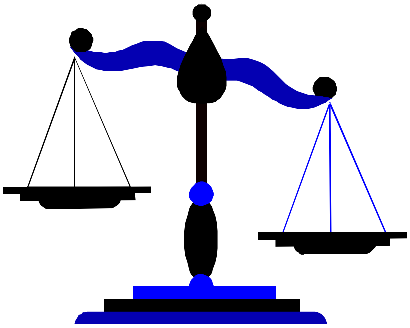
Uniform Consumer Credit Code

Post Implementation Review

Ministerial Council on Consumer Affairs



Final Report

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Uniform Consumer Credit Code: Post Implementation Review

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2. Executive Summary

Introduction

The Post Implementation Review has addressed terms of reference agreed by the Ministerial Council on Consumer Affairs ('the Ministerial Council') in August 1997 and has considered a broad range of issues relating to the operation and impact of the Consumer Credit Code in the current market. The review has gathered information and data[1] which, along with the specific recommendations proposed in this report, will feed into and inform the stage 2 competition policy review.

The consumer credit market

The national consumer credit market is a significant part of the Australian economy with a volume of $98 billion dollars in the 1997-98 financial year.[2] Of this amount, $43 billion is debt for personal finance commitments[3] and $55 billion is debt for owner-occupied housing commitments.

There has been a considerable increase in product innovation and variety, in the consumer credit market, in recent years. Home loans in particular offer greater flexibility and variety and include options such as combination fixed/variable rate loans and home equity loans. Home loans are offered with a range of choices such as redraw facilities and payment holidays, and loans are often bundled into packages which include insurance, fee-free cheque accounts and other financial incentives. There is considerable competition in the home loan market and credit providers generally compete on the basis of interest rates. However, while the Code assists in creating functional neutrality in this market, increased competition generally arises from market deregulation and other structural market changes, rather than the Code itself.

In the credit card market competition seems to focus primarily on loyalty schemes where use of the card allows consumers to accumulate points which are redeemable for, or count towards the purchase of, motor vehicles, holidays or other benefits. Competition on the basis of interest rates is less prevalent in

[1] Data will include a detailed research project on consumer behaviour in the market. See page 22.

[2] This amount represents commitments to financial institutions for the 1997/98 financial year, including credit limits. Australian Bureau of Statistics.

[3] Personal finance commitments include personal loans, credit cards and lines of credit etc.

this market, as it is in markets which provide unsecured credit or provide credit to high risk consumers.[4]

One of the significant changes in the consumer credit market has been the growth of interest-free credit which is provided primarily by retail stores for the purchase of household and domestic items. With these products, the cost of credit is usually paid by the retailer as a means of facilitating the sale of goods. Many goods are now sold on 6 months, 12 months and even 48 months interest-free terms. Consumers take good advantage of interest-free credit but there is some concern about over-commitment where consumers are unable to repay the loan within the interest-free period. The research project has gathered some data on these products which will usefully assist in further monitoring and evaluation.[5]

The Post Implementation Review

The Post Implementation Review has focused on three broad areas as defined by the terms of reference. Generally, the review has sought to determine how well the Code is functioning in the marketplace and to determine the overall views of stakeholders. While a number of recommendations for change have been made in this report, stakeholders generally believe that the Code is operating well and is a positive regulatory scheme. There will always be scope for improvement and change and the Code's ability to adjust to keep pace with change in the consumer credit market will be the ultimate test of its value.

Term of Reference 1 - the impact of the Code's truth in lending provisions on borrowers

One of the key functions of the Code is to provide pre-contractual information to prospective debtors to enable them to compare the costs of products, before entering into a loan. The Code also requires credit providers to include certain information in a credit contract to ensure that all of the terms of a contract are readily known to the debtor.

One question which was addressed in this review was whether the pre-contractual information was helpful to consumers and whether improvements

[4] Information on general trends in the housing and credit card markets was obtained from preliminary research conducted by Griffith University Law School as Module 1 of the research project. See page 23 for further details on the research project.

[5] See page 22 for details of the research project conducted in association with this review. See also discussion on interest free loans on page 81.

could be made to its content and presentation. While the requirement for precontractual disclosure was generally seen as desirable by consumers, many respondents considered the information was too complicated. Respondents to the review made suggestions for the simplification of this information and a recommendation along these lines is provide on page 30.

One of the problems of providing clearer pre-contractual information is that a large amount of information is currently included about fees and charges. Simplification of this information, for example, by providing summary information, is dependent upon clearly defining what fees and charges need to be included. Some fees and charges may never be imposed and are dependent upon the action of a debtor. For example, redraw facility charges will not apply unless a debtor uses the redraw facility. Similarly, default charges will never be applied unless the debtor is in default. A discussion of this issue is detailed on pages 28 to 30.

Defining which fees and charges should be disclosed also creates problems when comparing products. As the Code permits fees and charges in addition to the charging of interest, it can be difficult to compare the total costs of one credit product with another. For this reason the project team recommends that a comparison rate[6] should be required for all fixed term products to assist consumers to make informed choices. A discussion of this issue is detailed on pages 38 to 40.

The review also addressed the question of whether the timing of pre-contractual information is appropriate. A number of respondents expressed concern that the pre-contractual information was given too late in the lending process, when the consumer had already made a psychological commitment to the loan. Generally, it would be preferable for consumers to carefully examine the terms of a credit contract and to seek further advice before making a final commitment. One means of improving the timing of pre-contractual disclosure information is to introduce a mandatory delay in the credit approval process. However, it is generally understood that problems arising from 'impulse buying' relate to specific products, rather than to all credit. For example, most people take a reasonable time to consider a home loan but are more likely to impulsively purchase a motor vehicle. The research project and further investigations by the Uniform Consumer Credit Code Management

[6] A comparison rate is currently prescribed by the Code but its use is optional. A comparison rate is a rate expressed as a percentage, which takes into account all of the relevant costs of credit as well as the interest rate. This assists when comparing one credit product with another.

Committee ('the Management Committee') will provide further information on this issue.[7]

The recommendations contained in term of reference 1 may be revised, once the conclusions of the research project are available in mid-August 1999.

Term of Reference 2 - the relevance of the law to the current marketplace

The project team examined a wide range of issues in assessing the relevance of the law to the current market. Respondents generally supported the existing scope of the Code as appropriate but suggested some additional credit arrangements should be regulated. This section also makes note of the proposed regulatory reforms currently being considered by the Minister for Financial Services and Regulation[8] and the relationship between these reforms and the Code. The section also addresses some definitional issues relating to instalment sales of land and other instalment contracts.

Respondents recommended that small business, pawnbroking and finance brokers should be regulated by the Code. The project team does not support the extension of the Code to these groups and the reasons are detailed in pages 55 to 62 of this report. However, the project team recommends that solicitor lending should be covered by the Code and that governments should consider greater uniformity in the regulation of finance brokers.

Industry has argued that there is overlap and duplication between the provisions of the Code, the Insurance Contracts Act, and the Trade Practices Act, in relation to the regulation of insurance, linked credit providers and advertising. While there may be some scope to improve this regulation many of the Code's provisions, while similar to other legislation, regulate significantly different matters. These issues are discussed on pages 63 to 72.

A number of recommendations were made for improvements to the consumer protection provisions of the Code. Proposals included adding specific provisions for harassment and improving aspects of the hardship and default/enforcement procedures. Section 60 of the Trade Practices Act currently regulates debtor harassment and while it may be possible to duplicate these provisions in the Code, this should be further considered in the

[7] See page 33 for a discussion of this issue.

[8] Financial Products, Service Providers and Markets—An Integrated Framework - Implementing Clerp 6 - Consultation Paper - Corporate Law Economic Reform Program, April 1999.

light of a recently released review of section 60 of the Trade Practices Act provisions by the ACCC[9]. The project team recommends some improvements to the hardship and default/enforcement provisions and recommends that pre-contractual disclosure should be provided for consumer leases.

The civil penalty regime has also been the subject of concern by industry. Largely, these issues arise from technical difficulties in complying with the relevant provisions of the Code, in particular problems associated with contingency fees, discussed in term of reference 1. One recommendation has been made for modification to the civil penalty provisions but the project team is generally of the view that these provisions should remain unchanged. Detailed discussion of these issues is provided on pages 86 to 98.

The report discusses in considerable detail a range of issues relating to electronic commerce. The project team adopts the general recommendation of the Financial Systems Inquiry Report[10] that the Code should recognise electronic commerce. This section of the paper from pages 106 to 129, considers a range of issues which arise from the increasing development of electronic commerce in the global market. In developing a range of recommendations for amendment to the Code, this section of the report explores many of the issues already considered in the Commonwealth Government's *Electronic Transactions Bill 1999*. The report identifies those areas where amendment needs to occur, to address issues that arise specifically from the consumer credit environment.

Term of Reference 3 - the impact of the Code's administrative structure on the achievement of uniformity between jurisdictions.

A range of issues were considered by the project, relating to the practical administration of the Code by the eight participating jurisdictions. Concern was expressed by a number of respondents to this review about delays in adopting the amendment Act by Western Australia and Tasmania. Tasmania has adopted the relevant provisions but Western Australia has yet to introduce a Bill to adopt these changes. The project team recommends that amendments should be adopted more quickly and proposes amendment of the Uniformity Agreement to this effect.[11]

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[9] Australian Competition and Consumer Commission (ACCC).

[10] Commonwealth of Australia, 1997, Financial System Inquiry Report.

[11] See page 142.

There was also concern about the time taken to develop amendments. The paper explores the process of developing legislative amendment with a view to determining whether the multi-jurisdictional nature of the scheme presented specific problems. Generally, major problems do not appear to have arisen except that developing amendments in any jurisdiction is a time-consuming process and sufficient time must be provided for adequate consultation with stakeholders. It is difficult to significantly improve the amendment process as policy development will ultimately take its course, depending upon the nature and complexity of the issues being developed. The paper details the nature of the amendment process and discusses this issue on pages 134 to 139.

A number of submissions detailed proposals to assist in maintaining the uniformity of the Code. These proposals included: providing statutory recognition for the Management Committee; improving national compliance programs; linking interpretative guidelines[12] with the Code; and establishing a cross-vesting scheme for judicial and administrative functions. While the project team recommends a continuing role for the Management Committee until completion of the national competition policy review and any subsequent drafting process, it suggests that the functions of this committee should be considered in light of the circumstances at that time and does not support statutory recognition. However, the project team notes the development of a guideline process and supports a more formal linkage of these guidelines with the Code, to assist the courts in uniformly interpreting the Code's provisions. Further, the project team supports adopting a cross-vesting scheme as an important administrative tool in maintaining a uniform approach to the Code, among participating jurisdictions.

A list of recommendations are detailed below.

2.1 Recommendations

The project team proposes that the Ministerial Council adopt the following recommendations.

Term of reference 1

1.1 Amend Regulation 13 to provide a simplified 'Schumer Box' format containing essential financial information. Other essential information

[12] See page 154 for a details on interpretive guidelines.

would be provided outside the 'box' and would prominently indicate that other important information was contained in the contract document.

1.2 *Amend the Code to clarify which fees and charges are required to be:*
- *disclosed in the simplified Schumer Box; or*
- *otherwise disclosed/identified in the precontractual documentation but outside the Schumer Box.*

1.3 *Request the Management Committee to provide further detail on goods purchased with credit with which there is associated consumer detriment and make recommendations to the Ministerial Council for an interval or cooling off period in respect of those goods.*

1.4 *Require a comparison rate to be given for fixed term products in advertisements and in the 'Schumer Box' on the proposed summary sheet.*

Term of reference 2

2.1 *Request the Management Committee to further examine and consult on the implications of Rafiqi and McKenzie v Smith to determine whether the decision is consistent with the Code's policy in respect of 'deferred debt'.*

2.2 *Amend the provisions of section 6 of the Code to provide a clearer distinction between the 'amount of credit' and 'interest charges'. This may be achieved by providing a definition of 'interest' and making reference in this section to the Code's definition of 'cash price'.*

2.3 *Amend the Code's definition of 'cash price' to ensure that it adequately applies to goods which are not normally sold for cash by including the concept of 'reasonable value'.*

2.4 *Amend the Code so that the solicitor is the credit provider where consumer lending is organised by a solicitor on behalf of investors or from investment funds.*

2.5 *Revise the Code's regulation of insurance to remove overlap and duplication between the Code's regulation of insurance and the Insurance Contracts Act. The Code should regulate insurance only where a specific need arises because of its relationship with the credit contract or where the policy of the Code is to regulate an aspect of insurance which is not otherwise regulated. Where there is a need to make reference to other regulation, this should be achieved by signposting the provisions in the Code.*

2.6 Amend section 133 of the Code to:

(a) clarify the scope of this section;

(b) to ensure that this section more clearly expresses the Code objectives in relation to third line forcing; and

(c) harmonise, where appropriate, the Code's approach to 'bundled products' with that taken by the ACCC under section 47 of the Trade Practices Act.

2.7 Review the advertising provisions contained in Part 9 of the Code in the light of the Post Implementation Research Project.

2.8 Review the Code's regulation of linked credit providers to determine whether there is unnecessary overlap and duplication between Part 7 of the Code and the Trade Practices Act.

2.9 Amend section 66(3) of the Code to remove doubt as to the application of this section to continuing credit contracts.

2.10 Revise the monetary limit of $125,000 on the application of sections 67-69 imposed by section 66(3) of the Code to a level sufficient to cover most Australian home mortgages.

2.11 Amend the requirements for default notices under section 80(3) of the Code to include additional information stating:

(a) that the notice is a default notice;

(b) the date after which enforcement action may commence;

(c) that repossession may not extinguish the debtor's liability; and

(d) the debtors right to make applications for hardship and postponement.

2.12 Request the Management Committee to monitor the level of new fees and charges that are unilaterally imposed by credit providers during the course of credit contracts.

2.13 Revise the monetary limit of $125,000 on the application of Division 3 of Part 5 of the Code to a level sufficient to cover Australian home mortgages.

2.14 Amend Part 10 of the Code (consumer leases) to require pre-contractual disclosure of the information detailed in section 152(1).

2.15 Amend section 155(1) of the Code to include a reference to section 144 of the Code.

2.16 Amend section 15(G) and 100 to ensure that contingency fees and charges are not key requirements.

2.17 Request the Management Committee to examine the level of compliance with section 15N(d) of the Code.

2.18 Review existing state and territory laws relating to finance brokers to provide a consistent approach to the review of unconscionable broker fees and charges and standards for broker conduct.

2.19 Recognise electronic transactions, by harmonising the Code, as far as possible, with the Electronic Transactions Bill 1999. In addition, adopt specific consumer protection measures to respond to the issues that arise specifically out of the consumer credit environment.

2.20 Amend the Code's definitions of 'writing' and 'sign' to make it clear that the Code recognises both electronic records and the electronic authentication of records.

2.21 Give further consideration to those types of contracts, such as real property mortgages, which need to be exempted from being able to be entered into electronically.

2.22 Permit electronic communications where the consumer has an electronic address, the means to notify a change of address, elects to receive communications electronically and has a right to cancel this election.

2.23 Prohibit documentation under the Code that triggers an enforcement process being able to be provided electronically.

2.24 Implement points 1 to 7 below in relation to the storage and reproduction of information.

1. Ensure that the pre-disclosure statement and the contract is capable of being stored both before and after the transaction is completed.

2. Ensure that all electronic communications delivered electronically are capable of being retained and are accompanied by instructions on how to do so.

3. Ensure that the capacity to store or retain electronic communications includes both the capacity to copy them on a personal electronic file and make a paper print-out of it.

4. Ensure that any electronic communications so retained be able to be done in a manner that satisfies conditions of reliability and identification of place, time and date of origin and receipt of the information.

5. Ensure that electronic communications permit the display of text messages in a clear and readily understandable format.

6. Require that credit providers take reasonable steps to ensure that the pre-contractual information and the contract are complete and unaltered at the point at which a consumer receives them. Of course, this needs to be done in a way that does not prevent the electronic information from being stored by the consumer.

7. Give further consideration to the kinds of documentation or other information that would not be considered to be appropriate to post on a web site for the purposes of providing that information to the consumer.

2.25 Require that pre-contractual and contractual information is able to be scrolled though before any contract can be entered into. This documentation should be required to be sent in a form that enables consumers to download it or print it out if they choose.

2.26 Amend section 162 of the Code or make a regulation under section 13 to ensure that important electronic communications are clearly and conspicuously expressed without distractions.

2.27 Ensure that the Code's minimum requirement for font size for paper based documentation is also required for electronic communications.

2.28 Ensure that consumers are given the opportunity to challenge unfair presumptions concerning the sending and receipt of messages.

2.29 Ensure that consumers are given the opportunity to challenge unfair contractual terms concerning the attribution of a message to them.

2.30 Require credit providers to disclose a physical address in the context of electronic communications only.

2.31 Support a two-stage process by:

1. requiring the introduction of a multi-clicking process at the stage at which the consumer is considering the loan product and expressing their interest in proceeding to the formal contracting process; and

2. requiring the introduction of a mechanism that does not involve clicking at the stage at which they express their agreement to enter into legal relations. This mechanism would involve some kind of electronic signature, which is reliable in authenticating the identity of the consumer and of the intent of that person to be associated with the message. The consumer ought to have the option at this stage to enter into the contract by other means.

2.32 Address the issue of currency of disclosure in the electronic commerce context only.

2.33 In adhering to the objective of functional equivalence, the issue of a right of reflection ought not to be addressed in the context of electronic communication only.

2.34 Request the Management Committee to monitor the level of popularity of Internet transactions with overseas credit providers with a view to developing a targeted educational campaign on the potential problems associated with obtaining credit from overseas if any problems are identified.

2.35 Request the Management Committee to convey any concerns to the Federal Government via the National Office for the Information Economy.

Term of reference 3

3.1 Amend the Uniformity Agreement to require adoption of amendments to the Code or Regulations by all jurisdictions within six months of the passage of those amendments in Queensland.

3.2 Continue the operation of the Management Committee until completion of the stage 2 competition policy review and any subsequent amendment of the Code.

3.3 Provide a mechanism to legally link guidelines so that they can assist in interpreting the provisions of Code.

3.4 Establish a cross-vesting scheme under the Code for relevant judicial and, where appropriate, administrative functions.

Technical amendments

4.1 Defer further consideration of technical amendments until completion of both the Post Implementation Review and the national competition policy review, and consider these in any subsequent drafting process arising from these processes.

3. Introduction

3.1 Background

Ministerial Council on Consumer Affairs decision.

In August 1997, the Ministerial Council agreed to undertake a Post Implementation Review of the Code to determine:

- whether the objectives of the Code are being achieved;
- the impact the Code has had on the marketplace; and
- opportunities for improving the national management structure for the Code.

Stage 1 of a 2 stage review

A further review will be conducted under the National Competition Policy process and is to be completed by the year 2000. The Post Implementation Review links with the competition policy review to ensure a consistent and integrated approach, rather than comprising two separate review processes. The Post Implementation Review is stage 1 of this 2 stage process.

Purpose of the review

The Post Implementation Review has been a scoping study which provides data and recommendations that will feed into the stage 2 competition policy review.

Terms of reference (detailed in Appendix 2) for the stage 1 Post Implementation Review detail three broad purposes for the review which are:

- to inform and feed into the stage 2 competition policy review;
- pending full competition policy review, to inform the Ministerial Council as to the practical effects of the Code's implementation to date; and
- to make appropriate recommendations to the Ministerial Council for immediate improvements to the national management/administrative structure for the Code (ie matters identified as being able to be addressed without pre-empting the competition policy review).

Terms of reference for the stage 1 review are to address the following key areas:

- The impact of the Code's 'truth in lending provisions' on borrowers;
- The relevance of the law to the current consumer credit marketplace; and

- The impact of the Code's administrative structure on the achievement of uniformity between jurisdictions.

3.2 The review process

Ministerial Council on Consumer Affairs

The Ministerial Council commissioned the Post Implementation Review and approved the terms of reference. The final report for the review is presented to the Council.

Steering Committee

The Standing Committee of Officials on Consumer Affairs ('the Standing Committee', which comprises heads of consumer agencies, appointed the Management Committee as steering committee for the review. The Management Committee has provided regular reports to the Standing Committee during the progress of the review.

Project Team

The review has been conducted by a team comprising representatives from all Australian jurisdictions and managed by a project manager appointed by the Standing Committee. The project team comprised representatives from each State and Territory and developed the issues paper which was released in August 1998 seeking submissions from stakeholders on the matters raised by the terms of reference. The project team has jointly evaluated those submissions and has provided the analysis contained in this report. The names of project team members are detailed in appendix 3.

Technical Reference Group

The Standing Committee appointed a Technical Reference Group ('the Reference Group') to provide specialist advice to the project team during the review. The Reference Group represented a range of people with consumer, business, legal and academic expertise.

The primary role of the Reference Group has been to provide advice on the recommendations contained in term of reference 1 and the technical issues raised by the Queensland Law Society. Details of these issues were formally distributed to members in early 1999. Informal advice has been provided by individual members of the Reference Group in relation to other issues discussed in this paper.

Technical amendments

Since commencement of the Code, a number of technical amendments to the Code and Regulations have been developed and are contained in the *Consumer Credit (Queensland) Amendment Act 1998* and the *Consumer Credit (Queensland) Amendment Regulations (No 2) 1998*.

Following passage of the amendment Act, the Queensland Law Society in particular have raised a number of technical issues which have not been resolved by the amendment Act or amending regulations. While this review has been a broad policy review of the Code, with potential to make some of these issues redundant, it was considered appropriate to consider these issues during this process.

Technical issues raised by the Queensland Law Society have been distributed to the Reference Group for comment and a summary of these comments is provided on pages 161 to 175 of this report. The project team's recommendation is detailed on page 161.

A number of other submissions to this review have raised further technical issues. Not all of these issues have been dealt with in this review. However, once the stage 2 competition policy review has been concluded, a further drafting process is likely and these residual issues will feed into that process.

3.3 The review methodology

3.3.1 Issues paper

In August 1998, the Standing Committee distributed approximately 1500 copies of an issues paper to stakeholders in the consumer credit market. In addition, copies of the paper were provided in a downloadable form on the national consumer credit code web site. Copies of the paper are still available from the following Internet address. *http://www.creditcode.gov.au/*

The issues paper detailed the review process, the terms of reference and identified (after consultation with stakeholders) the key issues which related to the terms of reference. Submissions were sought from stakeholders on the issues which were detailed in that paper.

3.3.2 Submissions

While the closing date for submissions was 23 October 1998, the project team continued to receive contributions until 24 December 1998. In total, 33 submissions were received and these have provided invaluable information for the project team.

3.3.3 Research

The Standing Committee has approved substantive research in association with this review, on the impacts of disclosure on the marketplace. Development of this research took some time and as the research project did not finally commence until January 1999, it was not fully completed at the time this report was finalised.

As the research will provide further information which is specifically relevant to term of reference 1, the recommendations contained in this term of reference are provisional and will be reviewed in light of the research findings.

The research objectives are to provide information about:

- The socio-economic and demographic patterns of consumer credit usage in the community;
- The factors which contribute to and inform consumer decisions to enter into consumer credit arrangements;
- The factors which determine choices between credit providers and credit products; and
- The manner in which the Code specific disclosure information is used by consumers.

The main component of the research is a telephone survey of Australian consumers which has been conducted by the Queensland Government Statistician. Griffith University Law School has been contracted to manage aspects of the research project and to collect additional information about advertising, pre-contractual and contractual material. Data from the main survey have been collated, and focus group research has been conducted by Griffith University to explore in particular socio-economic and demographic patterns of credit usage. Griffith University is now completing a final report for presentation of the research data, in consultation with the Queensland Government Statistician. This report will be completed by mid-August 1999.

The telephone survey conducted by the Queensland Government Statistician obtained information from Australian consumers[13] over the age of 18 who had

[13] Western Australia was not included in the survey because the time difference created problems for interviewers based in Queensland. The population sample included all other Australian State and Territories.

taken out a consumer loan since January 1997. The survey selected a sample population by using a random sample methodology, known as Random Digit Dialling,[14] to obtain data which could be generalised across the Australian population.

As one purpose of the survey was to collect data which will report on the impact of the Code by socio-economic and demographic group, the sample was designed to produce estimates of similar precision for income ranges and metropolitan and non-metropolitan areas. The sample was designed to produce 5,000 successful interviews after 'out of scope'[15] responses were discarded. The sample delivered 7,812 'in scope' responses of which approximately 1,600 had taken out a loan since 1 January 1997. This number of responses will provide data of sufficient statistical validity to inform the objectives of the survey detailed on page 22.

Two pilot surveys, each comprising approximately 500 telephone calls, were conducted to refine the final survey and to identify problems which specifically related to the subject matter of this survey. These pilots enabled refinement of the survey questions and of the survey methodology.

The telephone survey asked specific questions of consumers about housing loans, personal loans, credit and store cards, and loans from retail stores and car dealers. The questions sought specific information from consumers about the factors which influenced their decisions in taking out loans and whether they compared products or credit providers before making credit related decisions. The questions sought information about the usefulness and the comprehensibility of pre-contractual and contractual information and also sought information about the length of time which elapsed between reading pre-contractual information and signing the credit contract.

The telephone survey results will provide valuable data for the national competition review and will inform further assessment of the recommendations contained in term of reference 1. The research findings will also provide valuable data which will contribute towards a better understanding of the consumer credit market generally. As mentioned above, the final analysis of the research data will be available by mid-August 1999.

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[14] This method of sampling selects telephone numbers from all connected numbers. These include unconnected numbers, business numbers and other numbers out of the scope of this survey but ensures an appropriate random sample. The sampling also includes silent numbers which comprise 15% of numbers in Australia.

[15] Out of scope responses included: Answering machines; businesses; fax machines; disconnected numbers and persons who refused outright to respond to the survey.

Relationship between research and term of reference 1

The recommendations made in term of reference 1 are provisional and will be further considered following completion of the research project. Therefore, while comment and analysis has been provided both from stakeholders submissions and the project team's experience, the recommendations will need to be revised once the data become available. This revision will comprise part of the national competition policy review.

3.3.4 Final report

Most submissions addressed the issues outlined in the issues paper and few additional issues were raised. The discussion and analysis in this report follows the scheme of the issues paper. The original numbering of issues identified in the issues paper has been retained. Contributions by stakeholders have been summarised for each issue and each summary is followed by comments, as appropriate, by the project team. The discussion and analysis is followed where relevant by conclusions and recommendations. Recommendations are contained in the text and are listed on pages 12 to 18.

While the project team has attempted to address all of the matters raised in submissions some selection of the most important issues, and those specifically pertinent to the terms of reference, has been made.

Some respondents raised a number of technical and drafting issues. While the review has focused on broad policy issues, some of these issues have been considered in Part 7 of this report. Those technical issues which have not been specifically examined will be considered in future drafting and amendment processes, where these have not been made redundant by amendments arising out of this and the stage 2 competition policy review.

Copies of this paper will be provided to each respondent to the review and will also be available from the national web site at the following Internet address. *http://creditcode.gov.au*

4. Term of Reference One

The impact of the Code's 'truth in lending' provisions on borrowers

The central basis for the Code is often formulated as the achievement of 'truth in lending'. The review will, as a matter of priority, focus on this objective and:

- *revisit this aim to make explicit the precise market failure or other problem intended to be addressed;*
- *examine the extent to which consumer behaviour has changed in relation to obtaining credit and managing debt as a result of the Code.*

Relevant questions will include the following: Has the Code made products more transparent and easier to compare for borrowers? Does the Code assist consumers in making informed choices when purchasing credit and if so, how? What is the optimum amount of information? Does this differ between various groups of consumers?

4.1 Background

As background to term of reference one, the issues paper noted that one of the key objectives of the Code is to assist consumers to make informed choices when purchasing credit and that the principle of 'truth in lending' is central to this approach. The Paper expanded this concept by quoting from a determination by Mr Justice Kirby which says that 'The ultimate theory behind the philosophy of truth in lending...is that disclosure...will help to ensure honesty and integrity in the relationship (where one party is normally disadvantaged or even vulnerable); promote informed choices by consumers; and allow the market for financial services to operate effectively'.[16]

The concept of truth in lending is derived from legislation enacted in the United States during the 1960s. Similar legislation followed in the United Kingdom and the principles were incorporated into the Australian Credit Acts.

The Credit Acts sought to establish truth in lending by using standardised methods of interest calculation and by prohibiting fees and charges. As a result the Annual Percentage Rate (APR) could be used as a means of comparing the cost of one product against another.[17] The Credit Acts regulated

[16] *Canham v Australian Guarantee Corporation Ltd* (1993) NSWLR 246 at p254

[17] The Credit Acts regulated a small percentage of 'closed' or 'fixed sum' contracts and 'open' or 'continuing credit facilities'.

products rather than processes and product innovation tended to occur in areas which were not regulated.

The Code adopts a different approach by regulating processes rather than products and applies, as far as possible, the same requirements for disclosure to all products in the market. The Code permits credit fees and charges in addition to interest as it is intended to create greater product flexibility and innovation.[18]

As noted in the issues paper 'the Ministerial decision in 1987 to review the 1980's credit laws was not based on an approach requiring formal examination of the precise market failure in the same structured way that would be required, for example, when conducting a review under competition policy.'[19] One of the objectives of this review is to 'make explicit the precise market failure or other problems which need to be addressed'. From this perspective, an analysis of market failure will be more effectively considered by the stage 2 competition policy review. Information gathered by this review will usefully inform that analysis.

Term of reference 1 focuses on the effect that the disclosure provisions are having on the market, in the context of the stated objectives of the Code which are:

- to provide meaningful disclosure to debtors, mortgagors and guarantors at relevant pre-contractual, contractual and post contractual stages;
- to ensure that the cost of credit is disclosed to prevent deception; and
- to enable comparison between products, and encourage competition.

Issues 1.1 to 1.9 in the issues paper were designed to explore the impact of the disclosure provisions in achieving these objectives and this section will discuss responses made in submissions to those issues. It is clear, from the assessment of responses, that the issues overlap and responses to each cannot be considered in isolation. For example, issues related to comparability and the value of disclosure must be considered in the context of the timing of disclosure.

[18] While the generic disclosure regime aims to achieve both 'truth in lending' and 'product flexibility' the Code also prescribes a formula which must be used in disclosing a comparison rate. The disclosure of the comparison rate is optional under the Code.

[19] Uniform Consumer Credit Code Post Implementation Review Issues Paper, August 1998

It was clear, also, from the responses, and anticipated when the issues paper was formulated, that further research was needed to precisely determine consumer behaviour and needs in respect of disclosure. Details of the research project are provided in part 3.3.3 of this paper.

4.2 Submission content and project team analysis

Summary information has been grouped around the specific issues raised in the issues paper. A number of respondents directly addressed these issues while the remaining comments have been grouped under appropriate headings by the project team.

4.2.1 Have the disclosure requirements resulted in the provision of information which is useful to consumers in making choices between credit products and credit providers? (Issue 1.1)

Submission comment

There was a wide range of opinion in response to this question.

Some respondents considered that consumers are increasingly more astute and that issues which have not previously excited inquiry are becoming the focus of greater attention. It was considered that the disclosure requirements have resulted in an improved consumer position, especially in relation to housing loans and to interest calculations.

However, most of those respondents qualified this view by stating that the information provided as a result of the pre-contractual disclosure requirements was given too late in the process and was too complex to be useful in comparing lenders and products. Respondents pointed out that the decision to purchase a particular product was made before the comparative information was given, and that the process of accessing information from different credit providers was costly and arduous. Some respondents believed that the information provided did not assist at all in making comparisons or influence the selection process.

The complexity of the documentation was thought to act against the objectives of the Code and that large numbers of consumers would need independent assistance in interpretation. The benefits and value of the disclosure requirements were thought to vary depending on the circumstances in which information is given to consumers since the amount of information required is too great to read at a pre-contractual stage if the information is only obtained after making an application to a credit provider.

The issues raised are clearly relevant to timing, complexity and comparability and are elaborated in the discussion of Issues 1.2 to 1.7 below.

4.2.2 Is it possible for disclosure information to be presented more simply and yet still comply with the requirements of the Code? (Issue 1.2)

Submission comment

Most submissions suggested that the information required by the Code could be presented more simply and yet still comply with the objectives of the Code. Some of the suggestions were based on a slight modification of the current regime and included suggestions which might not require amendment of the Code. However, many of the submissions pointed to a dysfunction of the current pre-contractual disclosure and suggested that the information was complex, excessive and often unhelpful to consumers.

The main thrust of submissions was that clear and concise information, perhaps in the form of a one page summary, should be given to consumers at the time of their inquiry. Opinions varied as to what information the summary might contain. A number of respondents referred to the Schumer box used in the US legislation (essentially a simplified financial table) which would contain the interest rate; amount of credit; credit fees and charges; and the number, frequency and amount of repayments.

A variation on this sought to address the difficulty of ascertaining total fees and charges by including a maximum possible charge and best and worse case examples. One respondent considered that the financial table would achieve its intended purpose if the fees and charges required for disclosure were those applicable before credit is first provided. They also suggested inclusion of account keeping fees and further, a statement that early termination fees apply.

It was generally thought that consumers should be able to make a choice or decision on the basis of the simplified financial table without the added complexity of the provision of information which was more relevant to the post contractual situation.

The issue of what constitutes a credit fee or charge, and what should therefore be disclosed up-front, was raised by the majority of credit providers. Currently, all fees and charges which might possibly apply are disclosed in the financial table despite the fact that the borrower's conduct of the account might never trigger the charging of any such 'contingency fee'. This is said to create confusion in the minds of consumers.

One consumer detriment which arises from the uncertainty surrounding credit fees and charges is the credit provider's description of fees or charges as 'unascertainable'. This is permitted by the Code to cater for circumstances where the exact amount of the fee or charge is not known by the credit provider at the time of making the disclosures. The extent to which this is overused, or abused, is not clear.

While one respondent submitted that pre-contractual disclosure should feature only that information that consumers want to know, others differentiated between information that consumers want and that which they need to make an informed choice. It was also pointed out that consumers have differing needs for information depending on the type of product they are considering, so that a statement of 'core information' might not be sufficient for those seeking to compare, say, different types of housing loan. It was suggested this could possibly be satisfied by having more information available on request.

It was also pointed out that the application of civil penalties to key disclosures encourages 'overcompliance' resulting in excessive documentation, and that this acts against the objective of providing accessible information.

Project team comment

The project team agrees that there is a need for disclosure documentation to be simplified.

One of the suggestions — to adopt a simplified Schumer box containing perhaps five or six items of 'essential information', is an attractive proposition which depends largely on identifying what is 'essential information'. Such a solution is not without problems, especially in identifying those fees and charges a debtor might reasonably be expected to incur during the course of the contract. Perhaps the most challenging task in this context relates to those fees and charges attached to activities which are at the debtor's discretion, such as operating a redraw facility. How is the quantum of such fees over the term of the contract to be assessed? The question of ascertainability is also related to this issue.

An important question arises as to what expectations can realistically be attached to a precontractual disclosure document. Should its primary purpose be a tool for comparison or to ensure that a debtor has a 'snapshot' of the cost of the loan in order to determine affordability? The answer to this question would essentially determine the content of the document. This is an issue which cannot be considered separately from the timing issues, and from research data into how and when consumers decide on a particular product or lender.

Conclusions

It is possible to conclude that, in the interests of clarity, the precontractual disclosure requirements should be confined to essential financial and contractual information, preferably no more than a one page summary, and that a 'Schumer box' situated on that page should be required to include costs which might reasonably be expected to be incurred. Those 'contingency' fees and charges not included in the Schumer box would be identified elsewhere in the documentation and reference to these made in the summary document.

The summary document would replace the current precontractual disclosure document and could be separate from the contract document or be part of the contract as is currently the case and would clearly draw attention to the fact that additional important information was included in the contract document. The detail of the information provided on the summary document would be subject to further consultation.

Recommendation

1.1 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.

1.2	**Amend the Code to clarify which fees and charges are required to be:**
·	**disclosed in the simplified Schumer Box; or**
·	**otherwise disclosed/identified in the precontractual documentation but outside the Schumer Box.**

4.2.3 Does the comprehensive supply of information have negative impacts for some consumers? (Issue 1.3)

Submission comment

There was little doubt in the minds of respondents that the comprehensive supply of information was not helpful to consumers in making a choice of products. Whether it had a negative effect was less clearcut.

There was one clear statement that consumers who were happy to read earlier (pre-Code) contracts were daunted by the amount of paper. Others referred to consumers being 'put off'. This was qualified in a limited research project conducted on behalf of one industry body which concluded that the extent to which consumers were 'put off' varied according to the institution they were with.

One respondent saw merit in rethinking the content and timing of the Form 2 information statement and said that consumers often left it behind at the premises in which it was given to them. It was thought not to add value to the pre-contractual process and that its role and relevance was post-contractual.

The point was made that large numbers of consumers find the documentation difficult and complex and therefore still enter into transactions where they do not fully understand their obligations. It was noted that important financial information is often lost among pages of disclosure and that, in particular, the interest rate is often buried in the middle of the contract documents. The problem is compounded where there are a number of documents to sign, such as insurance policies.

With respect to those consumers who had difficulty understanding the information given, it was suggested that this need not have a negative impact if the important summary information was prominent in the document, or if adequate resources were available for consumers to access advice.

One source of confusion, referred to under issue 1.2 above, was whether the fees and charges disclosed applied to all consumers and when or how they might arise.

As a clear statement of the possible negative impact, one respondent said that 'at point of sale the Code's warnings, prescribed detail, and the relevant information compete in vain for the debtor's attention. The sheer mass of material destroys any possibility of useful warning or information function.'

In contrast to the negative aspects of the comprehensive supply of information, the majority of consumers who were involved in the limited research project referred to above believed it was a positive factor, in that they felt assured that the institution was not hiding any costs or terms and conditions and that it put the consumer and the credit provider on an equal footing. The survey also demonstrated a reasonably high level of understanding of the documentation.

Consumers also believed that the complete documentation should be there for future reference in case of a dispute over terms and conditions during the term of the contract.

Project team comment

There are clearly two functions of the documentation. Firstly, it should be a record for reference and an 'equalising' factor between credit provider and debtor. Secondly, it should be a tool for comparison and for assisting the debtor to make an informed decision. While the majority of consumers want to have the comprehensive information for the former purpose there is a definite view that the complexity of the information may confuse and intimidate a large number of debtors, and may indeed obscure the important messages and financial information in the latter case. Suggestions as to how this can be partially addressed are detailed under issue 1.2 above and this issue must also be considered in the context of the timing of that information as discussed under issue 1.4.

Subsequently, it is appropriate to clearly recommend that debtors continue to be given an accurate and complete contract document before they enter into a contract. This will ensure that debtors know and can refer to their rights and obligations under the contract, and that the honesty and integrity of the relationship between credit provider and debtor is maintained.

4.2.4 Is the timing of the information useful to consumers in their choice of credit products? Is there a way around any difficulties associated with timing? (Issue 1.4)

Submission comment

Information supplied by respondents on this issue demonstrates clearly that the information required by the precontractual disclosure provisions of section 14 is, for the majority of consumers, given too late in the process to be useful in their choice of credit products.

One reason for this is said to be that, under the Code, the precontractual information may form part of the contract document. Where this provision is utilised by credit providers it is unlikely that the precontractual information would be available to consumers for comparison purposes until an application is made and, in many cases, a non-refundable fee is paid. Consumers are unlikely, therefore, to make a number of applications in order to compare costs and terms and conditions.

Some respondents report that certain credit providers refuse to give information about even the interest rate over the phone, and that they are reluctant to provide advice until consumers are about to sign a contract.

While ideally, comparative information should be able to be obtained without a formal application, the volume and complexity of the information currently required in the precontractual disclosure document may make it an unwieldy tool for comparison purposes. It is argued that the refinement of the financial table into a one page summary would allow the precontractual information to be used as envisaged in the objectives of the Code. Others suggest that, in any event, the decisions to purchase a particular product is made well before an approach is made to a credit provider. Whether this is related to the problems of accessing comparative material early enough to be of use in shopping around, or related to other social factors, is not clear.

It was suggested that consumers could receive useful comparative information by way of a quote, whereby a credit provider could be asked to provide simple written information on, say, the interest rate and repayments for a nominated amount of credit and loan term which was not subject to the restrictions of the disclosure regime. This could be requested by phone and would not be subject to a formal application.

Further, a number of respondents have proposed a mandatory interval of 24 hours between the receipt of the pre-contractual information and signing the contract. Others have suggested a cooling off period, especially in respect of car purchases, in order that consumers can read the documentation, get advice and shop around. The right to waive that period could be available in certain prescribed circumstances.

Project team comment

The way the Code is currently structured makes it unlikely that the precontractual disclosure document itself could be used for comparative shopping. In order to provide accurate information, the precontractual disclosure document would need substantial input from the prospective debtor. That, in turn, means that credit providers would have to spend considerable time with the debtor in order to obtain the information required. These factors act against the disclosure information being easily available to consumers who are comparing credit products from different credit providers, although it might possibly be available for comparing products offered by the same credit provider if a consumer is in a face to face situation at a loan interview.

The most positive function that the precontractual information can presently perform in such an interview situation or as a result of an application is to ensure that a prospective debtor is aware of the costs and major terms of the credit contract they are about to enter.

Information received to date, and which has yet to be confirmed by the research project, suggests that decisions are essentially made prior to consumers receiving the precontractual disclosure documentation and it may be unrealistic to expect the precontractual disclosure documentation to fulfil the function of comparability as well as affordability and informed consent to enter into a contract.

A quotation system may well assist to overcome any problems associated with the timing of precontractual disclosure information. It is likely that this is currently accessed by a large number of consumers, however, as with any representation, credit providers may have concerns that they may breach section 144 of the Code or section 52 of the Trade Practices Act which prohibit false and misleading representations. The project team considered addressing this directly in the Code with a proposal to amend section 144 to provide a protection from prosecution if a credit provider gave a quote following a prescribed scheme. This proposal was tested with the Reference Group and, on balance, it was considered there was not sufficient evidence to suggest that section 144 was responsible for the fact that some consumers did not access a 'quotation', nor was it certain that a protection from prosecution would solve the problem in view of the fact that the Trade Practices Act and the Fair Trading Acts also had powers to prosecute for false and misleading representations. The project team therefore concluded that it would be preferable to await the outcome of the Research Project before any proposals to improve the timeliness of financial information could be recommended.

An interval between the receipt of precontractual documentation and signing the contract would clearly enhance the debtor's ability to peruse the information and receive advice, where necessary. Again, this no doubt occurs in many cases, especially where the transaction between credit provider and debtor does not take place face to face. A proposal for such an interval was also put to the Technical Reference Group. Both the Reference Group and the project team recognised that the prescription of such an interval would have to take into account the convenience factor for debtors and the viability of a meaningful waiver system. It was suggested by some members of the Reference Group that, since the problem appears to be related to the purchase of specific products, especially motor cars, it may be preferable to consider an interval, or cooling off period, on the purchase of the goods rather than on the credit component.[20] The project team agreed that it would be preferable to have a more targeted solution, but that this was beyond the scope of the Consumer Credit Code.

Recommendation

1.3 Request the Management Committee to provide further detail on goods purchased with credit with which there is associated consumer detriment and make recommendations to the Ministerial Council for an interval or cooling off period in respect of those goods.

4.2.5 Is assessment of the information provided the major factor in choosing a credit product or credit provider (Issue 1.5)

Submission comment

Submissions on this issue suggest that assessment of the information provided is just one of many factors considered by consumers in choosing a credit product or credit provider.

[20] Where this is not already provided for under other specific legislation.

One of the critical considerations is thought to be the opinion of others and the reputation of the institution. An important factor once contact is made appears to be the level of comfort in dealing with an institution and the impression made by the staff of the institution both in being able to respond to queries and in taking time to understand the consumer's needs.

One respondent referred to a survey of people who had taken out personal loans which recorded that 65% of those surveyed had considered only one lender even though more than half had thought about the loan for four weeks or more. Another respondent was of the view that the vast majority of borrowers in the home loan market rely on advertisements to compile a short list of lenders and then do not deviate from that list.

It is likely that consumers of different product categories have a different approach in choosing a product. The view was expressed that the assessment of information is more likely with housing loans than loans for motor cars, and that in general, credit provided independently of the seller of the land, goods or services is more likely to be bought on the basis of comparative information than credit arranged through the seller. The proliferation of loyalty programmes was thought to be another reason for choosing one form of credit over another.

Conclusions

The research project will give more detailed information on the way in which consumers make credit choices since at this stage much of the information provided is based on anecdotal evidence or small studies.

The comment was made that, regardless of whether consumers choose credit products or providers on the basis of assessment of the information provided, it continues to be appropriate to direct the regulatory focus of the legislation towards encouraging accurate disclosure of the cost of credit. Consumers who do not currently use the information provided may be encouraged to do so by the use of appropriate education programmes. This was considered by respondents to be the responsibility of governments, to be undertaken in consultation with relevant stakeholders.

4.2.6 Does the presentation and delivery of information by credit providers assist consumers in their choice of credit product? (Issue 1.6)

Submission comment

It is clear that the presentation and delivery of information by credit providers could be much improved. Whether the deficiencies are due to the requirements of the legislation or to presentation of the information is less clear.

Those respondents who were critical of the presentation point to the fact that the use of stylistic devices is left to the credit provider and that not all credit providers use consumer friendly mechanisms to improve comparability and disclosure.

Consumers who were surveyed on this issue suggested that greater use could be made of stylistic devices such as the use of topic headings; a glossary of banking terms; shorter paragraphs and sentences and point form statements; and the avoidance of legal jargon. These are improvements that could be made without amending the Code.

However, the majority of respondents suggested improvements that are linked to perceived problems with the Code and discussed under the other issues raised in term of reference one. It has been noted earlier above that the civil penalty regime has probably contributed to 'over-compliance', and it is stated that, if provisions of the Code can be interpreted as requiring a full statement, many credit providers will not take the risk of being succinct.

The issue of the disclosure of fees and charges is also relevant here. The disclosure of all fees and charges, including those that are 'contingency' fees and may never be incurred by the borrower, certainly acts against the capacity of the consumer to compare prices.

Respondents also drew attention to the fact that much of the information provided at the pre-contractual stage relates to post contractual issues, and that separation of that information would reduce the amount of paper that consumers are confronted with when considering a credit product.

Standardisation of the description of fees and charges was suggested as an aid to meaningful comparison of fees and to prevent 'double dipping' on certain fees such as default charges and enforcement expenses. The standardisation of the credit contract itself was also raised as an alternate approach.

Project team comment

It is likely that many of the documents prepared by credit providers could be more consumer friendly. It needs to be borne in mind, however, that many products have very complex terms and conditions and that, while stylistic devices can be employed to make these as comprehensible as possible, the impact this might have in assisting consumers in their choice of products may not be substantial.

Given the complexity and variety of credit products in the current market it is also unlikely that standardisation of contracts would be possible or desirable.

4.2.7 Does the Code enable consumers to compare products when purchasing credit? (Issue 1.7)

Submission comment

Responses to this question ranged from a qualified 'yes' to a resounding 'no'.

There was a view that some consumers did use the opportunity to compare, however, this was a minority view. The more general view was that the timing and amount of disclosure was not helpful for comparison purposes. One respondent suggested that the information could be useful if a consumer had approached a wide section of the market, applied for finance and received Letters of Appointment from all sources. However, this process has a number of problems to overcome, not least the time taken to make the applications, and the possibility of incurring non-refundable application fees. It was also pointed out that multiple applications will affect a consumer's credit rating, which is clearly an unintended outcome.

The majority view was that, in order to facilitate the comparison of products, consumers must have access to simplified information, no more than a one page summary, containing key information and including a modified table of essential financial information. It was recognised by a number of respondents, however, that this might not be sufficient to provide a meaningful tool because the proliferation of fees and charges since the commencement of the Code made it difficult to assess the overall cost and whether a low interest rate was necessarily indicative of a competitively priced product.

A significant number of respondents suggested that it should be mandatory for lenders to provide a comparison rate, based on that prescribed in the Code, but which is currently optional. Some suggested that the rate must be used for marketing purposes in order to overcome the problem of having to make an application for credit to access the relevant information. It was also pointed out that the Code of Banking Practice requires a bank to give the relevant details to a person or an external agency in order that the calculation can be made so that, for bank products at least, there is an opportunity for a comparison rate to be calculated, although this is not undertaken by the bank.

The problems of providing an accurate comparison rate for all products was acknowledged. Earlier proposals to include a mandatory comparison rate in legislation were defeated because of the difficulties in applying the formula to continuing credit contracts. The formula relies on the repayment amount being known in advance in order to calculate the rate. Clearly, for continuing credit contracts, the repayment amount cannot be predicted since it requires the amount of credit to be known and also the term of the contract.

Attempts were made to resolve that problem by making an assumption as to the amount of credit and loan term (it was proposed that the assumption should be that the amount of credit would be for $1000 and the term of the loan one year), however, such assumptions would lead to the resulting comparison rate being grossly inaccurate for contracts which were not operated according to those assumptions. Since the focus of the Code was that accurate financial information should be supplied to consumers, the potential inaccuracies were seen as contrary to Code policy. It was also a source of concern to industry that such inaccuracies would trigger the misleading and deceptive conduct provisions of the Trade Practices Act and state Fair Trading Acts as well as corresponding provisions in the Code.

It was the lack of an appropriate formula for dealing with a general statement of the costs of continuing credit contracts which led to the current Code policy of an optional rate calculated according to a prescribed formula, but one which was based on the individual applicant's expected use of their continuing credit contract. There is no problem in calculating a comparison rate for a fixed term contract, however, the rate arrived at for any loan will vary according to the amount of credit and the term of the loan, and the Code has required that any advertised rate must be accompanied by a statement of the amount of credit on which it is based and the term for which credit is provided, and a warning that care should be taken in using the comparator.

One respondent on this issue suggested that consideration could be given to identifying broad 'families' of credit products to which different formulae might be applied, with suitable warnings. One suggestion to overcome the problem of assumptions for continuing credit contracts was that patterns of usage of open ended contracts that had been concluded could be used to make predictions that would form the basis for assumptions to calculate a comparison rate for other open ended contracts. Another has drawn attention to the fact that there is already the capacity to calculate a comparison rate for commonly used fixed term products such as housing and personal loans.

One respondent has suggested that it may be premature to pursue a mandatory comparison rate with its attendant practical and legal problems until research has provided some support for the notion that the absence of a comparison rate is a significant matter for consumers which leads to market failure. This is an issue which may be clarified by the research project currently under way, and by overseas research.

Project team comment

While a comparison rate for continuing credit products is clearly problematic, the case against prescription of a rate for fixed term products is less clear. One major issue which would have to be resolved is that of the decision as to which fees and charges would be included in the calculation.

The question also arises as to whether consumers would benefit from the prescription of such a rate. While there is theoretically a major benefit in having such a major comparative tool attached to certain products, further research data should be obtained as to overseas experience and to consumer needs before any commitment is made in respect of this step.

Recommendation

1.4 Require a comparison rate to be given for fixed term products in advertisements and in the 'Schumer Box' on the proposed summary sheet.

4.2.8 Is the Code's objective to allow consumers to make informed choices when purchasing credit incompatible with the Code's product flexibility objective? (Issue 1.8)

Submission comment

Not surprisingly, respondents who addressed this issue tended to be divided along industry or consumer lines.

Consumer advocates generally believed that any incompatibility which currently existed could be resolved by the imposition of a mandatory comparison rate. This was supported by another commentator who was of the view that so long as *bona fide* predictions for new products are acceptable in making comparison rate calculations, then product flexibility should not inhibit a mandated comparison rate and, conversely, the comparison rate requirement should not inhibit flexibility.

A few submissions reported anecdotal evidence that credit providers tended to reduce product flexibility in order to satisfy Code disclosure requirements related to current and future costs. Whether 'flexibility' in these instances equates with complexity is not clear.

A more general statement was that the Code hindered small business' flexibility in a competitive environment by creating more red tape for them to contend with. This is understandable, since the documentation and level of compliance required for Code disclosure may be daunting for those who do not have the resources of a legal department to advise them.

One respondent suggested that traditional banking sectors have discontinued some products and excluded some borrowers. The example was given of the reduced level of funding for Social Security recipients and low income earners in both the housing and personal loan markets. The writer in this instance appears to have focussed on a perceived reduced flexibility to grant loans to certain groups of consumers rather than the flexibility of the products themselves. With respect to the discontinuation of some products, no evidence was given of the effect of the Code on that product and it may be that such products have simply become uneconomical for the lender or superseded by other products.

Project team comment

In summary, no evidence was given to suggest that the flexibility of the products themselves had been fundamentally affected by the Code's objective to allow consumers to make informed choices, and it may be concluded that there should be no conflict between the objectives of promoting product flexibility and a fully informed consumer. The responses on other issues are, however, relevant in that improvement can be achieved in the way that consumers are informed.

4.2.9 Is there evidence that disclosure is used more effectively by different credit consumer groups? (Issue 1.9)

Submission comment

A majority of the submissions did not respond to this issue because there were no hard data to support what respondents might believe to be true.

In one submission, however, data were quoted from a survey of Australian adult literacy conducted in 1989 which stated that: 'At the intermediate level (of literacy and numeracy), nearly one in two adults could not enter two withdrawals and two deposits in a bank record book and keep a running total'. In respect of literacy it concluded that 'the results give sufficient information to suggest that prose literacy performance of adult Australians drops markedly when more than simple interpretations of text are required. The results we do have suggest that only about a third of the population possesses analytical thinking skills when it comes to understanding prose text'.

This information provides a context in which the usefulness of the disclosure provisions should be considered. The respondent who provided the above information suggests that 'If a large number of consumers cannot assimilate the information provided through the provisions of the Code then an alternative mechanism needs to be identified and implemented to assist these consumers.'

Information supplied by one credit provider suggested that in the personal loan and housing markets borrowers in the low income section of the market generally pay no attention to the disclosed information and seek the product based on the principle of 'first approval will do'. Middle income borrowers who would normally qualify for finance from any institution do use the information to assess to the best of their ability the right product for their needs, however, most resort to advice from other sources. Upper income borrowers in the housing market seek professional advice from accountants or professional brokers or assume their 'family banker' will provide them with sound advice — they do not choose products on the basis of disclosure information provided by the lender.

Data were also provided from a survey of consumers who had taken out personal loans. This survey found that consumers with the highest education levels were likely to place significantly more emphasis on the interest rate than the total costs of the loan than other groups; those with loan amounts in excess of $20,000 will be more likely to see interest rates as important while those with loan amounts of less than $20,000 will be more likely to see the amount of the repayment as more important. The findings of that survey were generally consistent with a UK study which found that consumers were most influenced by convenience and that repayment information was more important in product choice than the interest rate. A small Australian study found that the degree to which 'shopping around' occurs varies dependent on the type of credit facility sought; previous experience in obtaining credit; satisfaction with the consumer's current financial institution and personal confidence in seeking financial advice from other institutions.

The information provided is based on specific markets and it would therefore be unwise to assume that it reflects the whole of the consumer credit market. The research currently under way will throw more light onto this very important issue.

Project team comment

The Code regulates the substance of the credit transaction rather than the product and applies the same protections to all consumers. It is anticipated that the research will conclude that some groups will use the information disclosure provisions to greater advantage than others. The structure of the Code does not lend itself to differentiating protections for different groups, however, the information provided under Issue 1.9 and that gained from the research project will allow a more informed assessment of the usefulness of specific disclosures and will also allow for more targeted information as part of each jurisdiction's education programmes.

4.3 Public Awareness

A number of the issues discussed in this and other terms of reference highlight the need for on-going public education about consumer and credit provider rights and obligations. While regulation prescribes certain activities and establishes rights and obligations for all parties, awareness of those rights and a knowledge of the market generally is important. Therefore, there will continue to be an on-going consumer eduction role for Consumer Agencies.

4.4 Impact of research on term of reference one recommendations

In discussion of the issues raised above it is clear that there is not sufficient data on which to base authoritative statements about consumer behaviour. The research project aims to provide information which will allow recommendations to be made on a firm basis. The focus of the research is set out in page 22 and the results will allow the questions raised in the discussion of issues 1.1 to 1.9 to be addressed with greater clarity.

5. Term of Reference Two

The relevance of the law to the current consumer credit marketplace.

Does the scope of the application of the Code represent an appropriate market intervention? Consider the levels of product flexibility, innovation and consumer choice in the marketplace. Does the Code remain relevant to the current market? Have any changes in the financial marketplace since the Code was implemented been able to be accommodated within the existing regulatory structure of the Code?

5.1 Background

The scope of the Code - a broad based approach

As detailed in the issues paper, the Code applies to all forms of consumer credit in Australia, irrespective of the amount of the transaction (except the hardship provisions) and applies whenever credit is provided for personal, domestic or household purposes. The Code applies uniformly across Australia providing the same rights and obligations for consumers in each of the eight participating jurisdictions.[21] The Code also provides the same rights and obligations for credit providers in each jurisdiction and standardises the regulatory impact on those who conduct business in more than one State or Territory.[22]

The Code's broad-based approach derives largely from the dysfunctional experience of the Credit Acts which regulated products rather than processes. Further, the Credit Acts did not apply to amounts required for home loan mortgages and excluded much of the business conducted by building societies, banks and credit unions, by means of exemptions.

The former regulatory regime resulted in a skewed market which tended to favour unregulated products. The Code specifically seeks to redress this imbalance by remaining functionally neutral so as to create an environment where all products and participants are similarly treated.

[21] Except for differences in WA (see page 133).

[22] Except for credit provider licensing, interest rate ceilings, the establishment of a civil penalty fund and conferral of jurisdiction on local courts and tribunals.

The Code applies[23] whenever a debt is deferred and where the debtor is a natural person ordinarily resident in the relevant jurisdiction or a strata corporation formed in that jurisdiction.[24] Nevertheless, there are specific exemptions from the Code which are outlined in section 7. These exemptions apply to:

- credit not exceeding 62 days;
- credit for which only an account charge is payable;
- the debit facility of joint credit and debit facilities;
- bill facilities;
- insurance paid by instalment;
- pawnbrokers;
- trustees of estates;
- employee loans; and
- circumstances provided by regulation.[25]

As the volume of exemptions from the Credit Acts partly contributed to their dysfunction, exemptions from the Code are considered in accordance with an agreed policy process.[26]

The Code also contains a range of measures which are intended to ameliorate unfair or fraudulent conduct. Many of these measures are similar to those contained in the Credit Acts. These provisions enable courts to vary contractual terms that are unjust and, in certain circumstances, fees and charges that are unconscionable.

The civil penalty regime, detailed in Part 6 of the Code, is a central component of the Code's enforcement process. The regime provides for fines of up to $500,000 where a credit provider breaches one of the key disclosure requirements. This scheme represents a significant departure from the 'automatic forfeiture' provisions of the Credit Acts.

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[23] Application is subject to the qualifications in section 6 of the Code.

[24] See section 6(1) of the Code.

[25] Section 7(10) provides that the regulations may exclude credit of a class specified in the regulations.

[26] The need for exemptions under the Credit Acts arose, in many cases, from a lack of flexibility in the Acts. As the Code is intended to provide increased regulatory flexibility it was not envisaged that there would be additional categories of exemption other than in exceptional circumstances. The few additional exemptions which have been granted under the Code have been assessed in accordance with agreed policy criteria with particular attention to their potential to adversely impact on competition or consumer protection.

The discussion from pages 48 to 136 addresses a number of issues which were raised in the issues paper and can be divided into the following categories:

- the scope of the Code and the appropriateness of regulatory intervention;
- whether products or credit providers should be added to or excluded from its application;
- regulatory overlap;
- the adequacy of marketplace consumer protection;
- the appropriateness of the civil penalties regime;
- the appropriateness of its key requirements;
- integration and uniformity of credit laws;
- product flexibility; and
- electronic commerce.

Commonwealth reforms -financial services

It is important to acknowledge proposed developments detailed in a paper released by the Minister for Financial Services and Regulation in April 1999.[27] This paper ('Clerp 6') proposes a regulatory framework for the 'licensing of financial product markets and service providers, conduct and disclosure of service providers and financial product disclosure'.[28] In summary, the proposed reforms will focus on the investment aspect of the provision of funds rather than on aspects of their use from a consumer's point of view. The proposed framework treats consumer credit as a distinct entity within the financial services market by excluding consumer credit from the proposed regulatory regime.[29] The paper states that 'credit contracts to which the Uniform Consumer Credit Code applies will be specifically excluded as there is already a regulatory regime applying to these arrangements.' [30] Thus all credit which falls outside the scope of the Uniform Consumer Credit Code will fall within the new regulatory framework.'

Among other things, the Clerp 6 discussion paper focuses on concerns about real estate agents providing investment advice and notes that the Australian

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[27] Financial Products, Service Providers and Markets — An Integrated Framework - Implementing Clerp 6 - Consultation Paper - Corporate Law Economic Reform Program, April 1999.

[28] Ibid., p1

[29] Ibid., p3

[30] Ibid., p126

Securities and Investment Commission (ASIC) has been considering issues related to strata title/serviced apartment projects and mortgage investment schemes.

The paper concludes, particularly in relation to real estate agents providing negative gearing advice, that '[i]t seems desirable that a more uniform approach be taken to the provision of credit products and advice in relation to these products. However, pending the outcome of the review of the Uniform Consumer Credit Code, credit that comes within that regime should be excluded from the new regulatory regime.'[31]

5.2 Submission content and project team analysis

Summary information has been grouped around the specific issues raised in the issues paper. A number of respondents directly addressed these issues while the remaining comments have been grouped under appropriate headings by the project team.

5.2.1 The scope of the Code

5.2.1.1 Is the scope of the Code an appropriate market intervention? (Issue 2.1)

Submission comment

While submissions generally endorsed the scope of the Code and said that its coverage was more appropriate than the Credit Acts, respondents said that there are areas where regulation should be extended or where regulation should be reduced. One respondent said that the 'Code is an appropriate market intervention in so far as it provides a standard regulation of consumer credit transactions and provides a "plain English" transaction for consumers'. However, the same respondent said that 'a number of financiers would argue that the regulation is too pervasive, and that the broad terms of the *Trade Practices Act* and fair trading legislation should be sufficient to prevent (as far as possible) fraudulent, misleading, deceptive or unconscionable conduct by credit providers'.

[31] Clerp 6, p127

Project team comment

Generally, respondents were supportive of the broad-based approach taken by the Code's regulatory regime and comments and suggestions were directed towards a refinement of this scope rather than the adoption of a new approach. Subsequently, there would appear to be an endorsement of the 'functional neutrality' of the Code's approach and the following issues address the adequacy of its application rather than challenging its overall relevance.

The project team considers that the Code's broad based and discrete approach to consumer credit is an appropriate market intervention, while acknowledging that within that regulatory structure there may always be scope for refinement.

Conclusion

The scope of the application of the Code is an appropriate market intervention and its discrete regulation of consumer credit should be maintained.

5.2.1.2 Are there products or credit providers currently not regulated by the Code which should be regulated? (Issue 2.2)

Instalment sales

Submission comment

A number of submissions suggested that the Code's application to the terms sale of land[32] and the conditional sale of goods[33] should be clarified. Respondents pointed to two decisions which addressed critical threshold issues such as the meaning of debt to which the Code applies.[34]

Consumer groups noted that, in both cases, the court found that the Code applies to the transactions in question. However, one submission noted that 'the fact that in each case there was a consideration of a fundamental question as to the application of legislation which is intended to apply to all forms of

[32] A terms sale of land (a sale on 'vendor's terms') is a sale of land under which the purchase price is payable by instalments. The vendor lets the purchaser into possession but retains title until conveyance following the final payment.

[33] A conditional sale agreement (or 'Romalpa agreement') is a sale of goods under which the purchase price is payable by instalments. The seller delivers the goods to the buyer but retains title until the final payment.

[34] *Rafiqi and Thomas v Wacel Investment Pty Ltd* (1998) ASC 155-024; *McKenzie v Smith, Lenehan v Smith* (1998) ASC 155-025.

consumer lending suggests that there may be a need to determine...whether specific provision or amendment should be made to ensure that [the Code] retains its 'universal' character'.

Subsequent commentary on the cases by Wilkin[35] and by Duggan and Lanyon,[36] relating to terms sale of land and the conditional sale of goods, has highlighted ongoing concern about the application of the Code in this area. Duggan and Lanyon suggest that a higher court may find that the Code's definition of credit does not include sales contracts where title is retained by the credit provider until payment of all instalments under the contract.

Project team comment

Commentators have raised doubts about whether the Code covers the terms sale of land and conditional sale agreement.[37] Section 4(1) of the Code says in effect that 'credit' means the deferment of debt. The High Court decision in *McDonald v Dennys Lascelles Limited (1933) 48 CLR 457* is authority for the following propositions.

(1) In the case of a terms sale of land, where the contract does not name a date for payment in advance of completion, no debt is incurred until conveyance. Therefore there is no provision of credit up to that point.

(2) Nor is credit provided afterwards because in the usual case there will be no debt deferment. The purchaser's obligation is to pay when the debt is incurred upon conveyance.

(3) In the case of a sale where the price is payable by instalments under the contract in advance of the conveyance, a debt is incurred each time an instalment falls due. Again, however, credit is not provided because there is no debt deferment.

The analysis is the same for conditional sale agreements.[38]

[35] John Wilkin, "Need for Reform of the Consumer Credit Code: Non-Loans" (1998) 14 *Australian Banking and Finance Law Bulletin* 49

[36] Anthony Duggan and Elizabeth Lanyon, *Consumer Credit Code* (Butterworths Sydney, 1999)

[37] Duggan and Lanyon, op. cit., Chapter 2

[38] Ibid., para [2.2.11].

Rafiqi and Thomas v Wacal Investments Pty Ltd concerned a contract for the sale of land for a price of $21,950. There was a deposit of $3,500 and the balance of the price was to be fully paid within 30 days. The contract went on to provide that if the purchasers did not pay the balance on time, the vendors at their option could require payment by instalments instead. The terms were interest at 14.75% per annum, payment over 15 years by 180 equal monthly instalments of $255.17, completion to take place when all the instalments had been paid. The court held that there was a credit contract within the meaning of the Code. It gave two reasons:

> (1) there was a 'deferred debt' - 'the obligation to pay the balance purchase moneys after 30 days was transformed into an obligation to pay monthly instalments of the balance'; and
>
> (2) the reference in section 4(1) of the Code to 'deferred debt' covers future debts and an instalment sale is therefore necessarily a credit contract - 'the Credit Code has introduced a new concept and settled ideas have to give way to the recognition of what Parliament intends to cover by the words "deferred debt"'.

Duggan and Lanyon argue that the first reason is correct and say that:[39]

'The contract said the balance of the purchase price was payable in 30 days. Therefore, at the end of the 30 days the purchasers incurred a debt. The debt was deferred when the vendor elected to treat the contract as an instalment contract'.

However, they disagree with the court's second reason. They say:

'It implies that all instalment sale contracts involve the provision of "credit" within the meaning of the Code. The proposition is misconceived. An instalment payable in future is not a debt. It becomes a debt only when the date for payment arrives. However, even then, in the normal case, the vendor does not provide credit because there is no debt deferment. The Code does not displace this outcome.'

Rafiqi was followed by the New South Wales Commercial Tribunal where, in McKenzie v Smith, it considered the Code's application to contracts for the sale

[39] Duggan and Lanyon, op. cit., para[2.2.11]

of land.[40] The Tribunal gave two additional reasons in support of its conclusion. It said:

(1) the obligation to pay instalments gave rise to a debt that was not conditional or contingent on conveyance of the properties to the purchasers; and

(2) there was credit because the purchasers obtained a benefit, namely, occupation and possession of the properties, in advance of payment.

In relation to reason (1), Duggan and Lanyon say 'this overlooks the point that credit depends on the existence of not just debt, but debt deferred, and the transactions in issue did not satisfy this requirement'. In relation to reason (2), they say 'this overlooks the point that the benefit contracted for was title, not just possession. The Tribunal's conclusion might have been justified if the contracts had provided for immediate conveyance of the properties to the purchasers and deferred their obligation to pay. However, this was not the case'.

In summary, *Rafiqi and McKenzie v Smith* both held that the Code does cover terms sales of land. However, Duggan and Lanyon argue that some of the reasoning in both cases may be questionable in the light of *McDonald v Dennys Lascelles Limited*.

Conclusion

While *Rafiqi and McKenzie v Smith* both held on reasonable authority that the Code does cover terms sales of land there remain differing views about the meaning of 'deferred debt' as applied to terms sales of land and the conditional sale of goods. Whether 'terms sales of land' and 'conditional sale of goods' are intended to be covered by the Code would depend on the terms of the individual transaction. If it is necessary to clarify these provisions there may be scope for technical re-drafting.

[40] The purchase price was payable by instalments.

Recommendation

2.1 Request the Management Committee to further examine and consult on the implications of *Rafiqi and McKenzie v Smith* to determine whether the decision is consistent with the Code's policy in respect of 'deferred debt'.

Tiny terms products

Submission content

A number of respondents expressed concern about 'tiny terms' contracts. Tiny terms contracts are contracts where the cost of credit is incorporated into the cash price and the transaction is represented as a sale of goods by instalment (without any credit charges).[41] This practice is alleged to occur in relation to some motor vehicle sales and, in disguising the cost of credit, appears to be intended to avoid the application of the Code.

Respondents suggested that while in some circumstances, the cash price could be readily determined, other exclusive products such as encyclopaedias, or learning aids were not otherwise available for cash. These products are typically available by door to door or mail order arrangements.

Respondents recommended that consideration be given to the specific regulation of 'instalment or credit sales contracts' which they defined as being an arrangement 'where under a contract, payment for goods is by two or more instalments, and where the total amount payable exceeds the "cash price"'[42].

Respondents also recommended that where no comparator exists for establishing the 'cash price', such as for 'exclusive products', that the Credit Act definition of 'cash price' be adopted.[43]

Project team comment

Where a contract is for the hire of goods, Section 10 refers to the 'cash price' and a definition of 'cash price' is contained in Schedule 1.[44] However, some

[41] Some contracts were also contracts for the hire of goods.

[42] The proposal adopts the 'cash price' as currently defined in the Code.

[43] The Credit Acts definition of 'cash price' provided for the assessment of 'reasonable value'.

[44] 'cash price' is defined in Schedule 1 of the Code as follows: "cash price" of goods and services to which a credit contract relates means the lowest price (unaffected by any discount between the credit provider and the supplier) that a cash purchaser might reasonably be expected to pay for them (either from the supplier or, if not available for cash from the supplier, from another supplier).

'tiny terms' contracts are not contracts for the hire of goods but are purchases by instalment, and the definition may not apply. Also, where contracts are for the hire of goods and the price of the goods is inflated to cover the costs of credit, the Code's current definition of cash price may not assist in identifying those costs. Therefore the project team supports a revision of the definition of 'cash price' and inclusion of the term 'reasonable value'.

In determining whether the Code applies to tiny terms contracts, the threshold question is whether 'a charge is or may be made for providing the credit' in accordance with the provisions of section 6(1)(c) of the Code.[45] Where an arrangement is made to repay a debt by instalments the issue is to determine the amount of debt which is 'deferred' in accordance with the provisions of section 4(2) of the Code.

If we consider the amount of debt deferred as the 'cash price', and the payments to include a charge for providing the credit[46], then the Code will apply. However, as section 6 does not make explicit reference to 'cash price' this conclusion may not be clear. As a result, it may also be argued that the 'amount deferred' equals the sum of the instalments. If this is the case, there is no charge for providing the credit and the Code does not apply.

As Duggan and Lanyon state 'The trouble is that the Code does not differentiate clearly between principal ("amount of credit") and interest ("interest charges").'[47] Further, although the Amendment Act inserts an additional provision saying that the amount of credit does not include interest charges, the Code does not define 'interest'.

In the absence of a definition of 'interest' or a linkage to the Code's definition of 'cash price' in section 6, the application of the Code to tiny terms contracts, where the contract is a 'sale of goods by instalment', is unclear. Therefore, the Code's provisions should be revised and amended to remove doubt about its application to these products.

If this approach is adopted, amendment to define 'interest' and a link in section 6 to a definition of 'cash price' may resolve the issue and clarify the Code's application. Amendment should make a clear distinction between the 'amount of credit' and 'interest charges'.

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[45] Section 6 of the Code.

(c) a charge is or may be made for providing the credit...'

[46] A charge may include interest or fees and charges.

[47] Duggan and Lanyon, op. cit., para [2.4.9]

The project team notes that the existing definition of 'cash price' may also be inadequate for those 'exclusive' products which are not normally sold for cash. The definition for the purposes of its existing application and in any future linkage to section 6 should be revised to incorporate the concept of 'reasonable value'.

Recommendation

2.2 Amend the provisions of section 6 to provide a clearer distinction between the 'amount of credit' and 'interest charges'. This may be achieved by providing a definition of 'interest' and making reference in this section to the Code's definition of 'cash price'.

2.3 Amend the Code's definition of 'cash price' to ensure that it adequately applies to goods which are not normally sold for cash by including the concept of 'reasonable value'.

Coverage of small business

Submission content

Some submissions suggested that the Code should apply to small businesses so as to confer on them the benefits of the disclosure, fair trading and enforcement provisions. Debtors could then access remedies and pursue credit providers for, say, misrepresentations made by franchisors. This approach would recognise the vulnerability of small businesses, although it was suggested that high-risk small business groups might be regulated separately.

However, some submissions qualified their support by the reservation that small business coverage might dilute the consumer protection benefits of the Code, particularly from a government resource and compliance perspective. Respondents also acknowledged that defining the application of the Code to small business would create conceptual policy and drafting issues which would make this proposal difficult to implement.

Project team comment

The project team notes that the Fair Trading Inquiry recommended, in relation to business finance, that the Code of Banking Practice and Australian Industry

Banking Ombudsman Scheme be extended to cover all small business transactions.[48]

As already discussed earlier in this paper, the Code establishes a discrete regulatory regime for consumer credit which deals with the purchase of credit for personal, household or domestic purposes. While some of the disclosure principles contained in the Code might benefit small businesses, extending the regime to a diverse area of small business regulation would be problematic.

Conclusion

The project team does not support extension of the Code to small business but notes that in the absence of regulation by the Code, that the Clerp 6 proposals may result in regulation of aspects of this market.

Pawnbroking

Submission content

A number of submissions suggested that the business of pawnbroking should be covered by the Code.[49] Although a number of arguments were made, the two most prominent were:

- the policy objective of the Code is for it to apply to the provision of credit for domestic purposes; and
- the potential for consumer detriment is significant given the high real rates of interest charged and the current poor practices regarding the redemption of securities in the industry.

Respondents accepted that, were recovery costs in conducting a pawnbroking business to be expressed as an interest rate, that rate would be extraordinarily high and in excess of the interest rate ceilings applicable in most States and Territories. Yet it was argued that some costs could be recovered by transactions fees separately from interest and still comply with the Code's disclosure provisions.

[48] 'Finding a Balance towards Fair Trading in Australia' Report by the House of representatives Standing Committee on Industry, Science and Technology. May 1997.

[49] Section 7(7) currently provides that the Code does not apply to pawnbroking except for sections 70-72.

Project team comment

While the Code is intended to cover all consumer lending within its broad regulatory framework, it was recognised that some forms of lending did not fit within this framework and for this reason the Code exempts some types of lending, such as short term credit and pawnbroking. States and Territories regulate the activities of pawnbrokers and second-hand dealers and legislation deals with a wide range of issues such as:

- the lodgement of goods and the conditions which attach to pawn and loan arrangements;
- the sale, possession and disposal of second-hand goods;
- fees and charges which may be levied for pawnbroking services; and
- licensing regimes for pawnbrokers and penalties for infringement of appropriate conduct standards.[50]

Although the basic processes of pawnbroking vary significantly from the general provision of credit, there is certainly a need for adequate disclosure of information to consumers and there appears to be considerable scope for the disclosure regimes of States and Territories to be updated and improved. Nevertheless, the project team does not consider it appropriate to bring pawnbroking within the ambit of the Code and considers that considerable technical difficulty would arise from attempting to do so.

Further, there is not a pressing need, as was the case with other forms of credit currently regulated by the Code, for a harmonisation of laws relating to pawnbrokers. In the absence of a national market for pawnbroking services, it would not appear unreasonable that separate and quite different regimes of pawnbroking regulation apply around the country.

As the Code provides for the review of pawnbroking transactions for unconscionable charges and unjust terms, it is concluded that the current exclusion of pawnbroking transactions in section 7 of the Code should remain.

Conclusion

That the Code's current regulation of pawnbroking remain unaltered.

[50] *Second-hand Dealers and Pawnbrokers Act 1994* (TAS), *Pawnbrokers and Second-Hand Dealers Act 1996* (NSW), *Pawnbrokers (Amendment) Act 1990* (ACT), *Consumer Affairs and Fair Trading (Pawnbrokers And Second-Hand Dealers) Regulations* (NT), *Pawnbrokers Act 1984* (QLD), *Second-Hand Dealers and Pawnbrokers Act 1996* (SA), *Second-Hand Dealers and Pawnbrokers Act 1989* (VIC), *Pawnbrokers and Second-hand Dealers Act 1994* (WA).

Solicitor lending

Submission content

A number of submissions raised concerns about solicitor lending schemes, where an investor provides funds to a solicitor and the solicitor arranges for the funds to be lent to a consumer on behalf of the investor. Where the 'investor' is the credit provider on record (as distinct from the solicitor) the resulting credit transactions, which may be for personal, household or domestic purposes, may not be regulated in so far as the investor cannot always be said to be in the business of providing credit or in any other business.[51] Whether the 'credit provider' is in business would be a matter of fact to be ascertained in any given case and the Code would be unlikely to apply in all circumstances.

Respondents said that that while this type of arrangement provided a relatively secure, high return investment a number of problems arose for consumers where the transaction is unregulated. For example, there was often inadequate investigation by the solicitor or the investor of the debtor's capacity to pay, which was compounded by the attractiveness of these arrangements for people in financial difficulty. While many of the arrangements required interest only payments, consumers were experiencing difficulty in meeting these payments and often had no realistic expectation of repaying the principal. It was also suggested that the cost of credit was inflated by solicitor's fees and in some cases problems arose because of substantial penalties for late payment and high default rates of interest.

Some respondents suggest that, as solicitors acting on behalf of credit providers (investors) in effecting and administering consumer credit transactions do so in the course of a business (or incidentally to it), they should effectively be credit providers for the purpose of the relevant test in section 6(1) (which requires that credit be provided as part of a business).

However, one submission suggested that lending from solicitors' trust funds should not be regulated because it was argued that the disclosure requirements have resulted in some credit providers leaving the market, providing fewer choices for potential borrowers.

As a possible solution to this problem, one submission suggested that the 'innocent investor' might look for protection similar to that contemplated by

[51] See section 6(1)(d) of the Code.

section 169A[52] of the Code by obtaining a 'sanctioned indemnity'. This respondent also noted the relevant provisions of the Canadian legislation which apply where a broker (in this case a solicitor) arranges credit involving a credit provider (investor) who does not enter into the credit agreement in the course of carrying on a business.[53]

Project team comment

Where this type of lending is not covered by the Code, consumers do not have the benefit of some key protections which are otherwise provided. The protections which would be provided if this type of lending was covered by the Code include:

- the re-opening provisions of sections 70 and 72;
- adequate pre-contractual disclosure as required by section 15; and
- protection against penalties provisions and acceleration clauses which are prohibited under the Code.

The project team is of the view that the Code should apply to consumer credit transactions where a solicitor effects and administers the transaction on behalf of the investor (credit provider). If a credit contract is entered into solely between an investor and debtor (but arranged by a solicitor), it can be argued that the Code does not apply. However, it can also be argued that investment is made in the course of a business, particularly where the investment may be re-lent to another consumer for a further period. As there appears to be doubt about the Code's application to these arrangements, it would be appropriate to amend the Code to ensure that it applies in these circumstances.

While there is no reason why individuals who simply provide one-off credit to another person should be covered, (for example, it was not intended to catch one-off, individual loans between friends or family) the Code should apply where credit is provided by investors and arranged by a solicitor. Consumers in these circumstances should have the benefit of the Code's protections.

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[52] The Amendment Act inserts a new section 169A in the Code which sets aside the possible application of a rule of law which rendered void an indemnity given by another person in respect of a liability for an act or omission where that act or omission constitutes an offence. The respondent's proposal in relation to solicitor lending is that where the Code applies to an 'investor', the investor might seek an indemnity against the actions of a solicitor who conducts most of the business of lending. Where the investor suffers a loss as a result of an act or omission by the solicitor, the investor might recover that loss from the solicitor even where the act or omission is an offence.

[53] Broker is defined as 'a person who for compensation assists a person in obtaining credit'. See section 12 of the Canadian Cost of Credit Disclosure Act.

Sanctioned indemnities are to be provided by the Code[54] for credit providers to which the Code does apply, while the problem in relation to solicitor broker schemes is that the Code may not apply to the credit provider (investor). Rather than amending the Code so that it applies to the investor, it would seem preferable that the Code applied to the solicitor, who arranges the credit and primary dealings with the debtor.

Recommendation

2.4 Amend the Code so that the solicitor is the credit provider where consumer lending is organised by a solicitor on behalf of investors or from investment funds.

Finance Brokers

Submission content

A number of submissions detailed concerns about the conduct of finance brokers, particularly the level of brokerage fees which were perceived in some cases to be excessive. Respondents were also concerned about representations made by finance brokers regarding consumer credit contracts. While they acknowledged that section 144 of the Code would generally apply to representations made by finance brokers, they proposed that credit providers should accept more responsibility for finance broker representations and pointed to the linked credit provider provisions in Part 7 of the Code as a possible model for linking credit providers to credit broker representations.

Submissions recommended that the Ministerial Council either:

- extend section 118 (which renders a credit provider liable for a linked supplier's representations about the credit contract) to make credit providers liable for representations by brokers; and
- make it clear that finance brokers can be joined to an application, under section 70 of the Code, to set aside a credit contract as unjust; or
- that each state introduce legislation providing effective relief to borrowers and guarantors where they have been misled by brokers.

A number of submissions suggested that uniformity should be adopted in State and Territory broker regulation.

[54] On the commencement of section 169A of the Code.

Project team comment

Finance brokers are generally appointed by a prospective debtor for the purposes of negotiating/arranging a credit contract on their behalf. However, issues may arise if the finance broker can also be said to be acting for a particular credit provider in certain circumstances or for particular purposes or where the broker receives a benefit for the referral of business to a credit provider. However, in the absence of a clear agency arrangement between the broker and the credit provider, it is unreasonable to presume that all representations made by brokers are made on behalf of the credit provider and it would be difficult for credit providers to determine and control the substance of these representations.

Representations made by brokers are subject to the relevant provisions of the fair trading Acts, the Trades Practices Act and section 144 of the Code. Some specific State and Territory legislation also regulates representations by brokers.[55] Further, section 70 of the Code continues to apply to any contract between a credit provider and a debtor, whether or not the credit contract was arranged by a credit broker.

The central issue in relation to brokers is the extent to which brokers act as an agent of the credit provider and whether this agency is appropriately dealt with by the Code. Agent relationships are already covered by section 176 of the Code, which states that the conduct of an officer, agent or employee of the credit provider is taken to be the conduct of the credit provider.[56] Section 176(4) defines the relationship between persons with whom the credit provider is associated and section 176(5) provides a defence where the credit provider does not reasonably have knowledge of, or reason to believe something in relation to the actions or knowledge of an officer, agent or employee.

The project team discussed this issue with some members of the Reference Group who argued that credit providers are using brokers more frequently for the referral of credit business. Where these arrangements are formalised, the provisions of section 176 would appear to adequately cover any representations made. However, some arrangements may be made on an informal or 'nod and wink' basis.

The project team acknowledges a potential problem in the marketplace in relation to finance broker representations. However, expanding the concept of

[55] For example the *Consumer Credit (Finance Brokers) Act 1998* (Victoria).

[56] See section 176 (1) of the Code.

agency for the purposes of making the credit provider liable for finance broker representations (in the manner in which section 117/118 currently makes credit providers liable for representations about the credit contract by linked suppliers) may be problematic as the interrelationships are not necessarily compatible to the scenarios involving linked suppliers.

Further investigation and analysis would be needed to establish the prevalence and nature of these arrangements before any regulatory proposals could be considered.

In relation to finance broker fees and charges and broker conduct generally, a number of jurisdictions separately regulate these activities. The project team is of the view that finance broker conduct (including representations made by brokers) and the imposition of fees and charges by brokers are activities which stand apart from the general provision of credit and should therefore be regulated separately. This will be discussed further in relation to 2.10 and 2.11 on page 98.

5.2.1.3 Are there products or credit providers currently regulated by the Code which should not be regulated? (Issue 2.3)

Submission comment

Respondents did not identify any specific products or credit providers which should be removed from the regulatory regime of the Code.

Project team comment

While there were no suggestions to remove specific products or credit providers from the Code, there is provision for exemption under sections 7(10) of the Code and policy and processes have been established to deal with these issues. The administration of this process is further discussed on page 154.

5.2.2 Regulatory overlap / duplication

5.2.2.1 Does the scope of the Code include areas which should more appropriately be dealt with by other regulation rather than by the Code? (Issue 2.4)

Submission comment

The primary focus of submissions on this issue related to the Code's regulation of insurance and advertising. A number of respondents suggested that the remedies of the Commonwealth's Trade Practices Act, the *Insurance Contracts Act 1984* and the State and Territory fair trading Acts are adequate vehicles for consumers to assert their rights. Alternatively, it was suggested that the Code could signpost the existence of established remedies under those other Acts.

Insurance issues

Submission comment

A number of respondents detailed overlap in the regulation dealing with insurance matters between the Code, the Insurance Contracts Act (Cth) and the Trade Practices Act.

Respondents noted that the Insurance Contracts Act regulates:

- disclosure;
- insurance contract formation and documentation;
- copies of insurance documents;
- disclosure of remuneration;
- cooling-off periods;
- cancellation by insurers; and
- rights for consumers on cancellation of proposals by insurers.

However, respondents also said that the Code imposes requirements on credit providers in relation to the financing of credit-related insurance and that this additional regulation adds to the compliance costs of credit providers, as well as adding to the bulk of information provided to consumers.

Respondents argued that all insurance matters should be regulated within one regulatory environment. Therefore, either the States and Territories or the Commonwealth should regulate this area. This would make compliance easier and reduce costs. One respondent suggested that the issue of regulatory overlap ought to be considered by the competition policy review. The respondent also suggested that removal of overlap would simplify the amount of information currently being provided to consumers.

Restrictive trade Practices - third line forcing

Both the Code[57] and the Trade Practices Act[58] deal with third line forcing. Respondents argued that there is no need for this duplication and that there are variations in their respective approaches to third line forcing which were said to be undesirable.

Some credit providers have experienced compliance difficulties with section 133 of the Code. For example, there is debate about the precise meaning of the word ‘require’ in section 133(1), particularly in relation to bundled and discounted products. It has been suggested that this may have led to some limitation on product packaging or bundling. Also, the reference in this section to ‘in connection with the credit contract’ rather than to ‘credit-related insurance’, has created some doubt about the precise scope of this provision.

In administering section 47 of the Trade Practices Act, the ACCC can authorise certain conduct and has approved some bundled product arrangements. However, there is some concern that these ‘authorised’ products might still contravene section 133 of the Code. Respondents suggested that these differences in policy should be reconciled.

Definition of consumer credit insurance

One respondent said that it was difficult to determine whether the Code applies to certain types of consumer credit insurance as the definition in the Code is different from that in the Insurance Contracts Act. The respondent suggested that some products which are covered under the Insurance Contracts Act, appear not be caught by the Code. Further, it is not clear whether some products such as ‘gap’ insurance are caught by the Code. This type of insurance covers a situation where a shortfall arises from a pay-out under comprehensive motor vehicle insurance. The shortfall is payable irrespective of the debtor’s capacity to meet the shortfall.

[57] Section 133 of the Code.

[58] Section 47 of the Trade Practices Act.

Consumer Credit Insurance

Consumer groups have argued that there is a discrete role for the regulation of consumer credit insurance under the Code as consumer credit insurance is always sold in conjunction with the credit product by the person who arranges credit. They argue that '...consumer credit insurance is inevitably and inextricably bound up with the sale of consumer credit. As such the products represent a "package" and need to be regulated together.'

Group life policies

One respondent suggested that some credit providers entered into group life policies on their own behalf (a contract between the credit provider and the insurer with the debtor as beneficiary) as a means of providing 'consumer credit insurance'. In circumstances where the cost of this insurance is 'hidden' in the interest rate, it is alleged that credit providers represent the insurance as free and can require that the insurance is taken out. While the definition in Schedule 1 of the Code[59] refers to group policies the respondent's view was that the Code should be amended to prohibit this activity.

Life insurance

One respondent referred to a policy of the former Credit Act which prohibited financing of term life insurance unless it was as a separate contract. The respondent proposed that the Code prohibit the financing of these policies unless by a separate contract or require the insurer to conduct a needs analysis for the debtor. It was suggested that over-servicing occurred in the selling of these policies.

Project team comment

Insurance issues

Insurance financed by credit contracts has long been a focus of concern by consumer organisations, particularly in relation to commissions, insurance forcing and disclosure. The Code, particularly Part 8, specifically addresses many of these issues and carries forward much of the Credit Act's insurance regime.

[59] See Schedule 1 of the Code - definition of 'consumer credit insurance'.

However, while the Code deals primarily with matters relating to insurance financed by credit contracts or credit-related insurance, there are comparable provisions for the same or similar purposes in the Insurance Contracts Act and, with respect to insurance forcing, in the Trade Practices Act.

Concern has been expressed about the different definitions of 'consumer credit insurance' and practical problems have arisen in the different approaches to 'third line forcing' by the Trade Practices Act and the Code. While many of the other duplications detailed in the tables below do not represent a major operational dysfunction, they do increase compliance complexity and potentially add to business costs. There is clearly value in revising and simplifying this law.

Overlap or duplication between the Insurance Contracts Act and the Code is detailed in the following table.

Description	***Code***	***ICA***
Matters that must be contained in an insurance contract document and in a credit contract (duplication of requirement to detail).	*s15(N)*	*s73*
Information to be contained in statements of account - insurance payments (duplication of requirement to detail).	*s32(I)*	*s73*
Meaning of credit-related insurance (Different definitions of 'consumer credit insurance').	*s132 & Sch 1*	*Reg. 21*
Commission payable for consumer credit insurance (different approaches).	*s135*	*s73*
Supply of copy of credit-related insurance contract (Not a conflict or overlap but requirements are different).	*s136*	*s71A*
Rejection of debtor's proposal for insurance. (Duplication of requirements).	*s137*	*s75*
Copy of credit-related insurance to be given on request.	*s163*	*s74*
Requirement to give advice regarding choice of insurer.	*Form 3A & 3B*	*s73 & Regs. 33-35 & Sch. 2*

However, it is important to recognise that the Code regulates some insurance matters which are not regulated at all by other statutes and that the Code regulates different aspects of this insurance. For example, the regulation of consumer credit insurance rebates and a prescription of a rebate formula exist only in the Code. Similarly, a cooling-off period is found only in the Insurance Contracts Act.

However, as noted in the 'submission content' above, one respondent has strongly argued that '...consumer credit insurance is inevitably and inextricably bound up with the sale of consumer credit. As such the products represent a "package" and need to be regulated together.'

The table below details those matters that are regulated either only by the Code or only by the Insurance Contracts Act.

Description	**Code**	**ICA**
Limitation on the extent of financing of premiums over mortgaged property.	*s134*	
Termination of consumer credit insurance if credit contract is terminated (Insurance is not compulsory and credit provider does not know whether insurance is still current on termination of credit contract).	*s138*	
Termination of insurance contract over mortgaged property if credit contract terminated. Credit provider to give information to former debtor that insurance is no longer required because the contract is paid out.	*a139*	
14 day cooling-off period for consumer credit insurance. Insurer to refund direct to insured if contract cancelled.		*s64A*

Concern about regulatory overlap (in relation to insurance) between the Code and other legislation highlights a problem of competing objectives. On the one hand, there is clearly merit from a compliance perspective, in reducing statutory duplication or overlap. On the other hand, it is desirable that insurance requirements as they relate to consumer credit products are codified into a single (consumer credit) statute. Ultimately, the challenge is to balance these competing objectives in a way that reduces unnecessary regulation without undermining the educative and consumer protection functions of the Code.

There are a number of means by which the Code might better deal with insurance issues and these ultimately depend on more precise policy objectives of the Code in relation to insurance. If for example, the objective is to ensure that information is provided to credit consumers about other relevant insurance law (or rights and obligations under that law) then this might be achieved by either signposting or duplicating the comparable provisions of the

Insurance Contracts Act. Alternatively, the Code might regulate only those areas which have special relevance for consumer credit and are not contained in any other statute.

Conclusion

The project team recommends that the Code should regulate insurance only where a specific need arises because of its relationship with the credit contract or where the policy of the Code is to regulate an aspect of insurance which is not otherwise regulated. Where there is a need to make reference to other regulation, this should be achieved by signposting the provisions in the Code. Discrepancies should be resolved in consultation with the Commonwealth and other interest groups.

Recommendation

2.5 Revise the Code's regulation of insurance to remove overlap and duplication between the Code's regulation of insurance and the Insurance Contracts Act. The Code should regulate insurance only where a specific need arises because of its relationship with the credit contract or where the policy of the Code is to regulate an aspect of insurance which is not otherwise regulated. Where there is a need to make reference to other regulation, this should be achieved by signposting the provisions in the Code.

Restrictive trade practices - third line forcing

There are clearly concerns about the meaning of section 133 of the Code in relation to the prohibition on 'requiring' insurance to be taken out or to be taken out with a particular insurer. This problem arises in particular with 'bundled' products where discounts are offered on the costs of credit, and where a consumer agrees to take out insurance with a particular insurer. While it has been argued that this approach might contravene section 133, the ACCC has authorised these products and an apparent conflict has arisen between the respective regulatory approaches. However, it should be noted that authorisation by the ACCC is in relation to any possible impact on competition and this is not the focus of the Code in respect to third line forcing.

The Management Committee is currently considering a guideline which, if approved by the Standing Committee, may give clarity to interpreting this section in respect to its application to bundled products. If a guideline is provided, it may also be accompanied by a recommendation to amend this section.

It has also been argued that there is some doubt about the precise scope of section 133 as a result of the use of the expression 'in connection with the credit contract' rather than to 'credit-related insurance'.

Recommendation

2.6 Amend section 133 of the Code to:

(a) clarify the scope of this section;

(b) to ensure that this section more clearly expresses the Code objectives in relation to third line forcing; and

(c) harmonise, where appropriate, the Code's approach to 'bundled products' with that taken by the ACCC under section 47 of the Trade Practices Act.

Group life policies and Life insurance

While it is alleged that the cost of group life insurance is hidden in the interest rate, the problem is to identify this cost. If the debtor is required to pay the cost of such insurance, it is likely that this action would breach the provisions of section 133. However, if the insurance is 'free', the section would not apply.

The respondent claims that the practice is widespread and that in the case of one credit provider '99% of borrowers were beneficiaries under group life policy arrangements'. The project team is of the view that the problem deserves further investigation and has written to the respondent seeking further details. Amendment may be appropriate once the problem has been examined more closely.

In relation to the financing of life insurance, the review team is of the view that the Code's existing provisions are sufficient to provide adequate information and warnings to debtors. While the respondent's proposal for an 'assessment' to be performed to determine the debtor's need for life insurance is a useful suggestion, it is the project team's view that this is beyond the appropriate scope of the Code. While the Code currently provides warnings and information and makes it an offence for certain types of insurance to be 'forced' on consumers, it is not appropriate that the Code require credit providers to properly determine insurance needs.

Advertising

Respondents suggested that there is good argument for deleting sections 140 to 143 from the Code, on the basis that the misleading and deceptive conduct rules in the Trade Practices Act and fair trading Acts provide sufficient coverage in this area. Nevertheless, respondents acknowledge the valuable contribution made by the Standing Committee in providing a guideline on these provisions and the significant improvements made in the Amendment Bill.

Another respondent suggested that there '...is merit in research being undertaken to delineate the extent of overlap to ensure that the Code only deals with those matters not already addressed elsewhere'.

Project team comment

The project team notes the argument that the provisions of the Trade Practices Act and the State and Territory fair trading Acts should be sufficient to deal with false and misleading representations in advertising. There has been considerable debate in relation to advertising during development of the Code and the Amendment Act made a number of amendments to Part 9[60] of the Code to resolve practical and operational difficulties with these sections.

However, there is also good argument that credit presents problems which are not adequately dealt with by the general provisions relating to 'false and misleading conduct' and that specific credit related provisions are required.

Preliminary results from the research being conducted in association with this review, seem to indicate that advertising is a key source of information for consumers about the credit products. Consumers use advertising as a means by which to compare products and to make credit related choices.[61]

It would therefore be appropriate to revise the existing advertising provisions in light of the research data. However, on current indication, there would seem to be a special role for advertising in credit, beyond the general provisions relating to misleading advertising.

[60] Part 9 of the Code regulates advertising and related matters.

[61] See also 'interest free advertising' in 5.2.2.3 - page 81

Recommendation

2.7 Review the advertising provisions contained in Part 9 of the Code in the light of the Post Implementation Research Project.

Linked credit provider provisions

Submission comment

Industry submissions pointed to the similarity between the linked credit provider provisions of the Code and those contained in sections 73 and 74 of Trade Practices Act. One respondent specifically stated that the Trade Practices Act does not contain a provision similar to Code section 118 of the Code and that the Code 'actually imposes upon credit providers a more stringent regime than exists under the Trade Practices Act.' Another respondent said that the linked credit provider provisions arose from the Credit Acts and that the Trade Practices Act was amended to provide the same liability (with variations in drafting). The respondent suggested that the Code provisions dealing with linked liability should be repealed as they are superfluous.

Project team comment

In relation to the previous discussion about the Code's regulation of insurance, it was suggested that where reference needs to be made to other legislation, that legislation should be signposted in the Code. Provisions should be retained where the Code specifically needs to regulate additional matters.

The linked credit provider provisions of the Credit Acts were based on the recommendations of the Molomby Committee[62]. Similar provisions were included in amendments to the Trade Practices Act in 1986 and Part 7 of the Code contains provisions which are similar to section 73 of the Trades Practices Act. The general purpose of these provisions, and therefore of those in Part 7 of the Code, was to protect consumers from the insolvency of a supplier. Part 7 of the Code and the Trade Practices Act also link the credit provider with representations made by suppliers.

While there is close similarity between section 73 and much of Part 7 of the Code, removal of these provisions from the Code may present a number of

[62] Molomby Committee Report [para 5.4.2]. The Molomby Committee proposed a statutory scheme of linked credit provider liability. The purpose of the scheme was primarily to protect the consumer from the supplier's insolvency.

problems. For example, there are differences in the definition of goods and services,[63] and there are variations in the application of the Code and Trade Practices Act.[64] As a result, simply signposting the provisions of the Trade Practices Act in the Code may remove some important aspects of the Code's existing regulation.

As with the issues relating to the regulation of insurance, modification of these provisions would require closer analysis than is possible in this review and would require further consultation with stakeholders. While there appears to be an argument in relation to overlap or duplication, respondents did not propose the same type of compliance or operational issues as those which arise in relation to insurance. Therefore, while it may be appropriate to re-examine sections 119 to 123, there would appear not to be a major problem requiring urgent attention.

However, there appear to be a number of drafting issues which warrant closer attention and possibly amendment. For example there appears to be merit in redrafting section 117(2) to clarify the reference to 'tied continuing credit contract' and to reconsider the non-application of this section to some forms of credit card.[65] Further, there appears to be a conflict between the provisions of section 118 and 119 with respect to the extent of a credit provider's liability for representations made by suppliers. Section 118 also appears to conflict with the provisions of section 73 of the Trade Practices Act and Duggan and Lanyon suggest that this provision might be void to the extent of the inconsistency[66]. Duggan and Lanyon detail further issues relating to both the Code and the Trade Practices Act, and the project team is of the view that these provisions should be reviewed.

[63] See definition in Code Schedule 1 and section 4(1) of the Trade Practices Act.

[64] The linked credit provider rules in section 73 of the Trade Practices Act apply only to corporations and where the price is less than $40,000, as well as other differences. See Duggan and Lanyon, op. cit., p278-279.

[65] See Duggan and Lanyon, op. cit., p281 for a more detailed discussion of problems with this section of the Code.

[66] See Duggan and Lanyon, op. cit., p290 for a more detailed discussion of problems with this section of the Code.

Recommendation

2.8 Review the Code's regulation of linked credit providers to determine whether there is unnecessary overlap and duplication between Part 7 of the Code and the Trade Practices Act.

5.2.2.2 Are there any gaps in the Code's current scope? (Issue 2.5)

Submission content

Issues raised by respondents have been dealt with under more specific headings.

5.2.2.3 Do the Code's various consumer protection provisions adequately represent the interests of consumers? (Issue 2.6)

Harassment of debtors

Submission content

A number of respondents suggested that the Code include an express prohibition on the harassment of debtors during the enforcement process.[67] Alternatively, it was suggested that the Code signpost the existence of other legislation such as section 60[68] of the Trade Practices Act. Respondents also recommended that the provisions of the Victorian *Debt Collection Bill 1989* be adopted.[69]

Respondents suggested that some of the problems which occur are:

- using documents that appear to represent court documents;
- informing friends of debtors (and work colleagues) that they are in arrears; and

[67] Section 145 of the Code prohibits a credit provider or supplier from harassing a person in attempting to get that person to apply for credit. There are no other reference to harassment in the Code.

[68] Section 60 of the Trade Practices Act states 'A corporation shall not use physical force or undue harassment or coercion in connection with the supply or possible supply of goods or services to a consumer or the payment for goods or services by a consumer.'

- informing debtors that a failure to pay is an offence.

It was suggested that there is little incentive for debtors to complain about harassment as their liabilities will not be affected.

Project team comment

The project team noted that there have not yet been any matters before the courts to test the application of section 60 of the Trade Practices Act. However, it is understood that the section is currently under review, which may result in amendment and refinement of this provision.

Nevertheless, there is widespread concern about harassment[70] and some States and Territories have already drafted or enacted legislation to specifically[71] deal with this problem.

Conclusion

It would be premature for amendment to be made to the Code prior to the conclusion of the ACCC review of section 60 of the Trade Practices Act. However, once the provisions have been clarified, there may be value in either making a linkage with this law or in enacting separate debtor harassment provisions in the Code if it is considered that further protections are warranted. However, it may be unnecessary to duplicate this law and signposting of the section 60 provisions may be adequate.

Hardship provisions

Submission content

A number of submissions suggested that 'prominence should be given to the availability of hardship variations in communications with consumers during

[69] The *Victorian Debt Collection Bill 1989* was to prohibit harassment and contained detailed requirements in relation to debt collection activities but the Bill was not adopted. Provisions relating to harassment and coercion have been adopted in section 21 of the *Fair Trading Act 1999* (Vic).

[70] Refer to ACCC report on harassment in debt collection.

[71] For example, section 43 *Fair Trading Act 1987* (SA) and section 21 of the *Fair Trading Act 1999 (Victoria)*. Section 21(1) of the Victorian Fair Trading Act 1999 states that (1) A person must not use physical force or undue harassment or coercion in connection with the supply or possible supply of goods or services to another person or the payment for goods or services by another person. The provision also sets out conduct which is deemed to contravene the prohibition.

the life of the contract'. It was proposed that this information should be included in the section 80 default notice.

Another respondent suggested that the current wording of section 66(1) may limit the reasons for which an application may be made on the grounds of hardship and expressed concern as to how the threshold test might be satisfied. For example, the respondent suggested that the current wording of the section may prevent an application which arises from circumstances relating to a child or a spouse of the debtor.

One respondent suggested that it might assist in the application of this section if uniform guidelines were established by the courts. These guidelines might, for example, require debtors to produce statements of assets and liabilities to the court or require debtors to provide statements from treating doctors. It was also proposed that debtors should show that they can reasonably expect to meet their obligations if the terms of a credit contract are varied. It was also suggested that, where there are joint debtors, the financial position of both ought to be taken into account.

Respondents also pointed to the power of the courts under section 68 to make changes to credit contracts and suggested that the discretion of the court is 'apparently unfettered'. The respondent said that there are no guidelines set out in section 68 to assist the court or tribunal in making a determination. It was suggested that the purpose of the hardship provisions as identified originally by Molomby[72] and adopted in the Credit Acts, was to apply the concept of a 'reputable credit provider'. This concept appears to have not been included in the Code's hardship provisions.

It was also suggested that section 68(2) allows a court to make 'such other orders as it thinks fit' and that these orders would more appropriately be expressed as 'ancillary or consequential orders'. The respondent proposed that amendment be made to this effect.

A number of comments were also made in relation to the limits imposed by section 66(3)[73]. Firstly, there is doubt about the application of this section to

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[72] Molomby Committee Report [Para 5.7.13]. The concept of the 'reputable credit provider' is that such a credit provider would allow an extension of time if the credit provider's risk of loss is not greatly increased by the granting of an extension.

[73] Section 66(3) states that 'this section and section 67-69 do not apply to a credit contract under which the maximum amount of credit that is or may be provided is more than $125,000 (or such other amounts as may be prescribed by the regulations).

continuing credit contracts. One view is that it applies to the credit limit, irrespective of the amount owing at the time of an application. An alternate view is that the section, and therefore the limitation, does not apply at all to continuing credit contracts, only to non-continuing credit contracts. Further, a question was raised that if the provision does apply to continuing credit contracts, does it apply to the credit limit at the time of application or at the time of the contract's commencement?

However, a number of respondents questioned the basis for the limitation at all. They suggested that the existence of hardship should not be dependent upon an arbitrary financial limit and arises irrespective of the amount of credit.

Project team comment

While the project team notes the arguments about the grounds for applications under section 66(1), the words 'other reasonable cause' would appear to provide sufficient breadth to this section.[74] Further, the grounds for an application under section 66(1), apply to an 'application' made by a debtor to a credit provider. An application to a court under section 68(1) would appear to require only that 'the credit provider does not change the credit contract in accordance with the application'. It does not appear that the court must be satisfied that the debtor's application to the credit provider was made for the reasons stated in section 66(1).

While the court appears to have 'unfettered discretion' in making a determination under section 68(2), the court is limited to making changes in a manner detailed by section 66.[75]. While there is no linkage to the concept of 'reputable credit provider', the limits imposed by reading sections 68(2) and 66(2) together, suggest that the court is unable to alter a contract to the extent that it reduces the debtor's total obligations. Where the period of the contract is extended and the amount of each payment reduced, interest is still calculated in the normal manner.

Further, while a change in the manner detailed by section 66(2) may increase the credit provider's risk, section 68(2) ensures that the debtor, the credit

[74] Section 66(1) of the Code states ' A debtor who is unable, because of illness, unemployment or other reasonable cause, to meet the debtor's obligations under a credit contract and who reasonably expects to be able to discharge the debtor's obligations if the terms of the credit contract were changed in a manner set out in subsection (2) may apply to the credit provider for a change.

[75] Section 68 provides that a court may change the credit contract in a manner set out in section 66. Section 66(2) details the changes which a debtor may seek.

provider and any guarantor, have a 'reasonable opportunity to be heard'. In this sense, there is reasonable opportunity for all parties to present the arguments which include information relating to risk and the capacity of the debtor to fulfil their obligations under the contract.

While it might be useful to make an explicit linkage to the concept of 'reputable credit provider', there is no evidence of problems in the manner in which the courts have interpreted or are applying these provisions. If problems do arise where courts make determinations which impose unreasonable risk on credit providers, it might be useful to restrict the courts to changes based on a debtor's 'reasonable expectation to be able to discharge their obligations'[76]. Similarly, in relation to court guidelines and in relation to the expression and scope of court orders, it would be preferable to monitor the future application of the courts to these problems rather than to amend the Code at this juncture.

In relation to the limits on the application of section 67-69, there would appear to be merit in clarifying the application of these provisions to continuing credit contracts. There would appear to be no reason for the sections to apply differently to continuing and non-continuing credit contracts.

More importantly there would appear to be good reason to revise the limit on the application of these sections, particularly as the effect of the existing limit is to deny applications for hardship to a court for most mortgagees in the Melbourne and Sydney regions. Therefore, the project team proposes that a new limit should be established which sets the threshold at a level at least above the average level for home mortgages in these major cities. It would also appear that this change can be achieved by amendment to the Regulations.

Finally, it would be useful for debtors to be given information about the hardship provisions in a default notice under section 80 of the Code. Clearly, there may be occasions where an application to the credit provider might be an appropriate means by which to resolve temporary difficulties. This issue will be considered further in relation to default procedures under 'defaults and enforcement below'.

[76] A similar expression is used in section 66(1) of the Code.

Recommendation

2.9 Amend section 66(3) of the Code to remove doubt as to the application of this section to continuing credit contracts.

2.10 Revise the monetary limit of $125,000 on the application of sections 67-69 imposed by section 66(3) of the Code to a level sufficient to cover most Australian home mortgages.

Defaults and enforcement

Submission content

A number of respondents suggested that the Code requirements relating to defaults under credit contracts should be revised. It was argued that default notices should inform debtors of:

- whether in fact the document is a default notice;
- the seriousness of the breach;
- the date of repossession should the breach not be remedied;
- the debtors' rights to seek variation/postponement of enforcement procedures on hardship grounds; and
- that a sale of repossessed goods may not extinguish the debtor's liability to the credit provider.

It was suggested that specific warnings are required for mortgaged goods alerting the debtor that further liability may exist after repossession. The Code presently provides for such information to be disclosed in the prescribed information statement ('Things you should know ...'). However, it was proposed that that information gets 'lost' in the mass of paperwork and should appear on the first page of any pre-contractual statement or disclosed under section 15(L) of the Code.

One respondent proposed that a default form should be prescribed for Code purposes.

Another respondent referred to problems which arise where a default notice is not provided at all. In such situations, it was argued that a failure to provide a default notice should be 'fatal to proceedings subsequently commenced by the credit provider'. The respondent suggested that this should be placed beyond doubt. Further, where a notice is not provided there is some doubt that courts have the power to order the return of the goods to the consumer, pending determination of the debtor's application.[77] It was proposed that the power of jurisdictions to make such orders is made clear.

It was also suggested that a debtor's right to request postponement of the enforcement process should not be restricted either by the monetary limit in section 86 or the thirty day notice period. The debtor should be able to challenge the enforcement process in an efficient and timely manner or to seek relief in genuine hardship cases.

One respondent suggested that section 72 of the Code should be amended to allow a court to review unconscionable default fees.

Project team comment

The project team considers that there is some merit in including additional information in a default notice. The only specific requirements contained in the Code are those specified by section 80(3).[78] While prescription might reduce flexibility in form design, some additional information would be useful. For example, it seems appropriate that a default notice should clearly state that it is a 'default notice'. Similarly, while section 80 states that enforcement action may commence 30 days from the date of the notice to remedy the default, there is no specific requirement in section 80(3) for the credit provider to inform the debtor of this fact.

The notice should specify the date after which default proceedings can commence and where applicable, the date after which repossession might occur. There is also merit in advising the debtor that repossession may not extinguish the debtor's liability and that the debtor has rights to seek a variation or postponement on hardship grounds. There would appear to be little value in pointing out the seriousness of the breach as this would clearly be achieved by the other inclusions detailed above. There are clearly limits to the information a default notice can reasonably contain. However, the project team supports amendment along the lines detailed above.

In relation to repossession, section 80 specifically prohibits a credit provider from taking possession of or selling mortgaged property unless a default notice

[77] The submission argued that the sections of the Code providing relief for the debtor do not give the courts a specific power to return goods to the debtor in these circumstances.

[78] Section 80(3) of the Code states 'Default notice requirements. A default notice must specify the default and the action necessary to remedy it and that a subsequent default of the same kind that occurs during a period of 30 days may be subject of enforcement proceedings without further notice if not remedied within the period.

has been provided. As a penalty applies in this event it would appear unnecessary to specifically empower the court to return mortgaged property in this event, particularly as the act of repossession constitutes an offence.

The project team questions the appropriateness of the monetary limits placed on the debtor's right to seek a variation under sections 86 and 88 of the Code. As with hardship applications the current limit of $125,000 imposed by section 86(2) is below the value of many mortgages for residential property in Sydney and Melbourne. As with hardship variations, the project team sees merit in revising this limit.

However, the project team does not support the proposal to allow negotiations for a postponement of enforcement proceedings to commence after the 30 day notice period. Thirty days would seem sufficient time to approach the credit provider, under section 86, or to apply for a variation under section 66.

As detailed above, one respondent also suggested that section 72 be amended to allow a review of 'unconscionable' default fees. Section 72[79] provides that a court may review changes in interest rates and the amounts of establishment fees and termination fees, if they are unconscionable. The Code generally relies on pre-contractual disclosure to inform debtors of interest rates and fees and charges payable in connection with the credit contract. The restriction on establishment fees prevents credit providers from 'loading up' the establishment fee with charges which might more appropriately be charged as interest or described as another fee. Similarly, the restriction on termination fees prevents a credit provider from creating unreasonable barriers to paying out the contract early. While the Code does not restrict interest,[80] in an environment where most contracts provide for variations in interest, section 72 allows a court to review unconscionable changes to the interest rate during the course of the contract.

As the Code relies generally on disclosure in relation to fees and charges, it is difficult to sustain a view that default charges should be treated differently from other fees and charges. However, the project team notes that section 72 does not allow a court to review increases in fees and charges and the section does not apply to, unilaterally imposed, new fees and charges. As most credit contracts allow credit providers to increase fees and charges and to introduce

[79] Section 72 of the Code provides that a court may review changes to annual percentage rates, establishment fees, a fee or charge for pre-payment of an amount if unconscionable. The court may annual or reduce the fee or charge.

[80] Apart from prescribing the method of calculation section 26 of the Code.

new fees and charges, there would seem to be merit in enabling these to be reviewed under section 72.

While the project team notes concern about excessive default fees and considers that some extension to the ambit of section 72 might be appropriate, it is of the view that it is too early to make further modifications to this section. However, the level and nature of unilaterally imposed fees and charges generally, should be further monitored. Further monitoring would provide a clearer view of how the courts will apply both the provisions of sections 70 and 72. A further review of fees and charges should occur in the future once these patterns become clearer.

Recommendation

2.11 Amend the requirements for default notices under section 80(3) of the Code to include additional information stating:

(a) that the notice is a default notice;

(b) the date after which enforcement action may commence;

(c) that repossession may not extinguish the debtor's liability; and

(d) the debtors right to make applications for hardship and postponement.

2.12 Request the Management Committee to monitor the level of new fees and charges that are unilaterally imposed by credit providers during the course of credit contracts.

2.13 Revise the monetary limit of $125,000 on the application of Division 3 of Part 5 of the Code to a level sufficient to cover Australian home mortgages.

Advertising of 'interest free' credit

Submission content

Consumer organisations suggested that advertisement of 'interest free' products should disclose whether the transaction is unconditionally interest-free or if interest accrues during the period but is forgiven on certain conditions.[81] Under arrangements where interest is 'forgiven', interest will not apply unless, for example, a consumer is late making a payment, after which interest may apply to the remaining term of the contract.

[81] As in section 22 of the Canadian Cost of Credit Disclosure Act.

The submission also recommended that, not only should the duration of the interest-free period be disclosed,[82] but also the commencement date.

Where interest is calculated but forgiven on the basis of certain conditions, it is argued that the Code's disclosure regime should ensure that these conditions are clear to consumers. Consumer organisations suggested that the Code's disclosure and advertising provisions are inadequate for the specific issues raised by 'interest free' loans. In particular they suggested that the advertising provisions be amended where an advertisement states or implies that no interest is payable for a specific period. It is proposed that advertisements should state:

- whether the transaction is unconditionally interest free during the period; or
- whether interest accrues but will be forgiven under certain conditions; and
- the APR for the period if the conditions are not met.[83]

It was also proposed that, where an advertisement does not detail the information required above, it should be deemed that the contract is unconditionally interest free for the stated period.

Project team comment

The project team supports the proposal that consumers should be advised where conditions apply to interest free arrangements. However, a requirement to state the interest rate and other relevant information in advertising would apply rules to interest free arrangements in a different manner than other credit products. The project team would not support this as a separate proposal at this stage independently of a more general review of the advertising provisions. This is not to say that the project team condones advertising that may be misleading, but that it should be sufficient to rely on the provisions of s144 if the advertisement gives a false impression.

With respect to the disclosure provisions, where the interest rate is calculated but forgiven, section 15(C) of the Code requires pre-contractual and contractual disclosure of the annual percentage rate and section 15(D) requires disclosure of the method of calculating the interest. If this information is not disclosed, there would not be contractual authority to charge the interest on

[82] Regulation 13(1)(c) requires disclosure of the duration of any interest free period.

[83] This proposal mirrors the Canadian Cost of Credit Disclosure Act.

the occurrence of a breach of a condition. Further, a failure to include the information detailed by sections 15(C) and (D) of the Code would be a breach of a key requirement under section 100(1) of the Code. As a result, the project team is of the view that this problem is a compliance issue rather than a problem requiring further legislative amendment.

Inquiries by the project team indicate that the interest free period invariably starts on commencement of the contract. Therefore the project team does not see the need for a requirement to state the commencement of any interest free period in addition to the requirement in Regulation 13(1)(c) to state the duration of that period.

However, as discussed on page 70, preliminary results from the Research Project indicate that advertising may be a key source of comparative information for consumers. As the advertising provisions may be revised in light of the final research finding, any further proposals relating specifically to 'interest free' products should be considered as part of a general revision of the Code's advertising provisions.

Consumer leases - pre-contractual disclosure - false and misleading conduct

Submission content

One respondent proposed that section 144[84] should apply to representations relating to entering a lease. Other respondents argued that consumer misunderstanding about the nature of leases arose because of the absence of pre-contractual disclosure requirements for leases.[85] In particular, there was confusion about consumers' options to terminate a lease which might be made clearer if pre-contractual information were made available prior to entering into a lease. The respondent also stated that, as leases are being marketed as competitive alternatives to ordinary loan contracts, meaningful material as to the cost of these transactions ought to be disclosed to enable real comparisons to be made.

[84] Section 144 of the Code states '**144.(1)** A person must not make a false or misleading representation in relation to a matter that is material to entry into a credit contract or related transaction or in attempting to induce another person to enter into a credit contract or related transaction.

[85] Section 53 of the Code requires that a copy of the lease must be provided to the lessee within 14 days of signing the lease.

Project team comment

A consumer lease is a substantially different contractual arrangement to those involving the provision of credit to which the Code applies. A lease is a contract for the 'hire' of goods where the consumer does not have a right or obligation to purchase the goods.[86]. Where there is a right or obligation to purchase the goods, under a contract for 'hire', section 10 of the Code regards this arrangement as a 'sale of goods by instalment'.[87]

Where credit is provided for the purchase of goods, the debtor's objective is possession and ownership. Where goods are leased, the lessee's objective is to use the goods for a specified period. Payment is made for the use of those goods during this period. As there are fundamental differences in the purposes of leasing and purchasing, it may be difficult to compare the costs of these arrangements.

While leasing is a common activity in the business market, it is less common for consumers who generally enter into contracts for purchase. However, a number of businesses are now offering leases for personal computers as an alternative to purchase. The selling point for leases, as opposed to purchase, is the rapid obsolescence of computers and an opportunity to upgrade when a new model hits the market.

Section 152 of the Code prescribes the matters which must be contained in a consumer lease and prescribes a penalty[88] where a lease contravenes a requirement of that section. This section requires the inclusion in the contract of information which identifies the goods, the amount of rental payments and other charges which are payable in connection with the lease.

The project team is of the view that these matters are appropriate disclosures for contractual purposes. However, section 153 provides that a copy of the lease must be provided to the lessee within 14 days after entering into a consumer lease. Therefore, while the disclosures are made to the lessee at the

[86] Section 147 of the Code states 'For the purposes of this Code, a "consumer lease" is a contract for the hire of goods by a natural person or a strata corporation under which that person or corporation does not have a right or obligation to purchase the goods.'

[87] Section 10 of the Code states that where under a contract for the hire of goods, there is a right or an obligation to purchase, the contract is to be regarded as a sale of goods by instalment. The Code may also apply to the sale of goods by instalment, which is not a contract for hire, where a charge is made for the deferral of debt (see section 6 of the Code). See also discussion relating to 'tiny terms' on page 53.

[88] Section 152(3) prescribes a penalty of 100 penalty units.

point of signing the lease, Part 10 of the Code creates no obligation for pre-contractual disclosure.

In practice, it appears that lessors often provide a copy of the lease at the time of signing. For this reason section 58 of the Amendment Act will amend section 153 of the Code to ensure that, where a copy has already been provided, a further copy need not be given after 14 days.

The project team supports the proposal that pre-contractual information should be given to prospective lessees. As with credit contracts generally, the pre-contractual information could comprise part of the contract document or be the same document. The pre-contractual information should comprise those matters which are detailed in section 152(1) of the Code. Section 153 of the Code should remain unaltered once amended by section 58 of the Amendment Act.

In relation to section 144 of the Code, the project team sees no reason why the prohibition on making 'false or misleading representations in relation to a matter that is material to entry into a credit contract or a related transaction' should not also apply to consumer leases. To this end, section 155(1) should be amended to add a new subsection '(d)' which makes explicit reference to section 144 of the Code. Section 155(2) would then operate to ensure that section 144 applies to representations made by both lessors and lessees.

Recommendations

2.14 Amend Part 10 (consumer leases) of the Code to require pre-contractual disclosure of the information detailed in section 152(1).

2.15 Amend section 155(1) of the Code to include a reference to section 144 of the Code.

5.2.2.4 Are there dysfunctional effects or unintended consequences of the consumer protection provisions? (Issue 2.7)

Submission content

In addressing this issue respondents referred primarily to perceived gaps in the scope of the Code and addressed issues such as credit brokers, consumer leases, harassment, default procedures and other similar matters. These issues have been considered under other topics in this paper.

5.2.3 The Civil Penalty Regime

5.2.3.1 Background

The Civil Penalty Regime under the Credit Acts

The Credit Acts provided that, in the event of a breach of the Act by the credit provider, the credit provider automatically lost its right to charge interest under the affected loans. The credit provider could then make an application to the Court or Tribunal for reinstatement of that lost interest.

The Court or Tribunal could order partial reinstatement, thereby benefiting the affected debtors, or it could order full reinstatement with or without the payment of a lump sum civil penalty which was paid into a fund administered by the relevant Office of Fair Trading. The Credit Acts generally contained a 'minor errors' provision which provided for full reinstatement of credit charges without the need to serve debtors affected by the application if the error was one that was unlikely to disadvantage debtors in any significant respect.

This regime was widely criticised as draconian because it imposed a significant penalty (the loss of interest) often for highly technical breaches which did not disadvantage the debtor in any way. Furthermore, reinstatement applications in relation to those minor technical errors were in some cases very costly for the credit provider.

Civil Penalty Regime under the Code

The current civil penalty regime is contained in Part 6 of the Code. Essentially it provides that, if a credit provider contravenes a 'key requirement', the credit provider may be the subject of a civil penalty application. Key requirements are listed in section 100, which refers to sections 15 and 21 in relation to credit contracts and sections 15, 21, 32 and 33 in relation to continuing credit contracts.

A civil penalty application may be commenced by a credit provider, the Government Consumer Agency, a debtor or guarantor. If the application is commenced by the debtor or guarantor, the maximum penalty that may be imposed is the amount of loss suffered by the debtor or the amount of interest charges payable under the contract, whichever is greater. The debtor benefits from any penalty imposed.

The maximum civil penalty that may be imposed in an application commenced by the credit provider or Government Consumer Agency is $500,000 for a contravention of a particular key requirement. Any penalty that is imposed is paid into a fund administered by the Government Consumer Agency.

The civil penalty regime has 2 primary purposes:

- To provide an incentive for credit providers to comply with the most important disclosure provisions of the Code (the key requirements); and
- To provide a mechanism for dealing with credit providers who fail to comply with the Code, including the imposition of a penalty.

The regime under the Code therefore removed the automatic forfeiture provisions but retained provision for the imposition of a monetary penalty. The amount of the penalty is now capped and credit providers can ask the Court or Tribunal to take into account its prudential standing in considering the size of the penalty.

5.2.3.2 Does the civil penalty regime encourage a compliance culture? (Issue 2.8)

Submission comment

Generally, consumer groups were of the view that the previous Credit Act regime provided more incentive for credit providers to comply because of automatic interest forfeiture. However, most consumer groups acknowledge that the civil penalty regime does encourage compliance.

Industry responses to this issue were mixed. Some believed that the civil penalty regime does not add to the compliance culture among credit providers. Other industry groups believed that the threat of exposure to the civil penalty regime does provide an incentive to comply with the key requirements of the Code. Others suggested that the threat of exposure to civil penalties encourages a strict legalistic interpretation of the Code's requirements which is not necessarily helpful to consumers.

Responses from legal groups were also mixed. Some agreed that the regime did encourage compliance, while others believed that it does not. Others believed that it is less effective than the Credit Act regime because of the absence of automatic interest forfeiture provisions.

Project team Comment

Generally, it is the view of the project team that the threat of a civil penalty is an appropriate incentive for credit providers to comply with key aspects of the Code and this conclusion is largely supported by respondents.

One of industry's criticisms of the civil penalty regime is that it leads to over compliance with the key requirements because of the perceived risk of attracting a civil penalty. The project team does not see this as entirely negative or problematic, although they do understand that specific issues arise from a lack of certainty surrounding the treatment of contingency fees, in particular.

Conclusion

The project team concludes that the existence of the civil penalty regime does encourage compliance with the key requirements. However, it has been proposed that difficulties which arise in the treatment of contingency fees have contributed to the provision of too much information in pre-contractual disclosure documents, which appear to confuse rather than assist consumers. This issue is discussed in term of reference 1, but it would appear that a clarification of contingency fee issues would assist in simplifying pre-contractual documents and would enable industry to better manage civil penalty risk. This is discussed further in the following section.

5.2.3.3 Are the current 'key requirement' triggers appropriate to the purpose of the civil penalty regime? (Issue 2.9)

Submission comment

Generally, consumer groups were satisfied with the current key requirements but would like to see a number of other section 15 matters added as key requirements, as follows:

- Section 15(F) Repayments – in particular, paragraphs 15(F)(a)(i) and (ii) in relation to the number of repayments and the amount of repayments. It was submitted that the number and amount of repayments are high in the minds of prospective borrowers.
- Section 15(L) Mortgage or guarantee – in particular, whether or not a mortgage is to be or has been entered into. Again, it was argued that security in the form of a mortgage is an important factor for borrowers to

know and borrowers readily overlook the fact that a mortgage has been entered into.

- Section 15(N) Insurance financed by the contract – particularly subsection 15(N)(d) in relation to commissions payable by an insurer to the credit provider for the introduction of the business. It was submitted that under the Credit Act regimes, the Supreme Courts of New South Wales and Victoria have recognised that it is important that consumers have a right to know whether the credit provider and the insurer are at arms length in the transaction.

The following sections have been identified by legal and industry groups as ones that should, subject to the outcome of the research project, be removed from the list of key requirements:

- Section 15(B) – only the amount of credit should remain as a key requirement. It is submitted that failure to correctly disclose the remainder of the section 15(B) requirements are unlikely to materially disadvantage debtors;
- Sections 15(C)(c)(iii) and 15(J)(b)(iii) – the requirement to disclose where a reference rate is published. It has been submitted that there is no real potential for debtors to be misled by the failure to correctly state where the reference rate is published;
- Section 15(D) – the method of calculation of interest charges, although no reasons were given justifying why this should be removed from the list of key requirements;
- Section 15(E) – the total amount of interest charges payable. Again, no real reason was provided justifying its removal;
- Section 15(G)(c) – Credit fees and charges, and in particular, the total amount of credit fees and charges. It is submitted that this requirement has caused the most difficulty in practice, particularly the fees and charges that 'may become payable' or so called 'contingency fees and charges'; and
- Section 15(N)(a) and (b) – Insurance financed by the contract – the name of the insurer and the amount of insurance financed by the contract.

It has also been suggested that an overstatement of a number of the section 15 requirements should not attract a civil penalty. However, this is largely addressed by subsection 36(4) of the Regulations which essentially provides that an overstatement of interest charges, repayments and government fees and charges is within permissible tolerances.

Project team comment

Generally, the project team believes that the current list of key requirements is, subject to some fine tuning, appropriate.

The project team does not agree that section 15(F) relating to the number and amount of repayments should be included as a key requirement. While it is acknowledged that the amount and number of repayments are of vital importance to borrowers, there are practical difficulties in disclosing the precise amount of repayments. On fixed term contracts the amount of repayments will usually be influenced by the date the loan is actually drawn down, which of course is not known at the pre-contractual disclosure stage. In continuing contracts, the amount of the repayments will never be known with precision at the pre-contractual stage.

The project team does not see the need to include disclosure of the existence of a mortgage or guarantee as key requirements. Sections 38 and 50 of the Code require mortgages and guarantees to be in writing or included in the credit contract signed by the borrower, failing which the mortgage or guarantee is not enforceable. The project team considers sections 38 and 50, coupled with the offence created by section 20, to be sufficient to ensure disclosure of the existence of mortgages and guarantees.

The project team acknowledges that insurance commissions are of importance to borrowers and have traditionally been treated as important disclosure requirements. Section 15(N)(d) as it currently stands requires that, if a credit provider knows of any commission to be paid by the insurer for the introduction of insurance business, a statement is to be made to that effect along with the disclosure of the amount of commission, if ascertainable.[89]

Consumer groups have stated in their submissions that the avoidance of disclosure of insurance commissions is widespread either through the non-disclosure of the fact that a commission is payable or because the amount is alleged to be not ascertainable. Also they stated that as disclosure of these commissions is not a key requirement under the Code, there is little incentive for debtors to pursue these issues.

The project team understands that there are practical difficulties for credit providers in disclosing the precise amount of the commissions at the pre-contractual and contractual stage as commissions from insurers are often calculated retrospectively depending upon the amount of insurance sold in a particular month. It is questionable whether credit providers would, in many

[89] Section 15(N)(d) states that disclosure of the commission, if ascertainable, is required either as a monetary amount or as a proportion of the premium.

circumstances, be able to provide an accurate statement of the amount of the commission payable.

Nevertheless, if, as has been suggested, there is widespread non-disclosure of the fact that a commission is to be paid then further attention may be warranted. However, making section 15(N)(d) a key requirement is only one solution and further investigation and consultation would be required before determining the most appropriate policy response to this issue. At this point the project team does not believe it is appropriate to include section 15(N)(d) as a key requirement but sees merit in further examining this issue.

The key requirements that have caused most difficulty in practice are the requirements that fees and charges and total fees and charges be disclosed. This is largely as a result of the confusion relating to contingency fees. This has been addressed elsewhere in the report (see discussion in term of reference 1 on pages 28 to 30) and the review team agrees that contingency fees and charges should not be key requirements.

In relation to the remainder of the section 15 requirements listed above, the project team is of the view that each of those requirements are sufficiently important to justify inclusion as key requirements and do not give rise to any significant compliance problems.

Recommendation

2.16 Amend section 15(G) and 100 to ensure that contingency fees and charges are not key requirements.

2.17 Request the Management Committee to examine the level of compliance with section 15N(d) of the Code.

5.2.3.4 Other issues - the Civil Penalty Regime

Many submissions have raised other concerns about the civil penalty regime in addition to the matters raised in the issues paper. These problems relate primarily to the operation of the regime and some of these have already been discussed in this paper. However, it is useful to restate these here along with other issues. Broadly the issues raised are as follows.

(a) Over compliance and excessive legalism

It is stated that credit providers, through fear of exposure to civil penalties, have taken a conservative and cautious approach to the interpretation of the key requirements.

This has led to credit providers swamping prospective borrowers with vast amounts of information and paper at the pre-contractual stage and at the point of entering into the contract. This is counter productive to one of the main objectives of the Code — providing borrowers with the opportunity to compare the cost of credit and to 'shop around' for the best deal.

(b) Cost

Credit providers argue that it is excessively expensive to bring a civil penalty application. This is particularly the case in applications relating to inadvertent technical contraventions. Industry argues that there should be a cheaper, more efficient mechanism for dealing with contraventions of this kind.

Comments by the Commercial Tribunal in New South Wales in delivering the judgment in *Macquarie Credit Union v Director-General of Fair Trading (NSW)* were cited with support in a number of the submissions. The Tribunal said:

'...perhaps governments should seek to encourage a low-cost process which allows for early assessment of non-compliant conduct, with a view to cases involving what appear to be relatively minor contraventions of the Code being permitted to proceed to a relatively summary determination.'[90]

(c) Necessity of Court Action

A further criticism of the civil penalty regime was that it forces credit providers and debtors to take Court action in respect of any breaches of the key requirements. It was argued that there is no provision for credit providers to 'fess up' to Government Consumer Agencies about contraventions of the key requirements.

Credit providers pointed out that a lot of contraventions of key requirements are likely to be minor and technical with no loss and damage to debtors, but they are forced to make an application to the Court for even the most trivial

[90] Macquarie Credit Union Limited v the Director-General, Department of Fair Trading (1998) ASC 155-014 at page 148,502.

contravention. The most obvious example of a minor technical error that is unlikely to disadvantage debtors is an incorrect statement of the contingency fees and charges that may apply.

(d) Focus on Key Requirements

Respondents to the issues paper pointed out that the threat of exposure to a civil penalty resulted in most training and compliance resources being devoted to the key requirements, to the detriment of other important areas that do not attract a civil penalty for a breach.

For example, consumer groups argued that the default and enforcement provisions of the Code are at least as important as the key requirements.

(e) Self Prosecution

Industry groups point out that it is most often the credit provider that identifies its own breaches of key requirements. The civil penalty regime as it currently stands gives the credit provider only one option — commence a civil penalty application. The Court or Tribunal then has to determine whether there has been a contravention.

However, after the application has been made, the credit provider will sometimes argue that there has not been a breach. This is unique in that it reverses the role of the prosecutor/plaintiff and respondent/defendant. It is submitted that effectively the credit provider is prosecuting itself.

Industry argues that the Government Consumer Agency should be the only party able to commence an application under Part 6 to restore the traditional plaintiff/defendant roles.

(f) Incentives for Bringing an Application

A number of submissions have pointed out that, unlike the regime under the Credit Act, there is little or no incentive for a credit provider to bring a civil penalty application under the Code.

It is suggested that credit providers may be tempted to simply 'sweep the problems under the carpet' in the hope that no one finds out. It is also suggested that credit providers may do a cost benefit analysis on commencing a civil penalty application and decide that it is not worth while.

(g) Role of Borrowers in Civil Penalty Applications

Doubts have been expressed about whether debtors have a role to play in an application that has been commenced by the credit provider. If the Government Consumer Agency intervenes in the application, it has standing to represent the interest of debtors. Part 6 also provides a separate procedure for applications involving debtors or guarantors.

Credit providers argued that debtors have no role to play in applications commenced by the credit provider or the Government Consumer Agency. Consumer groups argued that debtors should have a role to play in such an application. Both industry and consumer representatives submitted that this issue should be resolved in the legislation.

(h) Other Criticisms

Other criticisms of the civil penalty regime or problems with the current system include:

- It is unique to consumer credit law without justification. Civil penalties have no peer in similar legislation, such as the Trade Practices Act and Fair Trading Acts and the Corporations Law;
- There are no defences available to credit providers under the civil penalty regime;
- At common law, damages are generally compensatory. Exemplary damages are only awarded where there has been an almost complete disregard for another's rights, whereas the civil penalty regime imposes a monetary penalty over and above the amount of loss or damage arising from innocent contraventions;
- Penalties are paid into a fund administered by the Government Consumer Agency which does not benefit debtors and does not encourage debtors to participate in the applications as there is nothing in it for them;
- The cost of the civil penalty regime (including the cost of bringing an application and any penalty imposed) outweighs its benefit;
- It may not be in the debtor's best interests to raise key requirement contraventions informally with a credit provider as the credit provider may make an application under Part 6 (thereby preventing the debtor from commencing an application and limiting the debtor's potential compensation to the amount of loss or detriment suffered as opposed to the total amount of interest charges payable); and
- Tribunals, where they exist, are given too much power to impose significant penalties on credit providers in the event of a breach.

The amendment that had most support among industry and legal respondents is the inclusion of a minor error provision. A number of the submissions from industry and legal groups argue that there should be a simpler more cost-effective means of resolving an insignificant contravention of a key requirement that does not disadvantage debtors significantly.

The respondents to the issues paper who commented on this issue propose a number of different options in relation to how such a minor error provision should operate. Some of the common features are as follows:

- notification of an error to the Government Consumer Agency prior to any court action;
- self rectification of the contravention, including any compensation to debtors affected by the error;
- excluding or limiting the role of debtors in any minor error application;
- mediation with or determination by the Government Consumer Agency on the seriousness of the error and any compensation payable;
- notification or mediation to act as a bar to debtors bringing their own Part 6 application;
- some sort of filing or registering with the court or tribunal of consent orders or agreements reached between the Government Consumer Agency and credit providers;
- if the Government Consumer Agency is not convinced that the error is minor, then only the Government Consumer Agency can take the matter to Court to ask for a civil penalty and involve debtors;
- time limit of say 3 years on the commencement of an application from the time the credit provider first becomes aware of the problem or first notifies the Government Consumer Agency; and
- only superior courts, not tribunals, should have the power to impose a civil penalty.

Project team Comment

Submissions have raised the following as potential advantages of a minor error provision:

- reducing costs for all involved, but particularly for credit providers;
- freeing up court and tribunal time;
- allowing more informal resolution of key requirement breaches, rather than being forced go to the court or tribunal for every breach;

- leaving the Government Consumer Agency with the primary role of protecting the interests of debtors;
- If only the Government Consumer Agency, after considering the minor error application, is able to commence a civil penalty application to the court or tribunal, it would restore the normal plaintiff/defendant roles in civil penalty applications;
- providing an incentive for credit providers to confess to key requirement breaches rather than hoping no one will discover the breach; and
- allowing more scope for direct compensation to debtors affected by the error.

The disadvantages of a minor error provision would include:

- shutting debtors out of the process completely because of direct dealings between the credit provider and the Government Consumer Agency;
- creating uniformity problems. (For example, what if an error crosses State and Territory borders or there is inconsistent treatment by different States and Territories of similar problems?);
- it can result in relevant evidence (particularly the context or circumstances in which the errors have occurred) being excluded from the hearing;
- natural justice may be denied to debtors by excluding them from hearings;
- it is not always apparent whether an error is minor merely by looking at the contract;
- disadvantage, loss or damage are not always the only issues to take into account in determining whether an error is minor;
- it may result in greater onus on the Government Consumer Agency to represent the interests of debtors, raising potential for conflict of interest where the Government Consumer Agency's interests and the debtor's interests are not identical; and
- a minor errors jurisdiction may result in increased litigation where errors are considered by a court or tribunal not to be minor.

Further, the following issues arise:

- Should a minor errors process be the realm of individual States and Territories or a national body such as the Management Committee?;
- What would be the effect on the resources of Government Consumer Agencies?;
- Will a minor error procedure really result in much cost saving? (A significant portion of the cost of a civil penalty application is attributable to finding and fixing the problem – costs that will still be incurred. Credit providers will still engage lawyers to represent them. The only saving comes

from not having to actually go to court. If the Government Consumer Agency is not satisfied that the contravention is a minor error, the matter will still need to go to court. In that situation the minor error negotiations will be an added layer of cost);

- Will there be any net cost saving? (Will it effectively be shifting a proportion of the cost burden from the credit provider to the Government Consumer Agency and therefore taxpayers)?; and
- What options will there be for debtors who discover a breach of a key requirement?

On balance, it is the view of the project team that legislating a minor error provision is not the answer. The civil penalty regime is primarily intended to be a preventative measure and to ensure that credit providers take their obligations under the Code seriously.

Overall, it is the view of the project team that the role of government is to ensure that the legislation is as easy as possible to comply with while meeting its primary objective of truth in lending.

While it is generally agreed that the civil penalty applications to date have been relatively expensive, the project team is not convinced that the introduction of a minor error provision will result in much real cost saving. It may be that the applications so far have been relatively expensive because of the newness of the procedure and with time and more experience credit providers, lawyers, Government Consumer Agencies and consumer representatives will be able to reduce the overall cost of applications in respect of minor technical contraventions.

The project team is of the view that the civil penalty regime as it currently stands is sufficiently flexible to allow for the swift and inexpensive resolution of minor technical errors. The Court or Tribunal only has to declare whether a contravention has occurred and whether a civil penalty should be imposed. There is nothing preventing credit providers, Government Consumer Agencies and borrowers as the case may be reaching agreement on the contravention and civil penalty issues as the legislation currently stands. The introduction of a minor error procedure would add nothing to the flexibility of the current civil penalty regime.

The issue of debtor participation in civil penalty applications has deliberately been left to Courts and Tribunals to determine on a case by case basis. The project team believes that debtor participation in civil penalty applications is not something that should be prescribed in the legislation.

In the project team's view self-rectification of errors by credit providers does not need to be legislated. In any event, the Code already provides for the rectification of contraventions. The factors listed in section 102(4), and in particular paragraphs (a) and (g), provide compelling motivation for a credit provider to rectify the contravention as a failure to do so will be taken into account in determining whether to impose a civil penalty.

It is also becoming apparent from the cases decided to date that a civil penalty will only be imposed in the more serious cases. This is clearly the intention of the legislation. The project team therefore does not agree that there is any basis for saying that credit providers are exposed to unjustifiable risks of having a civil penalty imposed in respect of minor technical errors.

The criticism that the fear of being subjected to a civil penalty has lead to excessive legalism and over-compliance will to some extent be ameliorated by clarifying in the Code that contingency fees and charges are not key requirements.

In relation to the criticisms of the reversal of the traditional roles of plaintiff and defendant by allowing credit providers to commence their own civil penalty application, the project team does not see this as a problem. The civil penalty regime is intended to be self-enforcing in allowing the credit provider to commence an application on its own behalf. This has the effect of preventing debtors making their own civil penalty application (section 101(2)).

Conclusion

The project team believes that with some fine-tuning of the list of key requirements, particularly resolving the confusion arising out of contingency fees and charges, the civil penalty regime should not be amended.

5.2.4 Uniformity

5.2.4.1 Is there a need for a uniform approach to credit provider and credit broker licensing throughout Australia? (Issue 2.10)

5.2.4.2 Do any problems arise from the current non-uniform scheme of regulating credit provider and credit broker conduct throughout the country? (Issue 2.11)

Submission content

One respondent suggested that questions about the uniformity of State and Territory laws relating to credit provider and finance broker conduct should be considered by the competition policy review, rather than this review. Another proposed that 'the licensing system' should be disbanded in favour of a negative licensing system and suggested that uniform regulation would be desirable but not essential.

Consumer organisations generally believed that some form of registration for both credit providers and finance brokers is needed. It was argued that positive licensing provided important information on the volume of participants in the credit market. These submissions argued that a scheme for the mandatory licensing of finance brokers in particular was the only 'truly effective' means of regulating broker activity and said they would welcome uniform regulation of both credit providers and finance brokers. They said that they would 'strongly oppose' any further reduction of regulation in this area.

A number of submissions expressed specific concerns about the level of fees being charged by finance brokers who arrange credit on behalf of debtors. Respondents pointed to cases where fees in the range of $2,500 to $3,000 are being charged for arranging credit and it was claimed that there were often discrepancies between the charges actually imposed and representations made by brokers.

Respondents supported a closer examination of the need for uniform licensing and registration requirements for finance brokers, and consideration of a specific mechanism, ideally under the Code or by way of harmonised ancillary legislation, which would provide for the review and annulment of unconscionable brokerage fees. Respondents also suggested that problems relating to finance brokers generally occur across a national market.

A number of issues relating to finance brokers, including liability for misrepresentation, were discussed in issue 2.2 on page 60. Other issues such as brokerage fees and broker conduct were deferred for discussion in this section, as these relate to the regulation of finance brokers as a discrete activity and are relevant to the issue of uniformity in legislation regulating the conduct of credit providers and brokers.

Project team comment

The Uniformity Agreement lists the 'establishment of a scheme for the licensing or registration of credit providers' as a 'non-uniform matter',[91] in which each State and Territory may secure the passage of legislation as it determines. There is no mention in the agreement of finance brokers.

There is currently wide variety between the existing State and Territory regulation of both credit providers and finance brokers. The Australian Capital Territory maintains a positive licensing scheme for credit providers while most other jurisdictions have negative licensing schemes. Tasmania has no licensing or registration requirements for either credit providers or finance brokers.

Where schemes exist, these make provision to regulate credit provider or finance broker conduct and allow a credit provider or broker to be prohibited from trading if certain conduct standards are breached.

There has been considerable debate in recent years about licensing schemes in general. The overall trend, which has to some extent been accelerated by competition policy, is towards negative licensing. Positive licensing and registration are administratively expensive and often the same benefits can be conferred by negative licensing where there is provision to prohibit, restrict or suspend participation in the market.

Apart from the value of gaining statistics on the number and nature of the players in the market, there were no substantial arguments put forward by respondents for greater uniformity in the licensing of credit providers. It is also reasonable to argue that the Code contains a substantial number of provisions which specifically regulate credit provider conduct. Therefore, the project team sees no reason to change the current approach to credit provider licensing and considers that the current arrangement, where States and

[91] Australian Uniform Credit Laws Agreement 1993, Part VI.

Territories adopt their own rules, should remain. However, a number of problems arise in relation to finance brokers, as discussed earlier on page 60.

There are a number of services provided by finance brokers which range from arranging home mortgage finance to finding credit for people who are unable to obtain finance through conventional means.[92] Many finance brokers are providing valuable service to consumers while some schemes are highly dubious.[93] A number of consumers who use brokers are clearly vulnerable and some additional protections may be appropriate.

The fair trading Acts provide protection from some of the sharper practices which clearly involve misrepresentation or fraud. However, there would appear to be value in providing some further means of redress for inappropriate representations and a facility for review of unconscionable fees. As previously mentioned some States and Territories already regulate the activities of finance brokers and have provision to review unconscionable fees or regulate conduct generally.[94]

While it might be possible to regulate these activities within the Code, many of the problems that arise, do so as separate issues to the provision of credit generally and relate to a specific relationship between consumers and brokers. It may be appropriate for further regulation in the Code of the relationship between credit providers and finance brokers but this issue needs further investigation, as discussed on page 62.

Regulation of finance broker conduct in the Code may clearly overlap with existing State or Territory regulation. If harmonisation is to be achieved it would seem preferable to do so by agreement to regulate core activities by ancillary regulation. While States and Territories might vary as to whether they register or provide negative licensing schemes for brokers, there is potential to reach agreement on specific provisions relating to fees and charges and conduct generally. To this end the project team is of the view that efforts should be made to harmonise the regulation of brokers. This could be achieved by establishing core standards for redress in relation to

[92] There are services which specifically assist people recently discharged from bankruptcy to re-establish a credit rating.

[93] It is alleged that some telephone application schemes require a long interview where telephone charges may exceed $50 and where credit is never provided. Some of these schemes are currently being investigated by Consumer Agencies.

[94] For example, the *Consumer Credit (Administration) Act 1996* (ACT).

unconscionable fees but allowing flexibility in arrangements for registration or licensing.

Recommendation

2.18 Review existing state and territory laws relating to finance brokers to provide a consistent approach to the review of unconscionable broker fees and charges and standards for broker conduct.

5.2.4.3 Are the laws relating to security interests consistent with a national approach to credit law? (Issue 2.12)

Submission comment

A number of respondents noted that there was inconsistency with State and territory approaches to the regulation of security interests and that these added to the complexity of compliance and ultimately to costs.

One respondent stated that the 'Australian States and Territories currently have a vast array of laws dealing with security interests in different kinds of property...there is a pressing need for a conceptually consistent legal framework for security laws in Australia.'

One respondent said that this was not an area which fell within the jurisdiction of the Code or of this review.

Project team comment

The project team notes the difficulties that arise in relation to varying procedures for the registration of mortgages and other security interests and the impact on compliance and costs for business operating nationally. However, these issues are already being considered in discussions between States and Territories and by the Standing Committee of Attorneys-General. Considerable progress has been made in linking all States and Territories to a national database of motor vehicle security interests and Tasmania is expected to link shortly to this system. It is not appropriate for this review to make further comment, beyond supporting the processes already in train.

5.2.4.4 Is there a need to regulate interest rates ceilings? (Issue 2.14)

5.2.4.5 Do any problems arise because of the non-uniformity of this regulation? (Issue 2.15)

The following discussion relates to both issues 2.14 and 2.15.

The Uniformity Agreement provides that each State and Territory should determine whether or not interests rates should be regulated. As a result, some jurisdictions have regulated for a ceiling on interest rates while others have no regulation.

Submission comment

Consumer representatives expressed support for the retention of interest rate ceilings and argued that the continued charging of high interest rates by some finance companies in a low interest rate environment strongly indicates that competitive forces alone are insufficient to ensure that credit contracts are not entered into at excessive rates.

However, one stakeholder argued that even where limits apply they have been are disregarded. It was further proposed that there is no need to regulate interest rates as the market regulates interest rates according to demand.

There were few comments on the non-uniformity of interest rate regulation and one response stated that there appears not to be a problem arising from non-uniformity in this area. It was suggested that the current approach should be retained. Further, where problems arose with the application of unreasonably high rates, these tended to be in relation to small lenders within specific jurisdictions and generally was not a national or uniformity issue.

Conclusion

It would appear that, as problems do not arise within a national market, that the existing arrangement where States and Territories determine whether or not to regulate interest rate ceilings should be retained.

5.2.5 Product flexibility and consumer choice

5.2.5.1 Has the ability to introduce fees and charges resulted in greater product flexibility and greater product variety in the marketplace? (Issue 2.16)

Submission comment

One major industry representative believed that product innovation had been slowed down, rather than frustrated, due to Code compliance demands and due to cautiousness engendered by fear of triggering a civil penalty. Product innovation could be enhanced, it was felt, by the Government Consumer Agencies developing industry guidelines and through modification of the civil penalty regime.

One stakeholder believed that the Code, if anything, had seemed to improve product flexibility, although they were aware of an instance in which an interest only product had been withdrawn as it was believed the product would not comply with the Code.[95] They also said that a mortgage offset facility was withdrawn from the market because of difficulty in adapting computer systems to ensure statement requirements of the Code were complied with.

Another stakeholder thought that compliance with the Code was more difficult in relation to more complex products, such as combination loans. It was pointed out that there are difficulties concerning disclosure requirements in relation to combination loans, where some part of the loan is fixed and another variable, or where one part of the loan involves a fixed rate loan together with a line of credit.

Consumer groups contended that the real issue was not so much whether the introduction of fees and charges had increased consumer choice, but whether any increased choice had in practice been beneficial to consumers. It was considered that any increased choice had not been beneficial to consumers, because it had not resulted in consumers being able to obtain better or cheaper financial services.

On the contrary, it was argued that the formulation of credit products with various fees and charges attached has resulted in more expensive credit for

[95] Though, according to the submission, the product was subsequently released on the market.

consumers who pay out their loan contracts early. It was also argued that, even if cheaper credit was available on the market, consumers would be unable to take full advantage of it. Without a comparison rate, consumers are not in a position to compare products in a way that enables them to choose the cheapest or best product for them.

One stakeholder noted that, while there has been competition in the home loan market, the introduction of fees and default rates of interest has not been accompanied by any reduction in interest rates in the low-income consumer credit market. It was contended that consumers may in fact be paying more after the new fees and charges are taken into account. The introduction of termination fees was argued to represent a failure of the Code to deliver benefits to consumers by way of reduced costs to consumers, as they can only be justified in situations where there is a fixed rate contract and the debtor pays out the contract at a time when market rates of interest are lower than when the contract was entered into.

It was also stated that some credit providers have returned to calculating rebates according of the rule of 78 which, in not being linked to the actual cost of terminating a loan, inhibits competition by discouraging consumers from transferring to another credit provider.

Project team comment

From the submissions received, the consensus was that the Code has mostly enhanced the level of product flexibility and variety in the market place. What is less clear is whether the increased choice of products available has delivered to consumers a net benefit. There is little doubt that the disclosure requirements of the Code represent a compliance challenge for some of the more complex products entering the marketplace.

Nevertheless, it is important to recognise that the problem of how best to structure more complex credit products or contracts for their purchase so that they comply with the disclosure requirements of the Code is a problem that arises from the Code having permitted credit providers to introduce fees and charges in the first place. It is also important to note that a trade off for permission to disclose fees and charges is the requirement that these fees and charges be made transparent to the consumer. If the need for transparency occasionally results in difficulties in ensuring more complex products comply with the Code, this in itself is not a reason for amending the disclosure requirements of the Act.

Conclusion

As the Code appears, overall, to support product flexibility and innovation, there is no basis at the moment for amending the Code to further these objectives.

5.2.5.2 Has the introduction of fees and charges increased consumer choice? (Issue 2.17)

This issue has been discussed in relation to issue 2.16 above and no further or specific comment has been added.

5.2.6 Electronic commerce

5.2.6.1 Is the Code drafted in sufficiently wide terms to encompass electronic commerce? (Issue 2.18)

Introduction

The Issues Paper sought submissions on whether the Code remains relevant to the current market. This question was asked particularly with reference to the emerging market of electronic commerce, and in the context of a policy objective of functional equivalence[96] - that the Code treat paper and electronic based transactions in a manner that does not give preference to either form over the other. Submissions, on balance, felt that the Code does not, or does not sufficiently, permit electronic commerce (see further discussion below under the heading 'Submissions generally').

The project team considers that the Code should facilitate electronic commerce in order to maintain its relevance in an age of burgeoning information technologies. In this respect, the review supports the recommendations of the Financial System Inquiry Report (otherwise known as the 'Wallis' Report) that the Code recognise electronic commerce.[97]

While many Australian banks are now providing various on-line banking facilities, none of their banking sites allow consumers to purchase credit on-line. Professor Lanyon has speculated that the reasons for this may be twofold: the technological and legislative framework to deal with risk management issues such as authentication is absent, and there is doubt about whether the

[96] The term 'media neutrality' is another name sometimes used to describe this policy.

[97] See Recommendations 91 to 93 of the Financial System Inquiry Final report March 1997 (AGPS, 1997) pp63-64.

Code permits electronic communication.[98] Yet, with the rapid growth in Internet usage in Australia and the impending passage of uniform electronic transactions legislation[99], there is mounting pressure on the Code to effectively recognise electronic transactions.

Policy considerations

To facilitate electronic commerce, the Code needs to legally recognise electronic transactions as paper transactions are currently recognised – on the surface a simple task. Yet, important policies have underlined the requirement that consumer credit contracts be in writing. The recognition of electronic transactions is then complicated by the need to satisfy the policy objectives that underlie the requirements in connection with paper based commerce. In an article reviewing the impact of a facultative statute on various legislation including the Code, Professor Sneddon identified these objectives as being evidentiary, cautionary/protective, record keeping and channelling.[100]

The evidentiary function of a signature ensures that there will be admissible and reliable evidence.[101] The evidentiary function of a requirement for writing ensures the existence of a durable record of information, which is less easily disputed.[102] The cautionary function of a signature is its capacity to encourage deliberation and reflection before action.[103] The need for a signature signifies that the document has legal consequences. The protective function of a signature provides evidence for people relying on the signed document that the maker had given his or her full attention to it.[104] The record keeping function of a signature or writing is that it creates a durable record of the parties and terms of an arrangement.[105] The channelling function of a signature is its

[98] Lanyon, Elizabeth. 'Hybrid Consumer Credit Products in the Electronic Age – A Challenge for Regulators'.

[99] See the *Electronic Transactions Bill* 1999 (Cth), which is likely to be enacted as a uniform model law in all Australian jurisdictions.

[100] Sneddon, Mark 'Legislating to facilitate electronic signatures and records: exceptions, standards and the impact on the Statute Book' Vol 21(2) UNSW Law Journal 1998. The article analyses the historical policy objectives underlying the form requirements for manual signature and writing on physical media in considering the kinds of exceptions that would apply to ensure that electronic authentication and electronic records satisfy these policy objectives.

[101] Ibid., p347

[102] Ibid., p347.

[103] Ibid., pp347-8.

[104] Ibid., pp348-9.

[105] Ibid., p348

ability to clarify that there is intent to act in a legally significant way, as opposed to some other way.[106]

These functions or policy objectives are important in determining how to recognise electronic commerce to ensure that functional equivalence is achieved without undermining the above policy objectives. For instance, unless an electronic signature[107] on an electronically formed loan contract can be reliably authenticated, the achievement of functional equivalence through the legal recognition of electronic signatures will not satisfy the evidentiary objective of requiring a handwritten signature. Similarly, unless the act of electronically signing an electronic document conveys the same caution and sense of legal significance to a consumer that the act of manual signature does, the cautionary and channelling functions will not be satisfied, rendering the achievement of functional equivalence of less value.

A recent Victorian Government Paper seems to contemplate some of these policy objectives in setting out its performance criteria for electronic commerce:

'However, the basic rule that paper based communications and electronic communication technology should be equivalent is subject to some necessary qualifications. Electronic communications can only satisfy legal requirements if they also comply with certain specified criteria variously designed to ensure that they are accessible, reliable and maintain the integrity of the information communicated.'[108]

Submissions generally

Given the project team's support for the facilitation of electronic commerce, a task of the review was to seek submissions on the extent to which the Code does, in fact, facilitate electronic commerce. Accordingly, the Issues Paper sought views on the ability of the Code to permit electronic commerce, on the effect of electronic commerce on market participants generally and on the impact on the Code of Australian consumers obtaining credit from overseas via

[106] Ibid., p349.

[107] While the expression 'electronic signature' has no universal meaning, it is often understood as being any means of electronic authentication of the identity of a person and of the intent of that person to be associated with that record.

[108] 'Explanatory Paper. Draft Electronic Transactions Bill 1999'. Attorney-General's Department, p.2. However, it should be noted that these three performance criteria of accessibility, reliability and maintenance of the integrity of the information are not of themselves sufficient to satisfy the four policy objectives earlier described as evidentiary cautionary, record keeping and channelling.

the Internet. It is worth noting that all submissions that addressed the issue of electronic commerce were unanimous in suggesting that the Code should apply to electronic commerce, but differed on the extent to which it is believed the Code facilitates these transactions.

Submissions were either of the view that the Code was insufficiently clear to permit electronic commerce, or that, if the Code did permit electronic commerce, legal certainty would be enhanced by introducing more specific recognition of electronic transactions. Some of these submissions addressed specific questions of how the Code should apply in relation to the particular concerns raised. These concerns included the following:

Harmonisation of laws regulating electronic commerce

Submission comment

Recommendation 93 of the Financial Systems Inquiry included a recommendation that, as far as possible, Australian law should be consistent with laws in major centres of electronic commerce. It was submitted to the project team that this recommendation be endorsed. Moreover, submissions generally supported a strategy of developing uniform laws regulating electronic commerce by reference to the fact that moves toward uniformity are now under-way.

Project team comment

The harmonisation of laws regulating electronic commerce is a three pronged goal. It entails the harmonisation of domestic and international laws regulating electronic commerce. It also entails the harmonisation of federal and state laws regulating electronic commerce. Finally, in relation to the Code, it involves harmonising general facultative laws (eg national electronic commerce legislation) with Code specific regulation of electronic commerce.

The first and second of these goals have been advanced recently by the Commonwealth Government in its developing an *Electronic Transactions Bill* 1999. This Bill would recognise the legality of electronic transactions by setting up legal requirements for writing, signatures, documentation and storage. The Bill adopts some of the core principles of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on

Electronic Commerce.[109] While the Bill is confined to Commonwealth Acts, the Commonwealth is co-operating with State and Territorial governments to develop a national uniform legislative scheme. This is being done with a view to creating a uniform legal framework within which business, consumers and governments can buy, sell or form agreements electronically, with the appropriate safeguards in place.

From both a consumer and business point of view, there is merit in attempting to harmonise State and Federal laws and these laws with international laws regulating electronic commerce. As a consequence, the review team expresses in principle support for the cooperative process now in motion, to ensure the recognition and legality of electronic commerce in Australia is developed in a consistent way.

It is, however, recognised that any national electronic transactions legislation is unlikely to advance the third goal of harmonisation described above, that being the goal of harmonising general laws regulating electronic commerce with Code specific laws. The *Electronic Transactions Bill* 1999 is not expected to stipulate the types of standards and process controls needed to satisfy the policy objectives associated with consumer protection legislation such as the Code. The Code will not be able to rely such national legislation to provide the kinds of consumer protection measures which may be necessary in the field of electronically conducted consumer credit.

Accordingly, the project team aims to highlight those issues specific to consumer credit transactions that need to be taken into account in achieving functional equivalence for electronic transactions under the Code. In doing so, while the review team will not go so far as to recommend technical specifications, it will make recommendations on specific standards and process controls that ought to apply to consumer credit transactions conducted electronically.

[109] The purpose of the Model Law is to provide national legislators with a set of internationally acceptable rules designed to remove the legal impediments to using electronic means to communicate information that is legally significant.

Recommendation

2.19 Recognise electronic transactions, by harmonising the Code, as far as possible, with the *Electronic Transactions Bill* 1999. In addition, the Code will need to adopt specific consumer protection measures to respond to the issues that arise specifically out of the consumer credit environment.

Permitting contracts to be formed electronically

Permitting electronic signatures

Submission comment

A credit contract formed electronically would be lawful if the Code authorised electronic records to satisfy the legal requirements for writing and to authorise electronic signatures to satisfy the legal requirements for manual signatures. In general, submissions expressed the view that the Code is insufficiently flexible to permit the electronic formation of contracts. Section 12 of the Code provides that a credit contract must be in the form of:

a) a written document signed by the debtor and the credit provider; or

b) a written contract document signed by the credit provider and constituting an offer that is accepted, if the terms of the offer provide for it, by the debtor or another authorised person accessing or drawing down credit to incur a liability by any other act of the debtor that satisfies the conditions of the offer.

Project team comment

Section 12 of the Code provides for regulations to authorise other ways of making a credit contract that do not involve a written document. It was pointed out in several submissions, however, that no regulations have been made under section 12 to date. Without any regulations made pursuant to section 12, it would appear that section 12 appears to require or at least contemplate only paper-based transactions.

While the Code's definition of 'writing' is very broad, it does not, unlike the *Acts Interpretation Act* 1901 (Cth), expressly include in its definition modes of representation on computer disk, screen or any other electronic means. Furthermore, there is considerable doubt about whether the definition of 'sign' in Schedule 2 of the Code (defined as including the affixing of a seal or the making of a mark) would permit electronic authentication in lieu of a manual signature, despite the definition being an inclusive one.

For the above reasons, there is a strong argument that the Code is ambiguous as to whether it permits credit contracts to be formed electronically.

Any amendment to authorise the use of a system of electronic authentication (such as an electronic signature) must ensure that any system adopted conveys the same sense of legal significance to the user that a manual signature does.[110] This means that an electronic signature may be used in place of a manual signature under the Code provided the process of electronically signing a document sufficiently conveys to the person using the process that he or she is signing an electronic document and that the act has the same degree of legal significance as if he or she was manually signing a hard copy of the document. The electronic authentication system adopted must also be one that can be relied on to authenticate the identity of the sender of the message.

Provided these policy concerns can be satisfied, the project team recommends that the definitions of 'writing' and 'sign' be amended to make it clear that the Code does recognise both electronic records and the electronic authentication of records. Such amendment could probably be achieved by amendment to the Regulations, bearing in mind the definitions in any future electronic transactions legislation. The regulations may also need amendment to recognise an appropriate electronic authentication device (or devices) for the purposes of electronic signature.

It is worth noting that logistical problems may arise in relation to contracts involving joint accounts, which require two signatures, and mortgages, which require witnessing. Furthermore, there is the limitation that real property mortgages are required to be in paper based format.

Recommendation

2.20 Amend the Code's definitions of 'writing' and 'sign' to make it clear that the Code recognises both electronic records and the electronic authentication of records.

[110] Sneddon, Mark. op. cit., pp349-350.

2.21 Give further consideration to those types of contracts, such as real property mortgages, which need to be exempted from being able to be entered into electronically.

Permitting electronic communications generally

Submission comment

A couple of submissions raised an issue with respect to the electronic delivery of notices and documents generally. Section 172 of the Code prescribes the manner of giving notice or other document separately for individuals and bodies corporate. Polczynski has pointed out that there is an anomaly in this regard.[111] The Code enables notice to be given by personal delivery, or for an individual:

'by leaving it by post, telex, facsimile or similar facility...'

and, for a body corporate:

'by sending it by post, telex, facsimile or similar electronic facility...'

Is the delivery of a notice or other document electronically a 'similar facility' to post, telex or facsimile, given that the expression 'similar electronic delivery' is used in reference to bodies corporate? Is the delivery of a notice electronically a 'similar electronic facility' to post, telex or facsimile, if it does not generate a hard copy in the process? It is because of these uncertainties that some submissions have argued that the Code could be both clearer and more explicit in its position on authorising notice by electronic means.

Project team comment

One concern in permitting communications to be provided electronically is that consumers will not receive actual notice electronically the day the notice is sent unless they switch on their computer and retrieve their mail on that day. Whether consumers who have computers with an e-mail facility, as a general rule, check their electronic mail on a daily basis is open to question. This concern is greater in relation to certain notices such as a default notice under section 80 of the Code, as such a notice requires a more urgent response.

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[111] Polczynski, Maria (Henry Davis York) 'Electronic Delivery of Retail Finance Products" 1998' p.21. Though Ms Polczynski later argues that the apparent anomaly is not necessarily an impediment to the electronic service of documents.

A participant of the Technical Reference Group has suggested that this concern could be overcome by confining the permission of service electronically to the following circumstances:

1. Where the consumer has an electronic address;

2. Where the credit contract was initially entered into electronically;

3. Where the consumer has elected to receive notices and other documentation electronically. The consumer's election to receive notices and other documentation electronically should be by separate specific election (eg click a box) after suitable explanation of the implications of making such an election; and

4. Where the consumer has a means of notifying changes of electronic address and a right to cancel the agreement to receive electronic communications.

Nevertheless, legitimate concerns remain over permitting documents that signal the commencement of a statutory process of enforcement (such as Default Notices and Notices of Repossession) to be provided electronically. These kinds of documents are unique in that there is a particular urgency with which they need to be drawn to the borrower's attention and particularly serious consequences for failure to act upon them in the required time. In light of the relative novelty of the electronic media and the fact that court processes are not yet on-line, it would appear premature to permit such notices to be provided electronically at this stage.

It is envisaged that, as electronically conducted consumer credit becomes a more regular feature of commercial life and as court process become conducted electronically, consideration be given to removing this exemption. The project team believes there is considerable merit in adopting the above safeguards for the electronic provision of such notices.

Recommendation

2.22 Permit electronic communications where the consumer has an electronic address, the means to notify a change of address, elects to receive communications electronically and has a right to cancel this election.

2.23 Prohibit documentation under the Code that triggers an enforcement process being able to be provided electronically.

Storage and reproduction of documents

Submission comment

Many submissions suggested that electronic transactions ought to occur in such a way that both parties are able to maintain a complete and accurate record of the contractual terms.

Project team comment

In certain respects, the issue of storage and reproduction of information overlaps with the issue of permitting the electronic provision of information – there may be circumstances when it is considered that information that is not able to be stored or reproduced has not been properly 'given' to the consumer.

Section 18 of the Code requires the credit provider to give the consumer a copy of the credit contract. Where the contract has been formed electronically, the question arises as to the meaning of 'give' in this context. It is debatable whether the policy objective underlying section 18 would be satisfied by posting a contract on an Internet site without the capacity for it to be downloaded or printed out.[112]

A participant of the Technical Reference Group has alerted the review team to the need to determine in what circumstances the provision of information of a web site would constitute adequate delivery or provision of the information to the consumer. The review team agrees that there needs to be consideration of the various permutations of consumer's interactions with credit providers and of the nature of web-site technology before particular modes of electronic

[112] See the United States Federal Reserve Board proposed rule modifying regulation Z for its Truth in Lending legislation, which states that to simply post information on an Internet site without appropriate notice and instructions on how the consumer can obtain the information is not satisfactory: Federal Reserve System 12 CFR Part 226 (Regulation Z; Docket No. R – 1005) Truth in Lending. pp3-4.

delivery are recognised as acceptable methods of providing information to a consumer.

What is clear is that the various disclosures and documentation of the credit provider need to be in a form that the consumer is able to keep. This has been the approach adopted by the United States Federal Reserve Board proposed rule modifying regulation Z for its Truth in Lending legislation.[113] If information is going to be posted on a Web site, the consumer needs to be given notice of this fact, be able to download it and be given instructions on how to do so.

Information provided electronically also needs to identify the place, time and date of origin and receipt of the information and be secure from tampering. It is worth noting that the Commonwealth Government in its *Electronic Transactions Bill* 1999 (Cth) had regard to the provisions of the UNCITRAL Model Law on Electronic Commerce 1996 in establishing legal requirements for retaining records by retaining electronic data messages subject to satisfying conditions of reliability and identification of place, time and date of origin and receipt.[114] The review team concurs that any system employed to authorise the use of electronic records in lieu of writing on physical media, or electronic authentication in lieu of a manual signature, must ensure that such system provides a lasting and reliable record of the details of such acts for record keeping purposes.[115]

Recommendation

2.24 Implement points 1 to 7 below in relation to storage and reproduction of information.

1. Ensure that the pre-disclosure statement and the contract is capable of being stored both before and after the transaction is completed.

2. Ensure that all electronic communications delivered electronically are capable of being retained and are accompanied with instructions on how to do so.

3. Ensure that the capacity to store or retain electronic communications includes both the capacity to copy them on a personal electronic file and make a paper print-out of it.

[113] Ibid., p5 The proposal is that consumers be able to retain electronically or print out any information they receive.

[114] See section 12 of the *Electronic Transactions Bill* 1999 (Cth).

[115] Sneddon, Mark. op. cit. , pp350-352.

4. Ensure that any electronic communications so retained be able to be done in a manner that satisfies conditions of reliability and identification of place, time and date of origin and receipt of the information.

5. Ensure that electronic communications permit the display of text messages in a clear and readily understandable format.

6. Require that credit providers take reasonable steps to ensure that the pre-contractual information and the contract are complete and unaltered at the point at which a consumer receives them. Of course, this needs to be done in a way that does not prevent the electronic information from being stored by the consumer.

7. Give further consideration to the kinds of documentation or other information that would not be considered to be appropriate to post on a web site for the purposes of providing that information to the consumer.

Form and delivery of pre-contractual and contractual information

Project team comment

A further issue is the form in which both the pre-contractual and contractual information should be delivered to the consumer. The Technical Reference Group suggested that, like the paper format, consumers should be required to scroll through the whole pre-contractual and contractual information before contracting. It is said that, while this would not necessarily ensure that consumers read the whole contract, it would at least ensure that they saw the document.

It was also suggested that consumers should be able to download the pre-contractual and contractual information before entering into the transaction. This would provide consumers with an opportunity to read the documentation in a format that they may find easier to read, as well as enabling them to store a hard copy should they so desire. It is beyond the scope of the review to prescribe the ways in which pre-disclosure statements and contracts are to be provided to consumers. However, it is suggested that credit providers:

(a) issue the pre-contractual statement and the contract in the same electronic document file; or

(b) use another electronic mechanism by which the consumer can gain access to the contract only if he or she has had access to the pre-contractual statement.

Recommendation

2.25 Require that pre-contractual and contractual information is able to be scrolled though before any contract can be entered into. This documentation should be required to be sent in a form that enables consumers to download it or print it out if they choose.

Communicating important warning disclosures without distractions

Project team comment

A participant of the Technical Reference Group expressed concerns that the various warning disclosures that appear on pre-contractual and contractual information need to convey a sense of the legal significance of the contract to be effective. To do this, however, it has been suggested that they need to appear in the absence of distractions.[116] The framing of a warning in an Internet browser with spinning icons and other flashing icons has been cited as an example of the kind of distraction that could undermine the channelling and cautionary function provided by such disclosures and warnings.

The Code does not address this issue except to provide in section 162 that a credit contract, guarantee or notice given by the credit provider must be legible and clearly expressed. It is considered that section 162 is insufficient to cope with the multi media or animated environment of electronic communications.[117]

[116] Seddon, Mark. op. cit., p368.

[117] Compare the Code to the United States *Truth in Lending Act* in this respect, where that Act requires its notices to be clear and conspicuous.

Recommendation

2.26 Amend section 162 of the Code or make a regulation under section 13 to ensure that important electronic communications are clearly and conspicuously expressed without distractions.

The presentation of information

Print size

Submission comment

Submissions noted that the Code needs to address the question of print size regulation in the electronic commerce context. It has been suggested that, if any section of the Code prevents electronic commerce, section 162(1)(b) of the Code do so by imposing print size requirements. This is because the section requires that a document 'to the extent that it is printed or typed must conform with the provision of the regulations as to print or type' and Regulation 39 provides that such print or type must not be less than 10 points. The argument is that something cannot be printed or typed unless it is in hard copy and that '10 point' relates to images of a fixed size that can only be images on a hard copy.

Project team comment

If the Code intends to unambiguously authorise electronic transactions, there is little doubt that amendment of the provisions relating to print size would assist. Bearing in mind the policy rationale behind the Code requiring hard copy in font size of 10 point, the review team considers that any regulation of size in relation to electronic documents must ensure that the documentation is legible and in a format that conveys or does not undermine the importance of the information being sent.

It could be argued that the prescription of a font size in relation to electronic communications is unnecessary, as consumers would have a zoom function in any case to expand the size of any text they found to be too small. However, it cannot be assumed that consumers will have a zoom function in respect of Internet viewable text to change the size of any text they find to be too small. There is considerable merit in encouraging consumers to read the information they receive by having the information provided in a form that makes it easy for them to read, or at least does not deter them from doing so.

Recommendation

2.27 Ensure that the Code's minimum requirement for font size for paper based documentation is also required for electronic communications.

Time and place of receipt of a contractual message

Submission comment

A number of submissions noted that the question as to when and where a credit contract formed electronically is said to have been formed is unclear and requires clarification.

Project team comment

The issue of when and where a contract formed electronically is said to have been formed is important for many reasons. The time and place of receipt of the acceptance of a contractual offer, for example, will determine the time and place at which a contract is made. The time at which a statement of amount owing is sent by the credit provider on the request of the borrower under section 34 of the Code will determine whether the credit provider is said to have satisfied its statutory obligation to provide the information within the required period of time.

Yet it is not entirely clear when an electronic message is considered to be sent or received. A message could be said to have been sent when the sender clicked the mouse on the send button, when the computer has stored it for sending or when the message leaves the system. Similarly, a message could be said to have been received when it enters the recipient's computer, when the recipient is notified of its arrival or when the recipient has actually opened the message. Different principles or rules, such as the postal acceptance rule[118] and the instantaneous communications rule[119] have evolved over time to

[118] The postal acceptance rule developed out of the common law to assist determining when a contract has been formed. The rule provides that, if certain conditions are met, acceptance of an offer by post occurs immediately the acceptance is posted. Without any provisions in the Code or in electronic commerce legislation to the contrary, it could be argued that the postal acceptance rule would apply to determine the date on which a credit contract formed through electronic means is formed. This would mean that, in certain circumstances, a credit contract could be said to have been formed at the time and on the date the credit provider e-mailed acceptance of the offer to the consumer.

[119] The instantaneous communication rule developed as an exception to the postal acceptance rule in cases in which the courts held that the postal acceptance rule did not apply if the parties were in instantaneous communication, such as via a telex machine. The question then arises as to whether e-mail (which for various reasons can be subject to

facilitate the determination of when acceptance of an offer occurs, but they do not readily apply to the electronic context.

The *Electronic Transactions Bill* 1999 provides that, unless otherwise agreed between the sender and the recipient, an electronic communication is sent when it enters an information system outside the control of the sender. Receipt occurs, unless otherwise agreed, when it enters the information system designated by the recipient for receiving electronic communications or, if none is designated, when the electronic communication comes to the attention of the recipient.[120]

A participant of the Technical Reference Group drew the project team's attention to problems that may arise where credit providers and debtor's agree on rules other than the default rules under the *Electronic Transactions Bill* 1999. It is possible that a credit provider may deem certain information to have been reached within a certain time of it having been sent by e-mail, a deeming provision which may be manifestly unfair. Likewise, similar deeming provisions may unfairly attribute an electronic message to a consumer. To overcome this possibility, the Federal Attorney-General's Expert Group on electronic commerce made recommendations that provide limits on such unfair agreements.[121]

The Expert Group recommended that reliance on any variation to the default rules should be subject to sub-section 68A(3) of the *Trade Practices Act* 1974.[122] Section 68A(3) provides that, in determining whether reliance on a term of the contract is fair and reasonable, a court shall have regard to the circumstances of the case and particularly the strength of the bargaining position of the parties.

Notably, among the grounds for seeking re-opening of a contract under section 70 of the Code are the relative bargaining power of the parties, and whether it was reasonably practicable for a consumer to negotiate for the alteration of, or to reject, a term or condition of the contract. However, it is arguable whether a contract could be re-opened solely on the ground that a provision concerning the time at which an electronic message is deemed to have been sent or

some delay between the time the message is sent and the time it is received) would also be excepted from the postal acceptance rule.

[120] See section 14 of the *Electronic Transactions Bill* 1999.

[121] See Electronic Commerce: Building the Legal Framework. 31 March 1998. In particular, see paragraphs [4.5.34] and [4.5.63] to [4.5.79].

[122] Ibid., Recommendation 4.

received is considered unjust. To the extent that it is unclear whether section 70 allows re-opening of a contract in relation to a term concerning the time and place of receipt of a message, further protections may be needed.

Recommendation

2.28 Ensure that consumers are given the opportunity to challenge unfair presumptions concerning the sending and receipt of messages.

Attribution of electronic communication

Project team comment

The *Electronic Transactions Bill* 1999 provides that, unless otherwise agreed between the purported sender and the recipient of an electronic communication, the purported sender of the electronic communication is bound by that communication only if the communication was sent by the purported sender or with their authority.

A participant of the Technical Reference Group drew the review team's attention to problems that may arise where credit providers and debtor's agree on rules other than default rules under the *Electronic Transactions Bill* 1999. The Federal Attorney-General's Expert Group on electronic commerce recommended that, where parties agree on rules of attribution and message integrity, a party cannot rely on the agreed rules unless it is fair and reasonable to do so in all the circumstances.[123]

As with an unfair deeming provision with respect to the receipt of a message, a consumer could seek to rely on section 70 of the Code in having a provision that unfairly attributes a message to him or her declared unjust. Again, it is arguable whether a contract could be re-opened solely on the ground that a variation to the attribution rules under Electronic Transactions legislation is considered unjust. To the extent that it is unclear whether section 70 allows re-opening of a contract in relation to a term concerning the attribution of a message to a consumer, further protections may be needed.

[123] Ibid., Recommendation 12.

Recommendation

2.29 Ensure that consumers are given the opportunity to challenge unfair contractual terms concerning the attribution of a message to them.

Address of credit provider

Submission comment

One consumer body pointed out that section 15 of the Code[124] does not require credit providers to disclose their address in the contract document. It was argued that this could encourage the growth of unscrupulous lenders and create a problem for consumers who would be unable to locate the credit provider or know where to serve notices. As a 'distance' form of selling, transacting over the Internet could exacerbate the potential for a credit provider to exploit not having to disclose a physical address.

Project team comment

The circumstances relating to electronic commerce are sufficiently different from paper based commerce to justify requiring credit providers to disclose their physical address in contractual documentation, if provided electronically. Furthermore, the physical address of the credit provider should also be disclosed on any web site of the credit provider.

Recommendation

2.30 Require credit providers to disclose a physical address in the context of electronic communications only.

Confirmation of consent to purchase credit

Submission comment

Concerns were expressed that, due to the instantaneous nature of the electronic market place, any permission of credit transactions over the electronic market needs adequate consumer protection measures in place to ensure that consumers do not purchase credit inadvertently. It was submitted

[124] Section 15 of the Code requires credit providers to disclose various information in the loan contract, such as the amount to credit to be provided, the annual percentage rate, the fees and charges that apply or may apply and the amount and frequency of repayments.

to the project team that it would be inappropriate, for instance, to permit credit contracts to be entered into by the single click of a mouse because of the ease with which consent or agreement provided in this way could be given.

It was suggested that, instead, there be a process in place to ensure that any acceptance of an offer over the Internet is informed and unambiguously expressed by the consumer. One consumer group suggested the idea of a 'triple click', or 'triple confirmation', process, whereby consumers register their interest in proceeding, acknowledge that they understand the price, terms and conditions of the credit being offered and agree to enter into the contract. Such a process was said to be similar to many computer software packages that ask the user whether they are sure they want to delete a file.

Project team comment

It is desirable to institute mechanisms to ensure the confirmation of consent to purchase credit for two reasons. Firstly, it enables the authentication of the identity of remote parties. Secondly, it ensures the unambiguous assent of a remote party to the contractual agreement. Clearly, therefore, mechanisms that confirm consent are to the advantage of both the credit provider and the consumer.

Professor Lanyon has suggested the idea of having a clicking process to mark off the commencement of the formal contracting process from merely accessing advertising and product information.[125] This would entail the consumer using a clicking process to express their interest in proceeding to a formal contracting process and the consumer then using some kind of electronic signature (such as the encryption of a message using a secret key) to signify their agreement to enter into the contract. At the point at which the consumer is required to expressly agree to enter into the contract, the consumer is given an option to enter the contract by other means if they choose.[126]

The OECD draft guidelines on electronic commerce propose that mechanisms such as a multi-step confirmation process through which a consumer could specifically confirm their interest in contracting, their understanding of the full price, terms, conditions and methods of payment, and their agreement to

[125] Lanyon, Elizabeth. op. cit., p.30.

[126] Ibid.

purchase[127] as a way of ensuring that the agreement to (contract) is informed and unambiguously expressed by consumers in a positive form.

The Attorney-General's Expert Group on Electronic Commerce has also supported mechanisms such as those advocated in the OECD Guidelines to ensure that the consumer is given adequate warning that they are entering into legal relations and assuming a legal liability.

In the opinion of the project team, the introduction of a clicking process on its own (whether single or multi click) as the mechanism by which the whole contracting process can occur presents two difficulties. Firstly, there is a tendency of computer users to click through various sorts of less legally significant 'OK' icons as quickly as possible. A clicking process would not, therefore, provide an effective warning function that conveys the legal significance of the prospective transaction. Secondly, prior to formation of the contract, credit providers will want to identify the consumer and authenticate their interest in proceeding with the transaction. Some kind of electronic signature, as opposed to a clicking process, would be more reliable in indicating the identity of the consumer and his or her intention to be contractually bound.

[127] Clause 30 of the OECD Draft Guidelines on Consumer Protection in the Context of Electronic Commerce.

Recommendation

2.31 Support a two-stage process by:

1. requiring the introduction of a multi-clicking process at the stage at which the consumer is considering the loan product and expressing their interest in proceeding to the formal contracting process; and

2. requiring the introduction of a mechanism that does not involve clicking at the stage at which they express their agreement to enter into legal relations. This mechanism would involve some kind of electronic signature, which is reliable in authenticating the identity of the consumer and of the intent of that person to be associated with the message. The consumer ought to have the option at this stage to enter into the contract by other means.

Currency of communication

Project team comment

A participant of the Technical Reference Group noted that, at present, the Code makes no reference to the currency of the disclosures required except to say that they can be taken to be correct if they are correct at the date stated.[128] Yet, in certain other jurisdictions, the question of the accuracy of the disclosure has been addressed.[129]

The issue is probably more relevant in the electronic commerce context, where consumers are at greater risk of coming across outdated information on, for instance, a web site, and less likely to be presented with the opportunity to discuss the information with a loan officer who would then be able to point out that the information is not current. There may, therefore, be a case for functional in-equivalence with respect to this issue by requiring currency of disclosure in the electronic commerce context only.

[128] Section 158 of the Code.

[129] Federal Reserve System proposed rule, op.cit. p.4-5.

Recommendation

2.32 Address the issue of currency of disclosure in the electronic commerce context only.

Consumer's right of reflection

Project team comment

A participant of the Technical Reference Group has drawn the project team's attention to the European Commission's Proposed Directive on Distance Selling of Financial Services.[130] This Directive would require that the terms and conditions of an offer of a financial service be available unchanged to the consumer for 14 days and be clearly stated as such to minimise pressure selling. Where the consumer signs the contract without viewing the terms and conditions, the consumer is given a right to withdraw from the contract for a fixed period after learning of the terms and conditions. It has been pointed out that this proposal is not readily applicable to the Australian context, where pre-contractual disclosure is required.[131]

The high pressure selling tactics that characterise some sales of goods and services in the marketplace can be counteracted by various methods such as by providing consumers with a right of reflection. Transactions characterised by high pressure selling of finance are not confined to electronically conducted transactions. The project team notes that the existing re-opening provisions under the Code are available to consumers who become party to transactions characterised as high pressure selling. In any case, as the Code does not provide for a warming up or a cooling off right in respect of paper based transactions, it would be inconsistent with the objective of functional equivalence to be advocating these rights in respect of electronic transactions. (This recommendation will be reviewed in light of the outcome of recommendation 1.3 on page 35).

[130] COM (1998) 468 dated 14 October 1998.

[131] Lanyon, Elizabeth. op. cit., p.32.

Recommendation

2.33 In adhering to the objective of functional equivalence, the issue of a right of reflection ought not to be addressed in the context of electronic communication only.

5.2.6.2 What effect will the acceptance of electronic commerce have on market participants? (Issue 2.19)

Submission comment

The project team received very little comment from stakeholders on this issue. One submission noted that electronic commerce will offer increased choices to consumers and lower costs to credit providers. Another submission predicted that the take up rate of new technology and electronic consumer credit would be high. It was considered by another submission that the rise of electronic commerce could present compliance and enforcement difficulties.

Project team comment

Electronic commerce is a new and rising form of commerce that many credit providers and consumers are likely to embrace. As such, it will have an undoubted operational impact on market participants that choose to adopt this method of transacting.

Compliance and enforcement difficulties represent future problems which the project team acknowledges could arise. Credit providers and Government Consumer Agencies will have to do their best to ensure compliance in this unchartered area. The emergence of electronic commerce is a market phenomenon which is not something that Government has hoisted on the marketplace. As such, any negative effects, if any, of electronic commerce on the marketplace will need to be addressed and ameliorated as they are identified.

Conclusion

Given the novelty of the medium, the project team makes no recommendation.

5.2.6.3 What is the impact on the Code of obtaining credit through the Internet from countries other than Australia (Issue 2.20)

Submission comment

Submissions generally acknowledged that important policy and regulatory issues are raised by the situation of Australian residents purchasing credit via the Internet from overseas countries. Some submissions went further and actually stated their preference to see Australian residents protected by the regulation of this kind of commerce.

One stakeholder noted that the extra-territorial operation of the Consumer Credit Code has been subject to speculation for some time and that the recent technical amendments appear to signal an intention by the legislature to restrict the operation of the Code to resident debtors.[132] It was argued that, if a credit provider chooses to provide credit in Australia, it should bring itself into conformity with Australian law. This will ensure that the Code at the very least ensures that all Australians enjoy its protection. However, it was acknowledged that the issue is complex.

It was suggested by another consumer organisation that the Commonwealth should establish Memoranda of Understanding or international treaties to deal with some of the problems raised by international electronic commerce. Interestingly, one consumer organisation suggested the Code should apply to and protect overseas consumers who purchase credit from credit providers who are located in Australia.

It was acknowledged by one industry group that, although the Code delivers rights to consumer who borrow from overseas, the ability of consumer agencies to regulate the conduct of overseas credit providers is doubtful. Furthermore, it was thought that it would be unlikely overseas credit providers will offer credit in circumstances in which it would appear they would have difficulties enforcing the credit contract.

One stakeholder suggested that Government Consumer Agencies monitor the incidence of credit providers outside of Australia providing credit to Australian credit consumers.

[132] See Higgins, J 'The extra-territoriality of the uniform Consumer Credit Code' (1996) BCCB (13).

Project team comment

The project team acknowledges the potential for issues to arise where Australian consumers are offered credit on-line from other countries. One issue is that of jurisdiction – which law applies in relation to cross-border credit transactions. Even where Australian law applies, a further issue is the practical difficulty of enforcing the Code against, or responding to breaches of the Code by, credit providers based overseas.

The project team supports, as a matter of principle, the premise that all Australian residents ought to be able to enjoy the protection of the Code. However, it is agreed that, as a matter of practice, the issue is unlikely to arise in the short term, if credit providers based overseas do not have the means to effectively enforce credit contracts entered into with Australian residents living in Australia. International consumer credit will probably rise in popularity when countries achieve agreement on an effective cross border dispute resolution procedure.

Recommendation

2.34 Request the Management Committee to monitor the level of popularity of Internet transactions with overseas credit providers with a view to developing a targeted educational campaign on the potential problems associated with obtaining credit from overseas if any problems are identified.

2.35 Request the Management Committee to convey any concerns to the Federal Government via the National Office for the Information Economy.

5.2.7 Changes in the financial marketplace

5.2.7.1 Have any changes in the financial marketplace been accommodated within the existing regulatory structure of the Code? (Issue 2.21)

Submission comment

Submissions did not detail any changes of significance which have not been accommodated with the structure of the Code.

5.2.7.2 Have any changes in the financial marketplace not been accommodated within the regulatory structure of the Code? (Issue 2.22)

Submission comment

The few submissions that addressed this issue generally stated that changes in the financial marketplace have been accommodated within the regulatory structure of the Code. One submission cited the Code amendments in relation to securitised lending[133] as an example of the successful adaptation of the Code to the changing marketplace – in this case being the rapid growth of securitised lending. Another submission referred to changes to the financial marketplace in relation to electronic commerce. (see discussion above 2.18, 2.19 and 2.20).

133 Particularly section 169A of the Code.

6. Term of Reference Three

The impact of the Code's administrative structure on the achievement of uniformity between jurisdictions.

The review will specifically evaluate the effectiveness of the administrative arrangements to maintain uniformity and identify any issues which may contribute to dis-uniformity. Are the benefits of uniformity being maximised? Are there administrative efficiencies that can be identified to improve the scheme's effectiveness?

6.1 Background

The administration of the Code comprises legislative, consumer agency and judicial components. The legislative component is administered formally by the Ministerial Council under the Uniformity Agreement and the administration of the Code in each of the eight jurisdictions is the responsibility of the consumer agency of that jurisdiction. Judicial functions are conferred under 'enactment of laws' legislation for each jurisdiction on the court structure of that jurisdiction.

Consumer agencies recognised a potential for differences in the application and administration of the Code across the country and the Standing Committee established the Management Committee to ensure consistency in the Code's implementation and administration. The Management Committee comprises a representative of each jurisdiction and has managed various tasks associated with the implementation and administration of the Code. These tasks have included:

- development of a national public awareness campaign following commencement of the Code;
- development of a national Consumer Credit Code web site;
- development of a process for considering applications for exemption from the Code;
- development of a guideline process;
- policy oversight in the development of the Amendment Act and Amendment Regulations; and
- acting as steering committee for this review and the stage 2 competition policy review.

The issues paper canvassed a number of issues relevant to this term of reference and comments were received on most of these matters. It is clear from the submissions that there is concern among stakeholders about the responsiveness of the Code's administration processes. The following section summarises these concerns and details solutions proposed by stakeholders. This detail is followed by project team discussion and recommendations.

6.2 Submission content and project team analysis

Summary information has been grouped around the specific issues raised in the issues paper. A number of respondents directly addressed these issues while the remaining comments have been grouped under appropriate headings by the project team.

6.2.1 Do any substantial problems arise from the differences between the Western Australian Code and the Code in other jurisdictions? (Issue 3.1)

Submission comment

One respondent stated that differences between section 108 in Western Australia and other jurisdictions may create problems that could significantly increase the cost of national civil penalty applications. It was further suggested that other variations are a source of concern and have potential to undermine the national consistency of the civil penalties regime.

One business organisation stated that variations between states are 'a source of consternation and additional cost to industry when the purpose of legislation in each State is ostensibly the same. A uniform approach to the Code would save businesses and the public sector time, money and frustration.' The respondent recommended that uniformity of the Code's provisions be encouraged in all Australian states.

Project team comment

There are six differences between the Code of Western Australia and those of other jurisdictions. These differences are:

- section 53 (guarantor may withdraw before credit is provided);
- sections 66-69 (changes on grounds of hardship);

- section 99 (recovery of enforcement expenses);
- section 101 (application for order relating to key requirements);
- section 108 (recognition of civil penalties determined in other jurisdictions); and
- section 179 (penalty units). [134]

These differences have potential to impose costs on industry and to impact upon the uniformity of the national civil penalty regime. From this perspective, it is appropriate to acknowledge the differences and to note that it would be preferable for all Western Australian provisions to be the same as in other jurisdictions. However, the Western Australian Parliament has clearly determined a different policy course in relation to these aspects of the Code and it is useful to note the law is a considerable improvement on that which existed prior to enactment of the Code.

Clearly these differences are of concern to industry in particular and while they have not presented any practical difficulties to date, their impact should be carefully monitored by government and stakeholders.

6.2.2 Is the process for amending the Code adequate compared to processes for maintaining other legislation and in particular other uniform schemes? (Issue 3.2)

Submission comment

One respondent said that on the basis of progress of the Amendment Bill, it would appear that amendments to the Code will not be achieved quickly. Further, it seems to have taken a long time for consensus to be reached on what were supposed to be relatively straightforward technical amendments. It was suggested that if the Code is to remain relevant to the market, the amendment process needed to be sped up.

Another respondent said that it is clear that better processes need to be found to amend the Code. The current process is deficient because -

- it keeps running out of time, with changes in the law occurring right at implementation deadlines;
- it does not allow sufficient time for credit providers (who are required to comply with the law) to fully assess the final detail of the legislative changes,

[134] Accessing the Consumer Credit Code Edwards, Brogan & Tierney. FT Law and Tax, 1996, p ‘X’

and implement any necessary operational changes with appropriate training and systems testing;

- it does not give time for adequate consideration of transitional and implementation issues;
- it relies on administrative flexibility and fiat through the release of enforcement policy statements to smooth over transitional considerations, rather than specific legislative rules.

Project team comment

The process for amending the Code is of concern to market participants who have suggested that the process be improved. The issue of process efficiency also links to concerns about consultation which will be discussed separately under issue 3.7.

The need to amend the Code to resolve various technical problems was identified by stakeholders shortly after commencement on 1 November 1996. From the market's perspective it has taken until 1 November 1998 to prepare and adopt an Amendment Bill to resolve these issues. As the problems were seen to be non-controversial it has been argued that it is likely to be much more difficult if future amendments are controversial or complex.

Developing amendments to legislation

In exploring these issues it is useful to determine the extent to which the problems which arise in the adoption of amendments are a function of the uniform scheme or arise from other causes. A useful starting point for this analysis is to briefly describe the stages of legislative development and to compare the differences between a single jurisdiction and the multi-jurisdictional development of a uniform law. The usual steps in developing legislation are:

Step 1 - identify issues

Identify the policy issues (this usually arises from information provided by market participants, compliance information or decisions by government to adopt a different policy approach). The issues which were ultimately resolved by the Amendment Bill were identified by government during or shortly after commencement of the Code on 1 November 1996. Government actively sought industry views on technical matters relating to the Code and appointed a consultant to manage the process of implementing changes to deal with these issues.

Step 2 - Government approves policy changes

The second step is to obtain formal approval by Government to the proposed policy changes. In a single jurisdiction, this would involve a submission to Cabinet and endorsement by Cabinet to draft the relevant amendments. In respect to the Code, the policy changes are endorsed by the Ministerial Council. As the Amendment Bill dealt with technical issues, the detail of the Bill was developed in consultation with market participants prior to Government approval.

Step 3- Amendments drafted

The third step involves drafting amendments (this involves detailed meetings with Parliamentary Counsel to transform the policy objectives into a legal form). In a single jurisdiction this task is performed by a dedicated officer while for the Code it was performed by the Ministerial Council Legislative Working Party. The drafting process occurs under the authority of Cabinet (in this case the Ministerial Council) and the drafting process is given priority according to the Government's overall legislative priorities.

Drafting for the Code has been performed in New South Wales. Once completed, further drafting is performed in Queensland to adopt local style, although this usually involves minor stylistic changes.

Step 4 - Consultation

Consultation can occur during the development of the drafting process and drafts are usually circulated to stakeholders, refined and re-circulated. This process occurred during development of the Amendment Bill and two drafts of the Bill were circulated for stakeholder comment.

Step 5 - Competition Policy

In a single jurisdiction, the development of amendments takes place according to the requirements of competition policy. Depending upon the impact of the Bill on the marketplace, a regulatory impact statement, further consultation with market participants and subsequent modifications may be needed. Generally, Cabinet does not consider legislation unless approved by the competition policy process.

While the drafting of the Amendment Bill complied generally with competition policy principles, the Amendment Bill was not subjected to the same process as legislation developed within a single jurisdiction. However, the Bill was reviewed to ensure that it met with competition policy criteria prior to introduction.

Step 6 - Final approval and introduction

Once drafting and consultation has been completed, the final Bill is presented to Cabinet for approval (in this case to the Ministerial Council). Once approved, the Bill is introduced into the Parliament and considered according the priority afforded by the Leader of the House in the relevant Parliament.

Step 7 - Royal Assent / Proclamation

Once approved by Parliament, the Act requires the formal approval by Governor-in-Council and the Act commenced by virtue of Royal Assent or Proclamation. This process usually takes about a month to complete.

As can be seen from this brief description, the stages required for amendment of the Code are not substantially different from those of a single jurisdiction. The primary difference is the additional complexity of decision making imposed by the Management Committee, the Standing Committee and ultimately the Ministerial Council. The Management Committee performs a role which may be performed by one officer in a single jurisdiction. Similarly, the Standing Committee needs to achieve consensus between eight jurisdictions, rather than exercising executive management authority. Further, while it is more difficult for eight Ministers to reach agreement than it is for one to make a decision, as there is no Cabinet involvement in this process, the timeframe for decision making is simply different rather than problematic.

While clearly there is potential for 'process delay' which might be avoided in the future, it is clear that the process of developing either primary legislation or amendments to legislation is a difficult and lengthy one. In the ordinary course of events, even in a single jurisdiction, it is reasonable to expect that major amendments of the magnitude of the Amendment Bill will take about 18 months to 2 years to develop from a conceptual stage to enactment. Minor regulations and amendments may be completed through all stages in a much shorter time of between three to six months.

From a comparative perspective the development of the Amendment Bill from concept to enactment, took exactly two years and while improvements could clearly be made, the process would not compare unfavourably with that of any single jurisdiction. Indeed if we compare the template model with other uniform models such as mirror legislation by which the Fair Trading Acts and the Trade Measurement Acts are adopted, the template process is an easier process. With respect to these Acts, harmonisation of the relevant law is achieved by a separate enactment of each participating jurisdiction where the potential for delay is greater and where variations in the law are more frequent.

Subsequently, there is no indication that the Code presents unique problems which compared to other uniform schemes and indeed is comparable with the process of legislative development in any jurisdiction. However, the method of adoption by Western Australia and Tasmania do present specific problems and extend the time taken for adoption of amendments. These issues are discussed further in issue 3.3 below.

In summary, the two main areas for delay in the amendment process are the levels of decision making between government bodies and the Ministerial Council and the complexity of the drafting process. Further delay arises as a result of the consultation process and this point will be elaborated in issue 3.7.

It has been suggested that it would be preferable to draft amendments in the first instance in Queensland to remove one step in the process. However, this would not solve the fundamental problem which arose in New South Wales; that of competing priorities between the Code and the legislative agenda of the host jurisdiction.

It is difficult to resolve this problem as competing priorities for finite resources arise in all jurisdictions both national and local. It is however, important to identify the problem as a potential source of delay and to monitor the process in relation to future amendments.

Similarly, with respect to the various layers of decision making, it is difficult to define a clear course of action beyond encouraging the participants to be mindful of the impact of delays in the overall process. Ultimately, if issues arise where policy options are disputed, then the process of resolving those issues, whether at an officer level or at Ministerial Council level, must to some extent run its natural course. While efficiency from a process perspective is one appropriate objective, this must be tempered by the need for quality policy decisions.

Nevertheless, in future amendment processes, it would be useful for the participants to establish clearer targets for completion dates at the outset of the process. Adopting targets for stages of the processes will not automatically prevent delays from occurring but would focus the participants, including market stakeholders, on progress and the impact of a particular delay on the outcome of the process.

6.2.3 Do the different mechanisms for adopting amendments in Western Australia and Tasmania create a real threat to maintaining uniformity? (Issue 3.3)

Submission comment

Generally, respondents were not concerned as much about the nature of the processes as the potential for delay. They argued that on the basis of the time taken for the passage of the recent Amendment Act and regulations and in relation to amendments to Form 5, that a real threat to maintaining uniformity does exist.

There is general concern about the process for adopting amendments in both Western Australia and Tasmania and the capacity of the process to create concern and uncertainty for business. It was noted that neither Western Australia nor Tasmania had adopted the Amendment Act or the Amendment Regulations by the time the amendments commenced in other jurisdictions on 1 November 1998. While Tasmania adopted the amendments on 23 December 1998, it was noted that the adoption of the amendments by Western Australia and therefore the final date for uniform commencement of the amendment provisions remains unknown and therefore uncertain.

It was suggested that as these amendments are primarily of benefit to industry and the community to deal with technical issues and unintended consequences under the Code, the delay created by Western Australia and Tasmania would appear to work against the ability of the Code to be responsive to the market and to its uniformity.

Project team comment

Neither Tasmania nor Western Australia adopted the Code as a template Act. In Tasmania, the Code and the regulations as existing on 1 November 1996 were adopted and subsequent changes are adopted by proclamation. A draft of the proclamation must first be approved by a motion of both Houses of the Tasmanian Parliament. The members of the Tasmanian Legislative Council clearly wished to be able to scrutinise future amendments to the Code or the Regulations and the process effectively provides a power of veto for any amendments by either House of the Tasmanian Parliament.

Nevertheless, it is important to note both the Government and the Legislative Council have given priority to considering amendments to the Code and Regulations and have approved amendments quickly. The only likely delay arises if Parliament is not sitting as the process requires formal Parliamentary approval. While this would not ordinarily be a problem in relation to Amendment to the Code, it does present a problem with the adoption of Amendments to the Regulations. Usually regulations have effect from the time they are approved by Governor-in-Council and are subject to disallowance for a specific period after the resumption of Parliament. To ensure that amendments to the Regulations in Queensland commence in all Australian jurisdictions at the same time, commencement in Queensland must be delayed until adoption of the regulation in Tasmania. The requirement that the Tasmanian House must be sitting means that the times that the regulations can be amended nationally are restricted to the sitting times of the Tasmanian Parliament.

Similarly, for Tasmania to adopt an amendment to the Code, the Amendment must be passed in Queensland sufficiently early in the year, to ensure that enough time remains for the measure to be adopted by the Tasmanian Parliament. If an amendment is adopted in the last week of the Queensland sitting year, it is unlikely to provide sufficient time for Tasmania to adopt the amendment until the following year. If the commencement is to be timed nationally, this would require waiting until resumption of the Tasmanian Parliament in the following year, which could create a delay of up to four months.

Nevertheless, despite the difficulties, the adoption process is relatively straightforward. Once the Queensland Government has adopted an amendment, a Proclamation is drafted by Parliamentary Counsel in Tasmania and presented to Parliament. Presentation requires Ministerial approval and once approved by Parliament the draft proclamation is forwarded to Governor-in-Council. Commencement of the provision is effective on the date of publication of the proclamation in the Tasmania Gazette.

The Western Australian government adopted a different approach by enacting Alternate Consistent Legislation. While the legislation is essentially uniform, amendments to the Code require a separate Amendment Bill. The regulation amendment process is much simpler than that adopted by Tasmania in that it does not require Parliament to be sitting. However, the Code amendment process requires that the draft Bill goes through all stages of the legislative development process. While this should involve minimal re-drafting by

Parliamentary Counsel, it requires approval by Cabinet, introduction into Parliament and approval as a discrete Act. This process ultimately repeats many of the processes which have already been completed for the amendments to be approved and enacted in Queensland.

With respect to the current amendment Bill, the Western Australian Government has given priority to the Code amendments within its legislative program. Nevertheless, as the Bill had not been introduced on the date of completion of this paper, it is difficult to determine a target date for completion. This situation does create uncertainty for business and means that it is impossible to predict the final passage of the current amendment process. In addition to the time taken for adoption by the WA Parliament, business will need some lead time following final enactment to implement systems and procedural changes to enable them to comply with the amendments.

While clearly some time must elapse following passage of the amendments in Queensland, Western Australian amendments do not need to be fully developed as discrete legislation. For example, the drafting of amendments is substantially completed by Queensland and changes to a Western Australian Act could effectively be completed in a short time. Indeed, drafting of amendments in Western Australia could easily commence as soon as the final drafting has been completed in Queensland. By the time an Amendment Bill has been passed by the Queensland Parliament, the relevant legislation could be immediately introduced into the Western Australian Parliament. From this perspective, there is clearly some scope for improvement, directed at creating more certainty for market participants.

Conclusion

There is clearly a need for greater predicability in the enactment of amendments to the Code in order that that market participants can adequately plan their compliance. As part of the participants' commitment to the Uniformity Agreement, it would be appropriate to establish a minimum period for the enactment of any amendments to the Code by those jurisdictions which do not have template legislation. This would be consistent with the Uniformity Agreement where all jurisdictions were required to secure the passing and proclamation of their Application of Laws Legislation or their Alternative Consistent Legislation, unless with the unanimous approval of the Ministerial Council to allow further time.

Recommendation

> **3.1 Amend the Uniformity Agreement to require adoption of amendments to the Code or Regulations by all jurisdictions within six months of the passage of those amendments in Queensland.**

6.2.4 Are market participants aware of the relevant players in the Code's administrative structure and are they able to obtain ready access to those players? (Issue 3.4)

Submission comment

Respondents were supportive of the Management Committee as one of the key players in the administrative structure. It was further stated in relation to consumer agency staff generally, that the relevant players are readily approachable and communicative. There were no other substantive comments in submissions which directly addressed this issue, although related comments were made in relation to issue 3.8.

Project team comment

Key stakeholders in the market are aware of the existence of the Ministerial Council, the Legislative Working Party and the Management Committee. Within specific jurisdictions the key participants vary depending upon the local administrative structure, resources and culture, and the nature of local policy networks.

One of the primary vehicles of communication at a national level is through the Credit Code web site which contains information both about national and local issues and includes copies of the Code and amendments, and relevant policy documents. This site appears to be relatively well known to market participants although it might be useful to place more information about the relevant players. For example, the names of Ministers for each jurisdiction might be usefully placed on the site. Also, it may be useful to revise information about the administrative structure of the Code and place contact information as a specific item on the menu.

It is not the players but the process which is important and key people are relevant to the extent that they provide access to a process, such as in lodging an application for exemption, submitting a request for a guideline or raising an issue for technical amendment. From a national perspective the key contact person is the Management Committee Chair.

As a number of submissions suggested changes to the role of Management Committee under issue number 3.8 these matters will be further discussed in this section.

6.2.5 Is the approach adopted by each jurisdiction to compliance and enforcement uniform? (Issue 3.5)

Submission comment

One respondent in particular was concerned about the adequacy of government compliance and says that there 'is a significant market failure here'. It was suggested that Government Consumer Agencies appear to be unable to respond effectively to consumer complaints. The respondent recommended that administrative mechanisms be put into place to:

- respond to complaints so as to protect both the individual complainant, other potential at-risk borrowers and the market generally; and
- collect on-going data about borrower complaints so as to gauge and monitor complaints against particular lenders as well as market place product trends.

Project team comment

While only one submission raised specific concerns about compliance, there is a need to revisit the national compliance approach to the Code. Efforts have been made since commencement of the Code to establish a uniform national compliance approach, and a national compliance committee was established under the auspices of the Fair Trading and Operational Advisory Committee (the Fair Trading Committee). The committee has made some progress towards development of a policy for communicating the detail of civil penalty applications and targets for uniform compliance activity. It is intended that some activities (such as a survey of advertising material) will be developed nationally and that further joint activities will be developed.

If a uniform approach is not adopted to compliance, there is potential for problems to arise in the uniform administration and enforcement of the Code. These problems are:

- varying interpretation and emphasis on Code law contributing to non-uniform compliance cultures;
- reactive responses rather than pro-active compliance;

- duplication of effort; and
- inadequate data to support policy review.

In relation to the first point, similar problems arise in relation to the Fair Trading Acts and have been dealt with by regular communication between States and Territories about focus and interpretation. As the administration and culture of the consumer agencies vary considerably, as well as the court structures and type of jurisdiction, there is potential for the Code to be enforced quite differently in the major metropolitan areas than it is in regional Australia.

However, it is also important to recognise that the level and nature of problems varies between jurisdictions. Differences in approach to compliance do not automatically translate into a non-uniform application of the Code. While the Code has harmonised the consumer credit laws of the eight Australian jurisdictions, it is a co-operative scheme between areas of Australia where there are considerable cultural variations in the government, business and consumer environment. While the legal framework is the same, there is some potential for the focus of its application to vary between jurisdictions.

Therefore uniformity in compliance needs to occur in the context of the differences and the principal focus of uniform application should be directed towards ensuring that variations do not impact on business or consumers or contribute to substantive variations in the legal interpretations of the Code on a national basis.

In relation to smaller jurisdictions, it is difficult to solve problems that arise from economies of scale. Nevertheless, there is an opportunity to share resources and experiences across the country and to ensure that as far as possible compliance is uniform.

6.2.6 Is the development of Code policy responsive and appropriate to the needs of the marketplace? (Issue 3.6)

Submission comment

A number of comments were made to the effect that delays in adopting amendments to the Code contributed to a lack of responsiveness to the needs of the market. In addition, some respondents indicated dissatisfaction with the quality of amendments and the nature of the consultation process and outcomes from that process. These issues are discussed in greater detail under issue 3.7.

One submission expressed concern about the time taken to consider an application for exemption from the Code in relation to employee loans. While the respondent acknowledged that it may be one of the first exemptions lodged and that the process had not been fully developed, the respondent clearly stated that a period of more than 2½ years between lodgement and a final determination is unsatisfactory.

Project team comment

The preceding discussion on the Code and the Regulations has already addressed this issue to the extent that amendment represents the operational dimension of responsiveness. The specific example referred to above deserves consideration in this section.

To a large extent this particular delay occurred as a result of the evolutionary nature of the Management Committee's role and the development of exemption policy. Further, the specific application was delayed because of ongoing negotiations with the applicant. The timing of these discussions meant that the application was at first associated and later separated from the Amendment Bill process.

The Management Committee is aware of delays which may arise from consideration of issues and will endeavour to ensure that the time taken to manage these issues is closely monitored. While the development of policy and the consideration of exemption applications has taken some time, it is not envisaged that either a large volume of applications will be made in the future or that significant delays will arise.

Further issues relate to the policy responsiveness of the Code administrative bodies. This is discussed in relation to the role of the Management Committee under issue 3.8.

6.2.7 Are policy decisions made on the basis of adequate consultation with market participants? (Issue 3.7)

Submission comment

General concern was expressed about the consultation process, although from different perspectives. Some respondents were concerned that the

Amendment Bill was to deal with non-policy amendments while in their view some policy changes were made. Another respondent stated that the amendment Bill contained significant changes to section 171[135] which had not been in the drafts circulated for comment. Further, while the stated aim of Government was to not introduce any change which would have cost or systems implications, the new section 171 will have both impacts. Another respondent clearly said that if there is to be a consultative process (as there should be) last minute changes should not be made without consultation.

Another respondent raised the issue of on-going policy development and said that there is no formal process by which stakeholders can draw the attention of officials to the need for technical amendments to the Code or its Regulation. It is argued that such a process is needed, along with a recognised process of consultation, to identify and to fully explore implications, consequences and transitional considerations.

Another respondent said that while consultation occurred on the Amendment Act, no consultation took place in relation to the Amendment Regulations. In other uniform schemes, such as Corporations Law the Ministerial Agreement, (the Corporations Agreement), stipulates that 3 months public consultation must occur prior to enactment of any amendment to the Act or the regulations. It was suggested that the Ministerial Agreement on Consumer Credit be amended to provide for a mandatory consultation period on any future amendments to the Code or the regulations.

Respondents specifically recommended that the Ministerial Council:

- develop a procedure for the collection and consideration of technical amendments to the Code and its Regulation;
- establish the Reference Group as a permanent administrative feature to support the Code; and

[135] New section 171 (2) inserted by the Amendment Act replaces former 171 (1) so that a credit provider or other person is relieved from the obligation to give a notice or other document to a person if -• the credit provider has previously unsuccessfully tried to give a notice in accordance with the Code by leaving it at or sending it to the address currently nominated by the person to the credit provider or in the absence of such nomination the address of the place of residence or business last known to the person giving the notice; and • the credit provider has reasonable grounds for believing the person cannot be contacted at that address. Under the previous provision in 171 (1) the credit provider was required to obtain an order of the court in order to be relieved of the obligation to give notices and other documents. This has proved to be commercially and practically unrealistic. See Consumer Credit Amendment Bill 1998 Explanatory Notes, p21-22.

- amend the Ministerial Agreement to provide for a mandatory consultation period on any future amendments to the Code or the Regulations.

Project team comment

In development of the Amendment Bill and Regulations, two drafts of the Amendment Bill were distributed to key stakeholders for comment. Consultation is often a lengthy and time consuming process which requires considerable effort by government to analyse and assimilate comment, and revise drafts. Nevertheless, the process has been criticised because it continues to run out of time and because some contributors felt that their contributions were not taken into account. Therefore, the recent amendments have left a number of unresolved issues, primarily those raised by the Queensland Law Society, who have expended considerable effort in reviewing the legislation and the amendments.

Further, as previously stated, there was no consultation in relation to the amendment regulations. While the regulations simply comprised an extension of the amendment bill policy, they required systems changes on the date of commencement, which were impossible for business to comply with. This was resolved by issuing an enforcement policy which gave latitude for business and allowed these systems changes to be implemented over a reasonable timeframe. While this problem was resolved at the last minute, it could have been prevented by consulting with stakeholders.

From a government perspective, consultation is important because the practical advice provided by market participants is critical to making the Code work. However, there is ultimately a conflict between consultation and timeliness in the legislative development process. Therefore, the need for consultation to enable stakeholders to make a contribution to policy and to assess the impacts of proposed changes must be balanced against the potential to extend the time taken for the process. In this context, there must be a balance between the need for the Code to be responsive to the market and the need to develop a speedy amendment process.

Nevertheless, some improvement should be made to the process. As a matter of principle, drafts of amendments should be distributed and comments should be sought from stakeholders. In the past amendments have been circulated to key stakeholders with a limited time for comment. The process might be improved by placing draft amendments on the Consumer Credit Code web site to increase their exposure and by publishing the availability of these drafts through legal publishers. Finally, amendments should not be made to the

Code or the Regulations unless a final draft has been circulated for comment. As already mentioned, Corporations Law requires that amendments must be circulated for at least three months prior to enactment. However, a mandatory period may create problems where minor changes are made. Imposing a mandatory consultation period for all amendments may cause delay and the process should relate only to substantive policy changes. Technical changes and minor drafting adjustments should be distributed within a more limited group of stakeholders for technical input.

One of the problems which is clearly evident is the absence of a mechanism to consider issues as they arise, outside of a specific amendment process. A process of ongoing policy review would be of considerable benefit. To this end the recommendation in a number of submissions for the establishment of a permanent Technical Reference Group has merit. Such a group could not only provide a consultation focus in relation to a specific amendment process, but could also be a source of ongoing policy feedback and advice.

Conclusion

It is likely that the Technical Reference Group established for this review will continue to provide advice to the stage 2 competition policy review and to any subsequent amendment drafting process. The project team emphasises the importance of consulting stakeholders in formulating, evaluating and revising policy. However, the project team believes that a reference and technical group should be established for a specific task rather than on a permanent basis.

Nevertheless, stakeholders should be able to raise issues at any time, not just during a formal review or evaluation process. From this perspective, stakeholders are encouraged to address ongoing issues and concerns to the Management Committee whose principal role is to consider ongoing policy issues relating to the operation of the Code.

6.2.8 What improvements might be made to the way in which the Code is administered? (Issue 3.8)

Submission comment

Respondents made a range of specific comments and recommendations for improvement to the administration of the Code and most of these are discussed under other headings. Those relating specifically to the Management Committee are detailed below.

One respondent suggested that a continuing role for the committee was important to provide the Australian community with a seamless regulatory environment for consumer credit.

The respondent further stated that the existence and functioning of the Management Committee is little known outside of the group of stakeholders closest to the Code. It would seem not to have a profile that those credit providers, consumer and advisers outside of that group would recognise. Giving a statutory support to its role would reinforce it as a permanent fixture on the national regulatory landscape and provide clear direction for its functioning.

It was further argued that statutory recognition will allow for a continuum of administrative functioning, to provide a national public face to the daily operations of the Code and to play a crucial role in communicating to people. Statutory recognition would give momentum for ongoing maintenance of the Code and, importantly, to provide a national repository of policy knowledge, official views and guidelines, case law and history.

The Management Committee should play a key role in developing and managing the national implementation of future amendments to the Code or the Regulation. For that process, the Code should expressly permit the Committee to form and seek advice from a technical reference group (as has been done for the current post implementation review) - 'a development for which Governments are congratulated.'[136]

Respondents specifically recommended that legislative recognition be given to the role of the Management Committee.

Project team comment

From a legislative perspective, ultimate decision making authority rests with the Ministerial Council. The Ministerial Council determines the policy of the Code and determines the substance of Code amendments. Therefore, any other organisations which contribute to the process of legislative administration, do so on delegated authority of the Ministerial Council.

The enforcement of the Code, public awareness, compliance and policy advice is the responsibility of the Consumer Agency of each jurisdiction. The Consumer Agency is defined in the enactment of laws provisions and is

[136] Submission to Post Implementation Review.

generally responsible for the 'administration' of the relevant Acts in each separate jurisdiction. The Consumer Agency is a discrete legal structure and co-ordination and co-operation between jurisdictions is achieved through the Standing Committee. While the Standing Committee has a role in providing policy advice to the Ministerial Council which is the ultimate determinant of joint Government policy, there is also a discrete relationship between the consumer agency and the individual Minister for each jurisdiction.

The development of both the Code and the amendment Act was conducted by a Legislative Working Party which reported directly to the Ministerial Council through the Standing Committee. This group (comprising a consultant and a departmental officer) was responsible for liaison and instruction of Parliamentary Counsel and management of the consultation and policy development process.

The Management Committee was established by the Standing Committee to provide policy advice and to implement programs on their behalf. The Committee was established on a temporary basis in 1996, to conduct various tasks associated with the implementation of the Code. The tenure of the committee has been extended until completion of this review.

Since established, the work of the Management Committee has expanded well beyond the primary implementation role that was originally envisaged. The role of the committee has extended to the development of a guidelines policy, development of an exemptions policy and process, oversight for development of amendments, public interaction and liaison and ongoing development and review of Code policy.

To a large extent, delays and uncertainty about the development of these and Code policies has arisen because of the evolutionary growth of these functions which have been shaped by the needs of government and stakeholders. The question which now arises is whether there is a continuing role for a dedicated organisation to manage aspects of the Code, and if so, what should be the roles, functions and resources of that organisation.

As there are significant issues surrounding the amendment processes and considerable ongoing administrative tasks in relation to the Code, there is a continuing need for these tasks to be managed by a discreet organisation. Further it is important that this body has continuity in the medium term. Some degree of permanence should be provided for stakeholders in the market and there should be a central body through which interactions can take place with stakeholders on a national and central basis. Also, such an organisation must serve both the needs of Ministerial Council for policy advice, and the needs of the Standing Committee for both policy advice and administrative support.

The current Management Committee comprises a representative of each jurisdiction. This structure ensures that a representative of each Australian state and territory sits on and contributes to the work of that committee. This model reinforces the state and territory structure of the legislation and provides that each jurisdiction has equal say in the policy and administrative process.

From an efficiency perspective, it is difficult to envisage that more resources will be provided for the management process. The resources provided by participating jurisdictions in terms of human resources, travel and accommodation and infrastructure costs are already substantial. While delays have been experienced in the past, these delays occurred in the absence of a policy framework, which for most of the major functions, such as exemption applications and guidelines, has now been developed. The Management Committee should pay particular attention to its turn around time for the processes in which it is involved and should conduct a performance appraisal for those matters which are considered. It is appropriate that this should comprise part of a regular report to the Standing Committee.

Conclusion

The project team is of the view that the Management Committee should continue under its present structure and that its tenure should be extended until the completion of the stage 2 competition policy review and any amendments which arise from that process. It is likely that this process will extent for a further two years from the completion of this paper.

Giving statutory recognition to the Management Committee would not achieve greater efficiency and would limit government's flexibility in the long term. Subsequent developments may mean that a different structure is more appropriate and the flexibility of government to make these policy changes should be maintained.

Recommendation

3.2 Continue the operation of the Management Committee until completion of the stage 2 competition policy review and any subsequent amendment of the Code.

6.2.9 Is there potential for dis-uniformity to arise from different interpretation of the Code provisions around the country and what additional measures might be adopted to reduce this potential? (Issue 3.9)

Submission comment

Submissions did not address this issue directly under this heading but did so under the following issue in relation to guidelines. There is widespread concern among consumer credit stakeholders about the potential for different court structures to make varying interpretations of the Code's provisions and therefore to create dis-uniformity.

Project team comment

There is general concern about the ability of varying courts to make different interpretations of the Code and for dis-uniformity to arise from this process. Submissions discussed this issue in relation to the guidelines process in issue 3.10 below (See also discussion relating to compliance on pages 143 to 144.)

6.2.10 Are guidelines an adequate response to the problem of uncertainty and potential interpretational variation? (Issue 3.10)

Submission comment

Respondents welcomed the finalisation of the industry guideline process by the Management Committee. Respondents also welcomed the issue of enforcement policies in certain areas as these have provided an opportunity for regulators to publicly state their policies on how and in what circumstances they will look to enforce compliance with particular provisions.[137]

[137] Enforcement policies are statements by regulators about the manner in which they will enforce a particular provision. Interpretive guidelines are statements which interpret the meaning of a provision. See detail of guideline process on page 154.

Nevertheless, some respondents suggested that the guidelines should have a statutory basis to clarify their role for all interested parties, including the regulators and the courts. At present the guidelines have no legal basis. The respondents further emphasised the need for a process of consultation before such guidelines are issued.

Another respondent said that while guidelines are important in reducing uncertainty, they were limited unless coupled with ongoing policy and legislative review. Guidelines alone would not reduce the uncertainty that existed and further measures should be adopted to reduce the potential for differing interpretations and dis-uniformity. These measures included:

- the implementation of a cross vesting scheme;
- the creation of a single register of all cases decided under the Code in a central government registry. The registry should include all cases considered by the Management Committee (and as advised by the Reference Group) that assist in the interpretation or enforcement action under the Code in all courts and tribunals of whatever level.

In particular the lower courts should be encouraged to give reasons for the decisions and the reasons for them to be included in this registry.

As an alternate approach, another respondent suggested specific private ruling under a similar mechanism to that offered by the Australian Taxation Office. The respondent recognised that a rulings process would be more difficult to implement because of the nature of the uniform legislative scheme. They also recognise that, unlike the tax system, the Code offers rights to debtors and guarantors, not just government agencies. Therefore any system of private rulings would need to leave the courts free to interpret the Code (at least where a key requirement is involved). However, private rulings would provide that a credit provider had acted accordingly, and could be taken into account in determining the amount of any civil penalty even where a court or tribunal disagreed with the ruling. Ideally a ruling would bind the government regulators and preclude the possibility of a criminal penalty.

Respondents recommended that the guideline process developed by the Management Committee be given legislative and legal efficacy by amendment to the Code which specifically -

- authorises the Management Committee to make guidelines;
- sets out the criteria and function of those guidelines;

- sets down a development and consultation process for guidelines; and
- declares that a credit provider or other person who complies with the requirements of a guideline will be taken to have complied with the relevant provision of the Code.

Project team comment

The Management Committee has developed a guideline process, which has been endorsed by the Standing Committee, and the policy for developing guidelines has been disseminated to stakeholders. Generally, the process provides an opportunity where the meaning of the Code is unclear, for that meaning to be clarified, until a permanent amendment can be made to resolve the issue. The threshold criteria for developing a guideline are:

- A request for clarification of a provision of the Code must be made by a significant sector of stakeholders or relate to an issue that has potential to affect a significant section of the marketplace; and
- There must be considerable uncertainty as to the application of the provision which may arise from legal debate or various interpretations evident from conduct in the marketplace; and
- There should exist in relation to a provision, a reasonable risk for a credit provider, intermediary, debtor or guarantor arising from such uncertainty.

Where the need for consideration of a guideline has been established, the following further matters should be considered:-

- Whether the provision requires clarification only or whether the Code may require amendment;
- If it is proposed to recommend amendment to the Code, whether it is considered that the objectives referred to above would be assisted by the development of a guideline in the meantime.

Where the need for a guideline has been established, the following matters are to be considered in the development of the guideline:-

- Guidelines should seek to clarify what is already contained in the Code having regard to the purpose/intention of the provision.

- Guidelines cannot expand upon the meaning of a provision to create an interpretation that would not be possible within the meaning of the provision.

- Guidelines are to have a prospective operation from the date they are expressed to come into effect.

- There should be regard to any potential disadvantage to any relevant class of stakeholder which may arise as a result of interpretation of provisions.

- Where it is anticipated that an amendment to the Code may be recommended, but it has been determined that a guideline may provide some assistance in the interim, the guideline can only deal with the existing law.

- Each guideline will have a specific review date.

The development of a guidelines process was debated at length at Management Committee level. While some industry groups have welcomed and indeed have argued for a guidelines process, others are concerned that guidelines will contradict the legal advice they have already obtained and subsequently the basis upon which their systems and procedures have been established. Ultimately, if the meaning of the Code is unclear, amendment is the best possible solution. However, as already discussed, amendment is not an easy process and there may be a need to resolve an issue within a shorter time frame, albeit on a temporary basis. Nevertheless, despite the establishment of a guideline process the rigorousness of the process means that it is unlikely that a large number of guidelines will be issued. Ultimately, it is a tool to be used only in the most dire of circumstances.

A number of submissions have suggested that guidelines should have a statutory basis as guidelines issued by the Standing Committee are advisory only. The purpose of giving these a statutory basis would enable a court to consider guidelines and would allow industry to place greater reliance on guidelines. There are a number of options including making guidelines by regulation. A further option would be to make guidelines extrinsic material for the purposes of the Code under section 8 of Schedule 2 of the Code. As Schedule 2 provides that a court may take account of extrinsic material in interpreting the meaning of a provision of the Code, this would link the law directly to a guideline. This would require a specific amendment to the Code.

It would be appropriate for the Management Committee to review this matter and to seek specific advice from Parliamentary Counsel as to the best method of achieving this objective. Nevertheless, as only one guideline has currently been determined and a further matter is being considered, the issue is not urgent. Of more immediate importance is a means of ensuring that market participants have access to any guidelines which are developed. Without a reference to guidelines in the Code or Regulations, it is difficult for stakeholders to know of their existence or where to obtain them. In this sense, it may arise that an interpretation exists which is not obtainable from the relevant law, or from case law. This issue also needs to be further considered by the Management Committee.

With respect to the development of a register of all cases, it is difficult to envisage that the Management Committee can allocate or cause to be allocated the resources needed to develop this function. Nevertheless, it would be an invaluable resource for government, business and consumer organisations. It would be useful to hold discussions with all industry sectors with a view to developing a co-operative arrangement whereby such a database could be established. The Management Committee should consider a process for initiating co-operative discussion towards this end.

Recommendation

3.3 Provide a mechanism to legally link guidelines so that they can assist in interpreting the provisions of Code.

6.2.11 What problems arise from the absence of a cross-vesting scheme for the Code? (Issue 3.11)

Submission comment

A number of detailed submissions were received on this issue. The primary argument of these submissions is that while the Code achieves national uniformity in the substance of the law, it is not national law but eight separate Acts.

Separate Codes were adopted or enacted in each Australian jurisdiction by each state and territory. These separate statutes confer judicial functions on the relevant court of that jurisdiction.

While uniformity of approach on administrative issues has been addressed by the creation of the Management Committee, the judicial and quasi-judicial response of each jurisdiction has been entirely independent. For example, some jurisdictions have specialist tribunals while others employ the normal court system, subject to its monetary jurisdictional limits. In those jurisdictions with specialist tribunals, exclusive jurisdiction is vested in the tribunals for some provisions of the Code, while jurisdiction is concurrent with the courts and/or with other consumer tribunals, in relation to other provisions. The provisions for which jurisdiction is exclusive or concurrent varies from one jurisdiction to another and although several jurisdictions have changed their tribunal structures since the introduction of the Code, this has not been done with any noticeable degree of convergence of approach.

The absence of a cross-vesting scheme means that any applications made by either a debtor or a credit provider under the Code, must be made in the jurisdiction in which the contract was entered into. This has potential to cause problems where a consumer moves from one jurisdiction to another. From a consumer perspective, this difficulty relates to applications under sections 35, 36(6), 44(4), 47(3), 68, 70, 77(1), 79, 98(1) and 119(1)(b).[138] From a credit provider's perspective, specific problems arise under sections 82(b), 85(2), 92 and 93.[139]

While a number of respondents made submissions on the need for cross-vesting, the Consumer Credit Subcommittee of the Banking Finance and Consumer Credit Committee of the Law Council of Australia has made a substantial and detailed submission on this issue.

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[138] Section 35 provides that a court may order a credit provider to provide certain statements if not provided within the times specified by section 24. Section 36(6) provides that court may determine disputed liability between a debtor and credit provider. Section 44(4) provides that court may order the discharge of a mortgage where the mortgage is unenforceable. Section 47(3) provides that a court may authorise a mortgagor to dispose of mortgaged property. Section 68 provides that a court may order a change in a contract on the grounds of hardship and stay enforcement proceeding. Section 70 provides that court may re-open unjust transactions. Section 77(1) provides that a court may determine a payout figure if not provided by the credit provider in accordance with section 76. Sections 79 and 98(1) provide that a court may order a credit provider to make a payment to a debtor or mortgagor or pay compensation where mortgaged goods were not sold for best price reasonably obtainable or as soon as reasonably practicable.
Section 119(1)(b) provides that a court may award damages in the event of a loss by a debtor arising from the misrepresentation, breach of contract or failure of consideration in relation to a contract, by a supplier.

[139] Sections 82(b) provides that a credit provider may be relieved from first obtaining a judgement against a debtor before proceeding against a guarantor, where recovery from the debtor is unlikely. Section 85(2) provides that court may in certain circumstances relieve a credit provider from a requirement to give a default notice under section 80. Section 92 provides that a court may authorise a credit provider to enter private property to take possession of mortgaged goods. Section 93 provides that a court may order a person who has possession of mortgaged goods to deliver them to the credit provider at a specified time or place within a specified period.

Respondents recommended the establishment of a cross-vesting regime of judicial and administrative powers to support the seamless determination of disputes and rights arising under the Code.

Project team comment

There is little dispute about the need to establish a cross vesting scheme and such a scheme was envisaged by the Code which provided regulation making power under section 177 for this purpose. The Management Committee has recommended that a cross-vesting scheme be established but because of the dedication of resources to the Amendment Bill, little progress has been made towards implementing this scheme.[140]

A number of submissions have called for the implementation of a cross-vesting scheme and in particular, the Consumer Credit Subcommittee of the Banking Finance and Consumer Credit Committee of the Law Council of Australia has provided a paper detailing such a scheme. The project team recommends that the paper be used as basis for cross-vesting policy and as a guide for drafting of the relevant provisions in consultation with market participants.

Recommendation

3.4 Establish a cross-vesting scheme under the Code for relevant judicial and, where appropriate, administrative functions.

[140] There has been some concern about the impact of recent cases on the feasibility of a cross-vesting scheme for the Code. However, the issues considered by the High Court in *Re Wakim Ex parte McNally & Anor Re Wakim Ex parte Darvall Re Brown & Ors Ex parte Amann & Anor[1999] 163 ALR 270* have concerned States vesting powers in Federal Courts, not States or Territories vesting powers in other State or Territory courts. The issues considered by the High Court should not present any impediment to a cross-vesting scheme for the Code.

7. Technical amendments

7.1 Background

Since commencement of the Code, a number of technical amendments to the Code and Regulations have been developed and are contained in the *Consumer Credit (Queensland) Amendment Act 1998* and the *Consumer Credit (Queensland) Amendment Regulations (No 2) 1998*.

Following passage of the amendment Act, the Queensland Law Society in particular has raised a number of technical issues which have not been resolved by the amendment Act or amending regulations. While this review has been a broad policy review of the Code, with potential to make some of these issues redundant, a specific request was made by the Society to consider these issues during this process.

As the Queensland Law Society provided a separate submission on technical issues these were readily distributed to the Technical Reference Group for comment in time for completion of this report. While a number of other submissions to this review have provided further detailed comment on technical issues, in particular by Allen, Allen and Hemsley, time did not permit separation of these and other technical issues from general submissions for consideration by the Reference Group. These remaining submissions will be provided to the competition policy review and will be considered during any subsequent drafting process.

As a number of amendments to the Code and the Regulations are likely to arise from this review and the competition policy review, it is not appropriate to make definitive recommendations at this time. Indeed some of the matters raised as technical issues may become redundant as a result of further drafting. For this reason, the technical issues detailed below and a summary of Technical Reference Group comments are provided simply to flag the issues and to ensure that they remain current, where appropriate, in the Code development process.

Recommendation

4.1 Defer further consideration of technical amendments until completion of both the Post Implementation Review and the national competition policy review, and consider these in any subsequent drafting process arising from these processes.

Submission by Queensland Law Society

Some the submissions made in the Queensland Law Society Submission have been resolved by the Amendment Act. Where this is the case, the proposals have been deleted. As a result, the numbering does not coincide with the material distributed to the Technical Reference Group.[141]

7.2 General responses by Technical Reference Group members

'The preferred position at the moment is that consideration of the possible technical amendments is deferred until after the current round of post implementation and national competition policy reviews have run their course. It may be that when the outcomes of those reviews are known, the extent of technical amendments may be diminished.

However, what the Queensland Law Society submission does highlight is the need for an official process to identify and consider technical amendments. The current reviews are essentially about ensuring that the right policy mix has been achieved – they are not about a forum for raising technical amendments.' (Australian Finance Conference).

'May we suggest that the Queensland Law Society proposals are held over until the full review, including the NCP review in 2000, so that they can be considered in the light of other amendments which may then be considered desirable.' (Australian Bankers' Association).

[141] The detail in this section is a brief summary of the issues and responses. While the summary attempts to summarise and survey these issues they are a simplistic representation of complex issues. The full text of these issues and the responses from the Technical Reference Group will be provided to the national competition policy review and will be made available to any subsequent drafting process.

7.3 Specific technical proposals and Technical Reference Group comment

7.3.1 Minor alteration to contract document after signing

Proposal

In relation to section 17 of the Code, minor or 'innocuous' changes to contract documents should be permitted after the contract has been signed by the debtor. The submission notes that normal conveyancing practice prior to the Code allowed credit providers to make 'non-material' alterations to security documents to secure registration. There was some reservation as what 'minor' might mean, particularly if the change impacted on a dispute in relation to section 70. It was acknowledged that even minor changes might have potential to create evidentiary problems.

Summary of responses

Respondents had considerable sympathy with the submission but said that determining what is 'minor' is somewhat problematic. It was suggested that typographical errors might be amended and that credit providers should be able to make non-material changes. It was further suggested that the onus would need to be on the credit provider to show that any changes were non-material.

One respondent said that the problem may arise in relation to 'ascertainably' in sections 14 and 15 but said that problem should be tackled separately. Generally, there was support for the proposal but concluded that it would not be easy to solve. A number of respondents suggested that attempts to resolve the problem may well create more problems than it solves. (See also pages 28 and 30.)

7.3.2 Unnecessary repetition of warnings about unilateral charges

Proposal

It was suggested that warnings to the effect that 'interest rates or fees may be varied by the credit provider' are required in both the 'Financial Table' and outside the table in disclosure. It is argued that this is unnecessarily repetitive.

Summary of responses

There was general agreement that this section would benefit from amendment to remove the need for duplication and clarify the section. However, one respondent disagreed that the section required duplication of the warning while another said that the duplication was useful.

7.3.3 Consumer lease - is it "credit"?

Proposal

It is unclear whether entering a consumer lease is intended to be the granting of 'credit'.

Summary of responses

There is a clear view that a consumer lease is not credit, particularly as they are dealt with separately by Part 10 of the Code. Nevertheless, there appears to be considerable debate about this view and there is some enthusiasm for clarifying the position.

One respondent stated that in the context of recent cases[142] there was some doubt about the application of the Code to leases and instalment purchase. (See also page 49) However, from the perspective that the courts have taken a broad view, there is no evidence of credit providers avoiding the Code because of this definitional issue. The respondent suggested that [at this stage] amendment would not address the problem and might make things more confusing. In the interim it might be more appropriate to leave the issue to the courts.

7.3.4 Enforcement expenses ¾ definition needs clarification

Proposal

It is suggested that the definition of 'enforcement expenses' is very broad and that it would be useful for the definition to be more specific by referring to matters such as: legal or other expenses incurred as a result of default; credit provider's administrative costs; direct debit

[142] *Rafiqi and Thomas v Wacal Investments Pty Ltd* (1998) ACS 155-024; and *McKenzie V Smith, Lenehan v Smith* (1998) ASC 155-025

dishonour fees; other similar default related expenses; valuation fees; and sale expenses.

Summary of responses

There was some support for the proposal and it was argued that there needed to a more specific reference to ensure that some enforcement expenses are included. However, generally it was the view of respondents that the section is relatively clear and does not require further amendments.

There was some discussion about cheque or debit dishonour fees but it was suggested that this should be dealt with as part of a general review of fees and charges. (See also page 30.)

7.3.5 Mortgage expenses

Proposal

A number of mortgage related expenses may be incurred by a mortgagor even where there is no default. For example: costs involved in resumption proceedings or insurance claims; rectification of encroachments; property owner disputes; disputes as to the validity of security documentation; and disputes as to the ownership of goods which are subject to a bill of sale. These expenses should be recoverable by the mortgagor and are not 'enforcement expenses' for the purposes of Schedule 1. These expenses should be dealt with separately.

Summary of responses

There was debate about whether the Code prevented the recovery of these expenses. It was also suggested that these fees are recoverable if they are disclosed and are therefore liabilities under the credit contract. It was also pointed out that some of the items mentioned in the submission may or may not be fees and charges. If they are not, they need to be disclosed. Non-disclosure doesn't automatically mean that they cannot be charged. It was suggested that the creation of a further category of fees and charges would simply make things more complex than they already are.

7.3.6 Recovery of expenses incurred by agents of credit providers

Proposal

Costs incurred by an agent of a lender (whether under a securitisation program or otherwise) should be taken into account in determining whether an establishment fee is unconscionable under section 72(3). Similarly, costs of an agent in relation to early termination fees and enforcement expenses should be relevant. Also, for the purposes of section 15(M) remuneration paid to an agent for the administration of a credit provider's business should not be classified as 'commission'.

Summary of responses

Respondents generally agreed that clarification was needed and would be welcomed by industry.

7.3.7 Restriction on mortgage of future property too narrow

Proposal

Section 41(1) makes void a mortgage 'over or in respect to future property or a class of property that is to be, or may be, acquired by the mortgagor after the mortgage is entered into'. There are some classes of property (for example, insurance proceeds, resumption compensation proceeds and encroachment rectification compensation) which a mortgage should cover, even though they are future property.

Summary of responses

There was disagreement about this proposal. Some respondents pointed to the purpose of this section and said that it was important to retain a restriction on mortgages over future property. However, a number of respondents suggested that while the objectives of the section should be retained, there was scope for practical amendment. This clearly would require careful consideration but there may be some scope for a practical amendment along the lines suggested by the Law Society proposal.

7.3.8 Changes on Grounds of Hardship

Proposal

Section 66(1) refers to an 'application' by a debtor to a credit provider to alter the terms of a credit contract. As there is facility for an application to a court in subsequent sections, it is proposed that the debtor's 'application' to the credit provider would be more properly referred to as a 'request' to avoid confusion. (See also page 74.)

Summary of responses

Respondents suggested that there really wasn't a problem and that the meaning of the section was sufficiently clear.

7.3.9 Newspaper advertisements

Proposal

Sections 58 to 74 refer for the purposes of notification to 'a newspaper circulating throughout this jurisdiction'. It is proposed that there may be jurisdictions where there is no newspaper which circulates 'throughout the jurisdiction' and that the provisions be amended to allow circulation to be effected in 'one or more newspaper which together result in circulation throughout the jurisdiction.'

Summary of responses

While the point in the submission was appreciated it was suggested that the expression was widely used (for example in section 68(1)(d)(i) of the *Electoral Act 1918* (C'wth), and the Code's provisions should be interpreted broadly.

7.3.10 Fee payable on termination - what is "loss"?

Proposal

Section 72(4) allows a credit provider to recover its 'loss' arising from early termination of a credit contract. It is proposed that the word 'loss' is vague and ambiguous and the section needs re-definition.

Summary of responses

There was agreement from all respondents about the need to clarify this section and provide a better definition of loss. In particular there would be advantage in ensuring that 'break costs' could be recovered in relation to honeymoon loans. There was also enthusiasm for better defining what might be included in a termination fee.

7.3.11 Review of unconscionable interest and other charges

Proposal

The Code should prohibit credit providers from charging exorbitant fees or charges for copies of documents and other statements. This problem could be dealt with by allowing a court to review these charges or by prescribing maximum charges.

Summary of responses

There was a resounding lack of support for the proposal to further define the quantum of fees and charges or to impose maximum charges. The Code's objective to provide flexibility on the one hand was already balanced by the provision to challenge some fees and charges under section 70. It was the view of respondents that the current structure of the Code in this regard is satisfactory.

7.3.12 Unforeseen circumstances

Proposal

The grammar in section 70(4) may be misleading. This would be improved by amending the phrase 'circumstances that were not reasonably foreseeable when…' to 'circumstances that could not have reasonably been known or foreseeable at the time.'

Summary of responses

A number of respondents did not agree with the proposal. It was suggested that, according to existing case law, a court would take into account that the credit provider did not know of the relevant circumstances. It was further suggested that, amendment might be useful to make it clear that the court was not limited to matters foreseen but also to things not foreseen.

7.3.13 Time Limits for reopening of contracts

Proposal

Subsections 73(1) and 73(2) refer to a time limit of two years being pegged to the time a credit 'writes off the relevant debt'. This term is imprecise and redundant. The Code would be better served by the deletion of this clause.

Summary of responses

Respondents stated that the proposed amendments would not solve the problem and that generally this issue had been dealt with by the Amendment Act.

7.3.14 Mortgagee's duties on sale of mortgaged goods

Proposal

The Code[143] requires that a credit provider sells goods 'as soon as reasonably practicable' and that they are sold for the 'best price reasonably obtainable'. As there is potential for a criminal offence, it is argued that problems arise from the degree to which these provisions are complied with. There should be a criminal offence only if the requirements of the Code are not complied with and the debtor is materially prejudiced by that non-compliance. (See also page 78.)

Summary of responses

Generally respondents did not support the proposal and suggested that the matter would be best left to the courts.

7.3.15 Default notices - clarification needed

Proposal

Section 80(1)(a) requires a credit provider to give a default notice to each of the debtor and any guarantor. It would be preferable if one default notice was given to the debtor and a copy to the guarantor rather

[143] Section 96(1) of the Code.

than separate notices, as the guarantor may not be in default at this stage.

Summary of responses

There was some agreement with the confusion that was suggested in the submission but generally respondents did not believe that there is a sufficient problem to require amendment.

7.3.16 Assignment by credit provider - more detail needed

Proposal

The words ‘continues to receive payments’ in section 166(3) should be replaced with ‘continues to be entitled to receive payments’ to avoid confusion. Further section 166 needs to be clarified in relation to whether rights of action by debtors should be taken against assignees or the original credit provider in relation to pre-assignment and post assignment breaches of the Code. It is also unclear as to whether the assignee or the original credit provider is liable in relation to pre and post assignment breaches.

Summary of responses

The Amendment Act appears to have dealt with a number of the these issues. Respondents generally suggested that the provisions of the Code are clear and that further amendment is not needed. However, other respondents suggested that there was still considerable ambiguity in relation to this section both in relation to this issue and others, and that a revision of the section would be useful.

7.3.17 Passing of rights on assignment

Proposal

Section 167 should make it clear what rights credit providers have if the rights of a debtor, mortgagor or guarantor have been transferred. Does section 80(4) or 85(2) apply if the fraud was by the original debtor rather than the assignee?

Summary of responses

Respondents agreed that there was some scope for revision but were divided as to whether there existed practical problems which needed to be addressed with any urgency.

7.3.18 Date of service -'ordinary course of post'

Proposal

The term 'ordinary course of the post' creates some problems. It may be useful for a table of delivery times to be included in the Code to create an objective test. (See also page 112.)

Summary of responses

Respondents appreciated the scope for argument about what 'ordinary course of the post' might mean but noted that it is a widely used expression derived from the Acts Interpretation Acts. There is some case law on this issue which may provide guidance. Respondents did not support the idea of a table of delivery times.

7.3.19 Clarification required - sale of land on credit

Proposal

The inclusion of rights in relation to real property in the definition of 'services' creates problems as the expression 'goods and services' does not usually include the sale of land. It would be preferable for the Code to make it clear that the Code applies to sales of land on credit. (See also page 49.)

Summary of responses

Respondents generally agreed that the Code should be amended to make it clear that land sales are covered by the Code.

7.3.20 Explanation of common name in a form

Proposal

The requirement in Regulation 4(3) that an alternative name be 'first explained' is unduly restrictive. If a term is used throughout a document and explained in a footnote, this would be easier to understand than a formal definitions clause.

Summary of responses

Most respondents supported the proposal and suggested that it would be useful to have more flexibility in forms. However one respondent suggested that the proposal was based on a misreading of the provision and that an explanation of a credit provider's name was not required.

7.3.21 Section 6 (Provision of credit to which this Code applies) - "Principal Place of Residence"

Proposal

The term 'ordinarily resident'[144] should be replaced by 'where the principal place of residence of the borrower is'. It is possible to argue that a person may be ordinarily resident in more than one place.

Summary of responses

Respondents agree that there are still problems with this section although they acknowledge the policy and drafting difficulties of reaching a satisfactory resolution. One respondent raised a question in relation to a debtor residing in London on holiday for three months, during which they acquire a 'Harrods' card. Generally, there would appear to considerable scope for ongoing debate about this section.

7.3.22 Section 12 (Credit contract to be in the form of written contract document)

Proposal

Section 12(3)[145] should be amended to state 'The following persons will not be authorised for the purposes of subsection (1)(b)', rather than 'may not'. The words 'acting as such' should be added to the end of subsections (1)(a) & (b) to exclude people without the requisite knowledge.

[144] Section 6(1)(a) of the Code.

[145] As inserted by the amendment Act.

Summary of responses

Generally respondents did not believe that there was a major problem and suggested that the section as amended by the amendment Act is clear enough.

7.3.23 Section 15 (Matters that must be in a contract document)

Proposal

Description of charge

The submission details a number of issues which are too lengthy to include here. Generally a range of issues were raised in relation to what is meant by 'description of charge'. [See response below.]

Mortgage release fees

In relation to mortgage release fees, the submission questions the value of disclosing a fee which may not be relevant for 15 years and argues that it may be misleading.

Current charges

It was suggested that banks currently list every possible fee and charge that could apply during the life of a loan. It is proposed that only set up costs and those fees currently charged be included.

Section 15(J) - Default rate

To avoid ambiguity, it would be better to add the words '(not being a reference rate disclosed under item (C)(c))'. This would mean that there would be no requirement to restate an annual percentage rate in the default rate heading.

Summary of responses

Description of charge

One respondent suggested that these issues may be assisted by sections 100(1)(E), 100(2)(D) and the inserted definition of 'retained credit fees and charges' by the Amendment Act.

Mortgage release fees

One respondent said that the fees should still be disclosed.

Current charges

One respondent said that it should only be necessary to list up-front costs and any fees currently charged.

Section 15(J) - Default rate

Respondents felt that the issues had been dealt with adequately by the Amendment Act. (See also discussion on fees and charges generally on page 30.)

7.3.24 Section 18 (Copy of contract for debtor)

Proposal

There is still some ambiguity in relation to the operation of section 18(3).

Summary of responses

There appeared to be some confusion about the intent of the submission by respondents. However, one respondent said that they thought the proposal was that section 18(3) should apply, irrespective of who received the original copy of the document. On this basis it was agreed that section 18(3) should make reference to the person authorised by the debtor.

7.3.25 Section 32(J) (Information to be contained in statements of account - alterations)

Proposal

Section 32(J) requires a statement 'to show any correction of information in a previous account'. Section 32(J) arguably requires every entry between the corrected entry and the date of processing to be reproduced. It is suggested that the section be amended so that it is only necessary to correct relevant entries, together with any appropriate adjustment of interest, without the need to adjust each account balance for subsequent entries.

Summary of responses

Respondents did not agree with the interpretation implicit in the submission. It was suggested that section 32(J) does not 'require every entry between the corrected entry and the date of processing the correction be reproduced.'

7.3.26 Section 166 (Assignment by credit provider)

Proposal

The amendment to section 169 is inadequate because:

- the indemnities are not permitted to apply to criminal matters or of settlement of civil penalty matters; and
- there is no access to trustees assets specifically permitted by them.

Summary of responses

Generally, respondents believe that section 169A is adequate as currently drafted.

7.3.27 Section 4 of the Code (Meaning of "credit" and "amount of credit")

The changes made by section 4 of the *Consumer Credit (Queensland) Amendment Act 1998* do not resolve problems relating to the meaning of the "amount of credit".

Summary of responses

Only two responses were received to this issues. One respondent agreed with the submission while the other stated that the section is effectively a codification of transitional regulations 59(1), 59(3) and 70(3). The meaning of these regulations is clear and the respondent thought the wording of section 4, as amended, was adequate.

7.3.28 S60 (2B) of the Code (Repayment charges)

The changes made by section 31(2) of the Amendment Act to insert section 60(2B) changes mean that a credit provider is not required by section 60 to give notice to a change (in the amount or frequency or time for payment of instalments or minimum repayments or to a method of calculation of those instalments or minimum repayments) if the change occurs while the credit contract does not require any repayment of principal. However, when the time arrives under the credit contract for the repayment of principal, if the amount or frequency or time has changed, it seems that even then the credit provider need not give notice of that change. No obligation to do so is imposed. If so, it is unclear how the debtor would know what to pay and when to pay.

Summary of responses

One respondent stated that they agreed with the technical problem but saw difficulty in solving the problem in practice. However, they suggested replacement of subsection 60(2B) with the following:

'This section does not apply to any change in respect of any payment that does not include any repayment of the amount of credit provided.'

Another respondent stated that, while in their view the point is technically correct, there was not a practical issue. However, the respondent suggested that the new section 60(2B) does not add utility to the Code and would not object to its removal at some future time.

7.3.29 S65 of the Code (Changes by agreement)

There is an apparent inconsistency between sections 65(2) and 65(3) in the case of an agreement to increase the amount of credit in a fixed sum credit contract. Section 65(2) indicates there is no need for a post-change notice; however, section 65(3) requires a pre-change notice 'also'. It seems that an agreement to increase the credit limit in a fixed sum contract requires a pre-change notice and may require a post-change notice. The changes made by section 35 of the Amendment Act to section 65 do not overcome this uncertainty.

Summary of responses

Two respondents agreed with this proposal. One stated that the word 'also' is superfluous and while subsections (1), (2) and (3) refer to different circumstances, it would be better to remove doubt by removing the word 'also' from this section.

Appendix 1 - Submissions

The following people and organisations made submissions to the Post Implementation Review:

- Wizard Finance
- Statehealth Credit Union Limited
- Phil Barton
- Victorian Law Institute
- Financiers' Association of New South Wales
- Finance Brokers of Tasmania Pty Ltd
- Care Inc Consumer Credit Legal Service
- Australian Bankers' Association
- Small Business Development Corporation
- Association of Permanent Building Societies
- National Credit Union Association
- Queensland Law Society
- Credit Union Services Corporation of Australia Limited
- Canberra Consumers Inc
- Allen, Allen and Hemsley
- Western Australian Chamber of Commerce and Industry
- CCLS New South Wales
- Australian Consumers' Association
- The Hon Judy Spence MLA
- Legal Aid (NSW)
- Australian Competition and Consumer Commission
- Law Council of Australia
- RTV Consulting Pty Ltd
- Consumer Credit Legal Service (VIC)
- Australian Finance Conference
- Super Members Home Loans
- School of Business - University of Newcastle
- The Secretary - Department of Justice Tasmania
- Financial Counsellors Association of New South Wales
- National Advisory Council on Consumer Affairs
- Consumer Credit sub-committee of the Law Council of Australia Banking Finance and Consumer Credit Sub-committee
- Financial Counselling Services (QLD) Inc
- Maria Polczynski - Henry Davis York - Sydney

Appendix 2 - Purpose and Relationship with NCP Review

The Post Implementation Review is Stage 1 of a two stage review, Stage 2 being the review of the Code under National Competition Policy (NCP).

The findings of the Post Implementation Review will feed into the NCP review. The findings will be of assistance to the NCP review when the latter deals with such matters as clarifying the objectives of the legislation, identifying any restrictive effects on competition and making recommendations as to the least restrictive, cost-benefit justified means of achieving the Code's objectives.

The Post Implementation Review has three broad purposes:

1. To inform and feed into the NCP review;
2. Pending full NCP review, to inform MCCA as to the practical effects of the Code's implementation to date; and
3. To make appropriate recommendations to MCCA for immediate improvements to the national management/administrative structure for the Code (ie matters identified as being able to be addressed without pre-empting the NCP Review).

Matters to be Reviewed

Specifically the Stage 1 review will conduct research into the following key areas:-

1. The impact of the Code's 'truth in lending provisions' on borrowers

The central basis for the Code is often formulated as the achievement of 'truth in lending'. The review will, as a matter of priority, focus on this objective and:

- revisit this aim to make explicit the precise market failure or other problem intended to be addressed;
- examine the extent to which consumer behaviour has changed in relation to obtaining credit and managing debt as a result of the Code.

Relevant questions will include the following: Has the Code made products more transparent and easier to compare for borrowers? Does the Code assist consumers in making informed choices when purchasing credit and if so, how? What is the optimum amount of information? Does this differ between various groups of consumers?

2. The relevance of the law to the current consumer credit marketplace.

Does the scope of the application of the Code represent an appropriate market intervention? Consider the levels of product flexibility, innovation and consumer choice in the market place. Does the Code remain relevant to the current market? Have any changes in the financial marketplace since the Code was implemented been able to be accommodated within the existing regulatory structure of the Code?

3. The impact of the Code's administrative structure on the achievement of uniformity between jurisdictions

The review will specifically evaluate the effectiveness of the administrative arrangements to maintain uniformity and identify any issues which may contribute to dis-uniformity. Are the benefits of uniformity being maximised? Are there administrative efficiencies that can be identified to improve the scheme's effectiveness?

Relevant data (eg statistics through tailored questionnaires and documented case studies where possible) should be obtained from all relevant stakeholders in the marketplace in determining the above matters in 1 to 3 inclusive.

Expected Outcomes

In addition to reporting its findings in relation to the above, the Post Implementation Review will be expected to:

- make recommendations to MCCA for any identified areas of immediate improvement to the national management/administrative structure for the Code (ie matters identified as being able to be addressed without pre-empting the NCP review).
- identify any issues it considers need addressing in the terms of reference for the NCP review (Stage 2) based on information it has obtained.

Appendix 3 - Project Team

Team 1	Team 2	Team 3
The impact of the Code's 'truth in lending provisions' on borrowers	*The relevance of the law to the current consumer credit marketplace*	*The impact of the Code's administrative structure on the achievement of uniformity between jurisdictions*
Barbara El-Gamal (Team Co-ordinator) (to 30 December 1998) **(New South Wales)**	Daniel Rose (Team Co-ordinator) **(Victoria)**	Rebecca Neilson (Team Co-ordinator) & Ray Lane **(Western Australia)**
Margaret Raffan **(New South Wales)**	Geoff Kennedy (30 December 1998 to 30 June 1999) Lynn Barratt (to 30 December 1998) (Queensland)	Scott Lanyon (30 December 1998 to 30 June 1999) Bryan Elliott (to 30 December 1998) **(Northern Territory)**
Peter Granleese (Australian Capital Territory)	Andrew Parkinson (15 June 1998 to 30 June 1999) Colin Chang (March 1997 to 15 June 1998) Juanita Lovatt (16 March 1998 to 30 June 1999) (South Australia)	Chris Batt (Project Manager) **(Tasmania)**

Appendix 4 - Technical Reference Group

Name		Organisation
James	Hutchinson	Consumer Credit Legal Centre (NSW)
Narelle	Brown	Financial Counsellors Association of NSW
Richard	Brading	Wesley Community Legal Service
Simon	Cleary	Legal Aid Office (Queensland)
Russell	Mitchell	Consumer Credit Legal Centre (VIC)
David	Niven	Financial Services Consultancy Pty Ltd
Denise	McGill	Faculty of Law Queensland University of Technology
Tony	Duggan	Corrs Chambers Wesgarth
Elizabeth	Lanyon	Monash University
Trevor	Robinson	Clayton Utz (Sydney)
Randal	Dennings	Clayton Utz (QLD)
Maria	Polczynski	Henry Davis York
Ros	Grady	Mallesons Stephen Jaques (Melbourne)
Betty	Weule	Wesley Financial Counselling Service
Michael	McAlary	Chairmont Consulting
Raj	Venga	Australian Association of Permanent Building Societies
Ian	Gilbert	Australian Bankers Association
Stephen	Edwards	Australian Finance Conference
Jane	Hutchison	Australian Financial Counselling & Credit Reform Association
Robert	Surman	CUSCAL (Credit Union Services (Australia) Corporation)
Col	Dickings	Insurance Council of Australia
Kerrie	Kelly	National Secretariat, Trustee Corporation of Australia
Lyn	Boxall	Law Council of Australia (Vic Committee)
Bob	Forsyth	Financiers Association of NSW C/- Gells Solicitors
Adam	Stack	Law Society of NSW
Lex	MacGillivray	Law Society of Queensland
Phil	Vernon	Perpetual Trustees Australia Limited
W A (Aub)	Chapman	Westpac Banking Corporation
Stephen	Cavanagh	Blake Dawson & Waldron
Katherine	Forrest	Mallesons Stephen Jacques (Melbourne)
Kevin	O'Connor	Commercial Tribunal of NSW
Alan	Bodger	Harris Scarfe
Mark	Sneddon	Faculty of Law University of Melbourne
Dick	Viney	RT Viney Consultants
Paul	O'Shea	Financial Counselling Services (QLD)
Professor Tony Moore	Dean	Flinders Univerity Law School
David Proudman	Partner	Thompson Playford
Shannon Adams	Partner	Knox and Hargrave
Sue Moffatt	Senior Manager ABA Liaison	ANZ Banking Group Limited

Appendix 4