

27 May 2016

Mr Garry Clements
Chair, Consumer Affairs Australia and New Zealand
By email: ACLReview@treasury.gov.au

Dear Mr Clements,

Australian Consumer Law Review – Issues Paper

The Customer Owned Banking Association (COBA) welcomes the opportunity to comment on the CAANZ's issues paper regarding the Australian Consumer Law Review.

COBA is the peak body for customer-owned banking institutions: credit unions, building societies and mutual banks.

Collectively the sector has four million customers, \$97 billion in total assets and provides important competition and choice in the retail banking market.

COBA's interest in the Australian Competition Law (ACL) Review stems from the fact that the consumer protection provisions of the ACL are largely mirrored in Part 2, Division 2 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act). Given this, any changes made to the ACL as a result of the Review are likely to be reflected in the ASIC Act provisions, and as such will impact on providers of retail financial services (including credit) including our member organisations.

COBA agrees with CAANZ's view, as set out in the issues paper, that the consumer policy framework must protect consumers from harm while not imposing unnecessary compliance burdens on businesses or stifling competition and innovation.

Consumers benefit when they can confidently participate in markets where businesses trade fairly. This stimulates competition, which is vital for the economy and real consumer choice. Regulatory settings should therefore be designed to promote competition, consumer choice, and, with these comes trust and confidence. In our view, the Review should particularly prioritise competition issues and ensure they are given more attention by policy makers and regulators.

The importance of competition and consumer choice in financial services

Competition is an essential element of efficient markets. Without adequate competition consumers suffer, in terms of price and choice. The banking and financial services market is dominated by the major banks, and consumers are losing out as a result.

The recent Financial System Inquiry (FSI) found that:

"Some sectors of the financial system are concentrated. In particular, the banking sector is concentrated, with the four major banks being the largest players in many aspects of the financial system and having significant market

influence. Such concentration creates risks to both the stability and degree of competition in the Australian financial system”.

and

“[T]here is a complacency about competition, and ... the current framework does not systematically identify and address competition trade-offs in regulatory settings”.

The FSI Final Report made 12 recommendations relating to competition, including measures to level the playing field in banking, increase regulator accountability, and strengthen the focus on competition in the financial system.¹

COBA welcomed the Government’s response to the FSI, and is particularly keen to see the Government move quickly to implement FSI recommendation 30: ‘Strengthen the focus on competition in the financial system’.

If regulators place greater emphasis on competition issues when developing policy, the result will be greater competition and better consumer choice. COBA believes that this will improve consumer outcomes in the banking and financial services markets, and across the economy more generally.

Apart from those general comments, COBA highlights the following specific issues that relate to COBA members:

Unfair contract terms – extension to a contract as a whole

Standard form contracts allow businesses to effectively negotiate contracts for the sale of a product with their customers. This promotes economic efficiency as transaction costs incurred by businesses are reduced. Businesses avoid high costs, in time and resources, associated with negotiating a new contract with each new customer each time a sale is made.

Contracts in financial services are highly regulated. The framework for non-prudential regulation of financial services consists of the existing generic consumer protection powers (contained in the ASIC Act), as well as highly detailed industry-specific licensing, disclosure, conduct, and dispute resolution requirements (which are set out in Chapter 7, *Corporations Act 2001* and the *National Consumer Credit Protection Act 2009*). In relation to credit, the regulatory framework also includes significant product design controls, particularly in areas such as small amount lending and reverse mortgages.

In addition to these existing powers, the Government has accepted the FSI’s recommendation to introduce a financial product intervention power that will allow ASIC to modify, or if necessary ban, harmful financial products where there is a risk of significant consumer detriment.

The existing unfair contract terms provisions of the ACL, applied to financial services and credit by Part 2, Division 2, Subdivision BA of the ASIC Act, already provide consumers with significant protections against unfair standard form contracts.

COBA questions the need to extend the unfair contract terms provisions to the contract as a whole, at least for financial services and credit. Extending the existing protection would represent a significant expansion of the existing prohibition, and is not justified given that financial services and credit contracts are already highly regulated, as noted above. If such an extension is pursued, careful attention needs to be paid to possible adverse interactions with existing protections and any unintended consequences.

¹ Financial System Inquiry Final Report November 2014

A new general protection against unfair commercial practices

COBA agrees with measures that protect consumers against significant harm including by business models that take advantage of a consumer's reduced ability to protect their interests.

A new consumer protection power against unfair commercial practices would need to consider existing business models that rely on ongoing fees as an acceptable way to generate revenue, including retail banking. Ongoing fees reflect the fact that financial services are often provided over extended periods of time and that costs in providing the service are also incurred over time.

Financial institutions already have comprehensive disclosure obligations, including obligations to disclose information to customers about their products, such as the applicable fees and charges. Credit providers are also bound by responsible lending obligations preventing credit being offered if it is unsuitable for the customer.

COBA questions how this power would be applied and what business models would be captured. If a new power is progressed, careful consideration will need to be given so that highly regulated products and services with existing disclosure rules are not inadvertently captured.

Please do not hesitate to contact myself on smackenzie@coba.asn.au or 02 8035 8450 or Alex Thrift on (02) 8035 8447 if you wish to discuss any aspect of this submission.

Yours sincerely

A handwritten signature in grey ink, appearing to read 'S. Mackenzie', with a long horizontal line extending to the right.

SALLY MACKENZIE
Acting Head of Public Affairs