THE Financier

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THE FINANCIERS ASSOCIATION OF AUSTRALIA LIMITED NEWSLETTER

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Welcome to the Winter 2008 edition of The Financiers Association of Australia Limited newsletter.

As usual we try to keep up with any legislative changes in the credit code as well as inserting any interesting general business pieces gleaned from various sources.

A welcome is also extended to new members at this time.

Productivity Commission Report on Consumer Policy: consumer protection law and product safety

The Minister for Competition Policy and Consumer Affairs, Chris Bowen MP, has released the Productivity Commission's final report of the Review of Australia's Consumer Policy Framework.

The Productivity Commission's key recommendations include:

- a single national generic consumer law, based on the *Trade Practices Act 1974* (TPA), which would apply in all States and Territories;
- identifying unnecessary or costly consumer regulation that only applies in a few States and Territories, or to one industry, and either removing them or, if justified, introducing nationally consistent rules;
- transferring regulation of credit providers and finance brokers to the Australian Government, with the Australian Securities and Investments Commission (ASIC) as the regulator;
- national laws to tackle unfair terms in consumer contracts;
- a national approach to product safety laws and enforcement; and
- new redress and enforcement powers for consumer regulators, including the ability to seek redress for non-parties, civil pecuniary penalties, banning orders and substantiation notices.

The Commission also recommended an enhanced role for the Australian Government in consumer policy.

The Government will consider the recommendations and, as agreed by the Council of Australian Governments (CoAG), respond formally at the end of October 2008.

Consumer Credit Code update

The Ministerial Council on Consumer Affairs (MCCA) has agreed to refinements to the Consumer Credit Code. The amendments are intended to enhance the operation of the Consumer Credit Code by:

1. Tightening current exemptions to the Code for short term credit and pawnbrokers ;
2. Dealing with abuses of business purpose declarations aimed at avoiding the Code;
3. Enhancing consumer remedies under the Code by broadening existing powers of courts to review credit fees and charges and changes of interest;
4. Providing Government Consumer Agencies with standing to conduct proceedings under the Code on behalf of consumers;
5. Prohibiting lenders from taking 'blackmail' security over essential household items; and
6. Requiring that consumers be provided with information about their rights and responsibilities regarding direct debit payment arrangements.

ASIC approves Financial Ombudsman Service

ASIC has approved the new Financial Ombudsman Service (FOS).

FOS will represent the merger of the three biggest complaints schemes operating in the financial services industry – the Financial Industry Complaints Service (FICS), the Banking and Financial Ombudsman Service (BFSO) and the Insurance Ombudsman Service (IOS).

Together, FICS, BFSO and IOS deal with most consumer complaints about financial services and cover the vast majority of retail financial services providers, including banks, credit unions, life and general insurance companies, stockbrokers, investment managers and financial planners. Between them, the schemes dealt with about 10,000 consumer disputes in the last reporting period and over 100,000 telephone enquiries.

FOS will be operational from 1 July 2008. In the first instance, FOS will continue to operate the rules and procedures of the three existing schemes, with a view to operating under a single set of rules no later than 1 January 2010.

Consumers and investors who want to refer a complaint to FOS can contact the scheme by calling 1300 780 808 .

Consumer credit interest rate cap for Queensland

Background

The Consumer Credit (Queensland) and Other Acts Amendment Bill 2008 has been introduced into Queensland Parliament.

The Bill, will introduce the concept of a maximum annual percentage rate for consumer credit contracts. In calculating the rate, fees and charges will be taken into account.

The Regulations prescribe a 48 per cent per annum annual percentage rate cap on consumer loans. Credit fees or charges arising from the establishment or maintenance of a temporary credit facility by an ADI will not be included in the calculation.

There are currently no caps on interest rates in Queensland and lenders can charge high interest rates, fees and charges on loans. Victoria, New South Wales and the Australian Capital Territory currently have interest rate caps to control the cost of consumer credit.

Credit providers who charge above the legislated maximum will be required to pay back any amount over the cap and will face civil penalties of up to $500,000 for breaching the Consumer Credit Code. They will also face criminal penalties of $10,000 for individuals and $50,000 for corporations.

The cap will apply to new loans made after the Act commences as well as to existing credit contracts which are extended or under which interest rates are increased or new fees or charges imposed after the Act commences.

Status

The *Consumer Credit (Queensland) and Other Acts Amendment Bill* was passed by the Queensland Parliament on 1 May 2008.

Challenges for the Mortgage Industry

2008 presents a number of challenges for the mortgage industry. Besides the credit and liquidity problems and some falling property values, there is a significant legislative agenda. This article attempts to bring together in one place the key current legislative proposals. In most cases, times for commencement are not available, and not all of the proposals may proceed.

- National uniform regulation of finance brokers. Submissions have been lodged and there will most likely be another round of consultation. No start date is envisaged before 2009. See the *Finance Broking Bill 2007*, which is a discussion draft only.

- The Productivity Commission has released a draft report into Australia's Consumer Policy Framework. This Commission will provide a report to the Commonwealth Government that could trigger further legislative change. Although the report is only in draft form, the report has recommended that 'responsibility for regulating finance brokers and credit providers should be transferred to the Australian Government, with the regulatory requirements encompassed within the regime for financial services administered by ASIC'. See *Review of Australia's Consumer Policy Framework – Productivity Commission Draft Report.*

- There is greater involvement by ASIC in the credit market. ASIC has already pursued some brokers for unconscionable or misleading conduct. ASIC is also currently conducting an enquiry into exit fees.

- Public consultation ended on 21 September 2007 in relation to national proposals to amend the UCCC to:

  - ☐ remove the conclusive presumption provided by a business purpose declaration;
  - ☐ require all 'charges in the nature of interest' to be shown as an annual percentage rate;
  - ☐ strengthen the ability to review fees, charges, and interest rates, including changing the test from 'unconscionable' to 'unreasonable';
  - ☐ allow government agencies to take action on behalf of borrowers;
  - ☐ require fees paid to associates of the lender to be included as a charge by the lender in determining whether interest rate caps are exceeded;
  - ☐ prohibit mortgages over essential household property; and
  - ☐ require further information about direct debits.

  Very extensive submissions were received on these proposals. The submissions are currently being considered, and it is expected a further draft for further public consultation will be released. See the *Consumer Credit Code Amendment Bill 2007*, discussion draft only.

- (Victorian UCCC lending only) From 18 March 2008, the Director of Consumer Affairs Victoria can take action on behalf of a consumer, or take class actions on behalf of a group of borrowers in relation to UCCC matters. It is yet to be seen how this power will be used. Hopefully, the power will be used to pursue fringe practices and will not impact on mainstream lenders. See the *Consumer Credit (Victoria) and Other Acts Amendment Bill 2007*.

- (Victorian UCCC lending only) From a date yet to be specified, lenders who provide UCCC credit to Victorian residents will need to be members of an ASIC approved dispute resolution scheme. There will also be minor changes to the procedure to obtain a credit providers licence in Victoria. See the *Consumer Credit (Victoria) and Other Acts Amendment Bill 2007*.

- (Victorian UCCC lending only) Victoria issued a consultation paper regarding a proposal to extend unfair contract legislation to credit contracts. This will make unfair contract terms illegal and automatically void. Under the current system, unfair terms are valid unless and until a court finds sets them aside as unconscionable. This will only apply to UCCC lending to Victorian residents. Submissions closed on 2 July 2007. The target commencement date is 1 January 2009. See *Application of unfair contract terms legislation to consumer credit contracts.*

- Privacy reform which may introduce positive credit reporting. A key issue is who will have access to that information, and how the availability of that information will impact on lo doc and no doc loans. Will the use of a positive credit report be considered a reasonable due diligence? Hopefully any reform will clarify and simplify the law as it relates to disclosure of personal and credit information in the finance industry. Submissions closed on 7 December 2007 and are now being reviewed. See *Review of Australian Privacy Laws*.

- Personal property security reform. If adopted, these proposals will establish a single way to take security over any kind of asset other than real estate. This will result in an easier and more certain way to take security over non-real estate assets, and should encourage lending on the security of those assets. See *Review of the law on Personal Property Securities*.

- ASIC is reviewing the Electronic Funds Transfer Code of Conduct. The importance of this Code is sometimes under estimated. The Code applies to all card and electronic transactions and as the number and size of both forms of transactions are growing, the rules governing those transactions will become increasingly important. Submissions closed on 30 April 2007. There will be a further public consultation on a revised draft code once the working group has completed its initial redrafting of the Code. See *Review of the Electronic Funds Transfer Code of Conduct (2007)*.

- Full implementation of customer identification and AML/CTF Programs commenced for lenders commenced on 12 December 2007. AUSTRAC is reported to have already commenced audits. Lenders need to file their first report by end March 2008.

- The trial of e-conveyancing is continuing in Victoria. Most lenders are keen to see a nationally uniform scheme, and this is being championed by National Electronic Conveyancing Office through the National Electronic Conveyancing System (NECS). Gadens is representing the non-bank lenders on the National Project Team, and also representing a number of banks through other committees. Electronic conveyancing is an important step to enable straight through processing (STP).

A significant challenge for the mortgage and credit industry is keeping track of and complying with these initiatives.

If you come across or would like to contribute any article that may be of interest for the newsletter please fax on (02) 9299 1433 or post to the Association c/- GPO Box 3463 Sydney NSW 1043.

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