



Submission responding to:

Financial Services and Credit Reform

**Improving, Simplifying and Standardising
Financial Services and Credit Regulation.**

Green Paper

June 2008

**Care Inc Financial Counselling Service
and the Consumer Law Centre of the ACT**

Contacts: Carmel Franklin, Acting Director

David Tennant, Principal Solicitor

PO Box 763
Civic Square ACT 2608
Phone: 6257 1788
Fax: 62571452

Email: carmel.franklin@carefcs.org and david.tennant@carefcs.org

30 June 2008

About Care:

Care Inc has been the main provider of financial counselling and related services to low income and vulnerable consumers in the ACT, since 1983. Care's core service activities include the provision of information, counselling and advocacy to low income and vulnerable consumers experiencing problems with credit and debt. Care also has a Community Development, Education and Research program, makes policy and law reform comment on issues of importance to its client group and has operated the ACT's only No Interest Loans Scheme since 1997.

In late 2002, Care was selected as the host agency for the Consumer Law Centre of the ACT. The CLC was officially opened in January 2003 and offers a range of legal services including representation and litigation in relation to consumer law issues. The service employs a full-time practicing solicitor.

Across Care's service delivery programs, the agency responds to over 2000 new requests for assistance every year.

Care receives funding from a variety of contributors, and specifically acknowledges the funding that it receives from:

- ACT Government, from the Department of Disability, Housing and Community Services and the Department of Justice and Community Safety;
- The NSW Financial Counselling Trust Fund administered by the Office of Fair Trading; and
- The Commonwealth Financial Counselling Program administered by the Department of Family and Community Services.

Care acknowledges the assistance provided by Mr Brendan Pentony in the preparation of this submission.

Summary of Care's views:

- a) Care welcomes the release of the Green Paper and the implicit commitment to regulatory reform.
- b) Care's main interest is in relation to the consumer credit issues contained in Chapters 1 and 6.
- c) Care supports the Commonwealth assuming control of the regulation of **all** consumer credit.

More detailed comments on the Green Paper:

Care welcomes the Green Paper and the initiatives it offers. It especially endorses the Minister's statement that

(...)The policy rationale for this approach is to provide a consistent national regime in areas that are national or international, where there are conflicts or gaps in the existing regulatory framework and where there is evidence that significant numbers of consumers are suffering losses and other detriment because of the failings in the regulatory regime.¹

The Green Paper does not define “consumer”. For the purposes of this submission however we adopt the Trade Practices Act definition, meaning persons who acquire goods and services of a kind ordinarily acquired for personal, domestic or household use or consumption and not for the purpose of re-supply or for the purpose of using them up or transforming them, in trade or commerce, in the course of a process or production or manufacture or of repairing or treating other goods or fixtures on land².

Care’s interests are broadly limited to consumers and consumer transactions. The problems encountered by persons dealing with categories 2 to 5 in the Green Paper (i.e. trustee corporations, margin lending, debentures and property spruikers) are not directly relevant to Care’s work and are rarely raised with the agency by its clients. That is not to say that reform in these areas should not be undertaken. From the viewpoints of consistency, commercial morality, protection of market players and improvement of the current legal framework Care supports the inclusion of these categories in the review of marketplace regulation.

In relation to the options canvassed in Chapters 1 and 6 of the Green Paper, Care strongly supports the Commonwealth assuming responsibility for the regulation of all forms of consumer credit. The Green Paper notes a distinction between mortgage credit and other forms of credit and presents as an option the Commonwealth assuming responsibility for mortgage lending, with the regulation of other forms of consumer credit remaining with the States and Territories. For the sake of clarity Care does not endorse that approach.

To follow are some observations on:

- Mortgage lending and the sale of home loans;
- Other forms of consumer credit; and
- Issues relevant to transfer of regulatory responsibilities to the Commonwealth.

Mortgage lending and the sale of home loans

The Green Paper notes that housing finance represents 86 per cent of the aggregate credit market in Australia.³ The importance of this market to the health of the overall economy is self evident.

Over several years, Care has expressed concern about the increasing numbers of middle income consumers seeking assistance in relation to problems with home

¹ *Financial Services and Credit Reform – Green Paper June 2008*, The Treasury Canberra, page ii.

² Trade Practices Act 1972 (Cth), section 4B

³ *Green Paper ibid*, page 2.

loans.⁴ In many instances, those problems have been caused by the inappropriate sale of credit that was unaffordable at the outset. Whilst Care accepts that the problems have occurred in a minority of loans, that minority is of sufficient scale to represent a genuine threat to the entire economy. The Green Paper notes that Australia has not experienced a sub-prime crisis of the scale seen in the US.⁵ Care agrees with that proposition but does not agree it leads to the conclusion that Australia's mortgage market has been operating effectively. Care will pursue this issue in a submission to the recently announced Economics Committee Inquiry into Competition in the Banking and Non-Banking Sectors. The submission will urge greater understanding of the difference between safe and effective competition and encouragement of unsafe, unfair and unsustainable market growth.

For the purpose of this submission, Care agrees that more attention should be paid to requiring similar and acceptable standards from both ADI and non-ADI lenders. Care also endorses the principle of a "level playing field" set out in Table 4 in the Green Paper.⁶

Care notes in the discussion of Australian mortgage fees the paper paraphrases an ASIC report suggesting that

...not all the legislative provisions are being taken advantage of by consumers to assist them with avoiding unconscionable fees. In particular, no use has been made to date of protections against fees exceeding costs to the lender.⁷

This observation suggests some laxity on the part of consumers and overlooks the practical hurdles and costs involved in launching litigation to enforce rights under the ASIC Act or the Uniform Consumer Credit Code. It also ignores the reality that community agencies such as Care already endure severe financial restraints and that the necessity of litigation to enforce basic rights means fewer consumers in crisis can access services.

It would, in Care's view, be useful for ASIC to be provided with sufficient resources and a direction to conduct test case litigation in appropriate circumstances under section 12CB of the ASIC Act. The observation in the ASIC report illustrates the continuing and often insurmountable gap between the coalface reality of consumer hardship and theoretical consumer rights, existing in legislation but inaccessible. It also illustrates the inadequacy of the current compliance and enforcement capacity of most State and Territory Fair Trading agencies.

On the subject of mortgage fees Care notes, and understands, that interest rates are not within the purview of the Green Paper. It is in Care's view unacceptable however that the decisions of financial services providers to move rates separately to the official cycle overseen by the Reserve Bank has not been tackled by Government as

⁴ A paper entitled *The Credit Crisis we did not have to have* was presented by David Tennant at the National No Interest Loan Scheme Conference in Adelaide on 19 May 2008. The paper contains data in relation to Care's client intake and changes in the numbers of new clients from the 'mortgage belt'. It can be accessed on Care's web-site www.carefcs.org.

⁵ *Green Paper, ibid*, page 7.

⁶ *Green Paper, ibid*, page 16.

⁷ *Green Paper, ibid*, page 7.

an issue of fair market conduct. Care submits that Government's apparent confidence that the exercise of consumer choice can or will influence such decisions is at best misplaced. In addition, Care believes that matters such as the fairness and enforceability of other imposts like entry and exit fees should be appropriate topics for regulation.

Other forms of consumer credit

Chapter 6 deals briefly with the other types of consumer credit that make up the remaining 14 per cent of Australia's personal credit market. This segment of the market includes credit and charge cards, personal loans, short term credit etc.

Whilst a relatively small proportion of the whole, in Care's view the significance of the volume and impact of the debt this segment represents should not be overlooked. The most recent aggregate balance on credit and charge cards to the end of April 2008 for example is \$43.6 billion.⁸ That figure is not only significant in its own right, it is even more so when read in the context of the rate of accumulation of additional debt. For example only five years ago the balance on cards was \$23.8 billion.

Whilst low to moderate income consumers carry less debt than higher income consumers, the potential for that debt to produce negative impacts on their lives, families, health and general well-being cannot be overstated. A good example of the relative impacts of smaller debts on more vulnerable consumers can be seen in Care's data detailing the reasons why clients seek assistance. For many years, the second most likely reason clients report for making contact with Care is problems with credit cards, at around a quarter of all new intake.

Decisions about regulation based on the size of debts, or the proportion of particular consumer credit markets, makes no sense in Care's submission. The Consumer Credit Code was an evolution toward universal legislation applicable to all consumer lending. The next logical evolution is a central process for updating that legislative framework and ensuring its effectiveness.

The Paper has identified weaknesses in the regulation of "property spruikers". The existence of these structural weaknesses illustrates the need for a more rational scheme of regulation – one that is national in its reach and orientation.

Issues relevant to transfer of regulatory responsibility to the Commonwealth

Page 13 of the Green Paper points out that

Further discussion and analysis may therefore be necessary before recommending Commonwealth regulation of credit instruments other than mortgages and margin loans.

⁸ Reserve Bank of Australia, *Credit and Charge Card Statistics*, available at <http://www.rba.gov.au/Statistics/Bulletin/C01hist.xls>

This work will be most appropriately progressed through the Council of Australian Governments and the Ministerial Council on Consumer Affairs. Care supports the notion of further discussion and recognises that the political roles of COAG and the MCCA need to be taken into account. The Paper also acknowledges that the Productivity Commission's recent report on consumer policy will be relevant and closely considered in this process.

Care would however urge the adoption of some high level principles to guide the discussion:

- Any revised regulatory system should represent the high water mark of financial services regulation and not a slide to lowest common denominator positions;
- At the heart of any revised system for the regulation of credit in Australia should be the concept of responsible lending, recognising the national and global fall-out from the sale of unsustainable levels of personal debt; and
- Consumers requiring access to consumer protections in financial services regulations should see that access *enhanced* by the reform process, rather than diminished in any way.

Care congratulates the Minister for Superannuation and Corporate Law for the release of the Green Paper and appreciates the opportunity to provide comment.

30 June 2008