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The Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

BY EMAIL: economics.sen@aph.gov.au

Submission regarding the Trade Practices Amendment (Australian Consumer Law) Bill 2009

GE Capital Finance Australasia Pty Ltd **("GE")** welcomes the opportunity to provide comments on the Trade Practices Amendment (Australian Consumer Law) Bill 2009 **("ACL Bill")**.

1. General Comments

GE has several financial services businesses operating in Australia, including the consumer finance business trading as "GE Money". Accordingly, GE has a significant and distinctive interest in proposed reforms affecting the regulation of financial services, and specifically consumer credit.

As we have previously submitted (in our submissions dated 17 March 2009 and 22 May 2009), GE supports measures that ensure consumers are supplied with goods or services on terms and in a manner, which are fair and reasonable.

We believe that there are circumstances in which vulnerable customers may require additional protection. However, regulation protecting customers, vulnerable or not, should only be considered where there is a clearly identifiable problem to be addressed and where the benefits clearly out weigh the costs. More regulation is not always the most productive and appropriate response. Further, any new regulation should be carefully aligned with existing regulation to ensure a cohesive and consistent approach at both a Federal level, and State level.

2. Specific Comments

GE's comments are restricted to those parts of the Consultation Paper specifically relevant to GE.

2.1 Business-to-business coverage would be disproportionate and unnecessary

While the ACL Bill currently restricts the application of the unfair terms regime to standard form 'consumer contracts', GE understands that further consideration may be given to extending the unfair terms regime to small business, and potentially to business generally.

GE reiterates its previous submission that the regulation of agreements between business parties should not fall within the scope of the proposed consumer protection laws, and that the application of the unfair terms regime to arrangements between businesses would be inappropriate.

There does not appear to be any substantive evidence suggesting that unfair contract terms are sufficiently prevalent in arrangements between businesses to warrant the application of the proposed regime. Introducing this concept in business-to-business contracts would also give rise to a real risk of commercially robust and fair transactions between businesses being weighed down by an unwarranted regulatory burden.

In this regard, we note the Productivity Commission's review of Australia's Consumer Policy Framework, which recommended that the existence of unfair contract terms as they relate to consumers be legislatively dealt with, but made no recommendation as to the regulation of such terms in business-to-business arrangements.

We note also the current Victorian unfair terms regime as contained in Part 2B of the *Fair Trading Act 1999*, which explicitly restricts its application to consumer contracts, and similarly the UK *Unfair Terms in Consumer Contracts Regulations 1999,* which apply to contracts concluded between a seller or a supplier and a consumer only.

2.2 The 'upfront price' exemption as currently drafted is insufficient

(a) Clear upfront disclosure of price should be sufficient for a term to attract the exemption

GE submits that clear upfront disclosure, and transparency to the consumer, of the price of products or services under an agreement, should be sufficient to indicate that a price is not unfair. Where these requirements are properly fulfilled, the consumer would have a clear understanding of the effect of the relevant term, and will thus be in a position to consider whether or not to enter into an agreement. For such prices to then be reviewable or challengeable at a later stage as 'unfair' is unjustifiable.

As an important and related point, GE submits that full upfront disclosure of any consideration payable under the contract should be sufficient for that consideration to be exempt from the application of the unfair terms laws. GE submits that consideration that is 'contingent' should not, by reason only of its contingency, attract scrutiny under the proposed regime if it has been properly disclosed.

For a wide variety of agreements between suppliers and individuals, a number of services need to be made available to consumers on an optional or contingent basis. That such services are provided by election of the customer should not result in the disclosed price for those services being open to scrutiny under the provisions.

If this submission is not accepted, GE submits that, if contingent consideration is to be open to scrutiny under the unfair terms regime, such consideration should only be assessable in relation to contingencies that flow from default of some kind (ie as opposed to consideration that is payable upon the exercise of a consumer-elected option under an agreement where that option has been contemplated upfront by the parties).

(b) Interest and periodic fees should be explicitly included as part of the exemption

The Explanatory Memorandum to the ACL Bill makes explicit that: '*consideration in the context of a credit contract includes both the principal repayable and the interest payable under that contract*'. This inclusion, however is not reflected under the terms of the ACL Bill itself, which expressly refers only to the exemption applying to '*the total amount of principal that is owed under the contract*' (s 12BI(3)). Interest is clearly part of the consideration with respect to credit contracts, and the ACL Bill therefore needs to make explicitly clear that exempt consideration includes *both* the amount of principal that is owed under the contract as well as the interest repayable under that contract. This appears to be the intention, but that intention has not yet been reflected by the draft legislation.

GE submits that it would not be sufficient for the Explanatory Memorandum to clarify this issue, as there would be a real risk that a court or a regulator would, according to the rules of statutory interpretation, disregard the Explanatory Memorandum if they considered that the legislation was clear on its face. Accordingly, the ACL Bill should be amended to explicitly reflect the position described in the Explanatory Memorandum.

GE submits further that establishment and periodic fees, provided they are fully disclosed to the customer up-front, should also be explicitly referred to as being part of the consideration under a credit contract that constitutes the upfront price of that contract. Such fees would, as with interest, clearly amount to the fundamental consideration for the services provided under a credit contract. They are no more 'contingent' than interest. Further, from a policy perspective, the application of such an exemption to interest, but not to non-contingent fees of this nature, does not appear logical.

GE notes the Government Policy, as stated in the Green Paper on Financial Services and Credit Reform: Improving, Simplifying and Standardising Financial Services and Credit Regulation (June 2008), that '*the Government does not intend to regulate bank fees and charges*' as part of the proposed regulatory changes discussed.

2.3 The exemption for 'terms required or expressly permitted by law' is too narrow

GE submits that this exemption should be broadened to allow a carve-out for terms that are consistent with law. That is, the carve-out should not only apply to terms that are expressly required or permitted by law, but also to terms where it is clear that such terms are consistent with, and contemplated by, a law or laws.

By way of example, while the *Consumer Credit Code* ("**Code**") neither requires nor expressly permits unilateral variation terms, the Code repeatedly contemplates the inclusion of such terms in consumer credit contracts, and also sets up a framework for how such terms should be relied upon (ie with regard to minimum notice requirements). The new National Credit Code based on the Code is, of course, soon to become Commonwealth legislation.

GE submits that unilateral variation terms in such regulated contracts are within the contemplation of the legislation and, if exercised in accordance with such regulations, should not then also be subject to further restrictions under the proposed regime.

If it is not accepted that such consistency should result in an absolute exemption, GE submits that, at the least, consistency with laws should be included as one of the relevant matters a court may take into account in determining whether a term of a consumer contract is unfair (ie alongside likelihood of detriment, transparency, and the contract as a whole).

GE considers that the potential for voluminous and frivolous complaints under the proposed legislation is already high, given firstly that the 'substantial likelihood of detriment' threshold has been retained as part of the proposed law, as opposed to a threshold that requires actual detriment, and given secondly that under the proposals the onuses of proof fall on the supplier (ie to prove that a contract is not a standard form contract and to prove that a term is reasonably necessarily to protect a supplier's legitimate interests). In this context, GE submits that a term's consistency with law should be sufficient to warrant an exemption from scrutiny of the unfair terms regime, or that such consistency should at least be a matter that the court must take into account in determining whether a term is unfair. This would assist in counterbalancing the likelihood of potentially unfounded complaints.

GE submits that 'law' in this sense should include principles of common law and approved industry codes along with legislative schemes.

2.4 Retrospective application to contracts containing varied terms should be refined

GE considers that the transitional provisions relating to contracts varied after commencement are overly burdensome and should be appropriately restricted.

GE submits that the unfair terms regime should be limited to any actual terms in a consumer contract that are varied, rather than to the entire 'contract as varied' (ie the whole contract) as is currently proposed in the ACL Bill. This is the sensible approach taken with regard to the extension of Part 2B of the Victorian *Fair Trading Act 1999* to consumer credit contracts.

By way of example, GE continually makes minor amendments to its long-term consumer contracts in response to market fluctuations and business necessity. These variations do not represent major changes to the terms of agreement between GE and the consumer.

If such variations led to GE being required to review already active contracts in their entirety, this would be a voluminous and cumbersome process - one which would ultimately result in increased costs and confusion for the consumer as GE would be required to invest significant resources to perform full contract reviews for any contracts containing terms that are varied after the commencement of the unfair terms regime.

2.5 The 'list of example terms' should be taken out of the legislation

GE considers that significant problems may arise if the effect of the list of "*examples of the kinds of terms of a consumer contract ... that may be unfair*" is misinterpreted.

Although it is described in the Explanatory Memorandum to be a "non-exhaustive, indicative list", GE considers that, left in the legislation, the list is likely to be misinterpreted as a more proscriptive list, to be given greater weight, than will ultimately be intended by Parliament. In any case, the Explanatory Memorandum may not be given any weight by a court at all.

Given the placement of the 'grey list' in the legislation, the list of terms is likely to be misinterpreted as a 'black list', with the risk that courts could give terms in the list disproportionate weight in determining whether a particular term in a particular consumer contract is unfair.

The existence of the list may have the unintended and inappropriate effect of making certain terms presumed to be unfair, unless proven otherwise.

GE submits that the 'grey list' of terms would be better placed in guidance, as opposed to its current position in the legislative scheme, which results in a much higher risk of misinterpretation.

2.6 In the interests of competitive neutrality, exemptions should not be made for entities that are, eg, licensed, prudentially regulated or subject to the Code

Exemptions for entities that are licensed, prudentially regulated or subject to the Code are not currently part of the ACL Bill. GE submits that, in the interests of maintaining competitive neutrality between industry suppliers, such exemptions should not form part of the unfair terms provisions.

If the Government does intend to include such exemptions as part of the regime, GE submits that the commercial and competitive consequences of such exemptions be seriously considered before doing so. There would be a crucial need for further consultation on such exemptions if they were to be adopted going forward.

2.7 1 January 2010 is an unrealistic and unworkable compliance deadline

The scheduled date for commencement of the Bill is too soon to allow suppliers sufficient time to consider the finalised legislation, review their consumer agreements and business arrangements, implement IT changes and any new necessary compliance processes going forward.

The short time frame has been condensed further given the necessity for an inquiry report by the Senate Economics Committee, which is due by 7 September 2009. The inquiry is of course an important step in the development of the legislation.

GE submits that a more realistic deadline is needed to provide suppliers with sufficient time to review their agreements and business arrangements. We submit that the appropriate date for commencement would instead be at least 12 months from the passage of the ACL Bill.

2.8 New substantiation notices power

GE submits that, given Aspic's (and the ACCC's) existing information-gathering powers, there is no demonstrable policy need for introducing a power to issue substantiation notices.

ASIC for example has extensive information gathering powers under the ASIC Act with various safeguards applying to such powers. GE is not aware of any evidence indicating that ASIC has faced barriers to using its current information gathering powers to fulfill its oversight functions in a manner that would justify the introduction of this new power.

Even if the Committee finds that the introduction of such a power is justified on policy grounds, GE submits that its proposed breadth and the lack of corresponding safeguards is excessive given the potential risks and costs to businesses that such notices can pose.

The power would enable ASIC or the ACCC to issue a substantiation notice merely "if a person makes claims or representations promoting or apparently intended to promote" goods or services. No requirement is proposed for the regulator to have any basis for believing that a business is breaching or has breached the law. GE submits that at a minimum this is an essential requirement. The power could allow a regulator to embark on a fishing expedition at a high financial and reputational cost to a business and by-passing other, more carefully controlled, investigative powers.

GE also emphasises the need for the ACL Bill to clarify how such notices would apply to information and documents subject to legal professional privilege and other protections.

2.9 New public warning power

GE submits that no policy justification has been demonstrated for introducing a new public warning power given other existing ASIC, ACCC and court powers and practices. ASIC already has the ability to obtain injunctive relief against potentially harmful conduct. In addition, a Court is already empowered under the ASIC Act to make non-punitive and punitive adverse publicity orders.

Further, when ASIC commences or concludes an enforcement action or agrees to an administrative remedy it generally issues relevant media releases as well as publishing enforceable undertakings where relevant. ASIC is also already very active in undertaking public early warning programs with regard to consumer issues. These measures and practices appear to already serve the aims of a public warning notice and already have been providing equivalent outcomes.

If the Committee nevertheless determines that there is a sound policy reason for introducing this power, GE submits that there is an insufficient threshold governing when the power may be exercised. The power is to be available where the regulator merely has "reasonable grounds to suspect" a breach, which is a disproportionally low standard given the potential seriousness of the consequences of using this power. Such a power could potentially have an equivalent reputational impact to, for example, a court order requiring corrective advertising or an apology, but without the checks and balances applying to a court before it can issue such an order.

GE submits that such a power should, at the very least, only be exercisable where the regulator has reasonable cause to believe a breach has been committed and only when the regulator is concerned with repeat conduct. GE supports the power also being subject to the public interest test currently proposed.

3. Conclusion

GE is concerned at the pace and level of change occurring with limited consultation and it appears in some circumstances, without well researched evidence of a real detriment that the current law, such as the misleading and deceptive conduct provisions, does not deal with. Whilst we welcome regulation to protect vulnerable consumers, the ACL Bill seems to go beyond the initial policy objectives and represents a significant increase in the regulatory oversight and intervention in contractual arrangements, leaving contractual uncertainty and an increased regulatory burden on business.

It is essential that Regulators take into account the larger picture of national reform, a piecemeal and inconsistent approach is costly for industry, confusing for consumers and difficult to enforce for Regulators.

We would welcome the opportunity to discuss our submissions, and would very much like to participate in any working parties, round tables, or discussion groups and otherwise assist. Please contact me with any queries by phone or email as per the details above.

Yours faithfully

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