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By email: [creditenhancementsbill@treasury.gov.au](mailto:creditenhancementsbill@treasury.gov.au)

The General Manager  
Retail Investor Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Dear General Manager

**Exposure Draft - National Consumer Credit Protection Amendment (Enhancements) Bill 2011 and Draft Credit Card regulations**

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the National Consumer Credit Protection Amendment (Enhancements) Bill 2011 (**the exposure draft bill**). This submission also provides comment on the Draft National Consumer Credit Protection Regulations regarding recent credit card reforms (**the credit card regulations**) distributed by Treasury on 5 August 2011.

Briefly, we have recommended regarding the credit card regulations:

- that regulations regarding the process for providing consent to receive unsolicited credit limit invitations need to be significantly strengthened;
- amendments to regulation regarding the provision of out of date information on credit card key facts sheets, including that lenders be permitted to provide information that is a maximum of one week out of date (rather than the three months currently proposed); and
- amendments to the information obligations on lenders regarding customers exceeding their credit limit.

Regarding consumer leases we recommend:

- amendments to the proposed statements of account;
- allowing only reasonable fees and charges actually incurred to be passed on to consumers who terminate a lease before receiving the goods in question, and require a statement to be provided setting out those costs;
- clarification and extension of the rights a consumer has against a lessor for a misrepresentation by a supplier of goods under a lease; and
- clarification that the provision regarding false and misleading representations will catch situations where the lessor indirectly creates an assumption that the customer will be offered a loan or sale by instalments, but is ultimately offered a lease.

Regarding the credit code enhancements we recommend:

- the restriction of the term 'financial counsellor' include a regulation making power to also restrict other similar terms as they become popular;

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- the remedies for unfairness and dishonesty be retained, but a number of details be revised; and
- the explanatory memorandum provide explanation of the objectives of the exclusions from "invitation" in regards to the provisions on canvassing credit at home.

Regarding Reverse Mortgages we have made recommendations regarding:

- the definition of 'reverse mortgage';
- items not permitted to be included in contracts;
- how 'market value' is defined; and
- damage caused, or misrepresentations by debtors.

Our comments are detailed more fully below.

### **About Consumer Action**

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

Since September 2009 we have also operated a new service, MoneyHelp, a not-for-profit financial counselling service funded by the Victorian Government to provide free, confidential and independent financial advice to Victorians with changed financial circumstances due to job loss or reduction in working hours, or experiencing mortgage or rental stress as a result of the current economic climate.

### **The Credit Card regulations**

#### *Consent to provide credit limit increase invitations: regulation 28LI*

The combined effect of the Act and proposed regulation 28LI requires that consent given in response to a written communication must be via a 'stand alone' document (the example of 'stand alone' being that it is not 'attached' to an application form) and the consent document must clearly set out the disclosure requirements at section 133BF(4) of the National Consumer Credit Protection Act (**NCCP**), namely:

- that the consumer can choose whether to apply for a limit increase;
- that the licensee can choose whether to grant a limit increase; and
- that the consumer can withdraw consent at any time.

In our view, these restrictions do not go nearly far enough. As currently drafted, lenders will be able to present customers with requests for consent which encourage inattentive or impulse decision-making. For example, even with the 'stand alone' requirement:

- the lender could present the consent document to a customer at the same time as other credit card application documents (as long as it is not 'attached' to the application form) with a 'sign here' flag at the relevant part of the consent form. The consent form could be designed to only require the customer to sign and date for consent to be given. We suggest that few customers read their card application forms and simply sign as requested, so this alone will provide lenders with the 'consent' of many new applicants. Many will simply believe they need to sign the form as part of their application and will do so without asking questions;
- where a consumer has chosen to request a one-off credit limit increase, the lender could present the consent document alongside the forms required to apply for that increase (creating the problems in the point above)—our point is that a consumer's decision to apply for a one-off increase does not imply that they wish to receive unsolicited offers to further increase their limit in future;
- the lender could present the consent form as a glossy, 'stand alone' marketing document (for example: 'would you like financial freedom through receiving credit limit upgrade offers?'). This could be done in a way that complies with regulations, yet be clearly inconsistent with the kind of disclosure the regulations envisage; or
- the lender could request customer consent as part of a promotion where the customer enters a draw to win a prize if they provide consent (either by ticking a box or signing their name).

We suggest that lenders will quickly be able to secure the 'consent' of most of their customers in these kinds of ways, and thereafter continue offering unsolicited credit limit increases as if the recent restrictions at section 133BE of the NCCP had never been made. This being so, unless requirements of consent are tightened, we entirely fail to see the point of creating those restrictions at all.

It is worth re-stating at this point why we oppose unsolicited credit limit increase offers. These offers are carefully designed to prompt consumers to make an impulse decision to apply for credit which they probably do not want or need.<sup>1</sup> As outlined elsewhere,<sup>2</sup> our casework experience (and that of other community legal and financial counselling services) shows that these offers frequently causes or exacerbates serious financial distress for many people. It is our view that unsolicited credit limit increase offers are entirely contrary to Commonwealth policy around responsible lending and financial literacy or indeed the original intent of the credit reforms. The legislation and proposed regulations in our view do not effectively implement the ALP's election platform which stated that:

the polic[y] will also give more say to consumers over their credit card products by ensuring that... unsolicited credit limit extension offers are not allowed unless the consumer has agreed to the service.<sup>3</sup>

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<sup>1</sup> For more details on the techniques used, refer to Consumer Action's 2008 report *Congratulations, You're Pre-Approved*, accessible at <http://www.consumeraction.org.au/downloads/CongratulationsYourePreApprovedfullandfinalreport150808.pdf>

<sup>2</sup> See, eg, Consumer Action, Submission to Consultation Regulation Impact Statement on Responsible Lending Practices in Relation to Credit Cards, accessible at: <http://consumeraction.org.au/downloads/SubmissiontoResponsibleCreditCardLendingRIS071008.pdf>.

<sup>3</sup> <http://www.alp.org.au/agenda/more---policies/fairer-simpler-banking/>

The consent provisions as proposed will allow that in many instances, consumers will find themselves subject to receiving such offers without actively having 'agreed to the service'.

For the regulations to achieve their purpose, they will require considerable strengthening.

**We recommend that:**

- the regulations prescribe a form for the provision of consent which:
  - contains the disclosure required by section 133BF(4);
  - requires customers to fill in their details to consent (rather than simply signing or ticking a box) to ensure that the customer is engaged and fully aware of the consent they are providing;
  - this form should not be attached to or even provided alongside any other material (including application forms or promotional material).
- If Treasury is opposed to prescribing a form, then in the alternative we recommend that the regulations should:
  - prohibit consent forms from being presented alongside other material such as application forms or promotions;
  - prohibit consent forms from also including discussion of any other matter except granting consent to receive these offers;
  - prohibit consent forms from allowing consent simply by ticking a box, or signing—the customer should be required to fill in their details to ensure they are not consenting inattentively or impulsively.
- regardless of whether a form is prescribed or not, the regulations prescribe a system to allow customers to quickly, simply and without cost withdraw their consent. This will ensure that lenders do not require either the payment of fees or cumbersome administrative processes for consumers to withdraw consent. At present, s133BF(4) only requires providers to tell consumers they can withdraw at any time but does not set out a process;
- provide that consent lapses after a given time, for example 2 years (that is, introducing an "opt-in" process to regain consent).

*Key facts sheets - Provision of out of date Key Facts Sheets (regulations 28LF)*

It is not clear to us why the regulations should allow lenders to provide Key Facts Sheets with information that is up to three months old.

The Explanatory Memorandum to the National Consumer Credit Protection Amendment (Home Loans and Credit Cards) Bill 2011 is the only guidance we can find on why out-of-date information will sometimes need to be provided. The Explanatory Memorandum states at 3.15 that an example is "where the annual percentage rate has changed from the figure stated in the Key Facts Sheet". In this scenario, we cannot understand why the online Key Facts Sheets generator would not be updated at the same time as the new rate comes into effect. Even allowing for cases where, for example, an employee of the lender distributes a recently out-of-

date Key Facts Sheet by mail to a customer, we fail to see why any sheet should reach a customer more than one week out of date.

It is also important that the regulations be clear that a lender is only permitted to provide an out of date key facts sheet for innocent reasons. This is to ensure the regulations do not allow lenders to gain a competitive advantage by distributing out-of-date key facts sheets showing a lower annual percentage rate than is currently available.

**We recommend that:**

- regulation 28LF be amended to require that for the purposes of NCCP section 133BC(3), lenders cannot provide Key Facts Sheets that are no more than one week out of date;
- regulation 28LF be amended to clarify that a Key Facts Sheet may only be out-of-date for the purposes of 133BC(3) for innocent (for example, administrative) reasons; and
- the Key Facts Sheets template at Schedule 6 of the regulations be amended include:
  - a 'correct at' date, showing a date on which the information was up-to-date;
  - a statement to the effect that the information on the Key Facts Sheet may be out of date at the time the consumer applies for the credit card, and how they can confirm whether or not the information is up-to-date.

*Lender obligation to notify consumer of use of credit card in excess of credit limit: regulation 28LJ*

Where a consumer exceeds their credit limit, sub-regulation 28LJ(2) requires a lender to inform the customer within 48 hours of being notified. It is not clear to us why it should take this long.

We are also unsure why a lender should be required to only notify a customer once every statement period that the customer has exceeded their credit limit (see 28LJ(4)). If it is important that consumers are made aware that they have exceeded their limit, we do not see the value of placing arbitrary restrictions around when customers need to be notified and when they do not.

**We recommend that:**

- sub-regulation 28LJ be amended to require that a lender should notify a consumer 'as soon as practicable, but within 48 hours' from being notified.
- subsection 28LJ (4) be deleted.

*Disclosure of fees, charges and higher interest: regulation 28LK*

Regulation 28LK sets out the disclosure a lender must provide to a consumer where the consumer is electing to have fees, charges or a higher rate of interest charged on a credit card used in excess of the credit limit. In our view these requirements are too weak, and will allow the lender to gain the 'consent' of most customers in a way that ensures those customers are unaware they have consented at all.

The ban on applying fees, charges or higher rates of interest recently introduced into the NCCP was introduced to prevent unreasonable penalties being applied to consumers who in many

cases have simply made an innocent error. The idea of allowing lenders to charge fees, charges or higher rates of interest if the consumer consents (as permitted by recent amendments to the NCCP) seems to us to make very little sense—we cannot imagine why any fully informed consumer would ever agree to pay such charges. However, if it is to be allowed, it is important to ensure that consumers are fully informed of the consequences of giving this consent.

**We recommend that** regulation 28LK be amended to require that consent to charge fees, charges and higher rates of interest can only be given through a stand-alone form which:

- is prescribed by the regulations
- sets out the information currently at paragraphs 28LK (a) and (b); and
- clearly explains that the lender cannot charge the fees, charges or higher interest in question without receiving such consent.

## **Consumer Leases**

*Section 175C, 175D and 175H: Statements of account*

**We recommend that:**

- A statement of account should be provided at least every six months. Twelve months is in our view, a very long time between statements, and six monthly statements will not create a significant burden for lessees.
- Regulations created under section 175D should provide that statements disclose that the lessee will not own the goods at the completion of the lease. One of the most common complaints we hear from consumers regarding consumer leases is that they were misled or otherwise unaware that they had entered into a lease (rather than a credit contract) and that they would not own the goods at the end of the lease term.
- Statements provided three months before the termination of the lease under section 175H should be prescribed by regulation. This is to ensure that they provide useful information to lessees rather than simply being used by lessors as a marketing tool to encourage repeat business.
- As well as the statements envisaged by sections 175C, 175D and 175H, we recommend that lessors be required to send a statement to the lessee at the beginning of the lease term clearly setting out key information regarding the lease, and that the consumer will not own goods at the end of the lease term.

*Section 178A: Termination before goods have been provided*

**We recommend that the section 178A be amended:**

- that only reasonable fees and charges that have been actually incurred by the lessor are permitted by s 178A(2); and
- that the lessor is required to provide the lessee with a statement explaining the fees charged.

### *Section 179T: Lessor liability for supplier misrepresentations*

Section 179T provides the lessee rights in regards to representations, warranties or statements made by the supplier in relation to goods, but not in relation to the lease itself. This is less protection than is offered for equivalent credit contracts—the combined effect of sections 128 and 129 of the Credit Code is that a consumer has linked credit rights for a misrepresentation (et cetera) in regards to both the loan and the goods and services.

Section 179T is silent as to the consumers rights regarding services provided under the lease in combination with goods. Consumer Action frequently sees cases where educational software is leased on the understanding that the product is accompanied by a service (tutoring and other ongoing support), which would not be covered under the current drafting of section 179T.

Further, we note that the definition of 'goods' in section 204 of the Code does not specifically include computer software (we note that the definition of goods in section 2 of the Australian Consumer Law does include computer software). Consumer Action frequently sees cases regarding poor conduct by traders who lease educational software products. To remove doubt, it would be useful to specify that such products are covered by section 179T.

**We recommend that** section 179T be amended to

- allow the lessee rights against the lessor for misrepresentations, warranties or statements by the supplier regarding:
  - the lease itself (as well as the goods or services provided under the lease), and
  - services provided alongside goods; and
- include a note clarifying that the definition of 'goods' includes computer software.

### *Section 179U: False or Misleading Representations*

Section 179 U provides that:

- (1) A person must not make a false or misleading representation:
  - (a) in relation to a matter that is material to entry into a consumer lease or a related transaction; or
  - (b) in attempting to induce another person to enter into a consumer lease or a related transaction.

Clients of Consumer Action with problems relating to consumer leases commonly report that they believed they had entered into a credit or rent-to-buy contract rather than a lease. Clients frequently claim they were misled in this regard. However, there may not always be an easily identifiable representation that gives consumers this impression—it may be one or a number of much subtler factors.

For example, the decision-maker in *Walker v DTGV1*<sup>4</sup> noted the Motor Finance Wizard's advertising (among other things) promotes its phone number as '1800 CAR LOAN' and avoids

<sup>4</sup> [2011] VCAT 880 (12 May 2011)

using the word 'lease' at all<sup>5</sup>. In this case (as in others that consumers have approached Consumer Action about), this advertising leads consumers to assume they will be offered a loan, but many are ultimately offered a lease.<sup>6</sup> In *Walker*, the consumer presumably would have known she was entering into a lease had she read the complex, 14 page contract but did not do so at least partly because she had waited at Motor Finance Wizard's office for five hours, was mentally exhausted and was not given any time alone to read the documents.<sup>7</sup>

It is unclear to us whether this collection of factors would be considered 'material' for the purposes of section 179U. In relation to the mirror provision at section 154 of the Credit Code, Beatty and Smith note that:

The Code does not define 'material'. Presumably in this context, it includes anything upon which a person actually relies in connection with entry into a credit contract or related transaction.<sup>8</sup>

It seems to us that the intent of sections 154 and 179U would be to catch conduct of the kind described in *Walker*. However we are not certain that, on a plain reading of 179U, Motor Finance Wizard's phone number could be shown to be considered a 'material' matter—despite the fact that it may lead the consumer to assume that they will enter a credit contract and that assumption is not disturbed because of the circumstances that follow.

Other traders also create arrangements which leave consumers unsure about whether they will have a right to purchase the goods at the end of the lease term. For example, the Micah Law Centre's 2007 report *A Loan in Lease Clothing* noted that one provider trader used a complex process whereby the consumer could keep the leased items after the expiry of the lease term without making further payments, though the goods remained the property of the lessor. Should the customer choose to sell the goods, they did so as an agent of the lessor and forwarded one dollar from the sale to the lessor.<sup>9</sup>

In our view, this arrangement is clearly designed as a regulatory avoidance technique—it is designed to technically be a lease under the law, but in all respects resemble a sale by instalments. This confuses consumers and leaves them unsure of their rights under the contract. Again, it appears that it is the intent that this kind of conduct would be caught by 179U but whether it would is not clear.

**We recommend that** the explanatory memorandum to the Bill note that, where a lessor directly or indirectly (including through their promotional material) gives the lessee the impression that the product they will be offered is a credit contract or sale by instalments (rather than a lease), this may be considered a material representation for the purposes of section 179U(1).

<sup>5</sup> at 56.

<sup>6</sup> at 62.

<sup>7</sup> at 82-3.

<sup>8</sup> Andrea Beatty and Andrew Smith (2006) *Annotated Consumer Credit Code and Regulations* (3rd ed), LexisNexis Butterworths, Australia. See para 144.15.

<sup>9</sup> At p 5. Accessed on 17 August from [http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV\\_Credit\\_Grant\\_Resources/\\$file/credit\\_grant\\_resources\\_micah\\_law\\_centre\\_consumer\\_leases\\_project.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Credit_Grant_Resources/$file/credit_grant_resources_micah_law_centre_consumer_leases_project.pdf).

### *Disclosure requirements and exclusions in National Credit Code section 171*

We understand that disclosure requirements and the exclusions of certain leases under section 171 of the Code will be addressed at a later date. We look forward to providing comment on these matters in due course.

### **Enhancements**

#### *Section 154B: Restriction of the term 'financial counsellor' or similar terms*

We strongly support the restriction of the use of the term 'financial counsellor' (and similar terms). However we suggest that fringe credit providers will over time begin using other terms with a similar meaning and it may be open to debate whether those terms are restricted under paragraph 154B (1)(c). For the avoidance of doubt, the Government should be given the power to regulate the restriction of other terms in future, and could initially use this power to prohibit similar terms such as "debt counsellor" or "credit counsellor".

**We recommend that** section 154B be amended to provide a power to regulate that use of other specified terms is also restricted under 154B(1).

#### *Section 156: Canvassing credit at home*

We strongly support the inclusion of the prohibition of canvassing credit at home. As described in our report with Deakin University, in-home sales of credit with goods or services, often through a coerced "invitation" into the home, is a significant cause of consumer complaint.<sup>10</sup> This report identifies key problems with these transactions, including:

- the sales took place in the consumer's home after an initial (usually coerced) invitation by the consumer;
- the cost of goods (commonly educational software) is significant—often many thousands of dollars;
- the cost is not disclosed until the end of the presentation;
- credit is often arranged by the salesperson; and
- interviews with consumers suggest that emotionally manipulative selling techniques are commonly applied to heighten anxiety about children's education.

We particularly support section 156(3) which deems certain acts not to be invitations into the home, and thus included in the prohibition. Our experience is that it is through surreptitious invitations (often for a "presentation" rather than a "sale") that salespeople gain entry into the home. We understand that sub-section 156(3)(c) is designed to capture the situation where representatives are invited into a home to provide presentations about goods or services—it would be good if the explanatory memorandum could explain further this intention and perhaps

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<sup>10</sup> Consumer Action Law Centre and Deakin University, *An analysis of psychology of in-home sales of educational software*, March 2010, available at: <http://consumeraction.org.au/downloads/ShuttingtheGates.pdf>

provide an example. We believe that item (iii) of that sub-section unnecessarily restricts the provision and could be removed.

**We recommend that** the explanatory memorandum clearly explain the objectives of the exclusions from "invitation" in section 156(3) and provide examples. We also suggest consideration of whether item (iii) in section 156(3) is necessary to achieve the intended purpose.

#### *Section 193A: Remedies for unfairness and dishonesty*

We support the objective of offering extra protection for consumers against unfair and dishonest conduct contained in section 193A. In particular we strongly support the inclusion of:

- 193A(4)(b) which allows the court to consider whether a consumer is a member of a class of people more likely to be at a disadvantage; and
- 193A(4)(c), which allows the court to consider whether the consumer is financially excluded.

These provisions may in our view extend greater protection to vulnerable or excluded customers who may find it difficult to prove unconscionability as defined by the ASIC Act. However, it is hard to predict at this point how this provision will be interpreted and applied by the courts.

**We recommend that** section 193A be retained and its operation reviewed after a certain period (perhaps two years) to assess its effectiveness and whether any amendment is required.

#### **However, we recommend the following amendments:**

- "fees and costs" at 193A(1)(c)(iii) do not appear to be defined. **We recommend that more detail be added to be clear that this includes interest.**
- the use of "may" in 193A(3)(a) in combination with "must" in 193A(3)(b) is confusing—it appears to give the court discretion to consider some factors but simultaneously mandate that it consider them. **We recommend that this subsection be redrafted to make the court's task clearer.**
- 193(4)(a) provides that a court may have regard to whether a consumer was at a "special disadvantage" in regards to the person whose conduct is suggested to be unfair or dishonest. Given the complexity of credit contracts, we would suggest most consumers will be at a considerable disadvantage when dealing with a credit expert (such as a lender or a broker). Use of the term "special disadvantage" invites a more conservative interpretation than is required. **We recommend that 193A(4)(a) be redrafted to replace "special disadvantage" with "disadvantage".** With this wording, the court will still be free to consider whether the extent of the disadvantage in each case amounts to unfairness or dishonesty under 193A(3)(a).
- 193(4)(f) provides that a court may have regard to whether the terms of a transaction were "less favourable than the terms of a comparable transaction". Again, we believe this invites a more conservative interpretation than required. Where it is a broker whose conduct is claimed to be unfair or dishonest, a consumer would reasonably expect to be given access to the best deal available, not a deal that is average or not unfavourable.

**We recommend that 193A (4)(f) be redrafted to replace "less favourable to the consumer than the terms of a comparable transaction" with "unfavourable to the consumer".** With this wording, the court will still be free to consider whether the extent of the disadvantage in each case amounts to unfairness or dishonesty under 193A(3)(a).

## **Reverse Mortgages**

### *Section 13A: Definition of Reverse Mortgage*

**We recommend that** the list of conditions at subsection 13A (2) should include that no repayments are expected to be made during the term of the loan.

### *Section 18A: prohibited terms*

**We recommend that section 18A (3) be amended:**

- to remove the words "and that the contract requires the debtor will pay" from paragraph 18A (3)(d). These words appear unnecessary and create confusion.
- to provide that a contract for a reverse mortgage may not allow the credit provider to begin enforcement proceedings on the basis that the debtor has taken an action that decreases the value of the property in question.

### *'Market value': sections 86A and 93A*

**We recommend that:**

- the regulations envisaged by paragraph 18A(1)(d) provide that market value be determined by a valuer agreed upon by both debtor and creditor. In the event that both parties cannot reach agreement, a valuer should be chosen by the President of the relevant Real Estate Institute;
- 'market value' for the purpose of subsection 93A(3)(a) should be determined by a valuer selected by the same process as for 18A(1)(d).

### *Damage caused, or misrepresentations made by debtors: section 93A*

**We recommend that:**

- section 93A (3)(b) be amended to include the words 'caused with intent to devalue the property' after 'deliberate damage'. Without making this clarification, a debtor who innocently or accidentally damages the property (for example, while making repairs or renovations) would not be protected from enforcement proceedings.
- section 93A (3)(c) be amended to replace 'misrepresentation' with 'fraudulent misrepresentation'. This is to make clear that this provision is concerned with

fraudulent conduct and should not catch innocent or even reckless misrepresentations.

Thank you for the opportunity to comment on the draft bill and regulations. Please contact David Leermakers on 03 9670 5088 or at david@consumeraction.org.au if you have any questions about this submission.

Yours sincerely

**CONSUMER ACTION LAW CENTRE**



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