



Submission –

Interest Rate Capping Measures for Fringe Lenders - Consumer Credit Code Amendment Bill 2008 and Consumer Credit (Queensland) Special Provisions Regulation 2008

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The author welcomes the ability to comment on these proposals on behalf of Min-it Software and its clients.

Background

Min-it Software is a specialist software supplier to the lending industry. We were a finalist in the Queensland Consumer Protection Awards 2005 and were awarded a Highly Commended Award in the 2007 Awards. Min-it Software promotes compliance with the Code and other legislation. In order to do this, we held our first Conference for micro-lenders in 2006 that was opened by the Queensland Fair Trading Commissioner. Last year's conference was held in May and we take this opportunity of thanking the Department again for supporting it. Neither the author nor his business partner has any financial interest in any lender. Aside from the software produced in-house, specifically by or for franchised organisations, Min-it Software is the industry leader in the Australian market. It has current clients in Queensland, New South Wales, Victoria, South Australia and Tasmania and will shortly have our first client commence in Western Australia operating.

The author holds a Master of Technology Management degree awarded by Griffith University.

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Foreword

In an industry sector that already is highly competitive and has the most transparency of all Australian businesses, the proposal to cap interest rates by the State Government for all non-ADI's (Authorised Deposit-Taking Institutions) re-iterates just how little knowledge is known by those proposing and advising on these measures.

It is ironic that these measures are being introduced by Queensland, the self-styled "Smart State" that regularly promulgates itself to the world that it is a leader in innovation and skills. Unfortunately, it is demonstrating little, if any, knowledge management. Recent research shows that interest rate caps do not work as intended¹.

Rather than being truly innovative and actually going after the so-called "loan sharks", the government is merely replicating what has been tried and discarded elsewhere.

We have just a few points to raise in relation to this proposal.

Is the problem really as bad as some make out?

According to the Minister himself, the top 10 complaint categories to the Department in 2007² were:

Complaint category	Percentage of total complaints
1. Household electrical and appliances	18%
2. Motor vehicle dealing	8%
3. Furniture	7%
4. Computers	6%
5. Motor vehicle repair and maintenance	6%
6. Motor vehicle parts and accessories	5%
7. Personal services	5%
8. Real estate property management	5%
9. Household trade services	5%
10. Mobile phones	4%
TOTAL	69%

¹ Morgan, D.P., and Strain, M.R., 2007. "Payday Holiday: How Households Fare After Payday Credit Bans", Staff Report No. 30, Federal Reserve Bank of New York. Available online http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1032621 viewed 14/12/2007.

² Ministerial Media Statements, 03/02/2008. Available online: <http://www.cabinet.qld.gov.au/MMS/StatementDisplaySingle.aspx?id=56341> viewed 04/02/2008.

As the total number of complaints made amounted to 12, 561³, this means the maximum number of complaints that could have been made last year in regard to consumer lending had to be less than 4% or 502. Based on our own data for loans raised in 2007 and allowing for at least an equivalent amount of loans being created each by City Finance, Cash Converters and all other lenders who either are not a franchisee of the latter two companies or who do not use our system, these comprising predominantly of what we regard as 'payday lenders', we believe a rough estimate of lending by the so-called fringe or alternative lending sector in Queensland alone is 9,200 loans per month. This equates to some 110,400 per annum. Even if 500 complaints were received, a figure we do not believe has been, this equates to an absolute maximum figure of just 0.453% of all new loan transactions. If 100 complaints had been received, this figure would drop to 0.09%. We believe the true number of complaints made in respect of alternative lenders will be much less than even this number. Even at its maximum, this figure is hardly reflective of the widespread consumer detriment being claimed as occurring. One would expect to find far greater numbers given the amount of attention being devoted to the industry by the Department.

Whilst we are not saying that there aren't rogue lenders operating in Queensland or elsewhere, the Office of Fair Trading's own statistics clearly show, however, that it is unjustly misdirecting its attention at a legislative and policy level to an industry sector where there really isn't a big problem. The Office of Fair Trading's own statistics should be suggesting where its efforts need to be focused.

The Use of Research in Policy Making

Some academics such as Wilson⁴ argue, based on the concept of corporate social responsibility, that there should be a universal right to credit. They have claimed that there are some in society who suffer from financial detriment. Anecdotally, this is primarily as a result of lower socio-economic factors, general economic conditions or the action or equally, in-action of government policies at both State and Federal levels. We have no problem with this statement but the number of affected people should be quantifiable. After all, every Queensland resident has a right to know just how many affected people there are influencing public policy decision making. Not one published paper, however, has ever authoritatively quantified this number.

³ Ibid 2

⁴ Wilson, T, 2006, p9. "*Values driven innovation or inadequate self-regulation? The effective regulation of Australian banks as service providers to low income consumers.*" Available online <http://users.austlii.edu.au/clta/docs/pdf/2007-cof-papers/wilson.pdf> viewed 22/12/2007

Contrary to what some may think, financial detriment is not restricted to those on Federally-supplied Benefits or low incomes. Unfortunately for those on what these agencies and academics regarded as higher incomes, they must suffer from their own incompetence or misfortune at handling their financial affairs whilst those equally incompetent or misfortunate on lower incomes should be rewarded by being able to obtain credit at the lowest cost.

To justify their calls for everyone in society to be able to borrow money at the lowest possible rate available, consumer protectionists⁵ have quoted case studies of some consumers worst affected with an insinuation that every borrower is similarly affected. Indeed, they have not backed up their insinuation with any evidence and this was not one of the findings in the substantial 2006 Victoria study⁶.

Proponents of this legislation go further and would have us believe that those who are disadvantaged should be entitled to borrow at rates lower than those traditionally available to the majority on the basis of it being societally beneficial⁷. Examples of this are the National Australia Bank's No (NILS) or its Step Up Low Interest Loan Schemes (LILS) established in conjunction with the Good Shepherd Youth and Family Service⁸ and its more recent 'Concession Card Account'⁹. We have no issue in those who qualify under these schemes from being assisted as many would not qualify for a loan from the majority of lenders. As the Victorian study showed, however, using a 4% interest rate and allowing for losses of 10%, 71% of the capital needs to be tied up in interest bearing deposits to maintain scheme viability¹⁰. On that basis, there is really very little funding available for actual lending. We submit such schemes by the major banks are more for appearance than anything else; with the limited amount of funding made available and substantial costs effectively transferred to the social agencies¹¹, it assuages the academic calls for corporate responsibility. Thus, these corporations are seen to be doing what some deem as the right thing. Others, such as any of those 300,000 plus Australians who are currently faced with the prospect of their homes being

⁵ As an example, refer to the Joint Community Response submission, September 2007 to the Queensland Government's Discussion Paper on Consumer Credit Code Amendment Bill 2007 and Consumer Credit Amendment Regulation 2007 on behalf of Consumer Action Law Centre (Vic), The Centre for Credit and Consumer Law (Qld), Legal Aid Queensland, Consumer Law Centre, ACT), CARE Financial Counselling (ACT), Consumer Credit Legal Service (WA), Consumer Credit Legal Centre (NSW) Available online http://www.creditcode.gov.au/content/downloads/creditcodesubmissions/Joint_Community_Response.pdf viewed 05/01/2008

⁶ Consumer Affairs, Victoria, 2006. "*The Report of the Consumer Credit Review*". Available online [http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Credit_Review_Documents/\\$file/credit_review_complete.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Credit_Review_Documents/$file/credit_review_complete.pdf) viewed 13/12/2007

⁷ Ibid 4

⁸ Media Release, National Australia Bank, 2006. "*Background on NAB micro-finance initiatives* (announced 26 April 2006)". Available online http://www.nab.com.au/About_Us/0,,78047,00.html viewed 10 February 2008.

⁹ Brochure, National Australia Bank, 2007. Providing the account holder has all their money paid into the account, this account attracts no fees whatsoever.

¹⁰ Ibid 6, p. 38

¹¹ Scutella, R. and Sheehan, G., 2006. "*To their credit: Evaluating an experiment with personal people on low incomes*" *Brotherhood of St Laurence*" Available online www.bsl.org.au/pdfs/To_their_credit_personal_loans_final.pdf accessed 06/11/2006.

repossessed¹², might disagree. With bankruptcy rates rising¹³, no one is asking why this kind of account is being offered only to certain qualified Centrelink clients.

The use of case studies, even if validly highlighting certain adverse commercial practices, is no better than the reliance placed on small-scale research studies such as that of Griffith University upon which the Department has relied heavily, even though it was advised not to. Small-scale research invariably limits the scope and range of what is either reviewed or researched. The same biases are brought equally to the fore in each and call into question whether the research or use of the case study is ethical and has integrity. Shills notes “[t]he ethical values affected by contemporary social research are vague and difficult to formulate precisely. They refer mainly to human dignity, the autonomy of individual judgment and action, and the maintenance of privacy.”¹⁴ The consumer agencies have no ethical bounds in using such material; they rely on situational ethics to justify their cause.

Citing Walt & Gilson, Almeida & Bascolo¹⁵ state that “the underlying assumption of many is that both research and policy-making are logical, rational processes where researchers ask the right questions, plan and conduct their studies rigorously, and circulate their results appropriately, and that decision-makers read research reports, understand the results and their implications, and act to correct their course in the direction indicated. Even admitting to a specific rationality in each of these processes, the real world is not so linear.” These authors argue that there are a number of influences such as Ideological Problems and Media Interference that affect research being used as expected by decision-makers. Ideological Problems are those “that constrain political rhetoric and the formulation of reform agendas, in addition to a lack of political “will” or an inability to formulate and implement more integrated, interactive policies”¹⁶ whilst Media Interference is that “which can both confuse the issue by publicizing results inappropriately and exploit divergences rather than clarifying them”¹⁷.

Almeida & Bascolo go on to cite Bardach who “states that policy analysis theory proposes that evidence is information that affects existing beliefs by important persons about significant features of the problem under

¹² Crawshaw, D. and Venes, P., 2008 citing research by JP Morgan and Fujitsu Consulting in their article “*Repossession risk for 300,000 home owners*”, Courier-Mail, 03 February 2008.

¹³ According to the Australian Financial Review, 8,001 people became insolvent in the quarter ending September 2007, 5% higher than the same quarter in the previous year. Available online <http://yahoo.infochoice.com.au/investment/news/onlinebroking/07/10/article17292.asp> viewed 25/11/2007

¹⁴ Shills, E.A., 1959, p.117. “*Social inquiry and the autonomy of the individual*”, in Lerner, D (ed), “*The Human Meaning of the Social Sciences*”, Meridian Books, New York.

¹⁵ Almeida, C & Bascolo, E., 2006, p.S11. “*Use of research results in policy decision-making, formulation, and implementation: a review of the literature.*” Available online <http://www.scielo.br/pdf/csp/v22s0/02.pdf> viewed 09/02/2008

¹⁶ Ibid 10, p.S12.

¹⁷ Ibid 10. p.S12

study and how it might be solved or mitigated.”¹⁸ Unfortunately, Griffith University has collected little actual evidence; it mainly reviewed some overseas studies and literature. Noting that the Office of Fair Trading not only financially supports but directs what research is undertaken at Griffith, there is little if any autonomy and one may draw a presumption that its research to date is no more unbiased than that applying to any other paid research.

We note that none of the research done by Griffith University appears to have cited any counter-argument in its research such as that done by the Personal Finance Research Centre at Bristol University. Professor Kempson of the Personal Finance Research Centre at Bristol University states

"superficially [an absolute interest rate cap] is a very attractive idea. However, our research with people on low incomes suggests that it is premature while they have such poor access to low-cost credit and could well have an adverse effect on the people it would be intended to benefit. It would, undoubtedly, lead to a displacement of costs (with more additional charges) so that they would not have to be included in the APR quoted by lenders. This would result in a serious lack of transparency for people who need it most."¹⁹

Recalling the parody of ‘Sir Humphrey Appleby’ in the BBC program “Yes, Minister” and its sequel, “Yes, Prime Minister”, in which he was always advising his Minister, the Honourable Jim Hacker to “never hold an enquiry unless you know the outcome in advance,” the Griffith research has been so politicised and compromised that any impartiality is fictional. It calls not only the Department’s decision-making methodology for policy into question but also Griffith’s research impartiality for its paymaster.

The ‘Consultation’ Process

Since the Attorney-General, the current Minister responsible for the Office of Fair Trading, has stated during discussion with representatives of the National Financial Services Federation (NFSF) that he is ‘merely following the advice of the previous Minister’, one must deduce, particularly given other public announcements by members of the MCCA, that this course of action was determined long ago and Ms Keech was intentionally misleading everyone when she stated the “concept of an interest rate cap is highly complex, and I am focused on finding an outcome that balances consumer welfare with the continued

¹⁸ Ibid 10, p. S12

¹⁹ Kempson, E., 2006. House of Commons Treasury Committee enquiry into “*Financial inclusion: credit, savings, advice and insurance*”, pp17-18. Available online <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmtreasy/848/848i.pdf> viewed 14/02/2008

financial viability of lenders”²⁰. Led principally by the *Courier-Mail*²¹, over the past 2 years, this newspaper has hyped up the issue of allegedly high-cost loans based almost entirely on Comparison Rates, to the point that the *raison d’être* for this legislation is more to appease the left wing political element of the party from further media attacks with the introduction of this Marxist ideology than anything else. The Department’s own statistics show that the amount of detriment is nowhere near what has been suggested by the *Courier-Mail*.

The State Premier herself admitted that she is not prepared to listen to any industry counter-arguments when she insisted “vulnerable consumers were being exploited by the exorbitant loans”²² and went on to say “[o]ur priority is to protect consumers here, not to protect the kinds of people in this business”²³. However, what constitutes an exorbitant or high-cost loan has never been determined. In fact, it is subjective and based entirely on the view of the beholder. For example, a lo-doc home loan that has a 13.75% interest rate might be seen to be a high-cost loan to those paying a honeymoon rate of 5.75%. These kinds of derogatory comment by the Premier, though, display the typical prejudices of one that has never dealt with the industry players. She is reliant upon anecdotal evidence yet is unable to produce any evidence to justify her claims of substantial consumer detriment, based on the quantifiable and verifiable number of people this legislation is meant to help.

The residents of Queensland are fully entitled to believe and expect that legislation is properly targeted and warranted and any consultation by a State Government Department on legislation genuinely means that the regulatory body will properly consider the views of all participants before deciding on any course of action. Given the State Premier’s²⁴ comments that “[w]e made a commitment to introduce a cap earlier this year and despite a sustained campaign by pay day lenders opposed to our proposal, I can now confirm that cap will be set at 48% inclusive of interest, fees and charges”, there can be no doubt that the decision to proceed, regardless of the ramifications and earlier commitment of a viable industry, has already been made. This ‘consultation’ must, therefore, be viewed as being no more than a sham, particularly given previous communication with the industry. In attempting to railroad these changes through Parliament, it is

²⁰ Keech, M, 2006. “*Discussion paper: Managing the Cost of Credit*” Message from the Minister, p.6. Available online [http://www.consumer.qld.gov.au/off/oftweb.nsf/AllDocs/E3B0BF78553C677C4A25721B000C96CB/\\$File/0467-Consumer%20Credit%20QLD%20Discussion%20Paper.pdf](http://www.consumer.qld.gov.au/off/oftweb.nsf/AllDocs/E3B0BF78553C677C4A25721B000C96CB/$File/0467-Consumer%20Credit%20QLD%20Discussion%20Paper.pdf) previously viewed November 2006.

²¹ *Courier-Mail*, 2006 – 7. Examples are Patrick Lion’s articles such as “*These interest rates sky high*” dated 26 June 2006, “*Poor left to loan sharks*” dated 05 July 2006, “*Feeding frenzy for sharks*” dated 10 July 2006, “*Fair loan rates push - Queensland excuses for inaction shown up by NSW consumer laws*” dated 26 July 2006, “*Squeeze on lenders*” dated 12 November 2006, “*‘Payday’ rates cap : New laws protect consumers*” dated 27 November 2007, together with others such as “*Mum’s 240pc interest scare*” dated 03 August 2007, “*Bungle lets off loan sharks*” dated 13 November 2007

²² Patrick Lion, *Courier-Mail*, 27 November 2007. “*Payday rates cap: New laws protect consumers*”.

²³ *Ibid* 6

²⁴ Department of Justice and Attorney-General Queensland Media Release, 2007. “*Bligh Government to crack down on pay day lenders*” issued 03 December 2007. Available online <http://www.fairtrading.qld.gov.au/OFT/oftweb.nsf/Web+Pages/A489A3150E694AE24A2573A5007E2FF5?OpenDocument> viewed 04 December 2007.

obvious that the industry has not been, nor will be listened to, just as occurred in New South Wales when that state introduced similar legislation. It is an affront to democracy, common decency and good government.

Having just returned from the UK where that Government engaged in a similarly flawed consultation process²⁵, the industry may well decide to follow that action and seek a similar judicial review should the State Government proceed further.

Unforeseen consequences

In an earlier submission to the Office of Fair Trading²⁶, we stated our belief that forcing all lenders to use the same income model is uncompetitive and will be counter-productive long term. It is worth restating the Credit Ombudsman Service Limited's²⁷ submission that quoted Chris Field as stating "what is sometimes done as good for the individual or, in the short-term, may actually in fact cause significant long-term detriment for all consumers²⁸".

We remind the Government that the vast majority of borrowers that use fringe lenders do so because of poor treatment and service²⁹, a poor credit record or they do not want a credit card. We have previously suggested that consumers would not be prepared to pay higher interest fees and charges if banks and

²⁵ See Ian Drury's article "*Brown to usher in a new atomic power age*" in the Daily Mail (UK) dated 31 December 2007 where the UK Labour Government held a five month public consultation in relation to building more nuclear power stations. Opponents brandished the consultation process as farce and are now preparing a legal challenge to the pro-nuclear findings. The article states "[I]n February, a High Court judge ruled that an earlier consultation had been 'seriously flawed' and no decision could be based on it" and continues "Professor Gordon MacKerron of Sussex University, who recently headed a government advisory committee on radioactive waste, admitted he had 'serious misgivings' about the legitimacy of the consultation process."

²⁶ Min-it Software response in relation to Clause 11 in our response to the Discussion Paper "*Consultation Package – Consumer Credit Code Amendment Bill 2007 and Consumer Credit Amendment Regulation 2007*" dated 17 September 2007.

²⁷ Credit Ombudsman Service Ltd, July 2007. Submission on the "Application of Unfair Contract Terms Legislation to Consumer Credit Contracts in Victoria", p.5. Available online [http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Credit_Review_Unfair_Contract_Terms_Submission/\\$file/credit_revie_w_cosl_unfair_contract_terms_submission.doc](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Credit_Review_Unfair_Contract_Terms_Submission/$file/credit_revie_w_cosl_unfair_contract_terms_submission.doc) viewed 01/09/2007 citing Submissions to Productivity Commission Inquiry into the Consumer Policy Framework, Perth, 23 March 2007, Available online <http://www.pc.gov.au/inquiry/consumer/trans/perth070323.pdf>, at pp 173- 175

²⁸ Credit Ombudsman Service Ltd, July 2007. Submission on the "Application of Unfair Contract Terms Legislation to Consumer Credit Contracts in Victoria", pp.5 -6. Available online [http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Credit_Review_Unfair_Contract_Terms_Submission/\\$file/credit_revie_w_cosl_unfair_contract_terms_submission.doc](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Credit_Review_Unfair_Contract_Terms_Submission/$file/credit_revie_w_cosl_unfair_contract_terms_submission.doc) viewed 01/09/2007 citing Submissions to Productivity Commission Inquiry into the Consumer Policy Framework, Perth, 23 March 2007, Available online <http://www.pc.gov.au/inquiry/consumer/trans/perth070323.pdf>, at pp 173- 175,

²⁹ As examples, see McMinn, T., 24 August 2007. Sydney Morning Herald, "*Maintaining a level of customer service you can bank on*" Available online <http://www.smh.com.au/news/heckler/maintaining-a-level-of-customer-service-you-can-bank-on/2007/08/23/1187462436368.html> viewed 06/09/2007 and AdelaideNow, 31 August 2007. "*Banks must better security, service levels*" Available online <http://www.news.com.au/adelaidenow/story/0,22606,22339040-913,00.html> viewed 06/09/2007

other ADI's were to be required to provide credit to all³⁰. Interestingly, the United Kingdom's OFT is presently taking a test case against a number of lenders that may affect all bank fees and charges. If they are successful, there is little doubt that similar action will follow here. Indeed, at least one organisation³¹ has been set up to assist the UK consumers claim back these allegedly high fees and charges back from their bank(s) for the past 6 years. However, whilst the majority of consumers are undoubtedly not exactly happy about these fees and charges, there is an extremely large number in the UK right now demonstrating very vocally on local radio stations on talk-back programmes³² that they would rather pay them than :

- a) have further banks fold should they be unable to repay them following the wake of the collapse of the Northern Rock Building Society from sub-prime lending;
- b) lose access to cheap or no cost bank accounts; and
- c) have to pay higher interest rates on personal loans, credit cards and mortgages in order to satisfy some idealist societal desire.

Whilst the academics and consumer protectionists are espousing the benefits of credit cards as a solution to the removal of those in this sector, it would be foolish of the Government to ignore the following:

1. The amount of credit card debt is rising³³; and
2. In the UK, one internet-based bank, Egg Banking Plc has recently written to 161,000 of its customers to advise them that they are "high credit risks" and their credit cards expire in 35 days³⁴.

Notwithstanding some of these borrowers dispute their credit standing³⁵ and regardless of whether or not this group of lenders is legislated out of business, it would be foolish to think such a scenario could not occur here.

³⁰ Ibid 24

³¹ Myvesta UK, a registered not-for-profit organisation. Available online http://myvesta.org.uk/bank_charges.html viewed 28/01/2008

³² As examples, refer to listener talkback on BBC Local Radio stations such as Radio Leeds, Radio Tees, Radio Cambridgeshire on 15 January 2008, Radio Leicester on 16 January 2008, Radio Lancashire on 16, 17, 18 January 2008.

³³ Dasey, D. and Taverniti, M., 2007. In their article "*Credit's getting simpler*", Sydney morning Herald dated 09 December 2007, they cite Reserve Bank of Australia figures that show as at the end of September 2007, A\$51.1 billion was owed on credit cards, an increase of 10% on the same quarter for the previous year. Available online <http://www.smh.com.au/news/national/credits-getting-simpler/2007/12/08/1196813081907.html> viewed 09/02/2008

³⁴ BBC News, 2 February 2008. "*Egg customer anger at credit move*" Available online <http://news.bbc.co.uk/1/hi/business/7224268.stm> viewed 03/02/2008

³⁵ BBC News, 9 February 2008. "*Banks 'cancel good payers' cards*" Available online <http://news.bbc.co.uk/1/hi/uk/7236171.stm> viewed 11/02/2008

Calculation methodology

There are a number of issues with this legislation. The first is in who it applies or is meant to apply to. In the Office of Fair Trading's own media release, it states that the "Bligh Government [is] to crack down on pay day lenders"³⁶. As this legislation targets all lenders other than ADI's, the inference must be taken that the Government views every lender other than an ADI as a pay day lender. This is nonsense. There are different sectors of the industry and payday lenders are but one of them. Micro-lenders are not all the same as has been pointed out previously³⁷. If this legislation is meant only to apply to payday lenders, it should be more specifically targeted with a "payday lender" being defined under Schedule 1 as a Principal Definition of the Code, pursuant to section 3(1) of the Code.

The second issue we have is with the actual methodology of calculation. We have raised our concerns about the Comparison Rate distortions before. It is worth noting, however, that all prior legislation has been written in such a way that it is the Comparison Rate that should be used by borrowers to compare loans rather than the Interest Rate. We remind you that the Comparison Rate formula excludes Government fees and charges whereas the calculation of the Interest Rate as proposed by this new legislation includes it. Given these facts, it is theoretically possible for a loan to have a Comparison Rate lower than the Interest Rate. Which rate is therefore more important? How will borrowers be expected to have the knowledge to understand it? Aside from these difficulties, the formula poses serious concerns for those undertaking secured loans where a REVS check is undertaken. Currently, the cost of a REVS search in Queensland is \$11.30 for an online search or \$15.20 for a posted certificate according to the Office of Fair Trading's website³⁸. This is equivalent to the interest on borrowing \$1227 for the online check or \$1651 for the posted certificate for 1 week at 48% per annum. Either fee is excessive when compared to a similar online security search in New Zealand for which the total cost is just NZ\$1.00³⁹ and you can print the result but given that the lenders income is being capped, the Government is effectively reducing the true income the lender can achieve below 48%.

This is an identical situation to that under the UK's Moneylenders Act 1927 where the rate of 48% is to be first found. The formula used to calculate the Moneylenders Act rate also distorted the true return to the

³⁶ Office of Fair Trading Media Release, 3 December 2007. Available online <http://www.fairtrading.qld.gov.au/OFT/oftweb.nsf/Web+Pages/A489A3150E694AE24A2573A5007E2FF5?OpenDocument> viewed 12/02/2008

³⁷ Min-it Software responses to the Discussion Paper "*Managing the Cost of Consumer Credit in Queensland*" dated 10 December 2006 and the Discussion Paper "*Payday lending in South Australia – options to increase consumer protection*" dated 01 November 2006.

³⁸ Office of Fair Trading, Queensland, 2008. "Get a REVS check!". Available online <http://www.fairtrading.qld.gov.au/OFT/OFTWeb.nsf/web+pages/5D2AA07B8AF5CAA04A256B5E00055BC6?OpenDocument> viewed 11/02/2008.

³⁹ NZ Ministry of Consumer Affairs, 2008. Consumer Information: "*Money owing on the vehicle*". Available online <http://www.consumeraffairs.govt.nz/consumerinfo/motorvehicles/mv-problems/mv-problem-money-owing.html> viewed 28/01/2008.

lender⁴⁰. We are not going to re-iterate the information we have provided previously and ask you to refer back to our earlier submissions where we provided relevant information on the fact that no small lender can survive on a 48% capped rate that is inclusive of interest, fees and charges calculated on a daily basis.

Thirdly, in a recent meeting in the UK⁴¹, the author learnt lenders in the 'Home Credit'⁴² market have always used simple interest calculations rather than the daily reducing methodology used here in Australia. This means that the 48% referred to in the Moneylenders Act 1927 is actually equivalent to approximately 82% on a daily reducing basis. Even this requirement, however, no longer applies as the UK now has no capped interest regime. We suggest it is totally inappropriate to simply pick various elements out of overseas legislation and then attempt to transplant it here without fully comprehending its actual implications.

Aside from the actual nominal rate being suggested, the methodology of calculating the rate requires a calculation similar to that of the Comparison Rate be performed at the outset to ensure compliance. The fact that all Government fees and charges be included, however, will require two separate calculations be made by the lender; one for the Comparison Rate and another for the Interest Rate. When ADI's are being exempted from this same requirement, it is ironic that these measures seek to impose additional costs on smaller lenders who are being castigated for allegedly providing 'high cost' loans. We are not sure what actually makes a loan 'high cost' given the distortions inherent in the formula but some will certainly have to pay more for their software if they intend staying in business and be compliant.

Finally, we note also that there are no transitional provisions included in this legislation. This is a ludicrous situation. If the Office of Fair Trading can allow Real Estate and Motor Vehicle Dealers 2 months to commence using a new or updated form after public release⁴³, then this shows that immediate effectiveness of this legislation is preposterous as the industry has no time in which to adapt. From a purely operational perspective, software developers cannot start to modify software and derive new percentage rate calculations based on a complex mathematical formula contained in a consultation document has been released and which may or may not be subject to change.

⁴⁰ Bizley, M.T.I., 1966. "The Rate of Interest under the Moneylenders Act, 1927". Journal of the Institute of Actuaries, Volume 92, pp.340 – 346. Available online <http://www.actuaries.org.uk/files/pdf/library/JIA-092/0340-0346.pdf> viewed 13/02/2008

⁴¹ Meeting with the UK's Consumer Credit Association Director and another Executive on 3 January 2008 at its Headquarters in Chester, England.

⁴² The term 'Home Credit' is used similarly to that of 'Fringe Lender' here in Australia. Given that most lenders in this market physically collect monies owing on a 'door-to-door' basis, however, it has a more significant meaning in the UK.

⁴³ Office of Fair Trading website, 2008. "Forms" Available online <http://www.fairtrading.qld.gov.au/OFT/oftweb.nsf/Web+Pages/8CC4CD66C6395FC34A2573CD001772EA?OpenDocument> viewed 03/02/2008

Requirement overlooked

Notwithstanding all the above, we wish to bring to the Department's attention one very important prerequisite which has been overlooked in the haste to introduce this legislation.

No statutory public benefit test has been performed.

The Decision-Making Regulatory Impact Statement and Final Public Benefit Test 44 (the "RIS/PBT") dated March 2006, the link to which somewhat remarkably appears to have been removed from the Downloads section of the Consumer Credit Code website but which may still be found by entering the correct document title in a search engine, specifically states:

“National Competition Policy Requirements

In April 1995, the Commonwealth, State and Territory Governments signed a set of agreements to implement National Competition Policy (NCP). Under NCP, each participating jurisdiction committed to implementing a series of competition reforms, including the review and reform, where necessary, of all legislation which contained provisions restricting competition. Each jurisdiction also agreed to subject new legislative proposals that contained measures restricting competition to a public benefit test (PBT).

The guiding principle for the NCP review of legislation, as contained in Clause 5(1) of the Competition Principles Agreement, is that legislation should not restrict competition unless it can be demonstrated that:

- the benefits of the restriction to the community as a whole outweigh the costs; and
- the objectives of the legislation can only be achieved by restricting competition.

This RIS/PBT identifies the costs and benefits of each option advanced to regulate the fringe credit market. Feedback provided on the options and the identified costs and benefits of each option has been incorporated into this analysis.

Regulatory Impact Statement Requirements.

In addition to each State and Territory's NCP obligations, a Regulatory Impact Statement (RIS) must be prepared on proposed changes to the Code. This RIS/PBT identifies the costs and benefits of each option advanced to regulate the fringe credit market. Information gained through consultation has enhanced the weight of the cost-benefit analysis contained in this RIS/PBT.

⁴⁴ Consumer Credit Code website, 2006. "The Decision-Making Regulatory Impact Statement and Final Public Benefit Test" dated March 2006. Available online http://www.creditcode.gov.au/content/downloads/FRINGE_RI.pdf viewed 11/02/2008

The key prerequisites for an RIS are that an initial assessment indicates regulation is necessary and the groups affected have been given, to the extent possible, advance notice of any new regulation or amendment and have been consulted adequately, unless there are very sound reasons for not taking such steps.

The Council of Australian Government's Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies requirements mean that the following are included in this RIS/PBT.

- **Overview of the industry:** an overview of the fringe credit market and borrowers who use fringe credit providers.
- **The problems sought to be addressed:** why government action is being considered in the fringe credit market, including identification of the problems sought to be addressed.
- **Objective:** the objective which the proposed Code amendments are intended to fulfil is stated in relation to the problems and how those problems might be fixed.
- **Statement of the proposed regulatory changes and alternatives:** this part of the RIS/PBT describes the proposed amendments to the Code and alternatives to allow comparative assessment and evaluation in the rest of the RIS/PBT.
- **Costs and benefits:** an outline of the costs and benefits of the proposals being considered including direct and indirect economic and social costs and benefits is included, as well as analysis of alternatives including maintaining the status quo .
- **Consultation:** this RIS/PBT outlines who has been consulted and provides a summary of the feedback provided during consultation by those who may be affected by the proposed action.
- **Evaluation:** an evaluation of the relative impacts of the proposals and alternatives is included to show that the desired policy objective cannot be achieved at a lower cost to business and the community at large.
- **Review:** consideration of how the effectiveness of the proposed changes to the Code will be monitored is included and is relevant to ensuring regulatory action remains justified in changing circumstances.”⁴⁵

It continues:

“One way to address the problems related to the imposition of fees that translate to exorbitant rates of interest is for jurisdictions to implement an interest rate cap. The Code is based on the Australian Uniform Credit Law Agreement of 1993 in which each State and Territory agreed to maintain uniform legislation in the area of consumer credit. However, interest rate caps are not

⁴⁵ Ibid 16, pages 9-10

covered by the uniformity agreement. Consequently, each State and Territory is free to determine whether they implement and maintain interest rate caps.”⁴⁶

Importantly, it states:

“Given the exclusion of interest rate caps from the uniformity agreement, further analysis of this option has **not** been undertaken”⁴⁷ and re-iterates “...an impact analysis has **not** been undertaken with respect to this option [interest rate capping] as there is no regulatory power to implement them at a national level.”⁴⁸ (This author’s bolding in both cases.)

We are encouraged by the State Premier’s recent comments that “Queensland boasts a healthy democracy with strong accountability mechanisms, checks and balances”⁴⁹ and “she wanted to provide the public with greater accessibility to information and better transparency”.⁵⁰ Whilst we acknowledge a number of industry participants have attempted to discuss matters with the Minister and other MP’s on an individual basis⁵¹, the Government is not adhering to the transparency ideals the State Premier says she wants to introduce.

In this particular case, the checks and balances have not been properly put into place and this legislation may therefore not be enacted until such time as has. If the Government wishes to implement such a cap, a properly constituted Risk Impact Statement and Public Benefit Test relating directly to it must be carried out by the State of Queensland. Furthermore, on the basis that no similar Risk Impact Statement and Public Benefit Test can be found as having ever been performed by the State of New South Wales, it would appear that state’s legislation pertaining to interest rate capping was enacted in breach of this requirement and is subject to challenge.

⁴⁶ Ibid 16, page 36

⁴⁷ Ibid 16, page 37.

⁴⁸ Ibid 16, page 71.

⁴⁹ Joint Ministerial Statement, 17 September 2007. Premier The Honourable Anna Bligh and Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland The Honourable Kerry Shine. Available online <http://statements.cabinet.qld.gov.au/MMS/StatementDisplaySingle.aspx?id=54046> viewed 15/02/2008

⁵⁰ Ibid, 48

⁵¹ We refer to discussions or attempted discussions by Cash Converters, City Finance and the National Financial Services Federation

Conclusion

If this measure is being introduced in order to clean the industry up, then the policy makers have got it all wrong. Whilst we have endeavoured to apply a fair approach in our responses to prior consultations, we cannot support this proposal as it stands. Had the Office of Fair Trading offered the industry a true 48% return on money lent, the industry would not be objecting as much as it has. Unfortunately, it hasn't.

It is our contention that any legislation introduced should not only be fair but also be seen to be applied fairly. Having failed to perform the required statutory Risk Impact Statement and Public Benefit Test and draft legislation arising out of such a test's findings, the Government is in contravention of its own laws in attempting to enact this legislation. This proposed Bill and Regulation should therefore not be enacted until such time as the issues of capping and anti-competitiveness are properly addressed as required.