

Banking and Financial Services Ombudsman Limited

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Fringe Credit Project
Fair Trading Policy Branch, Policy Division
Department of Tourism, Fair Trading and Wine Industry Development
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By email: consumercredit@dtftwid.qld.gov.au

To whom it may concern

Consumer Credit Code Amendment Bill 2007 and Consumer Credit Amendment Regulation 2007

We refer to the Ministerial Council on Consumer Affairs' (MCCA) Consultation Package on the *Consumer Credit Code Amendment Bill 2007* and *Consumer Credit Amendment Regulation 2007* (August 2007) (**the Consultation Package**). We thank MCCA for this opportunity to make a short submission in response to the Consultation Package.

Please note that this submission has been prepared by the office of the Banking and Financial Services Ombudsman (BFSO) and it does not necessarily represent the views of the Board of the BFSO.

The Banking and Financial Services Ombudsman

The BFSO is an independent external dispute resolution (EDR) scheme that considers and seeks to resolve disputes between Australian financial services providers that are members of the scheme and their individual and small business customers. It is an alternative to litigation and free for individuals and small businesses. BFSO members include Australian banks and their related corporations, Australian subsidiaries of foreign banks, foreign banks with Australian operations and other Australian financial services providers.

The BFSO also manages the operations of the Credit Union Dispute Resolution Centre (CUDRC) and the Ombudsman is also the Dispute Manager for CUDRC. CUDRC is also a free, independent EDR scheme. Its members include credit unions and building societies.



Comments on the Consultation Paper

We note that comments are sought on the proposed amendments to make changes to the Consumer Credit Code (the **Code**) to implement the *Fringe Credit Providers Decision-Making Regulatory Impact Statement and Final Public Benefit Test* (March 2006) (the **RIS**) rather than the underlying policy decisions of the RIS.

Although our comments are confined to the specific wording and workability of particular proposed amendments, we nevertheless express our general support for the policy aim of the amendments.

In particular we support amendments to remove the presumption that applies to a business purpose declaration and which encourage credit providers to ascertain the purpose of the loan.

We have not made comments on all of the changes referred to in the Consultation Package, rather we have concentrated on those amendments that raise issues about which we can speak from our experience as an EDR scheme dealing with a range of credit providers.

Proposed amendment to business purpose declaration presumption

The proposed amendment of section 11 of the *Consumer Credit (Queensland) Act 1994* (the **Act**) removes the conclusive presumption which operates if the debtor signs a business purpose declaration. It substitutes for it that it can be established that the Code does not apply only by establishing that the credit provider made inquiries about the purpose of the credit to be provided and was given information *by or on behalf* of the debtor that the purpose of the loan was wholly or predominantly for an identified business or investment purpose.

In our view, allowing the inquiries to be satisfied by information given on behalf of the debtor rather than by the debtor direct leaves open the possibility that a broker or other intermediary, without the knowledge of the debtor, will misstate the purpose of the loan in order to secure approval.

We have seen cases at BFSO where information is provided, ostensibly on behalf of the borrower, which is inaccurate and which the borrower is not made aware of – such as overstatement of income and understatement of liabilities. We suggest that MCCA consider requiring the inquiries to be

made of the borrower direct and the information to be provided directly by the borrower.

The use of the terms 'given information' in the proposed paragraph 11(2)(b) is also quite general and in our view, could include an information statement or something else similar to the current business purpose declaration, which the borrower might be pressured to sign.

Requiring that the business or investment purpose be identified should mean that a standard template cannot be used and that a specific purpose will need to be stated. This is, in our view, in accordance with prudent lending practice in any event: that is, to ask what the loan funds are going to be used for in order to make a proper assessment of the lending proposition.

MCCA may wish to consider further whether the current form of the words will ensure that a specific purpose for the credit provided is identified beyond obtaining the customer's signature on a standard form information statement.

The above comments also apply in relation to the proposed changes to section 150 of the Act dealing with presumptions relating to consumer leases.

Content and location of the proposed Direct Debit disclosure

The Consultation Package provides for a proposal to amend the *Consumer Credit Regulation 1995* (the **Regulation**) to require in forms 3A and 3B (offer to/acceptance of offer by debtor) information about direct debit arrangements, as set out in the amending clause.

BFSO supports the inclusion of the information that if the debtor has a direct debit arrangement for payments under the contract, the debtor may be able to take action to cancel the arrangement. It is also appropriate, in our view, for the information to refer the debtor to their financial institution.

However, BFSO suggests that it might also be said is that instructions to cancel a direct debit from a bank account (that is not a credit card account) can be given direct to the bank. This reflects both the provisions of the *Bulk Electronic Clearing Procedures* of the Australian Payment Clearing Association relating to direct debits, and clause 19 of the *Code of Banking Practice*.

In relation to unauthorised or irregular direct debits the proposed disclosure is:

- '2. If you think that an unauthorised or otherwise irregular direct debit has been made, you can complain to your financial institution.
3. You can contact the Government Consumer Agency for assistance in resolving the complaint.'

We suggest that reference also be made to the BFSO as an agency that can provide assistance in resolving the complaint.

Amendments to the reopening provisions ss70(6) and s72

The proposed amendments are to substitute 'unreasonable' for 'unconscionable' in the powers of the Court to review unconscionable:

- Changes in interest rate;
- Establishment fees or charges;
- Early termination fees or charges; and
- Prepayment fees or charges.

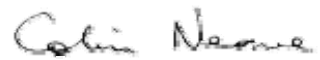
The Consultation Package states that the shift to the word 'unreasonable' was influenced in part by the test adopted in NZ and by the recent introduction of an 'unfairness' test in the UK. For jurisprudential and consistency of interpretation reasons, the use of 'unfair' rather than 'unreasonable' might be preferable. It would then be possible to have the benefit of decisions in those jurisdictions, and also be more in alignment with the proposed prohibition of unfair contract terms in credit contracts in Victoria and Part 2B of the *Fair Trading Act 1999* (Vic).

'Reasonable' has a slightly different definition to 'fair' as illustrated by, for example, the criteria for decision-making of the UK Financial Services Ombudsman 'fair and reasonable'. 'Fair is defined as "Impartial, just, equitable'; 'Reasonable' is defined as 'Fair, proper or moderate under the circumstances' (Black's Law Dictionary).

On the other hand, the definition of 'reasonable' appears more suited to a review of interest and other charges and would enable a review of whether in all the circumstances the interest and charges were moderate or excessive which is clearly the intention - as indicated by the references to 'more than a reasonable estimate of the credit provider's costs/loss in the proposed subsections 3-6.

Please contact Elisabeth Wentworth, Special Counsel to Ombudsman on 03 9613 7310 if you have any further questions.

Yours faithfully

A handwritten signature in cursive script that reads "Colin Neave".

Colin Neave
Banking and Financial Services Ombudsman