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31 July 2009

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

Email: economics.sen@aph.gov.au

Dear Secretary

Submission – Inquiry into Unfair Contract Terms Law

The Westpac Group, comprising the lending businesses of Westpac, St George, BankSA and RAMS, ("Westpac") welcomes this opportunity to provide a submission to the Senate Committee on the Unfair Contract Terms law (the "law"), which is the first part of the new Australian Consumer Law.

As a member of the Australian Bankers' Association, we also support their submission on the proposed unfair contract terms law. We also note our previous submissions to the Government of 17 March and 22 May 2009 on this topic.

Background

Westpac has opposed the unfair contract terms law since the Government released its discussion paper in February 2009. In our view, the economic and legal arguments for the introduction of this law are not well founded. It will erode certainty in consumer contracts and increase opportunities for vexatious litigation. It will make the pricing of risk in contracts more difficult and discourage the use of standard form contracts, all of which will have the aggregate effect of driving up costs for business and, consequently, consumers.

We have, subsequently, welcomed the changes announced by the Government, in respect of a monetary threshold for certain standard form contracts, and the more recent amendment to limit the coverage of the law to consumer contracts. Yet we reiterate our concerns about the likelihood of unintended consequences emanating from such a broad-based law. In the absence of actual detriment as a trigger for an action and a reverse onus of proof in the event of legal action being taken, the potential for harm from over-zealous regulators is real. In our view, this law will also have a detrimental effect on Australia's positioning as a regional financial services hub.

Business-to-business arrangements

One of Westpac's major concerns with the law in its original form was its broad application. Although promoted as a consumer protection law, it also clearly caught business–to-business contracts. Commercial dealings between corporate entities should not be caught by laws which would have the unintended consequence of impinging on companies' ability to freely enter into commercial contracts or introduce uncertainty in commercial bargains.

In the banking and financial services context, there is a range of standard form business-to-business contracts to which it would be entirely inappropriate for a consumer protection law to apply. The following list, which is by no means exhaustive, contains examples of such standard form contracts:

- Investment management agreements
- Standard form branch leases and ATM licence agreements
- Broker and franchise agreements

In the context of business-to-business arrangements, encouraging litigation on the basis of a theoretical 'likelihood of detriment' will increase legal and commercial risk and lead to higher costs of doing business. Whatever the consumer protection rationale for the introduction of this law, it cannot logically extend to business-to-business commercial contracts. Westpac recommends the law continues to exclude, in totality, business-to-business arrangements from coverage.

Variable interest rates and the upfront price exclusion

We acknowledge that it has been the Government's intention, as evidenced by the Explanatory Memorandum, that the upfront price of any good or service in a standard form contract, including a variable interest rate and unilateral changes to it over the life of a loan, is to be excluded from coverage. We strongly endorse this position.

However, we remain concerned that the draft legislation leaves open the possibility of a challenge to the unilateral variation of an interest rate once a credit contract has commenced. This would preclude lenders from unilaterally varying interest rates after a loan has been entered into and result in a structural change to the funding of consumer credit in Australia, ultimately to the detriment of consumers.

RECOMMENDATION

For the avoidance of any doubt, we propose that the following (or words to this effect) is inserted into the bill:

12BI (4) Section 12BF does not apply to a term of a consumer contract referred to in subsection (1) of that section to the extent that the term provides for an authorised deposit-taking institution[1] to set or vary an interest rate.

National uniformity

The Government has promoted the Australian Consumer Law as an exercise in streamlining business regulation. The Government has cited the Productivity Commission's estimates of savings for business of up to $4.5bn as a result of no longer having to deal with inconsistent state-based laws[2]. As a national organisation, Westpac has been a strong supporter of uniform national regulatory frameworks. However, after review of the proposed national model, we are concerned at the potential for the uniformity of the Australian Consumer Law to be eroded over time.

An historical example of the problem of a lack of uniformity is Victoria's own unfair contract terms law, within its Fair Trading Act, introduced in 2003. Despite being party to the COAG agreement, Victoria earlier this year amended its law to cover consumer credit contracts. Yet this did not bring Victoria into line with the proposed national law, which raises the question of why it went to the trouble of making changes to its law in the full knowledge of the COAG agreement. Avoiding these jurisdictional differences is the very reason the Government states that it is implementing an Australian Consumer Law. It would appear that the national agreement is already being undermined.

The Explanatory Memorandum to the Australian Consumer Law makes clear that it is for States and Territories to decide whether they implement the unfair contract terms law, since they are not required to implement the full Australian Consumer Law until 1 January 2011. Even then, there is no guarantee that all jurisdictions will implement the law or won't introduce additional, parochial provisions.

[1] A definition of "authorised deposit-taking institution" needs to be added to the bill. This exemption is based on the grey list exemption provided in the European Council Directive 93/13/EEC which expressly provides that restricting unilateral variation rights does not extend to a financial services provider's right to alter interest rates. It is important to note that the qualifications to this right in the Directive (the need for notice and termination rights) are already covered in other regulatory schemes such as the Uniform Consumer Credit Code (for credit) and Code of Banking Practice (for deposit products).

[2] See Annabel Hepworth , "Business counts cost of new laws", *Australian Financial Review* (24 July 2009 page 1).

In the short term, this means that companies like Westpac may be faced with a national law commencing in 2010 in addition to a different, albeit similar, law in Victoria. Over the longer term, this is a recipe for loss of national consistency, as evidenced by the negative experience of the Uniform Consumer Credit Code. Such an outcome would also be in violation of the spirit of COAG agreements on the Seamless National Economy agenda, thereby defeating one of the Government's main aims to reduce 'red-tape' for business. In our view, the Government must do everything it can to ensure there are no discrepancies in the unfair contract terms law across state and territory borders upon the 1 January 2010 commencement date.

Additionally, it is imperative that regulators charged with monitoring and enforcing the law develop consistent regulatory guidance, so as to ensure fair outcomes for both business and consumers. This is particularly important given that the legislative model contemplates that up to 10 regulators will have responsibility for monitoring and enforcement of the law across all jurisdictions. The recent issuing of regulatory guidance by Victoria, apparently without consultation with other regulators, further threatens to derail the supposed uniformity of the law and result in real costs for businesses operating across Australia.

Commencement and compliance

Westpac's previous submissions highlighted concerns about the pace at which this law has progressed and the limited time granted for industry consultation. These views were expressed in the context of the Government fast-tracking the commencement of the unfair contract terms provisions of the law to 1 January 2010 and the provision of only 10 days for industry to consider the draft bill when it was released in May. Given that the law is not expected to be passed by the parliament until late 2009, companies will have only a few months at best to undertake a significant compliance program of reviewing standard form contracts.

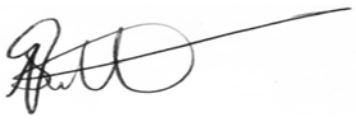
On its own, the limited time between the passing of the law and its commencement makes it extremely difficult for a responsible company to implement an adequate compliance program. However, it must also be noted that many financial services companies caught by the law will also be in the process of preparing for regulatory changes, including the new National Consumer Credit Protection law.

We have consistently queried the need to rush this law and requested that the commencement date be extended. However, our uneasiness with the speed at which the law is to be implemented is counterweighed by our concern about the threat to a uniform national consumer law posed by the emergence of jurisdictional differences.

For this reason, despite our concerns about the limited time for compliance, we have concluded that it is better for business to have the national unfair contract terms law commence on 1 January 2010. In mitigation, we recommend that the commencement is followed by a 12 month 'no action' period for companies working in good faith towards compliance with the law. The Australian Competition and Consumer Commission and the Australian Securities and Investments Commission must take the lead with State and Territory regulators to ensure a smooth transition and compliance period for business by issuing regulatory guidance that is timely and, most importantly, consistent.

If you would like to discuss any of the matters in this submission, please contact me on (02) 8253 4161 or at abuttsworth@westpac.com.au.

Yours sincerely



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