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26 May 2010

The Hon Virginia Judge, MP.
Minister for Fair Trading
Parliament House
Macquarie Street
Sydney 20000 via: *office@judge.minister.nsw.gov.au*

Dear Minister,

NSW Maximum APR – Commonwealth Powers Act

AFC writes in support of other industry representations seeking amendment to Division 2 of Schedule 3 of this Act, essentially holding Section 5 (5) in abeyance until its drafting ambiguities and uncertainties can be resolved.

We understand that the expanded provisions are directed at instances of abuse at the fringe aimed at avoiding the impact of the 48% ceiling in NSW. However laudable this intention, the provisions as drafted affect compliance for mainstream lenders. Under 5 (5)(a) unless the debtor or the "introducer" of such a fee or charge advise and specify this/these to the credit provider, the credit provider simply won't know to include it/them in the Section 7 (2) calculation so as to satisfy compliance. Where the fee/charge is a flat amount, the shorter the term of the credit and/or the smaller amount of credit, then the more likely is the calculation to exceed 48%. The point however, is that the credit provider may not know the fact or amount of the fee/charge to include it in the first place.

More problematic are the workings of 5 (5)(b) as they affect normal commercial relationships between debtor and lender, whereby via lender mail-out, web-site or other means, the debtor is "cross-sold" or simply made aware of other services (of the lender or a third party). Such services could include (but are in no way limited to) life, health, travel, or credit card theft/fraud protection insurances, wine club offers, travel or loyalty points redemption payments or matched charity donations. There is similarly a range of 5 (5)(c) credit contract related services fees such as lenders mortgage insurance, valuation fees, property inspection fees, enforcement expenses (e.g. repossession fees, storage fees, sale costs, etc); financed services fees/prices, such as consumer credit insurance, mortgaged property insurance, gap insurance, finance broker fees, investment advisor fees etc. which could also be captured and while several would be known at the time of writing, others would be subsequent or contingent.

It is appreciated that these "related" payments are unlikely to be the target of the NSW policy changes, however these are what the provisions as drafted capture. Given that none of them are rare or obscure, professional policy development in NSW should have been aware of them.

In this regard, it is most unfortunate that inquiries and consultations were not made of the AFC well before the legislation was introduced into the NSW Parliament. Like most others, in industry at least, there was no awareness of the specific detail other than NSW was referring appropriate power to the Commonwealth and maintaining the current NSW interest rate ceiling until the middle of next year. Even the official explanatory note which accompanied the legislation when it was in Bill form made it clear the legislative intention was to maintain/continue the current interest rate ceiling, albeit extending it to NCC-regulated contracts (i.e. not only credit for personal, household or domestic purposes, but also credit for residential investment property related purpose). There was no suggestion the calculation had changed. Nor obviously was there any prior consultation.

Indeed when we held our regular half-yearly consultative meeting with OFT on 16 February, we queried progress of the transfer drafting and were only told that it was progressing; some candour in policy intentions at that time would have enabled AFC to respond that the proposals would encompass a significant range of mainstream financier issues.

NSW sits on the main Treasury steering committee to progress the national consumer credit laws and would understand the considerable quantum of changes required to be adopted by industry in a very short space of time. It should also have appreciated that the unheralded NSW ambiguous and uncertain changes at the 11^{th} hour would distract industry from implementation of the national credit regime, which includes confirmation to ASIC that it complies with “credit laws” (including NSW).

A separate but related issue is the impact of the changes to the bridging finance market in NSW. These are not small amount pay-day or fringe loan arrangements but sizable loans for very short terms. The accompanying Paper by the Chairman of the Short-term & Bridging Finance Association (an AFC associate association) outlines the new difficulties for their transactions under the UCCC as well as for clients wishing to bridge finance residential property investments under the NCC.

AFC would again request that Section 5 (5) be held in abeyance for proper consultation and re-drafting. If further details are required please contact me.

Yours truly,

Ron Hardaker
Executive Director

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SHORT-TERM & BRIDGING FINANCE ASSOCIATION
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NSW Interest Rate Cap & Recent Changes

Bridging Finance companies often provide short-term loans to consumers secured against real property. These loans are more often than not required at short notice to take advantage of an unplanned opportunity or to cover unforeseen costs. Lenders are therefore required to undertake due diligence within a few days and this requires the application of considerable resources.

Short term capital is also expensive. And the risks of lending under the pressure of time are higher than they are under normal circumstances. It is not unusual for lenders to charge interest rates which, over shorter terms (1-3 months), are close to the interest cap when measured to the annual rate yardstick. It is not unreasonable for lenders also to charge a non-refundable due diligence or underwriting fee for what is a labour-intensive work-load.

As an example: a $100,000.00 risk for one week might incur an admin fee of $2,000, in addition to interest charges. Under the new pricing structure however, the maximum return for such a risk would be $923.07. There is not a lender in Australia, bank or otherwise, that could afford the labour or funding costs for a risk of this nature.

An interest cap of 48% does not currently affect lenders who measure loan periods in years, but it is totally unworkable for lenders who measure loan periods in weeks or months. And if we ever see the day when interest rates are 18-20% per annum, as they were in the late 1980's, we envisage legislators struggling to perform an absurd adjustment. The interest rate cap is, and always has been, a very simplistic, unsophisticated approach to providing consumer protection. It simply restricts risk appetite, particularly for short term finance. If Government practiced similar restrictions in the insurance sector insurers would not reduce rates but simply restrict policies to lower risk applicants. While we do not advocate the practice of lending at high rates to poor risk borrowers (who rarely benefit from additional credit), we ***do*** advocate strongly the oversight of responsible lending practices as a preference.

We fear that the government, in its effort to ensure ***'unscrupulous lenders cannot avoid the cap by artificially separating their business into a broker plus lender structure so that they can hide their exorbitant fees'***, will also drag into this net legitimate, provident lenders in the bridging finance sector and this may have a further negative impact by forcing needy borrowers to less scrupulous providers outside the NCC.

We have worked studiously to instil responsible lending processes in and among bridging lenders and these are described at length in our response letter to ASIC's Consultation Paper 115 Responsible Lending in preparation for the NCC. Had a similar consultative process occurred prior to recent New South Wales legislation, as industry might have expected, the Government might have taken a more considered course.

We advocate oversight of responsible lending practices under the NCC rather than an unworkable interest rate cap by State Governments and all the negative implications it implies.

Yours sincerely,

Andrew Way
Chairman