Queensland Government
Department of Tourism, Fair Trading and Wine Industry Development

Consumer Credit Code Amendment Bill 2007
Consumer Credit Amendment Regulation 2007

Consultation Package

Ministerial Council on Consumer Affairs

August 2007

0498

Disclaimer

Expressions of legal opinion or conclusion in this Consultation Package are not intended as legal advice. Anyone needing such advice should seek assistance from a legal practitioner.

Introduction

In the context of the consumer credit industry, a distinction is usually drawn between the "mainstream" and "fringe" markets. The mainstream market includes institutions such as banks, credit unions, building societies, non-bank mortgage lenders and national finance companies. The fringe credit market includes all those credit providers on the fringe of the market. Fringe credit providers, such as payday lenders, typically offer short term loans (from four weeks to 18 months) for small amounts (averaging less than $300), particularly to people unable to access credit from the mainstream lenders.

The fringe credit market has diversified and significantly increased in size over the past ten years due to mainstream credit providers, such as banks and credit unions, drifting away from servicing the needs of low income consumers or those with impaired credit records. Mainstream lenders typically no longer lend small amounts repayable over a fixed short term, because the processing and administrative costs are said to outweigh the return on the loan.

Originally, section 7(1) of the Code exempted all loans under 62 days, thereby exempting many fringe credit providers. However, amendments made to the Code in 2001 extended its coverage to short term lending above a prescribed threshold. As a result of the 2001 amendments, if the fees and charges for a loan of 62 days or less exceed 5% of the amount of the loan, or the interest rate exceeds 24% per annum, the Code applies. While these amendments addressed many major issues with fringe credit lending, it was acknowledged at the time that further reform was required to address other problems in the fringe credit market.

In late 2003, the Ministerial Council on Consumer Affairs took submissions on its Discussion Paper, *Fringe Credit Providers*. Thirty-eight responses were received. Following consideration of these wide-ranging submissions, the proposals were substantially reworked and included in a Decision-Making Regulatory Impact Statement and Final Public Benefit Test (RIS) released earlier this year and available at **www.creditcode.gov.au/content/downloads/FRINGE_RI.pdf**.

The RIS assessed a number of options according to their level of regulatory intervention and made a series of recommendations. Due to their urgency, the proposals relating to bill facilities have been fast-tracked in advance of the broader fringe lending recommendations. The RIS also includes the following recommendations to amend the Code:

1. An amendment to the disclosure settings so it is clear that an annual percentage rate must be provided for all loans where there is a charge for credit and that charge is in the nature of interest. This provision should be based on s 10B of the *Consumer Credit (New South Wales) Act 1995* (see RIS, sections 2.3.1, 4.3.1, 5.2.1 and 7.2.1).

2. An amendment to clarify that the pawnbroker exemption only applies where money is lent on the security of pledges of goods and the sole recourse provided for failure to repay the loan is for the pawnbroker to sell or otherwise dispose of the goods pledged (see RIS, sections 2.3.5, 4.3.3, 5.2.3 and 7.2.3).

3. An amendment to prevent abuse of the rules governing when short term loans are captured by the Code. For the purposes of determining the amount of credit fees and charges that are imposed or provided under s 7(1)(b) of the Code, a fee or charge is to include any fee paid to another party for referral to or from the credit provider irrespective of whether the party is related to the credit provider (see RIS, sections 2.3.5, 4.3.3, 5.2.3 and 7.2.3).

4. Amendments to remove the presumption that applies to a Business Purpose Declaration and to encourage credit providers to ascertain the purpose of the loan (see RIS, sections 2.3.5, 4.3.3, 5.2.3 and 7.2.3).

5. An amendment so existing remedies in the Code are modified to:
   - enable all fees and charges (and the combination of interest, fees and charges) to be reviewable under s 72 of the Code. The test for determining unconscionable interest will be based on s 70(2)(n) of the Code;
   - enable a court to consider fees and charges reasonably imposed by other credit providers in considering an application under s 72;
   - permit a court when considering an application under s 72 to take into account the objective reasonableness of costs incurred in establishing or terminating a loan of that type;
   - clarify the operation of s 72(3) generally; and
   - permit Government Consumer Agencies to make applications under ss 70 and 72 of the Code (see RIS, sections 2.3.2, 4.3.2, 5.2.2 and 7.2.2).

6. An amendment to require consumers to be given information about direct debit authorities (see RIS, sections 2.3.4, 4.4.4, 5.3.1 and 7.3.1).

7. An amendment to prohibit credit providers from asking or taking security over essential household goods (see RIS, sections 2.3.3, 5.3.2 and 7.3.2).

The purpose of the *Consumer Credit Code Amendment Bill 2007* (Attachment A) and *Consumer Credit Amendment Regulation 2007* (Attachment B) is to implement these recommendations. Although the amendments will apply to all credit providers, they particularly target practices which are considered unjust and exploitative.

For a more detailed discussion of the recommendations, see the RIS.

Purpose

The purpose of this document is to facilitate consultation with relevant stakeholders. Please note the exposure drafts are yet to receive formal Government endorsement.

Consultation process

All interested individuals and organisations are encouraged to provide comment on the *Consumer Credit Code Amendment Bill 2007* and *Consumer Credit Amendment Regulation 2007*. Individual consumer groups are encouraged to provide input on a co-operative basis.

Comments in writing should be forwarded by Friday 21 September 2007 to:

Fringe Credit Project
Fair Trading Policy Branch, Policy Division
Department of Tourism, Fair Trading and Wine Industry Development
GPO Box 3111
BRISBANE QLD 4001

Email: consumercredit@dtftwid.qld.gov.au

Summary of proposed amendments to the Code

Clause 4 – Amendment of s 7 (Provision of credit to which this Code does not apply)

Clause 4(1), which relates to recommendation 3, inserts a new s 7(1A). The purpose of this section is to capture fees and charges that may or may not be set out in the credit contract, but which must be paid to a person including a person other than the credit provider, in connection with the credit contract. Stakeholders are invited to comment on whether, and how, the fees and charges in new s 7(1A) ought to be disclosed.

Clauses 4(2) – (4) relate to recommendation 2. The intention of these amendments is to limit the pawnbroker exemption in s 7(7) of the Code to cases where credit is provided on the security of pawned or pledged goods, and the only recourse available to the pawnbroker is to sell or otherwise dispose of the goods secured.

Clause 5 – Amendment of s 11 (Presumptions relating to application of Code)

Clause 5, which relates to recommendation 4, amends s 11 of the Code to remove the presumption relating to Business Purpose Declarations and associated provisions. It is not intended to prohibit credit providers from requiring a statement about purpose. Rather, the intention is to remove any special evidentiary status.

The purpose of the new s 11(2) is to require credit providers who claim credit was not provided wholly or predominantly for personal, domestic or household purposes to be able to show they took active steps to ascertain the consumer's particular purpose for seeking the credit.

Submissions are sought on whether the new s 11(2) is workable.

For example, should the section be reworked so that in ascertaining whether the 'contrary is established', one factor that the court may have regard to is whether the credit provider ascertained by active enquiry that the consumer's purpose for seeking the credit was not personal, domestic or household?

If a provision such as the new s 11(2) is maintained, s 10 of the *Consumer Credit Regulation* will need to be repealed.

Drafting note

This drafting note relates to direct debit disclosures. Please refer to the discussion below under the summary of proposed amendments to the Regulation.

Clause 6 – Amendment of s 15 (Matters that must be in contract document)

Clause 6 relates to recommendation 1. It renumbers the existing s 15 as s 15(1) and inserts new ss 15(2) and (3) which mirror s 10B of the *Consumer Credit (New South Wales) Act 1995*. These sections require disclosure of an annual percentage rate which includes charges which although not portrayed by the credit provider as interest, are in fact interest.

Clause 7 – Amendment of s 46 (Prohibited securities)

Clause 7 inserts new ss 46(3) – (6) and renumbers the existing ss 46(3) as 46(7).

The new subsections, which relate to recommendation 7, prohibit the taking of security over essential household property.

The definition of essential household property is linked to property that is 'prescribed household property' under regulation 6.03 of the *Bankruptcy Regulations 1996* (Cwlth). In addition to property that is prescribed household property, the new s 46(4)(b) inserts a regulation making power to prescribe other property as essential household property.

It should be noted that under the new ss 46 (3)(a) and (3)(b), the prohibition does not apply where the security is taken over goods which the mortgagee supplied to the mortgagor as part of a business carried on by the mortgagor of supplying those goods, or the mortgagee is a linked credit provider of the person who supplied the goods to the mortgagor. For a definition of 'linked credit provider', see s 117(1) of the Code.

In order to rely on this exemption, the mortgagor must not, as previous owner of the goods, have sold them to the mortgagee for the purposes of the supply. This is to address sham sale and leaseback arrangements. The amendment to s 46 is not intended to enable a credit provider to demand a mortgage over essential household property simply because the property was sold to the consumer on a previous occasion.

Clause 8 – Amendment of pt 4, div 3 hdg (Changes on grounds of hardship and unjust transactions).

Clause 8 amends the heading of Part 4, Division 3 to reflect changes made to s 72 (see clause 11).

Clause 9 – Amendment of s 70 (Court may reopen unjust transactions)

Clause 9 renumbers subsections 70(2)(n) and (o) as 70(2)(o) and (p) and inserts a new subsection 70(2)(n).

The purpose of the new ss 70(2)(n) and the amendments to 70(6) is to confirm that s 70 can apply to a mortgage which has been avoided under s 46. This amendment is required because of the amendment to s 46 (see discussion of clause 7 above).

Clause 10 – Amendment of s 71 (Orders on reopening of transactions)

It is necessary to amend s 71 as a result of the new s 72A (see clause 11).

Clause 11 – Replacement of s 72 (Court may review unconscionable interest and other charges)

Clause 11 inserts a new s 72.

The proposal is to change the terminology used in s 72 from 'unconscionable' to 'unreasonable'. This shift is considered necessary following the decision in *Director of Consumer Affairs Victoria v City Finance Loans and Cash Solutions* where, in the absence of a definition for unconscionable, the court imposed traditional common law notions of unconscionability. The change in terminology - and hence the nature of the test - will ensure that the unwieldy and often unpredictable unconscionability test is confined to s 70, leaving a more apt, broad and flexible test for s 72.

The shift was influenced by the test adopted in New Zealand following a wholesale review of consumer credit in that jurisdiction and follows the recent introduction of an 'unfairness' test in the United Kingdom. Stakeholders' attention is drawn to s 72(6) which adopts a similar approach to fees and charges as has been taken with establishment, early termination and pre-payment fees.

Subsections 72(1)(a)-(d) of the new section are identical to the existing subsections. Subsections 72(1)(e)-(g) are new and flow from recommendation 5.

Although recommendation 5 does not specifically refer to a fee or charge arising because of a default by a debtor, such a fee was contemplated by the reference to 'all fees and charges'. Because the common law doctrine of penalties can apply to default fees, and because they are qualitatively different from other credit fees or charges, it has been necessary to add default fees as a separate limb.

Clause 11 has been much awaited. It inserts a new s 72A to allow applications under Division 3 by a Government Consumer Agency (for a definition of Government Consumer Agency, see Schedule 1 of the Code). Under this section, a Government Consumer Agency has standing to represent both the public interest, and individual debtors or groups of debtors. Stakeholders are invited to comment on whether actions under s 72A should have national effect, as is the case with civil penalties under Part 6 of the Code.

Clause 12 – Amendment of s 100 (Key requirements)

Clause 12 is a minor technical amendment.

Clause 13 – Amendment of s 150 (Presumptions relating to application of this Part)

Clause 13 relates to recommendation 4, and removes the presumption relating to Business Purpose Declarations for leases for the same reasons outlined in clause 5 above.

Clause 14 – Insertion of new pt 12, div 3

Clause 14 inserts transitional provisions considered necessary because of the amendments to s 72.

Summary of proposed amendments to the Regulation

The amendment to the *Consumer Credit Regulation 1995* relates to recommendation 6.

Consideration was given to whether the direct debit disclosure requirements should be placed in the Code or the Regulation.

For the purposes of consultation, the disclosure has been added as a separate 'warning' box to the existing Form 3A or 3B (whichever is relevant to the particular case) under s 15(O) of the Code. This means all consumers will receive direct debit information at the time of the credit contract irrespective of whether they enter into a direct debit arrangement at that time, at a later date, or not at all.

Other options, which both involve amending the Code, are:

- amending s 14(1)(b) so the disclosure can be added to the Information Statement (necessary because s 14(1)(b) currently refers to statutory rights, and there is no specific statutory right to cancel a direct debit); or
- adding a new s 14A to the Code which requires the disclosure to be made in writing prior to a credit provider entering into a direct debit arrangement with a consumer.

Submissions are sought on both the content of the proposed disclosure and where stakeholders believe it would be best placed.

Attachment A

Queensland

Consumer Credit Code Amendment Bill 2007

Contents

Consultation draft

Consultation draft

2007

A Bill

for

An Act to amend the *Consumer Credit (Queensland) Act 1994* to make changes to the Consumer Credit Code

The Parliament of Queensland enacts—

1 Short title

This Act may be cited as the *Consumer Credit Code Amendment Act 2007*.

2 Commencement

This Act commences on a day to be fixed by proclamation.

3 Code amended

This Act amends the Consumer Credit Code set out in the appendix to the *Consumer Credit (Queensland) Act 1994*.

4 Amendment of s 7 (Provision of credit to which this Code does not apply)

(1) Section 7—

insert—

'(1A) For the purposes of subsection (1)(b), credit fees and charges imposed or provided for under the contract are taken to include fees and charges payable by the debtor to anyone else in connection with the provision of the credit, whether or not the fees and charges are payable under the contract.'.

(2) Section 7(7), after 'the provision of credit'—

insert—

'on the security of pawned or pledged goods'.

(3) Section 7(7), 'pawnbroker).'—

omit, insert—

'pawnbroker) as long as it is the case that, if the debtor is in default, the pawnbroker's only recourse is against the goods provided as security for the provision of the credit.'.

(4) Section 7—

insert—

'(11) In this section—

security, of pawned or pledged goods, means security by way of bailment of the goods under which the title to the goods does not pass, conditionally or unconditionally, to the bailee.'.

5 Amendment of s 11 (Presumptions relating to application of Code)

Section 11(2) to (4)—

omit, insert—

'(2) The contrary can be established for the purposes of subsection (1) only by establishing that—

(a) the credit provider under the contract made inquiries about the purpose of the credit provided, or intended to be provided, under the contract; and

(b) as a result of the inquiries, the credit provider was given information by or on behalf of the debtor that the purpose of the loan was wholly or predominately for either or both of the following—

(i) an identified business purpose;

(ii) an identified investment purpose.'.

Note for consultation draft of Bill:

Submissions are sought about whether the provisions about direct debit disclosures ought to be made by amending s 14 of the Code or by amending the regulation.

6 Amendment of s 15 (Matters that must be in contract document)

(1) Section 15, 'The contract document'—

omit, insert—

'(1) The contract document'.

(2) Section 15—

insert—

'(2) For the purposes of the application of subsection (1)(C), and for the avoidance of doubt, it is declared that the credit contract must state an annual percentage rate calculated on the basis of charges under the contract that are in the nature of interest charges (whether or not they are expressed to be interest charges).

'(3) For the purposes of subsection (1)(E), the total amount of interest charges includes any amount that is in the nature of an interest charge (whether or not it is expressed to be an interest charge).'.

7 Amendment of s 46 (Prohibited securities)

(1) Section 46(3)—

renumber as section 46(7).

(2) Section 46—

insert—

'(3) A mortgage cannot be created over goods that are essential household property unless—

(a) either—

(i) the mortgagee supplied the goods to the mortgagor as part of a business carried on by the mortgagee of supplying goods; or

(ii) the mortgagee is a linked credit provider of the person who supplied the goods to the mortgagor; and

(b) if paragraph (a)(i) applies—the mortgagor has not, as a previous owner of the goods, sold them to the mortgagee for the purposes of the supply.

'(4) For the purposes of subsection (3), goods are essential household property only if—

(a) the goods—

(i) are household property as prescribed under regulations made under the *Bankruptcy Act 1966* (Cwlth), section 116(2)(b)(i); and

Notes—

1 See the *Bankruptcy Act 1966* (Cwlth), section 116 (Property divisible among creditors).

2 For the prescribed household property, see the *Bankruptcy Regulations 1996* (Cwlth), regulation 6.03.

(ii) are not an antique item; or

(b) the goods are goods of a type prescribed under a regulation made under this Code.

'(5) A type of goods may be prescribed under subsection (4)(b) only if the type—

(a) is similar to a type of prescribed household property mentioned in subsection (4)(a)(i); and

(b) does not consist of, or include, antique items.

'(6) For the purposes of this section, an item is taken to be antique only if a substantial part of its market value is attributable to its age or historical significance.'.

8 Amendment of pt 4, div 3 hdg (Changes on grounds of hardship and unjust transactions)

Part 4, division 3, heading, after 'unjust'—

insert—

'**or unreasonable**'.

9 Amendment of s 70 (Court may reopen unjust transactions)

(1) Section 70(2)(n) and (o)—

renumber as section 70(2)(o) and (p).

(2) Section 70(2)—

insert—

'(n) for a mortgage—any relevant purported provision of the mortgage that is void under section 46;'.

(3) Section 70(6), 'unconscionable'—

omit, insert—

'unreasonable'.

(4) Section 70(6), after 'Division.'—

insert—

'This section does apply in relation to a mortgage, and a mortgagor may make an application under this section, even though all or part of the mortgage is void under section 46(3).'.

10 Amendment of s 71 (Orders on reopening of transactions)

(1) Section 71(a), after 'parties'—

insert—

'to the transaction'.

(2) Section 71(e), after 'party', first mention—

insert—

'to the transaction'.

11 Replacement of s 72 (Court may review unconscionable interest and other charges)

Section 72—

omit, insert—

'72 Court may review unreasonable interest and other charges

'(1) The Court may, if satisfied on the application of a debtor, mortgagor or guarantor that—

(a) a change in the annual percentage rate or rates under a credit contract, or a change in the manner in which interest is calculated or applied under a credit contract, to which section 59(1) or (4) applies; or

(b) an establishment fee or charge; or

(c) a fee or charge payable on early termination of a credit contract; or

(d) a fee or charge for a prepayment of an amount under a credit contract; or

(e) a credit fee or charge arising because of a default by the debtor under a credit contract; or

(f) any other credit fee or charge; or

(g) the combination of the annual percentage rate and any credit fee or charge;

is unreasonable under this section, annul or reduce all or any of the rate or rates or the fee or charge and may make ancillary or consequential orders.

'(2) A change to the annual percentage rate or rates or a change in the manner in which interest is calculated or applied under a credit contract is unreasonable only if it appears to the Court that—

(a) the change was made in a manner that is unreasonable, having regard to—

(i) any advertised rate or other representations made by the credit provider before or at the time the contract was entered into; and

(ii) the period of time since the contract was entered into; and

(iii) any other consideration the Court thinks relevant; or

(b) the change is a measure that discriminates unjustifiably against the debtor compared to other debtors of the credit provider under similar contracts.

'(3) An establishment fee or charge is unreasonable only if it appears to the Court that the fee or charge is more than the credit provider's reasonable costs of—

(a) deciding an application for credit; and

(b) the initial administrative costs of providing the credit.

'(4) A fee or charge payable on early termination of the contract or a prepayment of an amount under the contract is unreasonable only if it appears to the Court that the fee or charge is more than a reasonable estimate of the credit provider's loss arising from the early termination or prepayment, including the

average reasonable administrative costs for a termination or prepayment of that type.

'(5) A credit fee or charge arising because of a default by the debtor under the contract is unreasonable only if it appears to the Court that the fee or charge is more than a reasonable estimate of the credit provider's loss arising from the default.

'(6) Any other credit fee or charge is unreasonable only if it appears to the Court that the fee or charge is more than the credit provider's reasonable underlying costs or losses that gave rise to the fee or charge.

'(7) In deciding the reasonableness of a matter under this section, other than a credit fee or charge arising because of a default by the debtor under the contract, the Court may have regard to the standards of commercial practice generally.

'(8) Also, if it is alleged that the combination of the annual percentage rate and any credit fee or charge is unreasonable because of excessive interest charges, the Court may have regard to the annual percentage rate or rates payable under comparable credit contracts.

'72A Applications under div 3 by Government Consumer Agency

'(1) The Government Consumer Agency may make an application under this Division and has standing to represent the public interest, the interests of a particular debtor, mortgagor or guarantor or of debtors, mortgagors or guarantors generally.

'(2) The application—

(a) may apply to any one or more credit contracts; and

(b) may apply to all or any class of credit contracts entered into by a credit provider during a specified period (for example, all credit contracts entered into during a specified period that are affected by a specified matter for which relief is sought).

'(3) The Court may require notice of the application to be published by notice, in a form approved by the Court, in a newspaper circulating throughout this jurisdiction or Australia, as the Court decides.'.

12 Amendment of s 100 (Key requirements)

Section 100, 'section 15'—

omit, insert—

'section 15(1)'.

13 Amendment of s 150 (Presumptions relating to application of this Part)

Section 150(2) to (4)—

omit, insert—

'(2) The contrary can be established for the purposes of subsection (1) only by establishing that—

(a) the lessor made inquiries about the purpose of the hiring or intended hiring under the consumer lease; and

(b) as a result of the inquiries, the lessor was given information by or on behalf of the lessee that the purpose of the hiring or intended hiring was wholly or predominately for an identified business purpose.'.

14 Insertion of new pt 12, div 3

Part 12—

insert—

'Division 3 Transitional provision for Consumer Credit Code Amendment Act 2007

'187 Undecided applications under old section 72

'(1) An application made under old section 72 that has not been decided immediately before the commencement must be decided under old section 72.

'(2) In this section—

commencement means the day new section 72 commences.

new section 72 means section 72 as in force after the commencement.

old section 72 means section 72 as in force before the commencement.'.

Attachment B

Queensland

Consumer Credit Amendment Regulation (No. ..) 2007

Subordinate Legislation 2007 No. ...

made under the

Consumer Credit (Queensland) Act 1994

Contents

1 Short title

This regulation may be cited as the *Consumer Credit Amendment Regulation (No. ..) 2007*.

2 Commencement

This regulation commences on the day the *Consumer Credit Code Amendment Act 2007*, section 3 commences.

Note: The purpose of this provision is to make the commencement of the amending regulation contemporaneous with the Act amendments, which are expected to commence simultaneously.

3 Regulation amended

This regulation amends the *Consumer Credit Regulation 1995*.

4 Amendment of s 15 (Additional disclosures about credit contracts to be signed by debtor)

Section 15(3)(a), 'a box'—

omit, insert—

'boxes'.

5 Amendment of schedule (Forms)

Schedule, Forms 3A and 3B, at the end—

insert—

'INFORMATION ABOUT DIRECT DEBIT ARRANGEMENTS	
1	If you have a direct debit arrangement for payments under this contract, you may be able to take action to cancel the arrangement if you wish. Contact your financial institution.
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.'.

ENDNOTES

1 Made by the Governor in Council on . . .

2 Notified in the gazette on . . .

3 Laid before the Legislative Assembly on . . .

4 The administering agency is the Office of Fair Trading.