



*Promoting Responsible Consumer Lending*

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## National Financial Service Federation Ltd

Submission  
on the

### **National Consumer Credit Protection Bill**

Consumer Credit Unit  
Corporations and Financial Services Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Submitted via email to  
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## **NATIONAL FINANCIAL SERVICES FEDERATION**

Submission on the exposure draft of the National Consumer Credit Protection Bill 2009 and associated documents, written by John Brady on behalf of the Board of the National Financial Services Federation.

### **INTRODUCTION**

The National Financial Services Federation is the peak industry body of the micro-lending industry. The Federation's aim is to promote the enhancement of customer service and build greater government and community understanding of the micro and alternate finance industry throughout Australia.

The Federation is pleased to make these submissions on behalf of its members. Whilst the legislation is wide reaching, and generally the Federation supports the legislation, these comments are limited, in the most part to the matters of most concern to the Federation's members.

### **SUMMARY**

The Federation has the following concerns or comments:-

- **National Scheme.** The scheme as presented is not national as there is a reservation of States powers.
- **Credit Guides.** Some general statements on the creation of credit guides are made, suggesting that the use of them is unwarranted premature and does not achieve the aims.
- **DEF5.** Credit Activity. The definition is wider than needed to achieve the stated objectives.
- **DEF7.** Credit Assistance. This makes the current arrangements of credit providers difficult to work.
- **DEF8.** Intermediary. Definition is very wide and may go further than intended.
- **LIC155.** There is no guidance what type of convictions will be regarded as being ones leading to a refusal.
- **LIC165.** It is obvious that classes of licenses are intended, but no indication what these classes are.
- **LIC170.** Lack of definition of words like "adequately trained", "competent" and "adequate arrangements and systems". No scalability of obligations – one size fits all application.
  - **LIC170(1)(b).** Conflicts of interest. There is a failure to recognize that there is a conflict in every loan between the lender and the borrower.
  - **LIC170(h).** Internal dispute resolution. In view of the way approved EDR schemes operate, this may not be a necessary provision.
- **LIC175.** Compensation arrangements. The default position that PI insurance be required is unworkable. There is no benefit to the consumer, and the insurance is not available in any event.

- **LIC180.** Provision of a Statement to ASIC. There needs to be some scalability in this provision, and similar provisions.
- **LIC186.** Breach reporting. Suggested change to the wording to provide for certainty as to when the breach has occurred.
- **LIC195.** Requirement to cite licence number. In practice this requirement is unworkable for groups with separate licenses.
- **LIC250(4)(d) and (e).** Authorisation of credit agents. Concern about the effect of the authorization in certain circumstances.
- **LIC290.** Responsibility for representatives. Concern as to the limit of the application of the clause.
- **LIC315.** Banning orders. Suggested amendment to ameliorate the effects of clause.
- **R130.** Credit assistants' credit guides. Concern expressed about the inclusion of commission when same may not be able to be expressed in the form required.
- **R135.** Quotes. Suggested amendment to limit the effect of the quote to work intended to be undertaken.
- **R180.** Commissions etc. paid to third parties. Concern about the requirement to include information not known to the licensee.
- **R192.** Staying in a contract. Concern expressed about the possibility of "no advice" when consumer needs advice.
- **R230.** Credit providers' credit guide.
  - **R230(1).** Timing. Should be at the time the NCC section 14 Statement is given.
  - **R230(2).** Information required. Some of the information is not appropriate to be provided now by the credit provider, particularly as to the working of the EDR scheme.
  - **R230(d).** Compensation requirements. Comments relating to compensation requirements made elsewhere.
  - **R230(e) and (f).** Statement of credit provider's obligations. Suggested that this be a standard form.
  - **R240(4).** Method of giving the guide. Discussion of frequency of delivery of the guide.
- **R260.** Enquiries about a consumer. Lack of definition of "substantial" and "reasonable"
- **R265.** When credit must be assessed as unsuitable. Discussion or lack of guidance as to concepts introduced.
- **R270.** Providing assessments to consumers. Discussion about the timing and frequency of the requests.
- **R280.** Disclosure of commissions. Discussion of need to disclose this twice.
- **NCC46.** Prohibited securities. Discussion of rationale and effect.
- **NCC70(6A).** Reopening. Discussion of effect having regard to the new NCC46.
- **NCC79A.** Notice on DDR failing. Discussion of need for, aim and timing of and content of the NCC79A notice.
- **NCC80.** Default Notice. Discussion of the new NCC80 notice.
- **NCC101(2).** Application regarding key requirement. Discussion regarding words removed from UCCC provision.

## SUBMISSION

It would be fair to say that the Federation and its members, jointly, were pleased when, as a result of the COAG deliberations in the middle of last year, it was decided that there would be a national credit code. It was the clear intention of the COAG meeting held in July 2008

*National regulation through the Commonwealth of consumer credit will provide for a consistent regime that extinguishes the gaps and conflicts that may exist in the current regime. The new regime is anticipated to introduce licensing, conduct, advice and disclosure requirements that meet the needs of both consumers and businesses alike. A seamless national regime will assist in ensuring that consumers are better protected in their dealings with credit products and credit providers, including brokers and advisers. (Emphasis added)<sup>1</sup>*

There are further statements of intention of the legislation at various places. For example:-

*These new measures will protect consumers and cut red tape for business.<sup>2</sup>*

*Under the first phase of the plan, the Commonwealth will take responsibility for trustee companies, the existing key credit regulation, and the Uniform Consumer Credit Code (UCCC) by enacting it as federal law.<sup>3</sup>*

*Extending the powers of the Australian Securities and Investment Commission (ASIC) to be the sole regulator of the new national credit framework with enhanced enforcement powers.<sup>4</sup>*

*Subsequently, on 3 July 2008, COAG agreed that the Australian Government would assume responsibility for regulating all consumer credit products.<sup>5</sup>*

It is against these aims that the Federation makes the submissions.

The Federation therefore believes that the stated aims of the legislation are to:-

1. Provide a Commonwealth-based national system of consumer credit legislation;
2. Create a seamless system between States;
3. Extinguish the gaps and conflicts which exist in the current regime;
4. Introduce licensing, conduct and disclosure requirements that meet the needs of businesses and consumers alike;
5. Provide a system solely regulated by ASIC, and

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<sup>1</sup> Communiqué from the COAG Meeting held 3<sup>rd</sup> July 2008. Found at [http://www.coag.gov.au/coag\\_meeting\\_outcomes/2008-07-03/index.cfm](http://www.coag.gov.au/coag_meeting_outcomes/2008-07-03/index.cfm) accessed 6th May 2009

<sup>2</sup> Press Release, Hon Nick Sherry issued 3<sup>rd</sup> October 2008, found at <http://minsc1.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/064.htm&pageID=003&min=njs&Year=2008&DocType=0>, accessed 6<sup>th</sup> May 2009.

<sup>3</sup> Press Release, Hon Nick Sherry issued 3<sup>rd</sup> October 2008, found at <http://minsc1.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/064.htm&pageID=003&min=njs&Year=2008&DocType=0>, accessed 6<sup>th</sup> May 2009.

<sup>4</sup> "National Consumer Credit, single, standard, national regulation of consumer credit for Australia", undated brochure, issued circa October 2008 found at [http://treasury.gov.au/documents/1381/PDF/NCC\\_Brochure\\_02102008.PDF](http://treasury.gov.au/documents/1381/PDF/NCC_Brochure_02102008.PDF) accessed 6th May 2009.

<sup>5</sup> Summary of COAG agreement found at [http://treasury.gov.au/consumercredit/content/coag\\_agreement.asp](http://treasury.gov.au/consumercredit/content/coag_agreement.asp) accessed 6th May 2009.

6. Provide protection for consumers whilst not imposing greater burdens on industry.

The Federation is of the view in a number of respects the legislation achieves its aims, but in a number of others it fails to do so. It is the intention in preparation of this submission to point out where the Federation believes there has been a failure to meet the stated aims.

Let it be said, however, that the Federation was privileged to be invited by the Minister to join the industry consultative group, and that the Federation found the participation in that group invaluable if only to see a wide range of opinions on a number of different issues. It is hoped that the submissions made by the Federation, particularly the written submissions have been of some assistance to the project. The Federation looks forward to participating further in such consultations.

### **Failure to have a National System.**

It was not until the very last moment that it was discovered that there would not be a national system. All the Statements by the Minister, by COAG communiqués, and by documents prepared by Treasury were indicative that the system would be national.

In fact, the Green Paper<sup>6</sup>, felt by most to be clearly the forerunner to the COAG agreement, notes

*A national approach would also address the problems that arise when credit providers operate in different States — differences across States and Territories can mean that the provider offering the same service nationally is subject to up to eight different regulatory environments.*<sup>7</sup>

And was noted in a number of submissions to the Green Paper<sup>8</sup>, the major differences between the various State regimes, so far as they impacted on lenders, were the diversity of interest-rate caps and the regulations supporting them.

It is on this basis that the Federation made earlier submissions, with a belief that there would be one system.

As has been pointed out in many earlier submissions and comments made by members of the Federation, there are many areas where, notwithstanding the 1993 Australian Uniform Credit Laws Agreement (“AUCLA”),<sup>9</sup> the States drifted apart.

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<sup>6</sup> Green Paper on Financial Services and Credit Reform – Improving, Simplifying and Standardising Financial Services and Credit Regulation, Treasury, 3<sup>rd</sup> June 2008, found at <http://www.treasury.gov.au/contentitem.asp?ContentID=1381&NavID=037> accessed 6<sup>th</sup> May 2009

<sup>7</sup> Green Paper, page 14

<sup>8</sup> For example, submission by City Finance Franchising Pty Ltd, 26th June 2008; submission by Cash Converters Pty Ltd, July 2008 page 12

<sup>9</sup> The Agreement, entered into between the States on 30<sup>th</sup> July 1993 attempted to provide the basis for national consumer credit laws, subject to some reservations to the individual States. There were 5 such matters:-

- a. Interest rates
- b. Creation of “trust funds” which became the Consumer Credit Funds
- c. Licensing of credit providers
- d. The vesting of credit in tribunals or courts
- e. Other matters with the approval of a unanimous resolution of MCCA

The agreement is available at

[http://www.creditcode.gov.au/display.asp?file=/content/original\\_credit\\_code.htm](http://www.creditcode.gov.au/display.asp?file=/content/original_credit_code.htm).

Of all the matters where the States have a difference, the most notable, politically controversial, and simple is that of interest rate caps. At present, insofar as the matters regulated by the Bills under discussion, there are four different systems across Australia in relation to caps which need to be complied with by lenders who lend across State borders. Those systems are the following:-

### **NSW & Qld**

These two States have an “inclusive” interest rate cap in which all ascertainable fees are to be included in the calculation of the interest rate under a formula similar to, but not identical with the comparison rate formula.

### **Victoria**

Victoria has a “non-inclusive” dual cap system. The interest-rate cap does not include ascertainable fees and has a different cap for secured and unsecured loans.

### **ACT**

The ACT has an “inclusive” interest rate cap similar to NSW and Qld, but in addition has a broking fee cap.

### **Balance of Australia**

There is no interest rate cap or broking fee cap. Loans are purely regulated by the Consumer Credit Code and regulations associated therewith.

As we read the Bills, and particularly the comments from the Minister, it is intended to continue with the caps where they occur presently. On the 27<sup>th</sup> April 2009, immediately after the Bills were released for public exposure, we learned for the first time that the caps would remain. This was not the expectation of lenders as a result both of the public and private comments made before this date; and particularly the comments of the Minister..

At a joint press conference with ASIC Chairman, Tony D'Aloisio, on the afternoon of the 27<sup>th</sup> April 2009, in answer to a question, the Minister said the following:-

**QUESTION:**

*Will there be any limit on lenders, like payday lenders and the like, what - a cap in the interest rates that they can charge?*

**NICK SHERRY:**

*Yeah, payday lenders will be covered by this legislation. I think three States have a 48 per cent cap. That will be retained.*

*What we are doing is adding this new responsible lending principle for the first time. Those States that don't have a 48 per cent cap, we're going to ask them not to impose a 48 per cent cap, and then we will assess the outcomes; we'll look at what has happened in the States that have a 48 per cent cap and those that don't, with a responsible lending provision that has come into force, and we'll look at what the outcomes are and determine whether it is appropriate to maintain that 48 per cent cap.*

*It's a good example, I think, of a practical way to assess the evidence in an area where there was strong disagreement between the various people, organisations who were consulted. This was one of the - an important area, one of the relatively small areas where there was disagreement during the consultations.<sup>10</sup>*

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<sup>10</sup> Transcript of press conference found at <http://minscl.treasurer.gov.au/DisplayDocs.aspx?doc=transcripts/2009/021.htm&pageID=004&min=njs&Year=&DocType=2> accessed 28<sup>th</sup> April 2009

Further, there are a number of comments in the Commentary issued with the Bills (and in the Bills themselves) which make it clear that the retention of interest rate caps is a possibility; although interest rate caps are mentioned nowhere in the Exposure Draft Documents.<sup>11</sup> As we understand it, there has not yet been any decision by the States on the type of powers which will be transferred to the Commonwealth pursuant to section 51(xxxvii) of the Constitution. As a result, we are not able to comment fully on the proposals as we are not aware whether there will be any other areas where the States will “reserve” their powers to ensure that existing legislation continues in full force and effect beyond 1<sup>st</sup> November 2009.

The greatest concern held by the Federation in this respect is the possibility that there will be further State legislation which, if our reading of the Bills is correct, means that the States will have the ability to effectively declare that Commonwealth law will not apply to that State. DP15(3) appears to give the States the power to make a “displacement provision” or declare that an existing provision is a “displacement provision”. The effect of this is that the Commonwealth provision does not operate to the extent that there is an inconsistency.<sup>12</sup>

This is a significant change in position, not only from that expressed at the time of the announcement of the transfer to the Commonwealth was made, but from that expressed consistently by the Minister right up until the release of the Bills:-

*We will introduce a regulatory structure for the 21st century, one which includes simple, standard national regulation, replacing regulation in six States and two territories.*<sup>13</sup>

*The new single standard, national regulation of financial services is an essential modernisation - bringing our financial services sector, its supervision, into the 21st century. There's a new national licensing regime built around what will be known as an Australian credit license.*<sup>14</sup>

As recently as the 20<sup>th</sup> May 2009, the Minister was still of the opinion there would be one regime across Australia:-

*This will be a decisive moment. For the first time, Australia will have one, standard, national regime which applies equally to all credit consumers and all credit providers, right across the nation.*<sup>15</sup>

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<sup>11</sup> See for example Commentary para 1.41 and National Consumer Credit Protection Bill, section DP5(1) (“*The Commonwealth credit legislation is not intended to exclude or limit the concurrent operation of any law of a State or Territory.*”)

<sup>12</sup> National Consumer Credit Protection Bill, section DP15(5):-

*The Commonwealth provision does not operate in or in relation to the State or Territory to the extent necessary to ensure that no inconsistency arises between:*

*(a) the Commonwealth provision; and*

*(b) the displacement provision to the extent to which the displacement provision would, apart from this subsection, be inconsistent with the Commonwealth provision.*

<sup>13</sup> Press Release, Hon Nick Sherry issued 3<sup>rd</sup> July 2008, found at

<http://minscl.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/042.htm&pageID=003&min=njs&Year=2008&DocType=0> accessed 6<sup>th</sup> May 2009.

<sup>14</sup> Transcript of press conference held 27<sup>th</sup> April 2009 by Hon Nick Sherry, found at <http://minscl.treasurer.gov.au/DisplayDocs.aspx?doc=transcripts/2009/021.htm&pageID=004&min=njs&Year=&DocType=2> accessed 28<sup>th</sup> April 2009

<sup>15</sup> Transcript of a speech made by Hon Nick Sherry to the Association of Financial Advisers, Melbourne.

Available at

<http://minscl.treasurer.gov.au/DisplayDocs.aspx?doc=speeches/2009/015.htm&pageID=005&min=njs&Year=&DocType=>

From that point of view, the Federation is of the opinion that many of its members would be better off with the current system on the following basis:-

1. The Federation has members who operate in one State and others which operate in more than one State.
2. Those members who operate in one State at present need only comply with one set of regulations.
3. The introduction of the National Consumer Credit Protection Bill will mean that they will now need to comply with that legislation together with any State legislation. In NSW, Victoria and Queensland, this will, at the very least mean that the businesses will be subject to the State based interest rate caps, together with the added requirements of the Commonwealth's new regime intended to provide consumers with protections in lieu of the interest rate caps.
4. Members that operate in more than one State will now have to comply with an additional layer of regulation.

Given that in addition to these requirements, there may be more (depending on the attitude of the referring States) this hardly seems, with respect, to "protect consumers and cut red tape for business".<sup>16</sup> In fact, the opposite is true. There is more red tape, not less. The Commonwealth's requirements will come at a cost to the lenders, and those lenders were happy to comply on the basis that they knew that the additional costs may be able to be passed on to the consumer. However, with the retention of interest rate caps, particularly in NSW, ACT and Qld, this may not be able to be done.

Further, and this the worrying issue so far as the Federation is concerned, this is a significant change to the principle expressed in the AUCLA whereby there were only a few issues where the States retained the ability to make laws in relation to consumer credit. The effect of the clause at DP15 is to give the States virtually unlimited power.

We understand that this will be the subject of an inter-governmental agreement, and in the process of some discussions relating to this issue, we were referred to the 2002 inter-governmental agreement known as the Corporations Agreement 2002 where it was said a similar legislative sharing arrangement was in place.

A review of that agreement<sup>17</sup> however, does not support the argument that it is a similar sharing arrangement. The preamble to the agreement makes it clear that:-

1. Representatives of the States, the NT and the Commonwealth met on 28<sup>th</sup> and 29<sup>th</sup> June 1990. The agreement entered into at that time was subsequently endorsed by the relevant Governments
2. It was agreed that ASIC should be the sole administering authority for companies and securities regulation in Australia.

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<sup>16</sup> Press Release, Hon Nick Sherry issued 3<sup>rd</sup> October 2008, found at <http://minscl.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/064.htm&pageID=003&min=njs&Year=2008&DocType=0>, accessed 6<sup>th</sup> May 2009.

<sup>17</sup> Found at <http://www.treasury.gov.au/contentitem.asp?pageID=035&ContentID=495> accessed 12<sup>th</sup> May 2009

3. The Parliaments of the States, the NT and the Commonwealth subsequently passed legislation putting that agreement into place.
4. A further, supplementary agreement was entered into in 1997.
5. The High Court subsequently cast doubt on the way the referral of power pursuant to section 51 (xxxvii).

As a result, the purpose of the Corporations Agreement seems to be to regularise a system which had been in place since 1990, but on which some doubt was cast prior to the 2002 agreement. It was not an agreement put in place when a fresh referral was made. The parties to the agreement had the benefit of the operation of the system for a decade before the agreement was entered into.

Whilst it is fair to say that there is a clause similar to Division 3 of Chapter 1 (that is sections DP5 to DP20)<sup>18</sup>, the operation of those clauses is quite different in operation to the current arrangement. It is conceded that the terms of the referral by the States and the terms of any inter-governmental agreement have not yet been seen.

Clause 512 (1) of the 2002 Agreement provides:-

*The national law will provide that it does not exclude the operation of State and Territory legislation (whether enacted before or after the commencement of the national law) that is capable of operating concurrently with it.*

Clause 513(1) provides, in respect of continuing laws:-

*Subject to this clause, the national law will provide for the continued operation of State and Territory legislation that is in force immediately before the commencement of the national law that:*  
*(a) would otherwise be inconsistent with the national law;...*

In this regard, however, it must be remembered that the system had been in operation for a decade and there were very few, if any, inconsistent State laws.

However, the process by which a State enacts a law after the commencement of the agreement is dealt with in clause 514 of the agreement. That provision seems to provide that a law commencing after the commencement of the agreement (that is passed before, but not commencing until after), if noted as a displacing law, will be valid. Any "proposal" for a State law which is inconsistent, on the other hand, must first be approved by the Ministerial Council. At present there is no such restriction on State credit laws, which are no longer, it seems limited to the matters referred to in the 1993 agreement.<sup>19</sup>

We realise that this is not the time or the place to go into the arguments about the benefits or otherwise of interest rate caps. Nevertheless, a discussion of it at this time will assist in seeing just how important this matter is in the overall scheme of the new Commonwealth legislation is.

The National Australia Bank set up a "Small Loans Pilot". Its aims are set out on the NAB website:-

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<sup>18</sup> Clauses 512, 513 and 514 of the Agreement.

<sup>19</sup> See note 10 above

*The NAB Small Loans Pilot is not a commercial venture for NAB, but an extension of our microfinance programs and NAB's commitment to helping Australians access fair and affordable banking services. Our aim is to demonstrate the costs of offering short-term, small loans in the fringe credit market and **to draw attention to the high interest rates and charges prevalent in that market...***

*The NAB Small Loans Pilot aims to demonstrate the actual costs of offering loans in the fringe credit market to people who do not traditionally borrow from mainstream lenders...*

*Under the pilot, Mobile Finance will offer small personal loans of between \$1,000 and \$5,000 on a **break even** basis for loan terms of one year. **A nominal annual interest rate of 28.25% p.a.** will apply to these loans.<sup>20</sup> (Emphasis added)*

The NAB issues quarterly reports on the pilot, and so far three have been issued, the most recent for the period December 2008 to February 2009.<sup>21</sup> Some significant figures from the report are as follows:-

1. In the nine months covered by the reports, a total of 3252 applications were made of which 248 (8%) were approved<sup>22</sup>. One would therefore assume that the "quality" of the loans would be high. Notwithstanding this, the dishonour rate of payments was 12.3%. This is significantly above the figure experienced by most of the Federation's members.
2. The cost of "administering" the loans was \$299 per loan and total cost per loan (in the current quarter) was \$624.35.<sup>23</sup>
3. While some numbers quoted are a little confusing due to a discussion as to the expected size of loans against actual size of loans, it appears that the "(b)reakeven rate (is) close to 46% because cost per loan is higher than expected".<sup>24</sup>

Therefore, if the cost of administering the loan was the only thing added to the principle to be repaid by the customer (that is no interest charge or fees whatsoever and recovery of "administration" costs alone), under the method of calculation of the annual percentage rate in NSW, ACT and Queensland used to calculate the inclusive interest rate cap, the interest rate on a \$1,000 loan over 52 weeks with equal weekly repayments would be 54.14%. This is of course above the cap set of 48%. That is, simply recovering the "administrative" costs of the loan, with no interest component or fees, the interest rate as imposed by the legislation is above the cap.

It follows then, that even in a pilot which "is not a commercial venture", will necessarily operate at a loss.

If the total cost of the loan (which we assume included the cost of funds and other non-administrative costs – rent, bad debt, advertising etc) was the only thing added to the principle to be repaid by the customer (again no interest component), the interest rate in NSW, ACT and Queensland would be 105.37% well over twice the

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<sup>20</sup> Found at [http://www.nab.com.au/wps/wcm/connect/nab/nab/home/about\\_us/4/3/6](http://www.nab.com.au/wps/wcm/connect/nab/nab/home/about_us/4/3/6), accessed 1<sup>st</sup> May 2009.

<sup>21</sup> A link to this Quarterly Report can be found at [http://www.nab.com.au/wps/wcm/connect/nab/nab/home/about\\_us/4/3/6](http://www.nab.com.au/wps/wcm/connect/nab/nab/home/about_us/4/3/6).

<sup>22</sup> Quarterly Report, Feb 09, page 8.

<sup>23</sup> Quarterly Report, Feb 09, page 11.

<sup>24</sup> Quarterly Report, Feb 09, page 1.

cap rate. In neither case has any actual interest been charged – it seeks only to recover costs. This supports the long held opinion of lenders in the area that short term small amount loans are unviable under an inclusive cap.

Added to this, now, are the new Commonwealth requirements (including licensing, compulsory external dispute resolution, additional disclosure, compliance, training, education, management and monitoring of employees and representatives and their activities and professional indemnity insurance); it will make lending simply unattainable. Credit will be more expensive if it is to be continued.

The Federation asks whether this is a time to restrict credit in this way.

There is another, related, matter which the Federation wishes to address. It seems that there is a possibility of a clash of policy objectives here. The proposed Trade Practices Amendment (Australian Consumer Law) Bill 2009: Unfair and prohibited contract terms legislation does not allow customers to challenge the payment of interest under a credit contract or to challenge the interest rate or variations of interest rates, on the basis that are unfair as the interest rate is part of the upfront price<sup>25</sup> (providing the transparency test is met). It seems to be the policy here that the consumer is able to make a decision that a price (that is the interest rate) is something which will be a determinant as to whether the contract is entered.<sup>26</sup> In this legislation, that does not seem to be that same policy objective.

## **NATIONAL CONSUMER CREDIT PROTECTION BILL 2009**

The Federation has the following comments about the Bill and associated documents:-

**Credit Guides.** The legislation introduces the notion of credit guides. The Federation has some reservations about this. Those concerns are the following:-

### Too much disclosure doesn't help.

The trend of modern consumer law both here in Australia and around the world is away from comprehensive disclosure and towards disclosure which is streamlined, targeted and based on empirical research. Indeed, Consumer Affairs Victoria, in its June 2007 submission to the Productivity Commission Inquiry into Australia's Consumer Policy Framework said consumer contract disclosure must be:

- targeted in terms of content and timing
- empirically based
- as simple as possible
- highly effective.<sup>27</sup>

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<sup>25</sup> The Australian Consumer Law Consultation on draft provisions on unfair contract terms page 14.

<sup>26</sup> The Australian Consumer Law Consultation on draft provisions on unfair contract terms page 15.

<sup>27</sup> Consumer Affairs Victoria, Submission to Productivity Commission Inquiry into Australia's Consumer Policy Framework, June 2007 pp 128-9

It is difficult to understand how Credit Guides will make pre-contractual disclosure in consumer credit “as simple as possible.” Further, there is no empirically based evidence to support the imposition of yet another layer of disclosure on industry and, for that matter, on consumers. As Consumer Affairs Victoria said in this same submission:

*“There is a considerable amount of research which demonstrates that, even when understandable information is available, consumers often ignore or misuse that information.”<sup>28</sup>*

Prof Justin Malbon of Monash University has said: “The evidence shows that deluging consumers with enormous volumes of pre-contractual disclosure is a waste of everyone’s time.”<sup>29</sup> Adding yet another document to the already voluminous disclosure requirements of the Code will exacerbate this problem for little or no consumer benefit.

Credit Guide Policy should be based on evidence and left to Phase II

Prof. Malbon’s statement is based, partly, on research he conducted for the Ministerial Council for Consumer Affairs. The Post-Implementation Review of the Code which was conducted in 1999, three years after the effective date of the operation of the Code, commissioned Prof Malbon, then, of Griffith University to conduct empirical research into how consumers used the existing disclosure regime of the Code and how they wanted it improved. Significant resources were committed to this research and its reporting document, entitled “Taking Credit” was cited extensively in the 2000 National Competition Policy Review of the Code.<sup>30</sup> Most of these citations were in connection with a discussion of the effectiveness of the disclosure regime in the Code. The NCP review recommended the adoption of Recommendation 1.1 of the Post-Implementation Review which was:

*“Amend Regulation 13 to provide a simplified ‘Schumer Box’ format containing essential financial information. Other essential information would be provided outside the ‘box’ and would prominently indicate that other important information was contained in the contract document.”<sup>31</sup>*

In response to submissions calling for empirical testing of any new disclosure format, in February 2007, the Western Australian Department of Consumer and Employment Protection acting on behalf of UCCMC and MCCA, issued a tender for “Consultancy Services for the Simplification of Disclosure Regulation-Consumer Credit Code.” This tender made specific reference to the Submissions in response to the Consultation Package saying:

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<sup>28</sup> *ibid* p 23

<sup>29</sup> Malbon, J “Predatory Lending” (2005) 33 *ABLR* 224 at p 236

<sup>30</sup> Malbon J, *Taking Credit, Report for the Consumer Credit Code Post-Implementation Review*, (Tasmania, Department of Justice and Industrial Relations, September 1999), <http://www.creditcode.gov.au> which was the basis for Malbon J, “Shopping for Credit: Empirical Study of Consumer Decision-making” (2001) 29(1) *Australian Business Law Review* 44. The NCP Report itself is KPMG Consulting *NCP Review of the Consumer Credit Code Final Report* December 2000 <http://www.creditcode.gov.au/content/downloads/final.pdf> and it cites Malbon 19 times.

<sup>31</sup> NCP Report p 104

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*“The key message arising out of consultation was that any changes to existing disclosure should be based on consumer testing and analysis and consideration of current research in relation to consumer behaviour and patterns of comprehension.”<sup>32</sup>*

This research is not complete. It is likely, the Federation understands, to be ready in time so as to input into Phase II of the Australian Government takeover of responsibility for the regulation of consumer credit. Indeed, as the primary focus of Phase I is regulatory and licensing matters, the introduction of new disclosure requirements is out of time and out of place.

The appropriate course would be to delay the introduction of the proposed Credit Guides to Phase II of the takeover process when:

- government commissioned research on pre-contractual disclosure is complete; and
- stakeholders, both industry and consumer groups, have had a proper opportunity to consider and comment on its implications.

### Practical Problems with Credit Guides

The “fees and charges” which are to “flagged” (according to the Commentary p 86) in the Guide for a credit provider are rarely going to be standard across individual consumers or even products. Credit is not sold that way. A substantial part of the price paid for credit is not related to a “fee for service.” It is about risk and the cost of funds in a particular market.

This is an example of the attempt to impose the *Corporations Act* model for investment and financial planning and advising on consumer credit which is a very different kind of financial service.

Financial Services Guides, as required under the *Corporations Act*, in the financial advising, broking, insurance and investment markets are usually mass produced by licence holders and updated on a periodic basis. This would be impossible for credit provider who, if they were to disclose honestly the cost of credit in their guides (thereby duplicating the mandated pre-contractual disclosure already required by the Code) would have to produce individual Credit Guides for each customer. More trees will die. Consumers will be no better informed.

### The Code already has pre-contractual disclosure

This issue is touched on later in the submission. If, as stated in the Commentary:

*The purpose of the credit guide is to provide the consumer with key information early in the credit transaction, so that they are informed of relevant matters before deciding to enter a credit contract with the particular credit provider<sup>33</sup> (p86)*

then, this purpose is fulfilled by the pre-contractual disclosure required by section 14 of the Code.

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<sup>32</sup> WA Dept of Consumer and Employment Protection , *Request for Consultancy Services for the Simplification of Disclosure Regulation-Consumer Credit Code*, February 2007, p 27

<sup>33</sup> Commentary, paragraph 3.76

Indeed, the requirements of R230 (a) is already a requirement of sections 14 and 15 of the Code. Indeed, these sections also stipulate, with precise detail rather than “flagging” as is suggested by the commentary, the likely fees and charges which the consumer will incur if they enter the transaction.

There is no objection in principal with consumers being provided in advance with the information prescribed by R230(b),(c) and (d) but surely the appropriate, legislative, regulatory and best practical vehicle for such disclosure is the existing financial table prescribed by section 14.

As to the requirements of R230(e) and (f), these would seem to be such standardized documents for all credit providers as to be the subject of an Information Statement similar to that already required in section 14(1)(b) of the Code.

If the result of the research discussed above is a simplified “Schumer Box” to replace the existing financial table required by section 14, then the new R230 requirements could be worked into that format.

This would be sensible policy based on evidence which leads to disclosure which is simple, effective and timely for consumers. Credit Guides, as proposed in the Bill, are not.

**DEF5**                    Credit Activity: The table depicting what is a credit activity states in various places that credit activity includes “performs the obligations” and “exercises the rights” in respect of the various aspects caught under the Bill. The examples given at pages 9 and 10 of the commentary go some way to indicating what activities are to be caught by these phrases, although the Bill itself does not go into the same amount of detail.

However, if an entity makes a determination that they do not need to be licensed, and are wrong about that, then they can be liable to significant civil penalties and be exposed to severe criminal penalties, including imprisonment.

It is the view of the Federation that where there are such significant penalties, the definition needs to be precise, so that there can be no question where there is a need for a licence. The use of the words “performs the obligations” without defining those obligations and “exercises the rights” again without definition is in the view of the Federation unsatisfactory. Whilst not strictly relevant here, there is an attempt to make exceptions to the general rule so far as licensing is concerned. *inter alia*, in the Licensing Regulations 6.2(5), but as will be discussed later, this does not cover the field and some of those not intended to be caught by the regulations will in fact be required to be licensed. Payment bureaus and some transactions statement processors are, in the Federation’s opinion, still required to hold a licence when clearly the intent of the regulation is to exempt such bodies.

From all evidence presented to date, the procedure to become licensed will neither be a frivolous, inexpensive or a quick matter. Interested parties will shortly need to make an involved decision of whether or not they need to become licensed. The repercussions of getting that wrong (by deciding to apply when it is not needed, or by deciding that they do not require a licence when they do) will severely affect their business’ viability and themselves personally.

We understand that the penalties proposed are significant for a particular reason. Accordingly, DEF 5 must be sufficiently precise to all but eradicate the chance of a person making an incorrect decision about the need to obtain a licence.

It is clear from feedback from members of the Federation, that there will be a number of them leaving the industry. A number left the industry when interest rate caps were introduced in NSW and Queensland and these changes will simply be the final straw for a number of others. They will therefore need to arrange their affairs to wind down their businesses. They accept that they must be either fully compliant, or they must leave the industry.

It is clear that the act of collecting monies owing on existing loans falls under the definition, and therefore requires a licence. The Federation notes that there doesn't seem to be any provision made for existing industry participants who wish to exit the industry but are not able to collect and finalise their loan books before the date by which licensing is required. Loan terms may run into multiple years even if they do not run into default. If they are leaving the industry, it is the Federation's view that it is unfair to expect them to go to the time and financial burden of becoming a licensed operator simply to collect what is owed to them. The only available options that they will otherwise have are to cease collection and write the loans off, or to find a licensed party who is willing to purchase the loan book from them. Neither of these options is generally financially advantageous particularly from a tax point of view. It is, of course, illegal for a lender to call in the loan ahead of schedule without the loan being in default. This is another layer of red tape being thrust on lenders, and as a result, ultimately on borrowers in terms of the cost implications.

The Federation strongly suggests that consideration be given to providing some sort of "run out" licensing where a credit provider simply seeks to wind down a business.

**DEF7 - Credit Assistance:** The Federation has some concerns about the definition of credit assistance. There is no doubt that as a result of these amendments there will be changes in the market. Those traditionally involved in one aspect of the lending process will find themselves doing other jobs.

The definition appears to be aiming at catching everyone who either "suggests" or "assists" anyone to apply for credit "under a particular credit contract". In the Federation's opinion, there are some who maybe will not be caught and who should be, and others who are caught, who clearly it is not intended to be. The Federation has concerns that the definition will prevent some activity not intended to be prevented. For example there are some circumstances where, quite reasonably, it will be the belief of some credit providers that no "assistance" can be given to a consumer until at least a preliminary assessment can take place. In that regard there will need to be some information collected (usually, one would have thought, in an application form). However there is a reasonable expectation that the act of providing even a blank application form is giving assistance.

It appears to the Federation that everyone will need to rethink the use of technology – particularly allowing people to apply for loans online.

Traditional brokers fall squarely in the definition in DEF5. There are a number of other instances, however, where the traditional broker's job can be done by a range

of other people. It is also possible for a broker, for example, who is accredited with, say, 5 lenders, to simply submit the same application to all 5 lenders with no recommendation as to the particular product of any of the lenders – simply a “test the waters” type process. In such a case it may be that the broker is not suggesting “that the consumer apply for a provision of credit under a particular credit contract with a particular credit provider” as referred to in DEF7, unless the definition is read to mean that the broker is suggesting that the services are being supplied in respect of all 5 applications

Further, there are possible scenarios, including that referred to above in relation to the application form, where there may be “assistance” provided in the strict sense of the word to apply for “credit under a particular credit contract with a particular credit provider”, where it is not the intention to be caught under the section. To take some extreme examples, where a non English-speaking person engages an assistant to assist in the application process where the applicant has already decided on the product required would under the current definition be caught. Likewise, a person who assists (for a fee or otherwise) to get an applicant’s documents in order to submit with an application already made by others – maybe a professional secretarial service company would, arguably, fall within the definition. Clearly these are not intended to be caught.

The Federation strongly suggests that the legislation be amended to ensure only those intended to be caught actually are caught.

**DEF8 - Intermediary:** This definition is very wide, and may inadvertently catch parties that may not have been considered. The width of the definition is supported in the commentary.

*The definition is intended to regulate every person who may be an intermediary between the consumer and the credit provider. Innovations in credit product design and delivery now mean that a consumer may pass through a number of hands between the first person they deal with and the lender, and may be uncertain as to the roles or functions of all these different parties.<sup>34</sup>*

Because an intermediary must be licensed or risk civil and criminal penalties (as above); once again this is a provision that requires greater certainty. As an example of this, accountants often provide advice to their clients that relate down to the activities described in DEF8. Is it intended that all accountants must become licensed under the new regime, or suspend provisions of these services to their clients? It is accepted that there is a Tax Agent exemption in Regulation 6.2(4), but is it safe to assume that all accountants are tax agents and that all their duties may fall under the exemption? Again the Federation strongly suggests review to ensure coverage is only that which is intended.

**LIC155 - Matters ASIC must consider:** Whilst the provision at LIC155(g)(ii) only sets out one of the matters to be considered in determining whether there should be a licence granted, in this case criminal convictions, there is no guidance either in the Bill or the explanatory memorandum as to what types of criminal convictions would lead to a refusal. It is suggested that this guidance would be helpful, both from the point of view of the applicant and ASIC, to limit the number of applications where success would not be guaranteed.

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<sup>34</sup> Commentary para 1.29

It is further noted that the fact of a criminal conviction is a matter to be considered in relation to a “single natural person”<sup>35</sup>, there appears to be no such specific requirement in the case of the directors of a corporation or the partners in a partnership. They are simply required to be a “fit and proper person”.<sup>36</sup>

**LIC165 - Licence conditions:** LIC165(6) states that ASIC must “ensure that the licence is subject to a condition that specifies the credit activities or classes of credit activities that the licensee is authorised to engage in”. There is no indication in any of the documents released which comment on classes of licenses. The Federation is of the opinion that if the intention is that there will be classes of licenses, as appears from this section (and others<sup>37</sup>), it is necessary to set out the classes somewhere. That does not seem to be the case at the moment. Further, what happens where a person is required to be licensed but does not fall into one of the set classes? Further disclosure is required here before sufficient comment can be made.

Likewise, whilst the Federation is of the opinion that there is a necessity to allow ASIC to impose conditions on a licence, there is no indication as to what these conditions may relate, and no restriction on the types of conditions allowed.

**LIC170 - General Licensing Obligations**

The Federation has some concerns about some of the matters in this section (and the mirrored provision in TL70). Generally the use of some words like “competence” in LIC170(1)(f), “adequately trained” and “competence” in LIC170(1)(g) and “adequate arrangements and systems” in LIC170(1)(k) are a concern where there is no guidance anywhere as to what standards are expected.

Further, as has been expressed before, it must be remembered that this legislation will apply equally to a major public corporation with 25,000 staff members as it will to a single person operation working out of the front room of their house. As a result, the Federation would expect that there will be some concession made to the small operators in terms of the requirements; the need, for example that there are “written” compliance plans, and the requirements, mentioned later on as to audit reports. There does not appear to be any recognition of the different types of businesses in the documents. Further comments in relation to scalability are made in the comments relating to LIC180 below.

The Federation seeks to make more particular mention of the following parts of LIC170.

**LIC170(1)(b) - Conflicts of Interest:** The Federation has considerable concerns about the provisions in LIC170(1)(b) (and the mirrored clause TL70(1)(f)) where it is a requirement that the licensee must “have in place adequate arrangements to ensure that clients of the licensee are not disadvantaged by any conflict of interest that may arise...”.

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<sup>35</sup> LIC155(g)

<sup>36</sup> LIC155(h)

<sup>37</sup> Other sections which refer to classes are LIC180(2)(b), LIC185(1), TL60(6) and TL80(1). It is also reasonable to assume that classes of licences are envisaged in sections such as LIC170(1)(f) and LIC175(1)(l)(i). There are other sections referring to “class of credit activity” but are not considered here.

There is a fundamental issue here in that every contract for the provision of credit involves a conflict of the interests of the client and the credit provider. The conflict is that after the loan is advanced, the interests of the lender and the borrower are significantly different. Every request for payment is a demonstration of a clash in the interests and in every case it could be argued that the client is being disadvantaged by the enforcement of the entitlement of the credit provider under the contract. In fact, it is arguable that simply by entering into a credit contract puts the client at a disadvantage – there is an immediate obligation to repay.

The commentary, paragraph 2.95 (and similarly at 2.167) says:-

*This obligation refers only to conflicts of interests that arise by operation of law, and does not create a conflict of interest that would not otherwise exist.*

Whilst that is somewhat relieving, our understanding is that there is no recourse to the explanatory memorandum except in cases where there is some uncertainty in the meaning of the words in the Act. With respect, we believe that there is no uncertainty in the Bill and as a result there would be no recourse to the memorandum.

In any event the memorandum gives examples at both paragraphs 2.95 and 2.167 of examples where there is and is not a conflict (examples 2.1 to 2.4). However there is no explanation as to what action needed to be taken, and how the credit/provider made the appropriate arrangements. Such guidance would have been helpful.

LIC170(h) - IDR: It is a requirement that each licensee have an IDR procedure. It is also a requirement that each licensee be a member of an EDR scheme. It is the requirement of the EDR schemes that every member must have an IDR process.<sup>38</sup>

The COSL Constitution, for example provides at clause 29:-

29. INTERNAL DISPUTE RESOLUTION

29.1 Every Member must at all times maintain Internal Dispute Resolution ("IDR") Procedures that comply with:

...

(e) relevant Australian Standards and ASIC policies.

As a result, the Federation wonders whether the requirement to have an IDR scheme as set out in LIC170 is otiose as the requirement to have one is obligated elsewhere.

In addition, where the licensee is simply a one-person operation, then this, practically, will be of no use either to the consumer of the licensee.

**LIC175** - Compensation requirements: Whilst it was agreed in the early stages of the consultation with industry that there would be no compensation requirements for a credit provider, this seems to have been forgotten in the Bill.

There has been much discussion in relation to this issue. The default requirement seems to be that every licensee is required to have PI insurance.<sup>39</sup> The Federation

<sup>38</sup> For example, in the COSL scheme, both in its Constitution and Rules require the member to have such a process. See <http://www.creditombudsman.com.au/4531,01,1-0-IDR+Procedures.php>

<sup>39</sup> As specified in regulation 2.5(1) of the *National Consumer Credit Protection Regulations*.

has approached, through a broker, a number of insurance providers and we are unaware of any insurance company which offers this type of cover. The difficulty appears to be that the insurers are having difficulty seeing what it is which is intended to be covered.

LIC175(1) requires the cover to be “for compensating persons for loss or damage suffered because of a contravention of an obligation under this Act by the licensee or its representatives.” We have been unable to show, and the Insurers apparently have been unable to find, a case where there would be a loss suffered by a “person” as a result of a contravention of the legislation. The insurers apparently agree that in the case of lending, the only risk which can be covered is the loss to the credit provider, in a case where the licensee is a lender and a lender alone. This loss is covered by the lenders usual business policy.

Therefore, if there is no insurance which can be taken which satisfies regulation 2.5(1), then why have it? Perhaps reverting to the original agreed position of there being no compensation arrangements for lenders would be the appropriate way to go or for there to be a blanket approval by ASIC of lenders’ arrangements without insurance.

It is significant, the Federation believes, that the bill was drawn with the expectation that there would be some occasions where insurance would not be available. In particular, attention is drawn to REM160 where there is a process put into place in circumstances where resources of the licensee are insufficient to cover both a civil penalty and damage suffered.

If there is an insistence on the provision, and if it is possible to find an insurer willing to enter into the market, then the necessity of such a proposal needs to be considered. The information we have is that it is likely, because of the fact that the insurance will be a new one, that there will be a significant deductible applied. The figure mentioned was \$5,000. Therefore even after the premium is paid, the credit provider will be required to pay the first \$5,000 of the claim made by the “person”. In the circumstances referred to below, this is simply a case of self insurance as we can envisage no circumstance where in the ordinary course of events, the damage suffered by the “person” would be anything like \$5,000.

We refer to “person” because the Bill does not make it clear who it is intended to be covered by the insurance. It simply refers to “persons” who suffer loss or damage because of the contravention. It is difficult to see whether there could be anyone else, but the Federation has concerns about whether this is intended to apply to persons other than the parties to the loan agreement.

The Federation is of the opinion that this type of arrangement is more than suitable for other licence holders other than credit providers. In particular, those providing credit assistance services, or the more traditional banking deposit-taking or insurance services, are to the fore of the Federation’s thinking here. However, there are specific exclusions for some of these, being any APRA regulated body.<sup>40</sup>

Historically the risk in the provision of credit has been with the credit provider. The ultimate remedy is that the credit provider loses the ability to obtain recovery of the

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<sup>40</sup> Regulation 2.5(3) of the *National Consumer Credit Protection Regulations*

amount lent, or loses interest of fees. Notwithstanding the existence of the compensation orders under REM120, the Federation is still of the opinion that any damage suffered will not be able to be covered by insurance in any case.

**LIC180 - Provision of Statement to ASIC:** The Federation finds this clause a difficult one to deal with. With a few exceptions, the membership of the Federation is made up of small family run stand-alone credit providers. Generally they have one or two employees, and a modest turnover. They are run by private companies, exempt from any audit requirements.

The requirement to provide an audited Statement if requested by ASIC will mean that a number of these lenders will be unable to continue in the industry, as the financial obligation that imposes will be too great. Added to this is the ability of ASIC to nominate the person to provide the audit report.<sup>41</sup> One would expect that such nomination would not be your local accountant. Whilst one would expect the intention of that was to specify a range of people who could undertake the audit (for example “a registered company auditor”), the Federation is of the opinion that it could nominate a particular person. This had obvious costs implications.

There are other clauses in the regulatory regime where there is the notion of “scalability” in relation to a legislative requirement. One such example is the breach reporting requirement.<sup>42</sup> There it is a requirement to report a breach only where, in effect, the breach, having regard to a number of preconditions, is considered significant enough.<sup>43</sup> It is the view of the Federation that the same idea could be applied here, and the requirement to provide the Statement could be scaled according to the size of the business.

The Federation is of the view that there are many clauses in the legislation which could be treated the same way. For example, the legislation, in the view of the Federation, is drawn with a view to it applying to a large corporation. There are many members of the Federation who are simply one person operations. As such it is difficult to see how some of the provisions applying to IDR<sup>44</sup>, compliance plans<sup>45</sup> and the like, could work with a one-person operation

**LIC186 - Obligation to notify ASIC:** These comments are made in respect of LIC186 and the related section TL85.

The requirements under LIC186 (3) are subjective as to when a licensee should be giving a report to ASIC, but the penalties given under LIC186 (1) and (2) are significant. It is the opinion of the Federation that this will likely lead to a situation where licensees will be overcautious and begin reporting matters to ASIC that are not intended to be reported. There have been comments made during the consultations that this is used by ASIC to determine whether licensees under AFSL have compliance monitoring, there were other comments made by representatives of current AFSL holders that the practice is to report anything.

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<sup>41</sup> LIC180(3)

<sup>42</sup> Contained in LIC186

<sup>43</sup> LIC186(3)(b)

<sup>44</sup> LIC170(1)(h), *National Consumer Credit Protection Regulations 2009* Regulation 2.3(1).

<sup>45</sup> LIC170(1)(k)

There is assistance given to licensees in LIC186(3)(b) in order that the licensee may make a decision whether the matter is one needing to be reported. Because of the serious consequences of failing to report, and given the apparent current practice of AFSL holders, the advice of the Federation to its members will be to report in every case, no matter what the breach. While ASIC may consider that this is an advantageous situation, it will place further cost on licensees as collating and reporting will be a time consuming matter.

Further, LIC186(4) states that a licensee is only likely to contravene an obligation where they are no longer able to comply with the obligation. The Federation therefore suggests that for the sake of clarity, LIC186(1) be amended to read:-

*If a licensee becomes aware of a failure to comply with an obligation, or if the licensee is no longer able to comply with an obligation, mentioned in subsection (3), the licensee must give ASIC a written report on the matter as soon as practicable, and in any case within 10 business days after becoming aware of the matter.*

If that was done obviously after some attention from Parliamentary Counsel, there would be no need for LIC186(4), and no possibility of a conflict in interpretation between “contravention”<sup>46</sup> and “comply with the obligation”.<sup>47</sup>

**LIC195 - Requirement to cite licence number.** The Federation is concerned about the form of this section, and the associated regulation 2.6 of the *National Consumer Credit Protection Regulations*. The Federation has no objection to citing the licence number in general, however the regulations make compliance difficult and extremely expensive.

The Federation notes that LIC195 makes it a requirement to cite the licence number on certain “documents” of a kind prescribed by the regulations from a time which is 2 years from the commencement date. Regulation 2.6 makes it mandatory that the licence be quoted on, inter alia, “advertisements”. One would assume, therefore, that the requirement to quote the number applies only to advertisements that are in the form of a “document”, thus aural broadcasts would be exempt.

It is noted that the section is adapted from section 912F of the Corporations Act and the documents in which it is required to quote the AFSL number as set out in regulation 7.6.01C of the Corporations Regulations which do not require the AFSL number to be published on advertisements. If section 912F of the Corporations Law does not require the licence number on advertisements, what is the benefit of making credit licence holders advertise?

Some of the Federation’s members are members of groups, and there are other groups who would need to be licensed (such as Aussie Home Loans, City Finance, Cash Converters, Mortgage Choice, Bank of Queensland etc). A requirement to publish the licence number on advertisements would be almost unworkable.

Take for example City Finance which has about 145 separate franchises, owned by dozens of unique franchisees. Each will have its own licence number.

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<sup>46</sup> LIC186(1)

<sup>47</sup> LIC186(4)

A requirement that the licence number be quoted on all advertisements would vastly increase the space required and therefore the cost. The vast majority of City Finance's advertising is done centrally, that is advertisements are prepared on behalf of a number of franchisees, sometimes on behalf of all franchisees. It is estimated that to state the company name of each franchisee, the ACN and licence number of 50 different companies (without the individual trading names or proper formatting) would take up about half of an A4 page at 10 point Arial print. That is simply unrealistic. It would also require, one would assume, additional screens of information on electronic advertising, and one side of a paper advertisement dedicated to licence numbers.

It should also be considered what the intent of the law is. We can assume that it is to ensure that the borrower induced by the advertisement can be assured that the advertiser is a licensee. The Federation submits that the requirement to deliver the credit guide as mandated in R130 and R230 would give adequate notice to the borrower.<sup>48</sup> Further, we understand that it is intended to allow the public free access to lists of licensees in a similar way to AFSL holders can be searched.<sup>49</sup>

It is the opinion of the Federation that there is no benefit to be obtained from this requirement, and on the other hand, there is a significant detriment.

**LIC250(4)(d) and (e) - Authorisation of credit agents:** The Federation has some concerns in relation to the effect of these clauses. It should be noted that the licensee may not have the authority or the ability (by virtue of the information not being in the public domain, privacy or other considerations) to know whether the agent is banned or has relevant criminal history. In such an event, if the licensee authorises the agent, the effect of subsection (3) is that there is in fact no authorisation. Where does that leave the borrower and the licensee?

The Federation believes that it would be appropriate to provide that the authorisation is deemed to be valid only for certain purposes. This comment is made in the knowledge of, and notwithstanding the effect of LIC280.

**LIC290 - Responsibility for representatives:** This clause makes the licensee responsible for the actions of the representative even in cases where the representative is clearly acting outside the authority given. However, it is said to apply only in cases where the representative is the representative of only one licensee. The clause clearly will discourage licensees from employing exclusive representatives. The Federation asks whether this is a desired result, and further asks why such a principle would not apply generally.

**LIC315 - Banning orders:** The Federation is of the opinion that there is a necessity for ASIC to have a banning power. However, it has concerns about the way this section is drafted. Whilst it is acknowledged that in every case the licensee will have the opportunity to be heard<sup>50</sup>, the section is very wide. It gives ASIC the power to make a banning order in circumstances where a licensee has breached any credit legislation, is "likely to breach any credit legislation" or been involved in a breach by another person.

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<sup>48</sup> By R130(2)(b) and R230(2)(b) it is a requirement that the credit guide contain the licence number.

<sup>49</sup> See <http://www.search.asic.gov.au/fsr/flb.html>

<sup>50</sup> See section LIC315(3)

There appears to be no definition of the determinant matters – for example the standard of proof required or whether there needs to be a conviction before the “has breached” part can be used. There is not, particularly, the type of amelioration of the effect of the clause as is contained in, inter alia, LIC190 (4):-

*For the purposes of subsection (3), a licensee is likely to contravene an obligation referred to in that subsection if, and only if, the person is no longer able to comply with the obligation.*

The Federation suggests that this would be appropriate.

**R130 -** Credit guide of credit assistants: The Federation has concerns about a requirement that information of a particular type (commissions) be given in a particular form (dollar value) when quite often they cannot be expressed in such a form as is required by R130(2)(e). As has been stated in various places, often commissions are on a sliding scale based on total deals in a month, or may be paid in ways other than cash – trips for example. It may simply not be possible to State commissions in dollar amounts. Perhaps a maximum and minimum commission for various products would be more appropriate.

**R135 -** Quotes for providing credit assistance: The Federation believes that the section should be amended to make it clear that the quote relates to a specific scope of work, so that if the scope of the work increases, the quote is no longer binding.

**R180 -** Fees, commissions relating to credit contracts: The Federation has concerns about the width of the information contained in R180(2), and in particular (d). Here it is a requirement that any fee paid to a third party needs to be disclosed. The Federation believes that many of these items will simply be unknown, for example possibly solicitors fees, accountants fees and the like.

**R192 -** Suggestions to remain in unsuitable credit contract: As had been raised by others, the Federation is concerned at the effect of this section. It may be that there is no better product available for a client. This will mean that the licensee might have to provide no advice, a situation which may not be the best result for the client. The obvious action to be taken by the licensee will be to decline to provide the client with any advice, leaving the client possibly in at least as bad a position as they were in, with no idea what to do.

**R230 -** Credit guide of credit providers: The Federation has several concerns with the part of the Bill dealing with the credit guide of credit providers. General statements in relation to the concept of the guides are made above. The concerns addressed here relate primarily to the content and timing of the guide, but each issue will be dealt with separately.

**R230(1) -** Timing of the delivery: The Federation has some concerns about the requirement that the credit guide be provided after “it becomes apparent” ... “that it is likely” that there will be a credit contract. The way a number of lenders have arranged their documents is that the document signed by the client is an offer submitted to the credit provider.

Therefore, it is not until the receipt of the offer that it becomes “likely” that there will be a contract. It would seem that the time R230(1) requires the delivery is at the time the offer is made to the credit provider by the borrower, as up until that time, the matter has really progressed as simply a negotiation. The Federation believes that this is too late if the apparent aims of the section are to be achieved.

This issue could be overcome, in the opinion of the Federation if the additional and new information required by Division 2 form part of the Statement required to be delivered pursuant to NCC section 14 (the so called precontractual Statement). That submission is made for several reasons:-

1. If it were to be a requirement that the credit guide not be a part of the section 14 Statement, it would mean that the borrower would be given yet another document prior to entering into the contract. As has been pointed out by a number of people a number of times, there is a danger that people will choose not to read information if the information is copious. “Less is more” should be the principle applied. All the evidence seems to be that even at present borrowers don’t read all they are currently given. To increase the amount of paper they have will be counter-productive.
2. It is not until just before the contract is entered into that it “becomes apparent” that a borrower “is likely to enter into a credit contract”. It is at this time that the NCC section 14 Statement needs to be given in any event. It is therefore inevitable that the credit guide will be delivered at the same time as the NCC section 14 Statement.
3. If the lender uses the offer to borrow system referred to above, the guide would not be required to be given until after the section 14 Statement.
4. There is an amount of information required in the guide which will inevitably simply be repeated in the section 14 Statement.

As a result, the recommendation of the Federation is to allow the additional matters contained in R230 to be incorporated into any document delivered pursuant to NCC section 14.

R230(2) - Information required in the guide: The Federation has some concerns about the amount of information required under R230(2). There is no concern in relation to (2) (a) and (b) – name, contact details, and licence number - nor to the first part of (c) – the name of the EDR scheme. However, the Federation has concern about the requirement to provide “information about a consumer’s rights under the scheme”. That in itself could be a rather large document and we would suggest that at this time it is really only necessary to name the scheme, and possibly give contact details. This was, I believe, supported by the consumer advocates at the meeting.

Further, whilst the Federation supports the Government’s decision that EDR becomes a compulsory part of the licensing process, it is in everyone’s best interests to ensure that the loan contract is discharged with as little stress as possible.

The Federation believes that to provide a document before a contract is entered into saying that when you have a difficulty there is effectively a free system to deal with any problems you may have with the lender, the stage is set for the contract to fail. The Federation believes that there is a lot of faith put on the EDR scheme to overcome many of the current ills of the system, when what will usually occur is that

a borrower contacting the EDR scheme will simply be told to go to the lender and attempt to resolve the issue.

R230(d) - *Compensation requirements:* In other places, the Federation has raised its concern about the compensation arrangements.<sup>51</sup> Whilst the comments here are really about the matters which need to be included in the credit guide, it should be noted that the Federation has real concerns about the whole compensation arrangement issue.

In respect of the comments about R230(d), the Federation simply notes that a comment stating that the arrangements comply with the law, as is required by R230(d)(ii), really add nothing, except further information to be given to a potential borrower who most likely will not read it, and if he does will see simply “these arrangements comply with LIC175”. It will be meaningless.

R230(e) and (f) - *Statement of licensee’s obligations:* The Federation has concerns about the information required in (2) (e) & (f) and would prefer to see a standard form. It is noted that there is no apparent reticence in requiring standard forms to be used in a number of occasions, and if the intention here is to provide the client with, in effect, a Statement of rights, in the opinion of the Federation, a standard form would be preferable.

As it is framed, there is no information about the extent of the information required, for example, in (e). Would a statement of a sentence or two merely stating the two propositions in (e) be sufficient, or is something more required? Similarly would a simple Statement of the two matters in (f) be sufficient? The Commentary seems to suggest that something more complete is required.<sup>52</sup>

R230(4) - *Method of giving the guide:* The regulations can provide requirements dealing with the method of delivery of the guide. So far as the Federation can ascertain, there are not yet any proposed regulations.

However, there is one matter the Federation would suggest be looked at when drafting any such regulations and that is the frequency of the guide.

The information in the guide is licensee specific – that is it doesn’t change no matter what the product being considered. The way section LIC230 currently appears, it is necessary to provide the credit guide on each occasion there is a credit contract, or more precisely, every time it is likely that there will be a credit contract. If the Federation’s suggestion that the guide and the precontractual statement be combined isn’t accepted, the Federation alternatively suggests that the need to deliver the guide be limited to one in a given period. This is intended to cover situations where there are a number of credit contracts over a relatively short period of time. Cases may be where there is a housing loan followed by an application for a credit card, or a personal loan followed shortly thereafter by an increase in a credit card limit, or a second personal loan. The Federation would suggest consideration be given to providing the guide once in any 12 month period unless there is some change to the information contained therein.

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<sup>51</sup> See comments in relation to LIC175 above.

<sup>52</sup> Commentary paragraph 3.77

The Federation suggests that the section be amended to make it clear that where a licensee is required to provide a document under NCC section 14, the information need only be provided once.

**R260 – Reasonable enquiries about the consumer:** The Federation has concerns about this section in that no guidance is given as to what are “reasonable inquiries”, particularly in relation to the consumer’s financial position. Further the Federation is concerned that the concept – “substantial hardship” – is being introduced without any definition. The NCC (in a direct assumption of the UCCC provisions) refers to “hardship” in section 66, but that is used in a different context, referring to the changes in a debtor’s personal circumstances since signing the contract. It further refers to “substantial hardship” in section 70(2)(l), but the cases are almost devoid of any definition or guidance. Under that section the contravention of the section could result in a re-opening of the contract; in the new proposals it becomes an offence to enter into an unsuitable contract.

The Federation would expect that there would be some guidance in relation to this issue. When does hardship become “substantial”? What is a “reasonable” enquiry? Is the test subjective or objective, and if objective, what criteria will be applied?

**R265 - When credit must be assessed as unsuitable:** The Federation believes that there will need to be some significant guidance here, particularly because of the introduction of a new concept “the consumer’s requirements or objectives at the time the contract is proposed to be entered”.<sup>53</sup>

There are many circumstances where the Federation’s members will be approached for a loan of a particular amount for a particular purpose or purposes, and that after a proper assessment of the financial aspect of the arrangement, the lender makes a determination that the client cannot meet the loan terms without hardship, but would be able to comply with the terms of a contract if the amount borrowed was lower.

Every credit provider knows that if an advertisement States that loans between \$X and \$Y are available, a large proportion of the applicants will seek the higher amount, whether or not they really need it. In addition, to justify the larger amount, there is invariably a seemingly legitimate reason given for the amount sought. In such a case the lender will have real difficulty approving a loan for a lesser amount where the loan amount does not meet the client’s requirements or objectives”.

Even in cases where the amount sought is reasonable, less than the maximum loan available, and the reason for the loan perfectly legitimate, there will be similar problems. Take an example where a client has an aged car needing significant work. The client approaches a lender for \$10,000 to buy a second-hand vehicle he has seen at a local yard. The “requirement and objective” is to buy the car. However, after a proper assessment and based on the lending criteria of the lender, the lender determines that the most the lender is prepared to lend the client is \$5,000 – not enough to buy the car, but enough to repair the old one. In such a case, based on the legislation it may be that the smaller loan must be seen to be unsuitable. Clearly this will be an unfortunate result.

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<sup>53</sup> R265(1)(b)

The lender will be very careful in the way the requirement and objective of the loan is expressed. In the example given, if the requirement and objective is expressed as buying the \$10,000 car, the loan will be unsuitable. However if the requirement and objective was to provide adequate transport, it may not be.

There has recently been an application in Victoria where an allegation in support of an application under UCCC section 71 was that the lender did not lend enough to the borrower.

A further concern the Federation has is that at present there are no regulations as foreshadowed in R265(1)(c), and its members would like to see more detail of the type of matters intended to be covered there before finally commenting. Is it intended, for example, through regulation to effectively proscribe some forms of lending; be it equity stripping, reverse mortgages to persons above a certain age, payday lending, loans to non English speakers, or some other form of lending?

**R270 -** *Providing the assessment to the consumer:* The Federation joins with many others in expressing its concern about this issue. The Federation has no objection in principle to the provision of the assessment, but the information therein must not be of such a detail to:-

1. Provide to the debtor details of the credit provider's lending criteria;
2. Provide the debtor with information which would allow the debtor at a subsequent application to gain a more favourable result for the debtor, or
3. Provide the debtor with information which may be used against others (for example brokers).

The Federation believes that the section should make it clear what information needs to be provided in the assessment. Clearly a simple statement that the product applied for was deemed to be suitable would be insufficient, but there is no guidance as to what is sufficient.

The requirement is that the assessment must be provided to the consumer at any time up to 1 year after the credit contract expires. It further requires the assessment be provided to the consumer within 2 days. That is, it is possible that the request will be made several decades after the assessment is made, but the requirement is that the assessment be produced within 2 business days. In the Federation's view, this timing is quite unreasonable.

It should be noted that there is no requirement to actually produce the assessment in a written form until it is requested, and the Federation suspects that in automated systems, as the assessment will be some sort of compilation of information already held by the credit provider, or calculations based on that information, the assessment process and the production of the written assessment will be two entirely different processes.

In other words, the written assessment required by R270 will not come into existence until requested. This is a similar process as currently obtains, for example, statements. Whilst all the information is there, there is no "statement" until it is requested. As a result, it may be there that if a request is received decades after the assessment is made, there may be real difficulties, either technologically or

physically in having the document retrieved or produced if the earlier data is no longer available.

This is a real issue, as we have heard from consumer advocates, that one of the first things they will require is the production of that assessment before they determine whether action could be taken. The assessment will become, in every case going to a consumer advocate, the primary ammunition. This could be 30 years after the credit contract was entered into.

The Federation also has some concerns about the timing of the delivery of the document. No doubt the time limit of 2 days is set in an endeavour to prevent such assessments to be retrospectively “created”. However, the requirement that the credit provider “must give the consumer... a written copy of the assessment before the end of 2 business days after the day” the request is received is extremely onerous.

Under that scheme, a request on a Monday afternoon must result in a copy of the assessment being “given” to the consumer by the end of Wednesday. In that time, it is necessary to retrieve the file (which may be up to 31 years old), obtain a copy of the assessment, and have it delivered to the consumer. For consumers in the immediate area and for recent files, that may be possible, but between areas even within a State and in particular older files, may take longer. It is not unusual for letters posted in the Brisbane CBD, for example, to take three full business days to get to the Gold Coast, 70km away.

The Federation suggests that the time provided by NCC section 34 – 14 days for an assessment made within the last year, or 30 days if made beyond that time<sup>54</sup> – would be more appropriate.

It is also interesting to note that there is a limit on the time a consumer can ask for a statement of account – that provided by NCC 34(5) – where the consumer is not entitled to expect statements going back more than 7 years (except where the amounts are still outstanding). The Federation believes that it is relatively more important to be able to access information relating to financial transactions between the parties more than 7 years ago than seeing what assessment was made for a loan more than 7 years old, and therefore believes that both the time limits in NCC 24 should be adopted here – the time for production and the period in respect of which the assessment needs to be produced.

There are other matters which the Federation believes should be dealt with. One of the Federation’s members is considering giving the consumer a copy of the assessment in every case prior to the credit contract being entered into. Whilst not specifically referred to, as the delivery was not made pursuant to a request as foreshadowed in R270(1), we have little doubt that the delivery without a request would satisfy that section.

However, there appears to be no limit on the number of times a consumer can request the assessment. The Federation would like to see, again along the lines of NCC 34, some limit on the need to produce the assessment.

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<sup>54</sup> NCC section 34(2)

The Federation concedes that in many cases, consumers rely on the credit provider to retain copies of documents they would otherwise have to keep, but under this proposal it is possible for a consumer to repeatedly request a copy of the assessment – even though one may have been provided earlier and recently.

Again it is noted that in NCC 34, there is a limit on one Statement every 3 months. As the nature of the assessment is quite different, the federation suggests that there be a limit of something like one every 12 months.

The Federation, as intimated above would like to see provision made that where a copy of the assessment is provided without request, the credit provider is deemed to have complied. This could be done, it is suggested by adding “unless the credit provider has already done so” in R270(1).

R280 - Disclosure of commissions: For credit providers, this requirement is no different to that contained in NCC section 14, which requires disclosure of the matters in NCC section 15, in which by virtue of NCC section 15(14), the commission must be disclosed. As a result, rather than have two documents disclosing the same information, the Federation suggests that the section be amended to make it clear that where a licensee is required to provide a document under NCC section 14, the information need only be provided once.

It is arguable that the NCC section 14 Statement is provided before the contract is entered into, and therefore complies with this section. As a result, it is otiose as far as credit providers are concerned. An alternative would therefore be to amend the section to note that it does not apply to credit providers.

## **NATIONAL CREDIT CODE**

**Section 46 –** Prohibited securities: The amendment to section 46, which provides that there cannot be security over household items, is supported by the Federation in principle.

Section 46(2) provides two exceptions to the rule preventing such security:-

1. Where the goods are actually supplied by the mortgagor, and
2. Where the finance is provided by a linked credit provider of the supplier.

It seems obvious that the reasoning for the exceptions is twofold. First, it will ensure that the retail side of a business is not adversely affected by a restriction on available finance. Secondly, it seems that the thinking is that there are times where the particular circumstances of a potential borrower are such that there should be the ability to offer security over household goods, and that circumstance seems to be in cases when the borrower does not have the possession of the goods. It follows that the reasoning is that as the potential borrower does not have the goods at the time of the purchase, the borrower is really not losing anything by providing security over goods being purchased – the borrower is in a “net-better” position, or at least not in a worse position.

However, there are instances where those arguments are not catered for. If there is no in principle objection to providing security over goods not in the possession of the borrower at the time the loan is negotiated, why is the exemption not extended to

circumstances where a borrower is taking a loan to recover goods not currently in the borrower's possession? Examples of these situations are where the goods to be secured are subject to a repairer's or warehouseman's lien, or in the possession of a pawnbroker.

Further, and more importantly from the Federation's point of view, the ability of a independent financier to take security (and as a result, often to supply finance) is limited to cases where that credit provider is a linked credit provider of the supplier of the goods.<sup>55</sup>

If a person was buying a \$10,000 plasma TV from a national retailer, ostensibly the TV would fall within the definition of "essential household items" - being the "television set" referred to in regulation 6.03(3)(e) of the *Bankruptcy Regulations 1996*. The result is that no matter what the personal circumstances of the borrower, the only way the goods can be purchased with finance requiring security is to have the supplier of the goods finance the purchase,<sup>56</sup> or to have the supplier's linked credit provider do so.<sup>57</sup>

As a result, it is not possible for the borrower to arrange their own finance, possibly on more favourable terms with another financier. This will create circumstances where the options of borrowers are severely limited and where independent financiers will be at a significant disadvantage. It is not third line forcing, but it does allow the borrower only one option. The Federation has concerns that it is arguable that this may, in cases where a trader has only one linked credit provider, breach section 130.<sup>58</sup>

There seems no logical reason why the exception should be limited to linked credit providers, if there is to be an exemption at all.

The Federation's suggestion is to extend the exemption in section 46(2)(b) to cases where the owner of the goods does not have possession of the goods at the time the loan is negotiated and to remove the linked credit provider requirement which would allow the borrower freedom to deal with any licensed credit provider.

**Section 70(6A) - *Reopening*:** The Federation has concerns about the retrospective effect of the operation of Section 70(6A). Whilst there is no argument in principle with the intention of the section, to have a provision which allows an application to be made in respect of a legitimate mortgage over goods as if those goods were prohibited at the time of the application, is unfair.

The effect of the amendment to section 70 is to make the fact of a mortgage over household goods (which is by virtue of the section 46 amendments void) a matter to be considered by the court. Section 70(6A) indicates that this provision applies whether the mortgage was entered into before or after the commencement of the section. It is conceded that it is arguable that the wording of section 46 ("cannot be

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<sup>55</sup> See section 117 of the National Credit Code.

<sup>56</sup> As foreshadowed in section 46(2)(a)

<sup>57</sup> As set out in section 46(2)(b)

<sup>58</sup> Section 130 provides "A supplier must not require a purchaser of goods or services to apply for, or obtain, credit from a particular credit provider."

created”) makes the intention clear, but out of an abundance of caution, our suggestion is that the bracketed words in subsection 6A should be removed.

**Section 79A - Notice on a DDR default:** The Federation believes that the Consumer Credit Code may not be the most appropriate place for this provision. The idea of providing a person who has given a DDR authority some advice when the DDR fails is a good one, but it appears that the only time there needs to be notice compulsorily given is where the DDR is provided in relation to an arrangement with a credit provider.

DDRs are used in many and varied applications which seem, in principle, to be no different to those given where a credit provider is involved. Some examples which spring to mind are the payment of rental for residential and other property, board, gym memberships, utility accounts, school fees, traffic fines in some States, superannuation contributions, memberships of professional organisations or unions, telecommunication accounts, rates – the list goes on. It may be that a more appropriate place for this requirement is in the EFT Code, which may, as a result, need amending.

We can see no reason why there should be any difference in the treatment of a DDR relating to a credit provider to that of a DDR in favour of a gym, a university college, a telephone or any other entity. If the justification is that it will possibly prevent the credit provider from repeatedly attempting to execute on the DDR (as one would assume as a result of the notice the borrower will be aware that they have the ability to terminate the DDR arrangement) and that no other group of DDR users is prone to do so, we would argue that such a reason is ill-founded.

In undertaking some research for the purposes of these comments, one of the first DDR documents looked at was the DDR arrangements of Jane Franklin Hall, a residential college attached to the University of Tasmania. There the arrangement is that if a DDR is “returned or dishonoured” by a financial institution, it will be represented three days later with any “transaction fees” added to the student’s account.<sup>59</sup> This type of comment in the DDR is common.

The Form 8 Direct Debit Default Notice<sup>60</sup> sets out the required information. Much of the information in the form is simply a repeat of the information many credit providers have with their clients in the DDR agreement delivered with the DDR form to be signed. As such, apart from the fact that it adds to the paper being delivered to the client, the Federation has no real issues with its content, except to say that there, once again appears to be an unrealistic expectation on the External Dispute Resolution system

The clear intention of the notice is to alert the client to the fact that there was a missed payment, and to give the client the opportunity to remedy the situation before the next payment is due. It must be remembered that many DDRs are weekly or fortnightly. Therefore a requirement that the notice be delivered within 10 days of the

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<sup>59</sup> See the DDR form available at <http://www.jane.utas.edu.au/Prospective%20Residents/PrForms%20Directory.htm> accessed 12<sup>th</sup> May 2009

<sup>60</sup> Form 8, Schedule 1 of the *National Consumer Credit Protection (National Credit Code) Regulations 2009*

default occurring would defeat the purpose. It may not be delivered until four days or so after the next request to a bank to execute a DDR is made.

Some the Federation's members have experienced significant delays with some financial institutions in advising the failure of a DDR. In one case, there was a 12 day delay between the failure of the DDR and the advice being transmitted to the credit provider.

Further, whilst the notice system suggested in the Bill may be appropriate for bank to bank dealings, many of the Federation's members do not have that relationship. Many use the services of a payment bureau where the DDR is signed in favour of a bureau on behalf of the credit provider. As a result there can be a further delay in the credit provider being advised of the failure of the DDR.

Additionally, we would suggest that there be some consideration of the meaning of "the default occurring"; what is meant by "default occurring"? It seems logical that it means the time when the paying bank returns or reverses the payment. If the 10 days was to be from the day the payment was reversed or returned, even in the most efficient of systems, it may be up to 5 days before the credit provider is advised of the fact, depending on the alignment of public holidays and weekends. In 2008, for example, because the Christmas public holidays fell immediately before a weekend, the success of any DDR processed on Wednesday would not be known to the credit provider, all things being equal, until the Monday or the Tuesday – 5 or 6 days later. To require the credit provider to "give the debtor ... a direct debit default notice ... within 10 days of the default" when it may be that the credit provider does not know of the default for 5 or 6 days, may be a big ask; particularly when we do not yet know what is going to be in the notice. There may be information required, for example, about inter-bank fees, which the credit provider may not know for some time.

In the Federation's view, a more reasonable provision would be that the notice was required within 10 business days of the credit provider being advised that the DDR had failed.

**Section 80 -** Default Notices: The changes to section 80 are of considerable concern. At present most of the default notices of the Federation's members are able to comply with section 80 in less than a page of 12 point type. The Federation estimates that the size of the section 80 notice will increase by a factor of four. Whilst this is a very basic comparison, the legislation has increased from about 60 words to about 260 words. There is a significant amount of further information required. We note that the more information you give to a borrower, the less they are likely to read. They are far more likely to read a document of one paragraph than they are to read a two page document.

The changes are significant in terms of the systems which will need to change to enable the new notices to be produced on 1<sup>st</sup> November 2009. The first the majority of lenders heard about this was in the last two weeks. Most of the Federation's members, whilst preparing for the changes, have not given any instructions to amend software until the final form of the legislation is known.. That appears to be in September. It may not be possible to write the changes to the systems, test them, propagate them and have them up and working by 1<sup>st</sup> November 2009. Further, because the Form 9 prescribed required the insertion of a person's name dealing with the matter, it is not possible to pre-print any of these documents.

The Federation is interested to note that the requirement in section 80(3)(i)(ii) – that the credit provider take “steps to recover” before listing with a credit reporting agency – is not a requirement contained in the Credit Reporting Code of Conduct issued by the Privacy Commissioner.<sup>61</sup>

**Section 101(2) - *Application regarding key requirement:*** We question whether the words deleted from section 101(2) remove the moratorium in relation to matters where a credit provider has taken an application itself, or a “Government Consumer Agency” other than ASIC has made an application, or where the application was made under one of the State Acts.

John Brady  
20<sup>th</sup> May 2009

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<sup>61</sup> Compare section 80(3)(i)(ii) with paragraphs 2.7 and 2.9 of the Credit Reporting Code available from <http://www.privacy.gov.au/ACT/credit/>