

## INQUIRY INTO UNFAIR TERMS IN CONSUMER CONTRACTS

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**Abacus**  
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**Association of Building Societies and Credit Unions**

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The Hon. Christine Robertson MLC  
Chair  
Standing Committee on Law and Justice  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

Per email: [lawandjustice@parliament.nsw.gov.au](mailto:lawandjustice@parliament.nsw.gov.au)

Dear Ms Robertson

### **Unfair terms in consumer contracts**

*Abacus – Australian Mutuals* appreciates the opportunity to contribute to the *Inquiry into unfair contract terms in consumer contracts* and the extra time granted to make these comments.

Formed in July 2006 in a merger between the *Credit Union Industry Association* (a part of Cuscal Ltd) and the *Australian Association of Permanent Building Societies* (AAPBS), *Abacus* is the peak association for the majority of mutual building societies and credit unions in Australia.

There are 146 credit unions and 9 mutual building societies across Australia – 74 of these based in NSW. Credit unions and mutual building societies play a critical role in the consumer and financial market, with more than four and a half million members nationwide and over 2 million in NSW.

Credit unions and mutual building societies are Authorised Deposit-taking Institutions (ADI) regulated under the Commonwealth *Banking Act 1959* and APRA supervision, and the *Corporations Act 2001* and ASIC oversight, as do all other Australian banking providers. Our members also comply with relevant State and Territory legislative and regulatory requirements.

Credit unions and mutual building societies also enjoy the highest levels of customer satisfaction in the retail banking market, and as member-focused organisations make substantial contributions to their local areas and communities of interest. As mutuals, our member institutions are owned by their customers, and have a strong record of acting in members' interests while promoting financial independence and stability and access to affordable and quality banking and credit services.

*Abacus* welcomes the focus the *Standing Committee on Law and Justice* has placed on contract terms. The Committee would be aware the *Uniform Consumer Credit Code* (UCCC) is the primary law regulating consumer credit contracts. It is in relation to consumer credit that *Abacus* makes this submission.

### ***Uniformity of consumer credit regulation***

Abacus strongly supports a continued focus on nationally consistent credit regulation. Uniformity across State and Territory jurisdictions is critical to the credit sector, which is very much a national industry.

The Committee would be aware that the *Ministerial Council on Consumer Affairs* (MCCA) and the *Standing Committee of Officials of Consumer Affairs* (SCOCA) have been reviewing unfair contract terms since 2004. Abacus has made submissions to the discussion paper *Unfair Contract Terms* as part of that review process.

In our view, MCCA's role "to consider consumer affairs and fair trading matters of national significance and, where possible, develop a consistent approach to those issues" provides the best forum for consideration of consumer contracts, particularly in relation to consumer finance. A national approach reduces scope for 'jurisdiction shopping', ensures consistency for consumers across the nation and reduces scope for expensive and duplicative processes in different States and Territories.

Credit unions and building societies, as smaller, member focused organisations, would be concerned were New South Wales to pursue reforms to deal with credit contract terms outside the established national template and Ministerial Council format.

Our industry is concerned at the trend for individual States and Territories to pursue separate credit reform initiatives, often over-lapping with each other or national reform proposals. Abacus encourages the Committee to consider the existing national review at Ministerial Council level, including submissions and consultations to date, particularly in relation to consumer credit proposals.

### ***Abacus' view on unfair contracts in consumer credit***

While Abacus and the mutual ADI sector support nationally consistent responses to these policy issues, the following comments are provided to assist the Committee's examination of credit issues in the context of the review.

Credit unions and mutual building societies support strong and consistent consumer protection regulation, and efficient and effective regulatory frameworks for financial services providers. Abacus is aware of the concerns raised by consumer groups regarding potential unfair contract terms and is interested in working with regulators and Government to resolve any potential areas of consumer detriment.

Obviously, Abacus is also committed to ensuring that regulation for regulation's sake is avoided and any regulatory interventions are targeted, subject to cost/benefit review and do not adversely impact smaller institutions in the market.

Abacus is not aware of any evidence that make a case for unfair contract terms existing under consumer credit contracts. Abacus believes the current regulatory framework and self-regulatory measures covering building societies and credit unions provide a broad layer of protection against unfair credit contract terms and a range of redress opportunities for consumers who have grounds for complaint.

As examples, powers under the UCCC that deal with unfair contract terms include:

- s.70 provides courts with power to reopen unjust transactions. This provision addresses circumstances where a contract is formed (being procedural fairness) as well as the terms of the contract (being substantive unfairness);

- s.72 permits a court to review unconscionable interest or other charges associated with a consumer credit contract. This addresses, for example, where interest rates are changed in a manner that is manifestly unreasonable or discriminates unjustifiably against the debtor.

In addition to the UCCC, an extensive regulatory framework covers building societies and credit unions. In addition to the APRA and ASIC coverage, trade practices law also covers building societies and credit unions.

For example, the unconscionable conduct provisions under the *Trade Practices Act 1974* and *ASIC Act 2001* – guided by the standards set out in *Commercial Bank of Australia v Armadio* (1983) 152 CLR 447 – provide a further benchmark in relation to dealings between creditors and their customers.

Building societies and credit unions also subscribe to the *Electronic Funds Transfer (EFT) Code of Conduct* and, for credit unions, the *Credit Union Code of Practice*. The *Credit Union Code of Practice*, for example, promotes fair treatment of members by formalising standards of disclosure and conduct.

This framework impacts the contractual relationships between credit unions and building societies and their members.

### ***Unilateral change clauses***

Unilateral change clauses where changes occur without notice to consumers are identified as a concern in the Committee's terms of reference. This is not the case of credit contracts, where notice is an essential element of changes or variations to a contract. For example, Part V of the UCCC includes:

- s.59 requires written notification of interest rate changes;
- s.60 requires written notification of changes to repayments;
- s.61 requires written notification of changes to credit fees and charges;
- s.62 provides that notification requirements operate and a contract remains in force for existing credit where a creditor decides not to provide any further credit in relation to a continuing credit contract; and
- s.64 prohibits a creditor making unilateral changes in contracts where the annual percentage rates is fixed, if the change involved the method of calculation so as to increase a fee or a charge payable on termination or prepayment.

Additionally, the hardship provisions in s.66 provide debtors with an avenue to seek a change to contract terms where the change – such as a time extension or postponement – would enable them to service their obligations.

### ***Standard form contracts***

Standard form contracts where they increase the use of terms detrimental to consumers or limit choice in the marketplace are also identified as a concern in the Committee's terms of reference.

Again, this is not the case for credit contracts where standard form contracts provide certainty and consistency for creditors and consumers. This is a key element in the provision and acceptance of consumer credit across the nation.

Standardisation aids legal compliance, supports industry codes and ensures decision-making is consistent with consumer expectations and industry best practice.

Under the UCCC, pre-contractual disclosure requirements in s.14 as well as the prescriptive elements outlined in s.15 for credit contracts provide consumers with information about the terms and conditions associated with a credit contract as well as a means to make comparisons between different products on offer.

These steps are supported by the disclosure requirements applicable to all Australian Financial Services Licensees (under the Commonwealth FSR reforms included in the *Corporations Act 2001*) and the self-regulatory commitments in the *Credit Union Code of Practice* and *EFT Code*.

### **Next steps**

In an environment that is increasingly conscious of the cost of regulatory burdens, *Abacus* believes any proposed regulatory reforms should be based on a careful cost/benefit analysis and be targeted at clear and identifiable goals. Regulation is a fixed cost and involves additional expense for industry. If particular contract terms are considered unfair then the industries associated with those contracts should be targeted. Reform measures should not adversely affect responsible industries or already those covered by extensive consumer protection regulations.

### **Conclusion**

Credit unions and building societies are committed to protecting the best interests of their members and will assist members facing financial difficulties. But credit unions and building societies also believe credit contracts must be equitable to both parties and support the operation of an effective and competitive market.

Thank you again for the opportunity to comment. *Abacus* looks forward to being included in consultation and to learning the outcomes of the Committee's review.

In the meantime if you would like further information about *Abacus* or the comments in this response then please contact me on (02) 8299 9050 or at [lpetschler@abacus.org.au](mailto:lpetschler@abacus.org.au) or Josh Moyes, Senior Adviser, Public Affairs on (02) 8299 9033 or at [jmoyes@abacus.org.au](mailto:jmoyes@abacus.org.au).

Yours sincerely,



**LOUISE PETSCHLER**  
Head of Public Affairs