

Your Ref:

Quote in reply: Banking and Finance Committee:25001233

21 May 2009

Senator the Hon Nick Sherry
Minister for Superannuation and Corporate Law
The Treasury
Langton Crescent
PARKES ACT 2600

EMAIL: consumercredit@treasury.com.au

Dear Minister

DRAFT NATIONAL CONSUMER LEGISLATION

The Queensland Law Society takes this opportunity to offer some comment on the draft legislation.

In addition to rationalising the number of laws and reforming the regulatory systems, the legislation will introduce major substantive changes to Australian credit law. In our view these changes should make the law more consistent, accessible and transparent for all those involved, and those about to be involved, in the credit industry.

One area in which the draft legislation is seriously deficient is the apparent absence of a procedure to identify problems and to handle them promptly.

The way in which defects in the Uniform Consumer Credit Code (**UCCC**) were identified, brought to notice and repaired and the time taken is worth noting:

- 1 The first draft of the UCCC appeared in 1993 and was followed by wide discussion in the industry and their solicitors and others.
- 2 It was enacted, via the unicameral Queensland Parliament on 14 September 1994 and commenced on 1 November 1996.
- 3 Even before commencement about 20 possibly fatal (to the operation of the regime) discrete issues were identified. They had to be dealt with in June 1996 by special subordinate legislation.
- 4 Then there was the 1997 the First Round of Amendments.
- 5 Then there was the Post Implementation Review by Consumer Affairs Officers commenced in November 1998. Their Report made 63 recommendations for improvement of the UCCC.

There is no need to recount amendments since. It is however very important to compare the time frames:

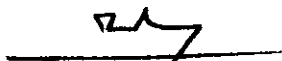

- (a) The UCCC process started in 1993 and it was in reasonable shape by 1997.
- (b) The National Credit Code (**NCC**) was exposed on 27 April 2009 and is expected to be enacted by mid 2009. That is a period of only 3 months.

There is not the slightest doubt that glitches will arise.

It is therefore our submission that the Government should now prepare and publicise a plan for the operation of a Post Implementation Scheme to ensure that the glitches are identified, brought to notice and dealt with very promptly.

In addition to this general observation we have, in the short time available for comment identified some specific issues which may require some further amendments to the draft legislation. These issues are set out in the submission document attached to this letter.

Yours faithfully



Ian Berry
President

**Submission on the
National Consumer Credit Protection Bill 2009
by the**

Queensland Law Society's Banking & Financial Services Law Committee ("The Society")



INTRODUCTION

This response to your request for public comment on the above proposed amendments has been prepared by the Society's Banking and Finance Sub-Committee.

Members of the Sub-Committee are drawn from the legal profession in Queensland and include senior lawyers experienced in banking and finance who act for lenders and for consumers, academics with expertise in consumer credit and consumer case-workers.

Unfortunately, due to the tight time frame imposed for the making of Submissions, the Society has not had the opportunity to canvas its members for their views and as such this Submission must be read accordingly.

GENERAL COMMENTS

1. Brief consultation period

At the outset the Society notes that of course it is a matter for the government to stipulate a period for public consultation on draft package. With respect, we observe that the exceptionally brief period in this case has meant that we have not been able to put together extensive comment on the significant impacts that the package is likely to have and to consider exhaustively in any unintended consequences or drafting irregularities.

We note that the Society has been active in making recommendations on the Uniform Consumer Credit Code and earlier legislation and has hosted a number of consultation meetings for the Uniform Consumer Credit Code Management Committee in order to draw out implications of proposed changes. The Society would again be keen to assist this process if thought advisable by you.

We must also note that whilst the brief consultation period has precluded us from being able to undertake an exhaustive review of the exposure draft, our members have noted a number of matters which are contained in the specific comments below.

2. Licensing obligations and timing

Given that issues concerning fringe credit providers was stated to be dealt with under phase two of the Credit Reform process, the Society is surprised to note the extensive licensing and registering obligations that will be attached to credit providers under the exposure draft. We note that the Society anticipates that credit providers would need to undertake a significant degree of procedural, documentation, computer and other changes in order to achieve compliance by the relevant dates and some members have noted that clients have indicated that this in fact may not be possible within the stated timeframe. The Society queries whether perhaps a useful intermediate step is to simply provide that the licensing obligations will not apply to credit providers until say July 2010.

No doubt industry groups will be able to provide further comments on the time necessary to achieve compliance and we query whether it would be appropriate to confirm with them that sufficient time is provided during both the consultation process and transitioning provisions to ensure that diligent credit providers will have sufficient time to ensure that adequate compliance arrangements are put in place.

The Society notes that it previously raised concerns along these lines with the FSR and UCCC legislation prior to their introduction and it subsequently proved necessary for significant amendments to be made in order to make the relevant regimes workable. In the latter case, this process was aided by emergency transitional regulations drafted by key stakeholders (including the Society) some months before the commencement of the legislation. We would suggest that this process be again considered.

In the event this is not possible, as an alternative, we suggest that there be a post implementation review undertaken of phase one at the same time as work was being undertaken under phase two of the UCCC change program and the Society again would be happy to be involved in a facilitation of this consultation concerning the post implementation review.

3. Licensing obligations - philosophy

The Society notes that there is a significant change of philosophy regarding the regulation of credit between that contained under the licensing provisions of the package and the provisions of the Consumer Credit Code. For example, under the Code a breach of a key requirement need not be disclosed to ASIC and the maximum penalty is \$500,000 whilst under the licensing provisions there is an obligation to disclose significant breaches of the Code and penalties of up to \$1.1 million.

The Society queries whether these two philosophical approaches can easily mutually co-exist. As a practical matter it may be that the licensing provisions would themselves bear the weight of the day-to-day practical regulation credit rendering the Code provisions of significantly less meaning than they currently have.

Another practical example of this is that under provisions of the licensing obligations it is possible for the license to be revoked or suspended which arguably means that the credit provider is stopped from performing its contractual obligations under its existing contracts (for example, continuing credit contracts) and has no ability to preserve its loan book by enforcing or even merely receiving repayments.

The Society queries whether this is the intention of the package as a whole and if it is, administratively what steps could be taken in the circumstances where an extension or revocation were contemplated.

4. Jurisdiction for debtors

The Society notes the decoupling of State and Territory jurisdictions given the passage of national legislation. The Society remains concerned that this may result in relevant credit litigation in jurisdictions which are remote from the place of residence of debtors.

The Society regards this as an loss of protection for consumers and an unintended detriment directly as a consequence of transferring credit to the Commonwealth.

The consequence of this loss of nexus between the debtor's home and any court action will mean that creditors and their debt collector assignees will be at liberty to sue in, for example, Sydney for a client residing in a remote location¹. This creates particular difficulties for borrowers and does not support access to justice because:-

- Accessing low cost legal advice about proceedings in another state is not as of right and not universally available;
- Defending proceedings in another state (preparation and appearance) is extremely time intensive and costly for the borrower;
- Clients are usually put to the cost of video conferencing and telephone appearance or travel and accommodation even where a stay and transfer of proceedings is probable;
- Vulnerable consumers may be overwhelmed and unlikely to exercise their rights².

¹ The UCCC provided that jurisdiction (s 6) was 'where the debtor is ordinarily resident'. S 177(1) provided for regulations to give effect to cross-vesting of administrative and judicial powers inter-state but there have not been any regulations enacted to give effect to this power.

S 80 UCCC provides for restrictions upon credit providers exercising their rights.

S 166 provides that if the credit provider's rights are assigned the UCCC applies to the assignee.

The UCCC provided for contracts to be made electronically (s164A(3)) and in those circumstances s 6 enabled the contract to be formed in the jurisdiction where the debtor resides. In the absence of s6 and the potential for expansion of on-line contracts there is significant uncertainty as to where the contract is formed.

The concerns about the potential impact of borrowers being sued in a State where they do not live are raised in the Commentary at 4.2 on p 119.

We agree with the commentary on p 120 that this may be a 'material barrier to justice for consumers'. The Society is also concerned about the impact on its regional members if credit providers can elect to employ capital city legal practices for all credit and credit recovery work.

By-passing regional firms will have adverse impact on regional communities already suffering from the mining and mining dependent economic downturn.

The Society suggests that an additional provision be added to Section 80 of the Code such that any credit proceedings be instituted in a registry nearest to where the debtor resides as at the date last known to the credit provider.

In the event that credit providers incorrectly issue process that the costs of transfer or reissuing should be borne by the credit provider.

The Society would appreciate receiving an opportunity to comment on the jurisdiction provisions once finalised.

5. Interest rate caps

The Society has previously supported the introduction of an interest rate cap in Queensland and notes that the package contemplates the concurrent operation of State laws. The Society would be pleased if you would confirm that it is the intention that existing interest rate caps are to remain. Further, no doubt, there will be a need for significant State and Territory based Consequential Amendments Acts to give effect to this concurrent jurisdiction and again we would be pleased to comment on the Queensland Act.

SPECIFIC COMMENTS

1. S 6 Provision of credit to which this Code applies

In subsection (1), after para (b) (ii), we believe "or" should be replaced with "and" as the requirements are cumulative.

2. S 46 Prohibited securities

S 46 (8) provides a definition of "antique item" but that term does not appear elsewhere in the section.

3. S124 Termination of sale contract which is conditional on obtaining credit

S124 gives a debtor a statutory right to terminate a contract for the sale of goods or services, if credit is required and the buyer makes that known. The section goes on to provide for the adjustment of the parties' rights in the event of termination.

This provision raises a number of issues:

- (1) It is not clear whether the section operates only when credit is in fact required to pay for the goods or services or whether it is sufficient for the purchaser to make known that he or she requires credit. An objective test may be justified on the basis that the section is intended to protect purchasers who cannot in fact afford to purchase the relevant goods or services. On the other hand, advocates of a subjective test could argue that a consumer should not be deprived of the benefit of the provision just because he or she has enough funds to pay for the

² The Commentary refers to debtors being particularly vulnerable in the absence of the ability to afford a defence or in the absence of capacity to seek assistance at p 120, *Background*.

particular purchase, if the consequence is that that prevents that purchaser from buying other things he or she wants or requires.

- (2) It is not clear whether the “reasonable terms” will be specific to the purchaser, or whether it means the sort of terms which would be reasonable for an ordinary debtor, presumably one who is a good credit risk. If a particular purchaser is not a good credit risk, and for that reason is offered credit by a credit provider, acting reasonably, only on terms which involve a higher-than-usual rate of interest to reflect the increased risk, the question arises whether such a purchaser will be able to rely on this provision. The terms offered may not be reasonable terms for an ordinary purchaser, but would be reasonable terms for that purchaser from a credit provider’s perspective. If “reasonable terms” for that purchaser do not include credit at the higher interest rate, this section will make it easy for consumers who are poor credit risks to get out of contracts. This is of course preferable to a consumer’s proceeding and later making an application under s 70 on the basis that the credit contract is unjust.
- (3) It is not clear whether the provision operates only when the supplier is informed of the need for credit prior to the sale. The terms of s124(3)(b) indicate that it could be used if the purchaser realises that he or she needs credit only after payment for the goods or services has been made. No time limit for “making it known” is expressed. If the right to terminate is not limited by the purchaser’s being required to “make known” the need for credit before the time of entry into the contract, there is no limit at any later time. However, from a purchaser’s perspective, it may seem unfair if that limit is adopted, as it would mean that a consumer would be deprived of the benefit of the provision if the consumer first agrees to buy particular goods or services and thus makes the relevant contract, and only then discloses the need for credit, even if that disclosure is made immediately after the agreement to buy is made.
- (4) Another problem is that the provision does not make clear whether the consumer must “make known” the need for credit before making the “reasonable endeavours.” Thus it is not clear whether a purchaser may say nothing to the supplier concerning the need for credit at the time of making the purchase, then subsequently make reasonable endeavours, fail, return to the supplier, then make known the need for credit, and immediately terminate.
- (5) No time limits are specified, either for making the “reasonable endeavours” to obtain finance, or for terminating after they have been unsuccessful. Presumably these would have to occur within a reasonable time, but that is not a very helpful limitation.
- (6) If the contract is terminated, the obligation to return the goods is limited to a situation where that is “practicable”, whatever that means. There is no obligation to return services, and as services includes an interest in land, the section appears to allow a purchaser to terminate a contract for the sale of land after settlement and yet retain the land.³
- (7) There seems to be nothing the supplier can do to gain some protection from the effects of this provision, except perhaps, if the purchaser makes known a need for credit, the supplier could actively intervene to arrange credit on reasonable terms for the purchaser before the purchaser has completed making his or her reasonable efforts to obtain credit.
- (8) In the case of a contract for the sale of land, the section applies only if the purchaser intends to obtain credit from the supplier or the supplier is linked to a credit provider from whom the purchaser intends to obtain credit and the supplier “was aware” of that intention. Presumably the supplier “was aware” at the time of entry into the contract, although that is not expressed. If the linked credit provider will not give the finance, given the tie between the supplier and the linked credit provider, it seems a fair outcome that the debtor is able to terminate.

³ Possible abuse of this is discussed in *Annotated Consumer Credit Code* Denise McGill and Lindy Willmott LBC Information Services 1999 para [124.10].

- (9) For contracts for goods or services other than land, s 124 is not in any way connected with the preceding provisions of Part 7 dealing with linked credit providers. S 124 has the effect that any contract for the sale of any goods or services by any supplier to a consumer is liable to be terminated on the basis of the need or perceived need for consumer credit.

4. **S 131 Prohibition on payment for goods and services by post-dated bills of exchange and promissory notes**

Bills of exchange and promissory notes may be postdated (s18(2) *Bills of Exchange Act 1909* (Cth)) but this is rare as it is unnecessary. If the drawer's objective is payment after the date of issue, that is achieved by making the bill or note payable at a fixed or determinable future time, rather than by postdating the instrument. Bills of exchange and promissory notes are ordinarily made payable in the future, at either a fixed or determinable time. However, s 131 does not make clear that a bill or note which is not postdated but which is expressed to be payable at a future date, is within its ambit.

It is also unclear whether the prohibition in s 131 extends to the supplier's taking a postdated cheque as payment. Cheques are defined and regulated by the *Cheques Act 1986* (Cth). Cheques are the usual methods of payment by negotiable instrument found in practice, particularly by consumers. Payment by a cheque which is not post-dated does not involve the provision of credit, as the cheque is payable on demand and there is no deferral of payment: *Tilley v Official Receiver in Bankruptcy* (1960) 103 CLR 529. This indicates that payment by the use of a post-dated cheque does involve the provision of credit and should be caught by this provision.

The term "bill of exchange" would ordinarily include a cheque, as s 78(1) of the *Bills of Exchange Act* provides that a cheque is a bill of exchange drawn on a banker payable on demand. The difficulty with adopting this construction for the Code is that the other provision in the Code dealing with negotiable instruments, s 46, refers expressly to "a cheque or bill of exchange or promissory note." If the Code has been drafted consistently, this express reference in s 46 to a "cheque" in addition to a "bill of exchange" indicates that the term "bill of exchange" used in s 131 does not include a cheque.

If s 131 does not apply to postdated cheques and to bills of exchange payable at a future date, it will be very easy to circumvent and will be essentially a useless provision.

5. **S138 Termination of consumer credit insurance if credit contract terminated**

S 138 provides for the termination of contracts for consumer credit insurance financed under the credit contract if and when the credit contract is terminated. Section 138 may operate to deny credit providers an expected source of recovery of the amount owed in certain circumstances. This would disadvantage the credit provider in that the credit provider would lose the benefit of the policy when it is most needed.

S 138 works well in circumstances where termination arises through the debtor paying out early under s 75 as the credit provider recovers the full amount owing and will not need to seek recovery from an insurer. It also works well under s 125 which allows the debtor to terminate a tied credit contract or obtain a credit under a tied continuing credit contract if the sale contract is rescinded or discharged. In those circumstances, as the credit provider will not need to seek recovery from the debtor or insurer, the credit provider will not need the consumer credit insurance and its termination by s138 will not produce any adverse consequences.

However, s 138 does not work well in the case of termination in connection with the voluntary surrender of mortgaged goods under s 78. S 78 confers a statutory right upon a debtor or mortgagor to initiate the termination of a credit contract and mortgage of goods by electing to return mortgaged goods. The debtor or mortgagor then acquires a statutory right to have them sold and the proceeds applied in reduction of the debt. The debtor/mortgagor's actions set in train a series of events which culminate in the credit provider's acquiring the right to recover the "net amount due under the contract": s 78 (7) and (9).

Voluntary surrender of mortgaged goods effects a termination of the credit contract. The termination is not a breach if done in accordance with s 78; however, it does put an end to the contract. This is so, although the Code does not define this as termination, nor define precisely when it occurs. The Code has left the matter of termination and when it occurs to the general law. Termination occurs because after the return neither the debtor nor the credit provider can compel performance of the obligations owed under the credit contract *in specie*.⁴ The termination takes effect from the time of election.⁵

Because voluntary surrender causes termination of the credit contract, as a result any contract of consumer credit insurance is automatically terminated. If the debtor does not have sufficient financial resources to meet the liability for the balance and becomes ill or unemployed or dies while part of the credit is still owing to the credit provider, the insurer under the now-terminated contract of consumer credit insurance will no longer be available as a potential source from which the credit provider could have recovered the debt. This is an unfortunate consequence and may have been unintended, as a contract of consumer credit insurance would be worth maintaining as long as any part of the credit remained to be paid by the debtor.⁶

Termination may occur through the credit provider's repossession of mortgaged goods under ss 83, 94-97.⁷ If it does, the same adverse consequences follow. Termination is unlikely to be associated with enforcement action taken in respect of credit contracts.⁸ However if the credit provider did decide to terminate the same consequences would follow.

6. S 139 Termination of insurance contract over mortgaged property if credit contract terminated

S 139 gives a debtor the right, if a credit contract is terminated, to terminate a contract for the insurance of mortgaged property financed under the credit contract and to recover a proportionate rebate of premium paid. Under s 139, the credit provider must "on termination" inform the debtor of the debtor's rights. This may also cause problems where the debtor or mortgagor voluntarily surrenders mortgaged goods under s 78⁹ or if the credit provider terminates before exercising remedies under s 80 (1) or (2)¹⁰, or repossessing mortgaged goods under ss 83, 94-97.¹¹ If the debtor elects to terminate such insurance contract before the credit provider is able to sell the goods under s 78(6), and the goods are damaged by fire or their benefit is lost through any other cause, the termination will be a disadvantage to both the credit provider and the debtor. This is because the credit provider will be unable to sell the goods, and the amount for which the debtor is liable will correspondingly increase. Again, it is likely that this is an unintended consequence of the operation of the Code.¹²

(5) and (6) In our submission, **ss 138 and 139 should be amended** to provide that contracts of consumer credit insurance and mortgaged property insurance will terminate only if no part of the amount of credit remains to be paid by the debtor to the credit provider.

⁴ *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 57 ALR 609 Mason J at 619 in the context of termination in the exercise of a contractual power; Greig and Davis *The Law of Contract* (The Law Book Company Limited 1987) p 1197

⁵ *Pennicott v Pennicott* (1936) 30 Tas LR 111 at 115, and see McGill & Willmott *Annotated Consumer Credit Code* LBC Information Services 1999 para [78.16]

⁶ This is explained in detail in McGill & Willmott *Annotated Consumer Credit Code* LBC Information Services 1999 paras [78.17.1], [138.3] - [138.4]

⁷ see McGill & Willmott *Annotated Consumer Credit Code* LBC Information Services 1999 para [94.6] and [94.7]

⁸ The reasons are explained in McGill & Willmott *Annotated Consumer Credit Code* LBC Information Services 1999 para [80.4]

⁹ McGill & Willmott *Annotated Consumer Credit Code* paras [78.16], [78.17.2] and [139.3].

¹⁰ McGill & Willmott *Annotated Consumer Credit Code* paras [80.4].

¹¹ McGill & Willmott *Annotated Consumer Credit Code* paras [94.6] and [94.7]

¹² McGill & Willmott *Annotated Consumer Credit Code* para [139.3]

7. Credit Guides

7.1 Disclosure Policy in General

There seems to be little or no consumer, industry or regulatory benefit in the proposed requirement for credit providers and credit assistance providers to produce a Credit Guide for their potential consumers.

While there might be an argument for such a document for credit assistance provider transactions which, up until now, in some states, have been so unregulated as to have no documentary requirements, this certainly does not apply to credit providers.

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. (See O'Shea P "Consumer Credit: Too Much Disclosure?" 90 Jan/Feb *Precedent* p56) As Consumer Affairs Victoria said in its submission to the Productivity Commission, "There is a considerable amount of research which demonstrates that, even when understandable information is available, consumers often ignore or misuse that information." (CAV Submission, June 2007, p 23)

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." (Malbon, J "Predatory Lending" (2005) 33 *ABLR* 224 at p 236) Adding yet another document to the already voluminous disclosure requirements of the Code will exacerbate this problem for little or no consumer benefit.

It also seems incongruous that government is imposing another disclosure requirement when the Ministerial Council for Consumer Affairs has commissioned empirical research entitled "Simplification of Pre-Contractual Disclosure Under the Consumer Credit Code". This proposed impost is counter-productive, counter-intuitive and, clearly, not "evidence based policy."

7.2 Using the existing disclosure requirements

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 (p86)

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

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.

7.3 Practical Problems with Credit Guides

The Credit Guide concept seems to have its genesis in the experience of regulators with the Financial Services Guides required of Australian Financial Services Licence holders under the *Corporations Act*. It is not a good fit with credit.

The “fees and charges” which are to “flagged” in the Guide for a credit provider are rarely going to be standard across individual consumers or even products. Credit is just 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.

Financial Services Guides, 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.

Credit assistance providers, admittedly, are more like the advisers and brokers targeted under the *Corporations Act* and could, conceivably, produce a generic guide which identified commission levels and/or time costing.

8. DEF 5- Definition of credit activity

Under LIC 75, a person is required to be licensed where that person engages in a credit activity. DEF 5 includes in the definition of “a person engaged in a credit activity”, a person who is the beneficiary of a guarantee. This could be interpreted broadly to include guarantees provided outside of the context of credit provision, for example a lease of office premises where the directors of the corporate lessee give guarantees in relation to rental obligations to the lessor. Perhaps the definition should be limited to “a person who is a beneficiary of a guarantee given in relation to obligations under a credit contract”.

9. R150 and R160; R250 and R260- Assessment of unsuitability of a credit contract and reasonable inquiries about a consumer

R 150 and R160 applying to licensees providing credit assistance, and R250 and 260 applying to credit provider licensees, impose the obligation on licensees to lend responsibly, specifically to make an assessment as to the suitability of a contract for a consumer through making reasonable inquiries. Our concern is the manner in which “reasonable inquiries” might be interpreted by a court or tribunal. Unfortunately in the VCAT decision, *Maisano v Car and Home Finance Pty Ltd (Credit)* [2005] VCAT 1755 (12 August 2005) it was held that the lender could not have ascertained by reasonable enquiry that the borrower was unable to repay the loan, largely because of language and communication difficulties. The pertinent facts were that the borrower was an elderly Italian woman on a pension. Her car, required as security for the loan, was her only asset. She could not read nor write in English or Italian and had limited spoken English. She was brought into the lender’s premises by her son to sign documents as his co-borrower. Undoubtedly language difficulties may have impeded the enquiry process for the lender in these circumstances, but one might argue that such circumstances should lead to a lender going to greater lengths than might otherwise be expected to ascertain details of the borrower’s financial position. To avoid any possibility of a lender failing to make appropriate enquiries when put on notice, we suggest that an additional requirement be added to R 160 and R260 after:

(1)....

(b) take reasonable steps to verify the consumer's financial situation;

Providing:

(c) where the licensee has difficulty in verifying the consumer's requirements and objectives in relation to the credit contract or the consumer's financial situation, in circumstances which would put a reasonable person in the position of the licensee on notice that the contract may be unsuitable for the consumer, the licensee shall make such further enquires as a reasonable person in the position of the licensee would make;

CONCLUSION

We thank you for the opportunity of making submissions on this important topic and would be keen to develop these concepts further with you as required.

QUEENSLAND LAW SOCIETY

21 May 2009