve compliance, and what benefits or impacts would there be for businesses and consumers?

Question 9: Are there any unintended consequences, risks or challenges in doing so?

2.1 The AFC expressed its view in the AFC Issues Paper Submission that the interaction between the ASIC Act and the ACL while complex to analyse is, overall, satisfactory. We also highlighted that there are concerns about "credit repair" businesses and that the ACL Review should consider the appropriate model for regulation of these businesses.

2.2 CAANZ in the Interim Report appears to agree with the AFC view on the interaction of the two regimes at page 30 where it comments "while there is complexity around the definitions of 'financial product" and "financial service", and the complexities of these products and services themselves, CAANZ notes that the MOU allows the ACCC and ASIC to delegate respective parts of their jurisdiction to the other

regulator to ensure that there is no regulatory gap." Thus, the problem would seem to be theoretical rather than practical.

2.3 Even so, CAANZ notes at page 31 that some stakeholders suggested that "some key ACL protections … have not been carried over to apply to financial products and services", such as consumer guarantees, unsolicited consumer agreements, single pricing and proof of transaction. CAANZ refers to Professor Sharon Christensen's view that

"There should not be a differentiation in the broad consumer law standards applicable to financial services when compared to other goods and services, unless there is a strong, evidence based policy justification for any divergence."

CAANZ goes on to note on page 32 the generally higher level of regulation in the financial services sector, as contrasted to other sectors of the economy, as highlighted by Suncorp's submission, with which the AFC agrees and with which CAANZ also appears to agree given its observations on various Commonwealth level reforms. CAANZ "nonetheless" observes, again on page 32, that

"there may be scope to clarify the application of the ASIC Act to cover financial products. Currently, many of the key consumer protection provisions in the ASIC Act only apply to 'financial services', such as protections against unconscionable conduct, misleading or deceptive conduct, and harassment and coercion. This is inconsistent with the ACL, where these provisions generally apply to both 'goods and services'.

This is the context within which CAANZ poses question 7, and successor questions 8 and 9, in the Interim Report.

2.4 The AFC observes, with respect to Professor Christensen's view, that she seems to be looking at the problem through the wrong end of the telescope. Given the financial services industry is subject to a higher level of regulation than any other service industry in Australia, including compulsory participation in independently administered external dispute resolution (**EDR**) schemes to resolve complaints, the AFC submits the more logical starting point is that there should be differentiated standards for financial services when compared to other services, unless there is a strong, evidence based policy justification for convergence.

2.5 Further, there appears to be some confusion in the Interim Report as to the interaction between "a financial product" (which sounds like a good, but isn't), "a financial service" (which is a service supplied to consumers) and the ACL (which provides protections to consumers who purchase services, including financial services).

2.6 The general definition of "financial product" in section 12BAA of the ASIC Act, to which CAANZ refers on page 29, relevantly reads:

"a financial product is <u>a facility</u> through which, or through the acquisition of which, a person does one or more of the following:
(a) makes a financial investment …;
(b) manages financial risk …;
(c) makes non-cash payments ..." (underline added)

2.7 A facility is a means by which a person makes a financial investment or a non-cash payment or manages a financial risk. This is a "service" not a "good". Even so, "a financial product" is a service which is never supplied to consumers.

2.8 The service which is provided to consumers, using the dichotomy of goods and services, is "the financial service". The definition of "financial service" in section 12BAB of the ASIC Act, as referred to by CAANZ on page 29, relevantly reads:

"For the purposes of this Division, subject to paragraph (2)(b), a person provides a ***financial service*** *if they:*
(a) provide financial product advice (see subsection (5)); or
(b) deal in a financial product (see subsection (7)); or
(c) make a market for a financial product (see subsection (11)); or
(d) operate a registered scheme; or
(e) provide a custodial or depository service (see subsection (12)); or
(f) operate a financial market (see subsection (15)) or clearing and settlement facility (see subsection (17)); or
(g) provide a service (not being the operation of a derivative trade repository) that is otherwise supplied in relation to a financial product (other than an Australian carbon credit unit or an eligible international emissions unit); or
(h) engage in conduct of a kind prescribed in regulations made for the purposes of this paragraph."

2.9 To be clear, and expressed from the perspective of the consumer law framework, consumers *never* purchase or acquire a service which is "a financial product". Consumers *always* purchase or acquire a service which is "a financial service", which may consist of various actions in relation to a financial product eg a provision of advice, a dealing, making a market for etc.

2.10 The quote on page 32 of the Interim Report might be read as suggesting that CAANZ understands a "financial product'" to be "a good" and a "financial service" to be "a service". Further, key protections of the ACL only apply to financial services, the ACL applies to both goods and services, therefore, there is scope to extend the ACL to cover financial products which are presently uncovered because they are goods.

2.11 If so, then that conclusion and reasoning is erroneous given it is based on a misapprehension. Financial products are not goods and they are never supplied to consumers. Therefore, conceptually there is no scope to clarify the consumer protection provisions in the ASIC Act to cover financial products.

2.12 In the AFC's view question 7 is misconceived given it is based on a misapprehension. It follows that the answer to the question asked is, "No" and that comment on questions 8 and 9 can be disregarded as the questions do not arise.

3. Question 14: Can issues raised in particular industries be adequately addressed by generic approaches to law reform, such as Option 1 [Clarify the law on what can trigger a 'major failure'], in conjunction with industry-specific compliance, enforcement and education activities? What are the advantages and disadvantages of this approach?

Question 15: What kinds of industry-specific compliance and education activities should be prioritized in the context of finite resources.

3.1 The AFC submitted in the AFC Issues Paper Submission that special "lemon" laws are not needed, that any inadequacies in the current law should be addressed via the consumer guarantees provisions.

3.2 CAANZ seems inclined to a similar view to the AFC on page 61 of the Interim Report where it notes:

"[g]enerally, industry-specific regulation would only be preferable to a generic approach where it can be demonstrated that there are issues particular to that

industry, and that generic approaches (such as Option 1 below) would not adequately address the problem.

3.3 Further, and again on page 61:

"*CAANZ notes that even if the case cannot be made for an industry-specific approach to legislative changes at this time, CAANZ will continue to monitor this issue, as well as the need for industry-specific compliance, enforcement and education activities."*

3.4 The AFC is of the view that if guidance is given as to what triggers 'a major failure' that it be done on a generic basis that applies across industries and maintains the consistency of the consumer guarantees, as contemplated by Option 1. AFC does not express a view as to how that should be effected eg by prescriptive amendment to the ACL and/or inclusion of specific examples.

3.5 The AFC is concerned that if there are industry-specific compliance and education activities, as it was with the prospect of specific 'lemon' laws, that these adequately take account of and explain financiers' interests in goods which may become subject of an 'acceptable quality' guarantee claim. The AFC does not have a specific view, at this stage, on the industry-specific compliance and education activities which should be prioritized, subject to this concern being addressed.

4. **Question 41: Are there any other benefits and disadvantages to a general unfair trading prohibition that should be considered?**

Question 42: Is there further evidence of a gap in the current law that justifies an economy-wide approach?

4.1 CAANZ at page 113 includes several examples given of 'unfair' or 'predatory' practices which include "debt management (such as credit repair services, and for-profit debt negotiation)". It further enumerates some common features of these practices, which relevantly in the case of credit repair services includes on page 114, "business models that exploit consumers in vulnerable situations by charging fees or costs which far exceed the cost of providing the service".

4.2 CAANZ goes on to conclude, after a review of comparative international approaches, that "Any new general prohibition within the ACL needs to be carefully considered and supported by evidence that there is a gap in the current law that needs to be addressed, and that an economy-wide approach would be the appropriate response".

4.3 The AFC drew to CAANZ's attention in its AFC Issues Paper Submission that "consideration should be given to how 'credit repair' businesses should be regulated" for the reasons highlighted by CAANZ on pages 113 and 114.

4.4 The AFC agrees that careful consideration should be given as to whether or not a general prohibition of unfair trading should be included in the ACL. Having given that consideration, AFC is of the view that the potential detriment outweighs any benefit, particularly when the specific prohibition of unfair terms and misleading and deceptive conduct appears to be working reasonably well. The risk is that if a general prohibition is too broadly drafted, or has other unintended consequences, whole areas of economic endeavor might be shut-down thereby depriving people of their livelihoods and consumers of access to services. This risk is amplified if an economy-wide approach is taken. It should be recalled that these businesses come in to being to meet a consumer want or need. It is not the existence of the consumer want or need which is objectionable, but the manner in which some businesses conduct their activities in servicing, or exploiting, that want or need.

4.5 The AFC is of the view that the existing protections in the ACL are likely sufficient to deal with businesses who engage in unfair trading. Where this activity flourishes this is likely to be due to “a gap” in regulator activity, rather than in the legislation.

4.6 In section 1.2.6 of the Interim Report CAANZ discusses the interaction between the ACL and ASIC Act. CAANZ notes on pages 30 to 31 that “the MOU allows the ACCC and ASIC to delegate respective parts of their jurisdiction to the other regulator to ensure that there is no regulatory gap”.

4.7 AFC agrees that the capacity of the ACCC and ASIC to delegate relevant powers to the other should ensure that there is no regulatory gap. But, that statement is only true if ACCC and ASIC in *actuality* delegate relevant powers to the other. However, if neither regulator steps up and takes responsibility for an emerging issue of poor business practice which potentially falls within eithers’ remit, then the respective parts of their jurisdiction never get delegated and that unsavoury business practice flourishes. Without being privy to consultations between ACCC and ASIC this would appear to be the case with the practices of some credit repairers.

Appendix 2

AFC MEMBER COMPANIES

Allied Credit
American Express
ANZ
Automotive Financial Services
Bank of China
Bank of Melbourne
Bank of Queensland
BMW Australia Finance
Branded Financial Services
Capital Finance Australia
Caterpillar Financial Australia
Classic Funding Group
CNH Industrial
Commonwealth Bank of Australia
Credit Corp Group
Custom Fleet
De Lage Landen
Dun & Bradstreet
Eclipx Group
Experian Asia Pacific
Finance One
FlexFleet
FlexiGroup
Genworth
HP Financial Services
Indigenous Business Australia
John Deere Financial
Komatsu Corporate Finance
Kubota Australia Finance
Latitude Financial Services
Leasewise Australia
Liberty Financial
Lombard Finance
Macquarie Equipment Rentals
Macquarie Leasing
Max Recovery Australia
McMillian Shakespeare Group
ME Bank
Mercedes-Benz Financial Services
MetroFinance
Nissan Financial Services
nlc Pty Ltd
Once Australia t/as My Buy
On Deck Capital
PACCAR Financial
Pepper Australia Pty Ltd
Qudos Bank
RABO Equipment Finance
RAC Finance
RACV Finance
Ricoh Finance
Selfco Leasing
Service Finance Corporation
Sharp Finance
St. George Bank
Suncorp
Suttons Motors
Thorn Group/Radio Rentals
TL Rentals
Toyota Financial Services
Veda
Volkswagen Financial Services
Volvo Finance
Walker Stores
Wells Fargo International
Westlawn Finance
Westpac
WEX Australia
Wingate Consumer Finance
Yamaha Finance

<u>Professional Associate Members</u>:

CHP Consulting
Clayton Utz
Credit Sense Australia
Dibbs Barker
Henry Davis York
Sofico Services
White Clarke

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