



Min-it Software



Joint Submission –

National Consumer Credit Protection Bill 2009 and National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009

22 May 2009

Contact:

Haydn Cooper

Director

Min-it Software
PO Box 314
Aspley
QLD 4034

Telephone : 07 3261 2296
Fax: 07 3261 2296
Mobile: 0413 722 223
e-mail: haydn@min-it.net

TABLE OF CONTENTS

TABLE OF CONTENTS

Foreword	4
Licencing Requirements	6
FSR cut and paste nonsense	6
Lenders wanting to leave the industry	7
Credit Guides	8
Issue of assessments	8
Reasonable Steps	8
Enforcement	9
ADI Special considerations	9
Contravention Penalties	11
EDR Scheme Membership	13
Code Penalties	13
The (not-so) National Credit Code	14
Business Purpose Declarations	14
Prohibited securities	15
Disposal of Mortgaged Property	16
Re-opening of Contracts	16
Direct Debit Default Notice	17
General Default Notice requirements	17
Application for Postponement	18
Civil Penalty for Prudential Standing	19
Penalty Payments	19
Comparison Rate	19
Electronic transactions	19
Double jeopardy	19
Aiding and abetting	20
Definitions	20
Lowest price	20
Fair Market Value	20
Software Requirements	21

Background Information

This submission is made on behalf of the Financiers Association of Australia (“FAA”) and Min-it Software clients. We welcome this opportunity to contribute to the consultation on the National Consumer Credit Protection Bill 2009 and National Consumer Credit Protection (Transitional and Consequential Provisions) Bill 2009.

Aside from the software produced in-house, specifically by or for franchised organisations, Min-it Software is the industry leader in the Australian market. It has current clients in Queensland, New South Wales, Victoria, South Australia, Western Australia and will shortly have its first Northern territory client. Min-it Software promotes compliance with the Uniform Consumer Credit Code and other legislation. In order to do this, we have held industry-wide Conferences for micro-lenders in 2005 and 2007 plus one exclusively for our own clients in 2008. We were a finalist in the Queensland Consumer Protection Awards 2005 and received a Highly Commended award in 2007. Neither the author nor his business partner has any financial interest in any lender.

The Financiers Association of Australia is recognised as one of the industry's specialists on all matters relating to finance and credit management. The Association, having been established since the 1930's, is an organisation for individuals and companies involved in the fields of finance and credit provision. By promoting professional unity amongst its members, the Association is able to represent the industry with the objective of educating, training and informing its members with a view to expanding the proficiency of the Association. Min-it's clients (nearly all of whom are not FAA members) are both payday and micro-lenders, with others operating in the business loan and invoice discounting arenas.

The FAA's members are non-ADI microlenders, providing loans up to \$5,000 over terms of up to 2 years.

Between us, we have made substantial submissions to New South Wales, Victoria and Queensland and lobbied against the interest rate caps in the New South Wales and more recently, in Queensland. We have provided in the past accurate statistics that show the realities of the industry in an unbiased manner.

Foreword

Given the author's return from an overseas trip on Monday evening and the reluctance by Treasury to allow an extension, this submission is not as detailed or as referenced as we would like it to be. Nevertheless, it addresses our major concerns.

When the Green Paper was originally released last year, we commented on the short response time given to make submissions. It is becoming increasingly apparent that changes are being rushed through by Government with apparently little thought of the ramifications and we stated that "[t]his is not a matter for knee-jerk, subjective reactions and any action by the Federal Government needs to be carefully thought out¹". We re-iterate that the exceedingly short time given for comment of complex legislation that is almost double the existing is fraught with danger; unforeseen and unintended consequences are inevitable. This is not good government.

In 2006, the then Treasurer, the Hon P. Costello in a Media Release² on the Bank Taskforce report *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business* stated:

"The Government endorses the six principles of good regulatory process set out in the report and is announcing measures to ensure they are adhered to. The principles are:

- establishing a case for action;
- examining alternatives to regulation;
- adopting the option that generates the greatest net benefit to the community;
- providing effective guidance to relevant regulators and affected stakeholders;
- reviewing regularly to ensure the regulation remains relevant and effective; and
- consulting effectively with stakeholders at all stages of the regulatory cycle.

¹ FAA and Min-it Software Joint Submission. "*Green Paper: Financial Services and Credit Reform – Improving, Simplifying and Standardising Financial Services and Credit Regulation*"

² Treasury Press Release No 088, 2006. "*Report of the taskforce on reducing regulatory burdens on business - Final Government Response*". Available online <http://www.treasurer.gov.au/DisplayDocs.aspx?pageID=&doc=pressreleases/2006/088.htm&min=phc> viewed 19/05/2009

A key step the Government is taking towards reducing the regulatory burden is in ensuring that systems are in place to guard against the introduction of unnecessary regulation and improve the quality of existing and new regulation. This means that gains will continue to be made into the future. Government ministers will ensure that these strengthened processes are implemented in their respective portfolios.

The Office of Regulation Review in the Treasury portfolio will be strengthened and reoriented, becoming the Office of Best Practice Regulation. It will work closely with government agencies as they develop policy proposals in order to prevent the generation of unnecessary new regulation.”

The legislation as presented does not achieve what Senator Sherry promised both industry and the public at the outset and creates a single, national credit regulatory scheme that is applied uniformly. Senator Sherry's continued comments³ where he says “[i]t gives me great pleasure to announce the Rudd Government’s \$71 million historic plan for single, standard national regulation of consumer credit. This plan will significantly boost consumer protection, cut red tape for business and deliver on our commitment to modernise Australia’s key financial services with the provision of single national regulation and oversight” ignores reality. The Minister has already confirmed that those States that have interest rate caps are retaining them. Therefore there is no uniformity, nor a single national regulation. We suggest the Minister’s comments are grossly misleading.

The question of licensing and short-term credit providers has been recently examined in the US (April 2009) and found that restrictive regulatory practices being sought in Texas actually cause consumer detriment and create economic harm. Robertson⁴ suggests that “[d]riving up the costs of these loans through increased regulation and bureaucratic oversight will result in diminished consumer choice. Effective APR caps set below the market rate, whether they are set by the Legislature of the Office or the Consumer Credit Commissioner, will not be adequate for businesses to remain profitable. In an industry that is already sensitive to marginal costs, it seems counter-intuitive to increase costs for businesses as well as consumers.”

³ Treasury Publication, National Consumer Credit Action Plan Brochure, 2009. *Message from the Minister*, page 2.

⁴ Robertson, C, Center for Economic Freedom, Texas Public Policy Foundation, 2009. “*Licensing and Regulation of Short-Term Lenders*”, page 2. Available online <http://www.texaspolicy.com/pdf/2009-04-PB06-short-termcredit-cr.pdf> viewed 20/05/2009

We will state from the outset this draft legislation is not Best Practice and this submission will show why. Consumer protection does not require the level of outright bias being promulgated. This plan increases red tape markedly and we suggest that the former Treasurer's principles of good regulatory processes have not been implemented. The legislation offers an over-the-top approach and given the Global Financial Crisis, is hardly one conducive to continued lending practices. Credit providers should be encouraged to lend responsibly but without the complete reversal of centuries of contract law that this draft promulgates. This draft legislation provides no protection for credit providers at all. The bias in favour of the consumer is total and relieves the need for any truth in borrowing by the borrower. The credit provider must instead do all the checking and verification.

Licencing Requirements

FSR cut and paste nonsense

Whilst we comprehend the suggested need for licensing, this draft legislation fails to deliver on the promises Treasury provided at its public meetings last year that it would not be seeking to implement the measures contained in the Financial Services Regulations. Despite this, it is more than apparent that many parts of the licencing requirements have essentially been cut and pasted from the FSR provisions. In doing so, the legislation writers either show the Government's complete lack of understanding in recognizing who is actually wearing the risk or they were under so much pressure to deliver the draft legislation on time that someone authorized them to do so. Either way, this is unsatisfactory.

The legislation is written in a very black and white style. No thought has been given to commercial reality. It is a nonsense, for example, to implement an internal dispute resolution solution (subsection LIC170(1)(h)) for a single operator or, we would suggest, even a husband and wife or two partner operation - or are we seriously suggesting some skit for Fawlty Towers or Monty Python becomes the norm? The sensible thing to do would be to amend the draft legislation so that an internal dispute resolution solution is required only where the licensee has no employee. There are many "Mum and Dad" lenders and brokers that have no staff. One or two working directors would therefore be exempt as they are not employees.

The same can be said for the need for a systems and written compliance plan (subsection LIC170 (1) (k)) and adequate financial and human resources and a risk management plan (subsection LIC170 (1)). These requirements are impracticable and in some cases, one would suggest, almost impossible to achieve at a reasonable cost. This is not cutting red tape as the Minister asserts.

Lenders wanting to leave the industry

There will, no doubt, be some – possibly many - in the industry who wish to leave it as a result of the implementation of these changes. Some of the unknown changes still scheduled for discussion in Stage 2 have also created uncertainty within the industry. As the number of loans reduce, the cost of compliance per loan increases. The way the legislation now stands, if implemented “as is”, these businesses have no option but to pay and comply in order to leave it hopefully with their investment. This is increasing their exit strategy costs and for many, there will be no ability to recover them. This is particularly so for those credit providers in New South Wales, Queensland and the Australian Capital Territory where capped interest rates that include fees and charges exist. There will be some existing lenders that have loans that may need some time (possibly up to 5 years) to run out. This assumes, of course, that they are fully paid out. Given the Government’s recent release for discussion of the proposed amendments to the Trade Practices Act⁵, there will undoubtedly be some borrowers that will try and use those amendments to take lenders on and try to wriggle out of their commitments, further exacerbating these lenders’ own financial situation.

This situation is not covered in the legislation and one wonders whether it was even considered. In our opinion, provision should be made for any current credit provider to continue to collect the debts owed purely as a registered applicant without having to fulfill all of the proposed Australian Credit Licence requirements. We suggest this could be achieved by way of a special class of licence which prohibits the further issuance of credit and which exempts some (we are not proposing all) of the compliance requirements. We would welcome further discussion on this.

⁵ Trade Practices Act Amendment (Australian Consumer Law) Bill 2009: Unfair and Prohibited Contract Terms
Min-it Software / FAA Joint Submission

Credit Guides

We are concerned at the vast amount of paperwork being generated due to the need for everyone involved in the financial chain to provide their own Credit Guide. See for example subsections R130 (1) and R230 (1) both of which refer to credit guides but which are obviously different. This is more FSA nonsense. The industry and consumers have found the existing pre-contractual statement more than adequate. We suggest this does nothing for the actual consumer and will merely increase compliance costs and the time taken to process an application. We suggest this matter should be reviewed and preferably removed.

Issue of assessments

The right of the consumer to be provided with a copy of a credit provider's assessment and without charge within 2 days is a monstrous and onerous requirement. If Government thinks it achievable then perhaps we should expect Government to do likewise and provide all FOI requests within the same time frame. The implication is the credit provider is large, has plenty of staff and does not close over the Christmas / New Year break.

Reasonable Steps

Paragraph 3.97 of the Commentary states that “[i]n undertaking the assessment, credit providers are required to take into account information about the client's financial situation and other matters required by the regulations that they either already possess, or which would be known to them if they made reasonable inquiries and took reasonable steps to verify it. This provision means that lenders must ask the client about their financial situation and the other matters prescribed in the regulations, and must make such efforts to verify the information provided by the client as would normally be undertaken by reasonable lenders in those circumstances. Conducting a credit reference check is, for instance, likely to be an action that would be reasonable to undertake in most transactions. Lenders are not expected to take action going beyond standard business practice in verifying the information they receive.”⁶

We note that the assessment must take into account a consumer's current income and expenditure and “the consumer's future prospects, including any significant change in the consumer's financial circumstances that is reasonably foreseeable (such as a change in

⁶ Treasury, 2009. *Commentary on Exposure Draft to National Consumer Credit Protection Bill 2009 and National Consumer Credit Protection (Transitional And Consequential Provisions Bill 2009*, page 90.
Min-it Software / FAA Joint Submission Page 8 of 21

repayments for an existing home loan, due to the ending of a honeymoon interest rate period)”⁷. Given this, we suggest it would also be reasonable to assume that an ADI from whom credit is sought by a borrower and which provides credit to a borrower’s employer and whom that ADI is preparing to take some form of bankruptcy action in the immediate future against that employer, such as the appointment of a receiver, should not be granted credit on the basis that the ADI knew or should have known that the borrower would be unlikely to meet his or her repayment obligations in the near future at least. This would appear to be a legitimate form of insider trading but one that should not be exceptioned. It may be that the ADI would have to delay providing the assessment until it had commenced its own enforcement actions against the employer but then we would question whether or not that is efficient and honest. Part of the ACL requirement is for the licensee to be required to act ‘efficiently, honestly and fairly’ under subsection 170 (1) (a).

Enforcement

ADI Special considerations

The enforcement provisions do not implement a truly national and uniform scheme. One must question why, under subsection TL65 (2), ADI's have been given special treatment consideration when the public at large regard the banks (and other ADI's) as being the main offenders of most consumer detriment.⁸ As the Minister states he wants to promote uniformity and deter widespread consumer detriment, then the Government must apply the same standards to all credit providers without exception or favour. The Minister should not become personally

⁷ Ibid 5, page 90

⁸ See for example, Janet Albrechtsen Blog, The Australian, 06/05/2009. “*Having a lend of us - Comments*”. Available online http://blogs.theaustralian.news.com.au/janetalbrechtsen/index.php/theaustralian/comments/nightmare_for_business/#commentmore viewed 08/05/2009,

Martin North, Fujitsu on Broker News, 05/03/2009. Fujitsu: Australian banks ripping off customers Available online <http://www.brokernews.com.au/people/fujitsu-australian-banks-ripping-off-customers/1330/34044> viewed 20/05/2009

and I Hate Bank\$.com.au, Available online <http://www.ihatebanks.com.au/> viewed 21/05/2009

involved in any decision to prosecute or not as the case may be or apply any punitive measure against any credit provider.

There is no arguable case for exempting the ADI's if the Government wants to be seen to be promoting transparency for the industry. One type of organisation should not be treated differently to another merely because of size and the fact that it subject to other regulation; every business in Australia can claim the same since they are subject to both Federal and State laws.

Under the Consumer Credit Code, it is those areas where exemptions apply that have been exploited by those that have caused the most detriment. The Government needs to resist having exemptions or allow as few as is possible, allowing for commercial practicality. In retaining the provision that allows only the Minister to decide whether or not a prosecution will occur for an ADI is effectively creating the ability for corruption to occur or be perceived to occur. To be blunt, there is enough evidence to show the top end of town are not adverse to providing "financial sweeteners" dressed up as donations to political parties in return for "favours"⁹. We suggest it would be a brave Minister indeed that effectively stopped a bank from trading yet the legislation makes it clear the Government is not adverse to any other credit provider or credit assistance provider business from being stopped from trading. There should be no differential; if the ADI has or could have committed an offence that would stop it lending, then so be it. If that keeps it honest, well the legislation is all about reducing consumer detriment isn't it?

Of course, this assumes that it is not the Government's intention to drive out all industry participants apart from the ADI's. Controlling monetary supply through a small and select group such as the ADI's would create the ultimate Governmental population control tool. For a while, at least, anyway.

It is timely that the UK has just removed its Speaker of the House following rort claims that have being going on for years¹⁰. Whilst there may be an argument that what the UK Members

⁹ Australian Protectionist Party, 2008. "*Political donations from corporations are a recipe for corruption*" Available online <http://www.protectionist.net/?p=126> viewed 21/05/2009

¹⁰ BBC News, 19/05/2009. "*Speaker quits for sake of unity*". Available online http://news.bbc.co.uk/2/hi/uk_news/politics/8057203.stm viewed 21/05/2009

of Parliament have done is legal, the vast majority say it's immoral. The same sentiment could be applied here if the ADI exemption isn't removed.

Contravention Penalties

If the Government wanted to scare the industry, it has totally succeeded with its proposed, over-the-top penalty provisions. To impose a criminal offence and substantial financial penalties for being "unreasonable" is the height of unreasonableness in itself. It comes down to one person's opinion. This is a sledge-hammer approach to force a few to comply. The vast majority of non-ADI lenders are currently compliant with the Uniform Consumer Credit Code ("UCCC"). The State Government Consumer Agencies have relatively few issues with the industry but that is not to say there are those that do not comply. Those are the ones that have brought the industry into disrepute. The State Governments, through the UCCC and Fair Trading legislation together with federal legislation such as the Trade Practices Act 1974 (Cth) does, in our and that of many others' belief give them sufficient powers but they have failed to use them. Equally, there has been an unwritten rule that the State Government Consumer Agencies would not challenge the ADI's as they are under ASIC and APRA control. Whilst other lenders have been prosecuted or taken to task by the State Government Consumer Agencies, to our knowledge, the simple fact is neither APRA nor ASIC has ever tackled any ADI for a breach of the UCCC. Why? The answer is simple, the UCCC is State-based and the ADI's generally see themselves as above it as they have to comply with APRA rules. APRA does not see itself as being the regulator for UCCC compliance for the ADI's and is more concerned about prudential control.

Under this proposed legislation, if the holder of an Australian Credit Licence ("ACL") is deemed to have contravened the law, the Commentary states it can be subject to a variety of tiered sanction approaches¹¹. Should an infringement notice be given, the licensee must either pay up or be prepared to go to Court. Whilst there are maximum amounts that may be imposed by way of an infringement notice, going to Court offers no such luck. The civil penalty provision is fixed as is the criminal penalty, with many being strict liability offences. A Court has no room to manoeuvre or consider the harshness of the penalty against any misdeed. In itself, this is totally unfair and we suggest that the penalties be made "Maximum" penalties rather than the fixed penalties they currently are so that the Court can determine the gravity of

¹¹ Ibid 5, section 4.19, page 100.

the offence and the proper penalty to be imposed. Strict liability offences under the Criminal Code have far wider implications in that the onus of proof falls not on the regulator but back on the licensee. The regulator merely has to show that a contravention has occurred, not whether it was intentional or otherwise and this appears to be purely for administrative convenience. Upon being found guilty, this may have the effect of barring overseas travel and precluding employment. For sole or “Mum and Dad” directors, conviction may also affect other family members.

Once again, this is more cut and paste FSR legislation imported into the draft and this fails to recognise who is bearing the risk. Contrary to the assertion that “the disclosure of documents to consumers is a significant policy component of financial services regulation to address the particular economic ‘harm’ of information asymmetry in the market¹²” it fails to acknowledge the vast amount of documentary evidence to date that shows borrowers do not want to read vast amounts of complex documentation when applying for a loan¹³. This stance also assumes that borrowers do not adequately research prior to borrowing¹⁴ or fail to understand high cost credit. Elliehausen shows this is incorrect¹⁵. Many small payday lenders and micro-lenders have catered to this demand by ensuring that they provide speedy service. Whereas the banks traditionally offer anything up to 3 or 4 days for a personal loan decision and some housing loans right now are taking a full 20 days for a decision, micro-lenders and payday lenders will make far quicker decisions, often a maximum of a few hours. After all, it is their own money they are lending and not that of a shareholder.

¹² Treasury, 2009. Commentary on Exposure Draft to National Consumer Credit Protection Bill 2009 and National Consumer Credit Protection (Transitional And Consequential Provisions Bill 2009, page 100.

¹³ For example, see Janet Albrechtsen Blog, The Australian, 06/05/2009. “*Having a lend of us*”. Available online http://blogs.theaustralian.news.com.au/janetalbrechtsen/index.php/theaustralian/comments/having_a_lend_of_us viewed 08/05/2009 and Australian Bankers’ Association Inc, 2007. “*Application of unfair contract terms legislation to consumer credit contracts*” Available online [http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Credit_Review_Unfair_Contract_Terms_Submission/\\$file/credit_review_australian_bankers_association_unfair_contract_terms_submission.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Credit_Review_Unfair_Contract_Terms_Submission/$file/credit_review_australian_bankers_association_unfair_contract_terms_submission.pdf) viewed 23/09/2008

¹⁴ Elliehausen, G., Division of Research and Statistics, Federal Reserve, 2009. “*Analysis of Consumers’ Use of Payday Loans*”. Available online

¹⁵ Elliehausen, G, Network Financial Institute, Indiana State University, 2006. “*Consumers’ Use Of High-Price Credit Products: Do They Know What They Are Doing?*” Available online <http://poseidon01.ssrn.com/delivery.php?ID=554072120067118108096072086083017098102019085079049016085027005127122000027097126018122122053012104056055082025071108120016052053090062082066028085071091125079041042019098088112072067111001006091005&EXT=pdf> viewed 04/05/2009

Whilst stating there is a tiered approach¹⁶, the way the draft is written, many offences are strict liability offences that carry both civil and criminal penalties. Some of the criminal offences additionally carry both a further monetary or imprisonment penalty or both penalties. Some of these offences are relatively minor yet carry penalties that are well over-the-top given all risk is borne by the credit provider¹⁷.

EDR Scheme Membership

In addition to consumers having the right to take action under an External Dispute Resolution scheme (“EDR”) that is binding on the licensee under the terms and conditions of the scheme provider, the borrower has the right to obtain further redress in Court. Given this, many would suggest that the borrower simply go to a Small Claims Court and be done with it, particularly since the cost will be free to the consumer. Whilst we accept that membership of an EDR is the ideal, some existing lenders question the purpose of being a compulsory member of an EDR scheme under subsection LIC170 (1) (i) given the Court’s finality.

Code Penalties

We are extremely concerned that penalties under the UCCC that are currently maximum civil penalties have become fixed criminal penalties. This is totally uncalled for. For example, if a credit provider supplies a statement under Section 34 that is not within 14 days, which could easily occur over a Christmas / New Year period, then the new penalty imposed is a criminal penalty of 100 penalty units. Currently, the UCCC has this as “Maximum penalty – 100 penalty units”. State enforcement officers currently would use discretion and judgement in determining whether or not an offence had been committed but given the black and white nature of the drafting, we are of the opinion some overly zealous individual within the regulator could easily give someone a criminal record because of a strict interpretation of the legislation.

¹⁶ Ibid 5, section 4.19, page 100.

¹⁷ For example, under LIC195(2), it will be an offence not to cite an ACL number on a document that carries a 2,000 penalty unit civil penalty and because this is a strict liability offence, under LIC 195(3) will also attract a 10 unit criminal penalty.

In our opinion, any penalty currently within the UCCC should be carried over exactly as they are. Making criminals of people for simple mistakes is hardly showing the caring and compassionate nature Australian society believes it enjoys.

The (not-so) National Credit Code

Given the States have the right to modify or amend any existing credit legislation that will override this legislation, and those States that currently have interest rate caps will retain them, then this is not the National Credit Code. The States have yet to advise how the existing UCCC will be retained and / or interfere with the mechanics of this Code. When Treasury promulgated this legislation, its officials stated publicly and repeatedly at that time and subsequently that there would be no interest rate caps retained upon implementation. We suspect that those industry participants that were invited members of an Industry Participation Discussion group did so purely on the basis of this and other promises that were made. The fact that these promises have been reneged is outrageous. Industry has been sold out and we now find the Federal Government has lied to it in the same way that the State Governments have.

It is obvious this never was ‘consultation’ in its truest sense of the word and it has been a sham. The fact that the interest rate caps and the ability for the States to impose their own conditions or choose to select parts or otherwise of this legislation as they see fit defeats the whole reason for the industry wanting one single uniform credit code, even with these draconian measures. We have 8 Consumer Credit Codes in various states of uniformity that exist now and will continue to remain and no, plus this on top. Hardly national and definitely not uniform; does Senator Sherry really believe this is reducing red tape and the cost of compliance?

Business Purpose Declarations

We are extremely pleased that the suggestion we made to the MCCA Round Table in April 2008 has been taken up in Section 11¹⁸.

¹⁸ Ibid 5, page 154

Prohibited securities

For the larger financial institutions, the provisions of Sections 46(3) and 46(5) will have little impact. For the vast majority of smaller lenders that do lend currently using a vehicle, rather than household goods, as security, the impact of this provision will be enormous if implemented across all goods listed in subparagraph 116(2)(b)(i) of the Bankruptcy Act 1966. The list allows a bankrupt to retain motor vehicles with a net equity of less than \$6,000 or \$12,000 for a jointly owned vehicle. Where a vehicle of higher value is sold the bankrupt will be given \$6,000 (or \$12,000) in order to buy a cheaper vehicle which he or she can keep. In Sydney, however, we are aware ITSA interpret this more generously than the limits expressed and will allow a bankrupt to retain vehicle(s) worth up to \$12,000¹⁹.

In many cases, the borrower's sole realisable asset is a vehicle that is often worth less than the amount of money sought. Many lenders currently take such security in the knowledge that the majority will pay, purely because they do not want to lose it. This is not a blackmail security as in the form of household goods but merely prudent secured lending to ensure the moneys lent are repaid. If lenders are to be unable to take security where the value of the goods is essentially worth less than the amount of credit, then it is likely a large number of applicants will either be unable to obtain any credit whatsoever or only obtain limited amounts of credit. These are people that will have no other means of raising credit and will certainly not qualify for a credit card given their past history. We suggest this will lead to social discontent and higher crime levels.

We have stated to both the MCCA and Victoria that we oppose blackmail securities²⁰. It is one thing to ban taking essential household goods at all as security but we suggest it is entirely another to prohibit lending on a vehicle worth less than the amount of credit sought even if the credit provider is willing. We would suggest that this matter needs some attention and further discussion with the consumer groups and we would welcome the opportunity to provide further information.

¹⁹ ITSA provided advice at Min-it Conference 19-20 May 2007, Seaworld Resort, Southport, Queensland. .

²⁰ Min-it Software submission, 2008. "*Victorian Consultation: The application of Unfair Contract Terms Legislation to Consumer Credit Contracts*", page 8

Disposal of Mortgaged Property

It is interesting to note that the penalty for a mortgagor disposing of mortgaged property under Section 47(1) has been retained as it is in the UCCC. Presumably, this is because the Government only wants to make criminals of credit providers and not those borrowers that rip the lender off. If the criminal penalties are to apply to credit providers, then the same should apply to the borrowers that breach this requirement. The publicity will be good for the industry and force borrowers to become responsible because it would then be the only place in this draft legislation where they are made accountable for their actions. This provision currently only applies to where the Government Consumer Agency takes the prosecution. To date, Queensland has taken one successful prosecution²¹ and is being forced into taking a second, albeit reluctantly. Every other State regulator has, to our knowledge, refused to prosecute believing there are adequate alternatives when there are none. Unless ASIC is prepared to prosecute every borrower the industry refers for this widespread offence²², then there is a need to amend the section so that either the regulator or the credit provider can prosecute the offender. Any penalty should be returned to the lender and not the Consolidated Fund.

Re-opening of Contracts

We note in the commentary that a “contract, mortgage or guarantee will not necessarily be unjust because one or more of these criteria applies to the transaction. Conversely it may still be unjust even where none of these factors is made out.”²³ We find it difficult to comprehend how a Court could find a contract unjust if none of the criteria the Court could take into effect did not occur, taking into account the Court cannot have regard to any unforeseen circumstances (section 70(4)). If this is the case, we suggest this makes any and every contract subject to a ruling that it was unjust and is likely to raise vexatious claims. This provides neither consistency nor certainty for a credit provider in which to operate.

²¹ OFT (Queensland) v Muirhead (Beenleigh). TradeSmart Update July 2007. Available online Refer: <http://www.fairtrading.qld.gov.au/of/oftweb.nsf/Web+Pages/1B221029A7C7E96A4A257309000EE0B3?OpenDocument> viewed 02/07/2007

²² Based on our own client data, this occurs a minimum of 10 times a month. Extrapolating this across the country, it could be anywhere up to 100 prosecutions required a month. Adding in the ADI's, this could amount to around 150 a month.

²³ Ibid 5, section 7.144, page 160

Direct Debit Default Notice

Whilst the requirement under Section 79A to provide this notice within 10 days of the default occurring sounds fine in theory, it really reveals just how geared this legislation is to large corporations that operate every business day. For the small or “Mum and Dad” operators that shut down completely for the Christmas break, like many Australian companies do, complying with this requirement over the Christmas / New Year period will be a nightmare. The requirement is not 10 business days but a strict 10 days from the default occurring. Furthermore, under the BECS system, whilst most payments are defaulted where appropriate within 3 days, the banks have essentially an unlimited time in which to default a payment. We have known some payments from over a Christmas / New Year period, particularly with some of the small financial institutions, take up to 3 weeks or more to be dishonoured. Whilst these are exceptions, they do occur. On this basis, a credit provider may not be able to default the borrower because of the late notification. In our opinion, if this requirement is to remain, subsection 79A (2) needs to be amended to read “within 10 days of the credit provider being made aware a default has occurred”.

In addition to this notice, the standard Default Notice will also have to be raised. Given some contracts are Continuing Credit contracts, the first default may (or, we acknowledge, may not) have a large intervening period between defaults. We believe this will confuse the borrower and question its need. It would be far better to prescribe a Default Notice by regulation that incorporates any required wording on every Default Notice issued – but see below.

General Default Notice requirements

This matter raised in Section 80 was discussed at length at the MCCA Round Table²⁴ which we attended and both we and others provided advice that this is a ridiculous requirement. It was calculated that it will take four (4) pages to do the work of one (1). We believed then and now this will confuse ordinary people. In our response to the MCCA, we stated that “[r]ather than the Default Notice being a simple, one page communication device it is currently, it will become overtly complicated and longwinded”²⁵. This shows the MCCA did not listen to

²⁴ MCCA Round Table Meeting, Melbourne, 01/04/2008

²⁵ FAA/ Min-it Software Submission, May 2008. “*Discussion Paper: Consumer Credit Code Amendment Bill 2008 and Consumer Credit Amendment Regulation 2008 regarding Default Notice Changes*, page 3.

industry and we must take the view neither is the Federal Government. We would suggest many borrowers will be alarmed at the information required for the Default Notice.

As we further stated²⁶, “[i]t further regulates an already over-regulated industry and one in which the current Federal Government is already committed to easing the burden²⁷. At the end of the day, one needs to ask how many reasonable people would not communicate with the lender immediately or within 30 days of the date they receive the Default Notice? We suggest it would be only those borrowers that have little or no intention of paying. A far better solution would be to have a warning statement on the Default Notice requiring the borrower to contact the credit provider or seek legal advice. For example, on our own Default Notice, at the bottom of the document, in large, bold red font, we print the following warning message:

WARNING: THIS IS A LEGAL DOCUMENT AND FAILURE TO COMPLY MAY HAVE SERIOUS LEGAL CONSEQUENCES. IF YOU ARE IN ANY DOUBT YOU SHOULD OBTAIN LEGAL ADVICE.

The warning is simple to understand and clear.”

We stand by those comments. This does not make good business practice and is bureaucracy for bureaucracy’s sake.

Application for Postponement

There is no doubt that some borrowers, and equally some astute Legal Aid or other consumer lawyers, will apply for a postponement close to the end of the 30 day default remedy period and using the provisions of Section 86(1) request for postponement as a way of delaying action under the Default Notice. If the credit provider refuses the request, the borrower can apply to the Court and ask it to consider the request. If the credit provider were to repossess the mortgaged goods, there is a possibility that the Court may state the repossession is unwarranted under Section 99A and therefore be made liable for compensation and possibly additional costs if the credit provider has sold the goods (Sections 99B and 99C). Either way, the credit provider is virtually caught in the middle and unable to recover its debt owing. The borrower is not being educated to show that it must borrow and act responsibly. This is patently unfair and harsh on the credit provider yet there is little the credit provider can do apart from listing

²⁶ Ibid 12, pages 3- 4.

²⁷ Media Statement, Australian Labor Party, 10 May 2007. “Real Action To Cut Business Red Tape”. Available online <http://www.alp.org.au/media/0507/msloosbicsuifl00.php> viewed 20 May 2008.

the default with a credit reporting agency until the matter is resolved or take the matter immediately to Court. It further exacerbates the diminishment of any ongoing relationship between the credit provider and the borrower and given human nature, any subsequent action will be treated more harshly. This provision alone may make many credit providers wary, to the point of refusing to provide credit to other than existing clients. Inevitably, there will be a number of individuals that will be refused credit because of the overboard consumer bias in this legislation.

Civil Penalty for Prudential Standing

In keeping with our earlier comments, we believe Section 100 (3) should be repealed. Those credit providers with prudential standing should be shown the same consideration as any other credit provider. Prudential standing should have nothing to do with it.

Penalty Payments

We assume that as the UCCC will still stand, any penalty to be paid pursuant to action by a State regulator will continue to be paid pursuant to Section 106 of the UCCC.

Comparison Rate

It is pleasing to see the requirement under Section 140(4) of the UCCC and the need for Comparison Rate Schedules under Section 146J of the UCCC have not been transferred into this legislation.

Electronic transactions

We note that Section 164A (3) of the UCCC which provided for certain documents that were not to be electronically delivered has not been transferred into this legislation. We consider this a retrograde move by Federal Government as it forces the credit provider to ensure certain documents are delivered or the credit provider knows why they were not. We believe that this will further exacerbate consumer detriment for some individuals.

Double jeopardy

We note that Section 181 of the UCCC has not been transferred into this legislation. This is of some concern given that the States will now continue to be able to take action themselves and it leaves credit providers open to action by ASIC despite having been punished under State or

Territory law. We suggest some suitably worded section be introduced so that a credit provider cannot be punished twice. This is already covered by the UCCC wording.

Aiding and abetting

Notwithstanding that the legislation covers almost everyone involved in the financial lending can debt recovery chain, it seems odd that Section 182 of the UCCC has not been transferred into this legislation to cover those that may not be. For example, if a retailer that is engaged in linked credit provision were to aid in the contravention of this “National” Code, that individual or corporate body would not be committing an offence.

Definitions

Lowest price

Given this legislation now defines “lowest price” in relation to the cash price, many retailers and particularly those larger chains that offer “less for cash” pricing will be caught out by this provision should the purchaser require credit. It may also affect some car dealers as they will often strike a better deal for upfront cash. Currently, those retailers that offer this generally do not offer the “cash price” to credit sales as the credit provider may not pay the retailer immediately. Consequently, the retailer will be left with bearing the additional overhead expense until payment is made. This will affect general profitability at retail level and it is to be hoped that ASIC will immediately instruct the ACCC to begin educating retailers on this. Failure to do so may inadvertently lead some credit providers into committing an offence which in the first instance, they are liable to repay back to the borrower. It will then be left to the credit provider to recover this from the retailer. Given the aiding and abetting clause removal, the credit provider should not also have to ensure that the price being paid by the borrower is the lowest or cash price. We suggest they have enough to do in trying to comply with the legislation without having to look over their shoulders at retail pricing.

Fair Market Value

It will be interesting to see how ASIC as the regulator intends to assess fair market value as the discussions we have had with the Queensland State regulator have shown this concept is

fraught with difficulty, particularly in relation to some white ware supplies and motor vehicles. Fair market value cannot be said to be the lowest price from any supplier but needs to be weighed against those of a similar scale and size and market position in the same or a close proximity location. This may be difficult in some cases.

Software Requirements

Finally, new entrants into the industry from 01 January 2010 or those that fail to register prior to the end of December 2009 will be required to obtain an ACL immediately. For existing credit providers that register in time, there will be a gradual period of change-over, notwithstanding the States' ability to do their own modifications. Some of the proposed changes will require software changes, such as the need to amend documents and contracts with ACL numbers but in order for these businesses to operate, software suppliers such as us will have to gear up well prior to any mainstream industry change in order for these businesses to operate. With the pressure being faced on the industry from other legislative amendments, this may mean that software suppliers may be forced to upgrade systems immediately in order either convert all documentary changes or turn new (or existing in the case of those that simply failed to register in time) business away. This pressure is both unwarranted and undesirable; clearly, there has been no thought put into how industry software suppliers will cope with the magnitude of amendments.