



**SECOND SESSION OF THE THIRTY-SIXTH PARLIAMENT**

**REPORT OF THE**

**STANDING COMMITTEE ON UNIFORM  
LEGISLATION AND GENERAL PURPOSES**

**IN RELATION TO THE**

**CONSUMER CREDIT (WESTERN AUSTRALIA)  
AMENDMENT BILL 2002**

**Presented by Hon Adele Farina MLC (Chairman)**

Report 9  
May 2003

# **STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL PURPOSES**

## **Date first appointed:**

April 11 2002

## **Terms of Reference:**

The following are extracts from Schedule 1 and Standing Order 230A of the Legislative Council Standing Orders:

### **“7. Uniform Legislation and General Purposes Committee**

- 7.1 A Uniform Legislation and General Purposes Committee is established.
- 7.2 The Committee consists of 3 members with power in the Committee to co-opt 2 additional members for a specific purpose or inquiry.
- 7.3 The functions of the Committee are –
- (a) to consider and report on bills referred under SO 230A;
  - (b) of its own motion or on a reference from a minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;
  - (c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;
  - (d) to consider and report on any matter referred by the House.
- 7.4 For a purpose relating to the performance of its functions, the Committee may consult with a like committee of a House of the parliament of the Commonwealth, a state or a territory, and New Zealand and similarly, may participate in any conference or other meeting.”

## **Members as at the time of this inquiry:**

Hon Adele Farina MLC (Chairman)

Hon Paddy Embry MLC

Hon Simon O’Brien MLC

## **Staff as at the time of this inquiry:**

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## LIST OF ABBREVIATIONS

1993 Agreement	Australian Uniform Credit Laws Agreement 1993
1996 Position Paper	Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, <i>Scrutiny of National Schemes of Legislation Position Paper</i> , October 1996
AFC	Australian Finance Conference
Bill	Consumer Credit (Western Australia) Amendment Bill 2002
COAG	Council of Australian Governments
Committee	Standing Committee on Uniform Legislation and General Purposes
Consumer Credit Code	The national legislative scheme of consumer credit laws that commenced on November 1 1996 pursuant to the 1993 Agreement
Council	Legislative Council of Western Australia
GCA	Government Consumer Agency
Qld Act	<i>Consumer Credit (Queensland) Act 1994</i>
Qld Amendment Act 2002	<i>Consumer Credit (Queensland) Amendment Act 2002</i>
Qld Code	<i>Consumer Credit (Queensland) Code</i>
UCCCMC	Uniform Consumer Credit Code Management Committee
WA Act	<i>Consumer Credit (Western Australia) Act 1996</i>
WA Code	<i>Consumer Credit (Western Australia) Code</i>



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**REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL  
PURPOSES**

**IN RELATION TO THE**

**CONSUMER CREDIT (WESTERN AUSTRALIA) AMENDMENT BILL 2002**

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**1 REFERENCE**

- 1.1 On April 3 2003 the Consumer Credit (Western Australia) Amendment Bill 2002 (Bill) stood referred to the Uniform Legislation and General Purposes Committee (Committee) pursuant to Standing Order 230A. Standing Order 230A(4) requires that the Committee report to the Legislative Council (Council) within 30 days of the first reading of the Bill, being May 2 2003.
- 1.2 Pursuant to Standing Order 230A(5) the policy of the Bill is not a matter for inquiry by the Committee.

**2 INQUIRY PROCEDURE**

- 2.1 The Committee was aware that the Bill would be subject to Standing Order 230A when it was introduced into the Council and likely to be referred to the Committee. In anticipation of such referral the Committee, of its own motion, commenced preliminary research into the background of the Bill.<sup>1</sup> The Committee resolved at its meeting on March 5 2003 to write to the Minister for Consumer and Employment Protection, seeking specific information about a number of aspects of the Bill.
- 2.2 The Committee received a response from the Minister for Consumer and Employment Protection to its request for information by way of a letter dated April 1 2003.
- 2.3 At its meeting on April 2 2003 the Committee resolved to conduct a hearing on the Bill with representatives from the Western Australian Department of Consumer and Employment Protection.
- 2.4 The following people provided a briefing on the Bill at the Committee's hearing on April 9 2003:
- Ms Susan Barrera, Chief of Staff, Office of the Minister for Consumer and Employment Protection;

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<sup>1</sup> The Committee's Term of Reference 7.3(b) states "*The functions of the Committee are...(b) of its own motion or on a reference from a minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;*"

- Mr Simon Ward, Policy Adviser, Office of the Minister for Consumer and Employment Protection;
- Mr Gary Prior, Manager, Consumer Policy, Department of Consumer and Employment Protection; and
- Mr Tom Filov, Policy Officer, Department of Consumer and Employment Protection.

2.5 The Committee thanks these people for their assistance.

2.6 The Committee also received an unsolicited letter from Mr Ron Hardaker, Executive Director, Australian Finance Conference (AFC), dated March 12 2003. Although Mr Hardaker expressed some reservations about the proposed amendments in relation to comparison rates,<sup>2</sup> he advised that the AFC was in favour of the Bill and actively supported the move to template legislation.<sup>3</sup>

2.7 Details of the inquiry were also placed on the parliamentary website on the Internet.

### **3 UNIFORM LEGISLATION**

3.1 The Bill is an example of 'uniform legislation'. Uniform legislation arises out of national uniform schemes of legislation and intergovernmental agreements.

#### **Scrutiny of uniform legislation in the Western Australian Parliament**

3.2 The scrutiny of uniform legislation is not new to the Western Australian Parliament. Since 1991 both the Council and Legislative Assembly have established procedures to assist Parliament in the scrutiny of national schemes of legislation:

- a) In the Council the Standing Orders were amended to provide for a 120-day delay before the second reading debate on a bill may resume in the House. In 1997 the Council amended the terms of reference for the (former) Constitutional Affairs Committee and the Standing Orders to enable automatic referral of such bills to that committee for inquiry and report within 30 days.
- b) In the Legislative Assembly a committee was appointed specifically to scrutinise uniform legislation – the Standing Committee on Uniform Legislation and Intergovernmental Agreements. That committee existed until the Thirty Sixth Parliament, when it was not reappointed as part of a review of the Legislative Assembly committee system.

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<sup>2</sup> The proposed amendments in relation to comparison rates are discussed in section 9 of this report.

<sup>3</sup> Template legislation is discussed in section 4 of this report.



- 3.3 More recently during the Thirty Sixth Parliament until the appointment of the Committee, the scrutiny of uniform legislation fell within the terms of reference for the Legislative Council Standing Committee on Legislation. In addition, the relevant Legislative Council Standing Order (Standing Order 230A) was enacted to consolidate matters relevant to uniform legislation and to facilitate automatic referral of such bills to the Committee for inquiry and report within 30 days.

### **Legislative structures**

- 3.4 National legislative schemes have been addressed in a 1996 Position Paper on the Scrutiny of National Schemes of Legislation by the Working Party of Representatives of Scrutiny Committees throughout Australia (1996 Position Paper). The 1996 Position Paper emphasises that it does not oppose the concept of legislation with uniform application in all jurisdictions across Australia. It does, however, question the mechanisms by which those uniform legislative schemes are made into law and advocates the recognition of the importance of the institution of Parliament.
- 3.5 A common difficulty with most forms of national scheme legislation is that any proposed amendments may be met by an objection from the Executive that consistency with the legislative form agreed among the various Executive Governments is a 'given'.<sup>4</sup>
- 3.6 National legislative schemes can take a number of forms. Nine different categories of legislative structures promoting uniformity in legislation, each with a varying degree of emphasis on national consistency or uniformity of laws and adaptability, have been identified. The legislative structures are summarised in Appendix 1 to this report.<sup>5</sup>
- 3.7 The Bill is 'template' legislation which is discussed in section 4 of this report.
- 3.8 The *Consumer Credit (Western Australia) Act 1996*, which the Bill amends, is 'alternative consistent' legislation which is discussed in section 5 of this report.

### **Scrutiny principles**

- 3.9 One of the recommendations of the 1996 Position Paper was the adoption of the following uniform scrutiny principles:

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<sup>4</sup> For example, refer to the Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, *Scrutiny of National Schemes of Legislation Position Paper*, October 1996, pp7 – 12.

<sup>5</sup> Ibid. Also see reports of the Parliament of Western Australia, Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements.

- Does the Bill trespass unduly on personal rights and liberties?<sup>6</sup>
- and

- Does the Bill inappropriately delegate legislative powers?<sup>7</sup>

3.10 Although not adopted formally by the Council as part of the Committee's terms of reference, the principles can be applied as a convenient framework for the scrutiny of uniform legislation.

#### **4 TEMPLATE LEGISLATION**

4.1 In its discussion on template legislation, the 1996 Position Paper noted that "*This is an elastic structure as variations can be made to accommodate requirements determined during the negotiation process.*"<sup>8</sup>

4.2 The 1996 Position Paper identified two common versions of template legislation, based on their treatment of amendments.

4.3 In the first version, participating jurisdictions automatically adopt future amendments to the legislation by the host jurisdiction. In the second version, participating jurisdictions retain the ability to consider amendments as and when they are enacted by the host jurisdiction.

##### **Amendments adopted automatically**

4.4 This version of template legislation requires one jurisdiction to act as host and enact legislation in the form agreed by the executive branches of governments. The other participating jurisdictions enact legislation which applies the legislation of the host jurisdiction, and any future amendments to that legislation.

4.5 The relevant intergovernmental agreement usually provides that participating jurisdictions must refrain from introducing separate legislation on any matter within the scope of the agreed legislation, and must undertake the repeal, amendment or modification of existing inconsistent legislation within certain parameters and in accordance with a specified procedure.

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<sup>6</sup> For example: strict liability offences, reversal of the onus of proof, abrogation of the privilege against self-incrimination, inappropriate search and seizure powers, decision-making safeguards (that is; written decisions and reasons for decisions), personal privacy, decisions unduly dependent on administrative decisions.

<sup>7</sup> For example: 'Henry VIII clauses', insufficient parliamentary scrutiny of the exercise of legislative power.

<sup>8</sup> Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, *Scrutiny of National Schemes of Legislation Position Paper*, October 1996, p47.

- 4.6 Each State or Territory is usually permitted to make minor or technical variations to their own applied legislation to ensure consistency with other State or Territory legislation.
- 4.7 The intergovernmental agreement should provide for the method of agreeing amendments. For example, the relevant Ministerial Council may have to:
- unanimously agree to any proposed amendment; or
  - two-thirds of the Ministerial Council may have to agree; or
  - a majority of the Ministerial Council may have to agree; or
  - the Ministerial Council may only have to be consulted, rather than agree.<sup>9</sup>
- 4.8 The 1996 Position Paper noted that unless the approval of all Ministers is required to proposed amendments, a vote against the proposal will not of itself prevent that amendment applying to that Minister's jurisdiction.
- 4.9 It is therefore possible that the Minister of the host jurisdiction will be obliged to introduce amendments into the host Parliament, if the amendments are approved by the relevant Ministerial Council, even if that Minister voted against the proposal in the Ministerial Council.<sup>10</sup>
- 4.10 The Parliaments of the participating jurisdictions are not involved in the amending process, unless the attention of a State Parliament is drawn to the need to pass legislation which specifically varies an amendment made in the host Parliament.
- 4.11 The 1996 Position Paper noted that *"This version of this structure emphasises a high degree of consistency for the legislation as amended."*<sup>11</sup>

### **Amendments enacted separately**

- 4.12 This version of template legislation requires one jurisdiction to act as host and enact legislation in a form agreed to by the Council of Australian Governments (COAG) or relevant Ministerial Council. The other participating jurisdictions enact legislation which applies the legislation of the host jurisdiction, but retain control over the amendment process.
- 4.13 The intergovernmental agreement may specify whether the relevant Ministerial Council or national regulatory body is required to agree to any departures from the

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<sup>9</sup> Ibid.

<sup>10</sup> Ibid, p48.

<sup>11</sup> Ibid.

national scheme by individual States or Territories. Further, the intergovernmental agreement may require Ministers to propose amending legislation in their jurisdictions, despite voting against the proposed amendments in the Ministerial Council.

4.14 Under this version of template legislation each jurisdiction retains some flexibility in its consideration of proposed amendments but, as noted, may in practice be constrained by certain parameters and procedures laid down in any intergovernmental agreement.

4.15 The 1996 Position Paper noted that “*A high degree of consistency is emphasised in the original legislation.*”<sup>12</sup>

## **5 ALTERNATIVE CONSISTENT LEGISLATION**

5.1 The 1996 Position Paper noted that with this structure of uniform legislation the intergovernmental agreement may permit a jurisdiction to participate in a national scheme by enacting legislation which states that an ‘act or thing’ will be lawful, if such an act or thing would be lawful under legislation of the host jurisdiction. The State or Territory would undertake not to introduce any legislation which would otherwise conflict with the legislation, and would undertake to repeal, amend or vary existing legislation which conflicted with the ‘alternative consistent’ legislation.<sup>13</sup>

5.2 The intergovernmental agreement may permit a jurisdiction to later repeal its legislation and adopt the legislation of the host jurisdiction.

5.3 With this structure of uniform legislation, each participating jurisdiction is responsible for monitoring amendments to the legislation in the host jurisdiction and introducing consistent amendments, where necessary, into their Parliament.

5.4 The 1996 Position Paper noted that “*The Parliament is reliant on the executive branch of Government to monitor amendments proposed in relevant Ministerial Councils or the Council of Australian Governments.*”<sup>14</sup>

5.5 The emphasis with this structure of uniform legislation is on flexibility.

## **6 STRUCTURE OF THE REPORT**

6.1 The Bill contains 16 clauses.

6.2 The Committee has, in section 9 of this report, drawn the Council’s attention to the significant issues resulting from the adoption of the *Consumer Credit (Queensland)*

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<sup>12</sup> Ibid.

<sup>13</sup> Ibid, p49.

<sup>14</sup> Ibid, p50.

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*Code*, namely comparison rate advertising and the extension of the time limitation period.

## **7 BACKGROUND TO THE CONSUMER CREDIT (WESTERN AUSTRALIA) AMENDMENT BILL 2002**

### **Australian Uniform Credit Laws Agreement 1993**

- 7.1 In 1993, all Australian States and Territories entered into the *Australian Uniform Credit Laws Agreement 1993* (1993 Agreement) which commits all jurisdictions to ensuring that the same consumer credit laws apply across Australia and binds signatories to the process of maintaining uniformity between the jurisdictions. In addition, all parties are bound not to submit legislation to their respective Parliaments that conflicts with or negates the uniform credit laws.
- 7.2 The 1993 Agreement binds signatories to either adopt the Queensland template consumer credit legislation or to enact and maintain legislation which is consistent with the template. The Western Australian Government's policy at the time was to adopt the latter approach.

### ***Consumer Credit (Queensland) Act 1994***

- 7.3 Pursuant to the 1993 Agreement, the Queensland Parliament passed the *Consumer Credit (Queensland) Act 1994* (Qld Act) which annexed the *Consumer Credit (Queensland) Code* (Qld Code).

### ***Consumer Credit (Western Australia) Act 1996***

- 7.4 In Western Australia, alternative consistent legislation in the form of the *Consumer Credit (Western Australia) Act 1996* (WA Act) and the *Consumer Credit (Western Australia) Code* (WA Code), which formed an Appendix to the WA Act, were enacted.

### **Other Australian States and Territories**

- 7.5 All other Australian States (except Tasmania which adopted a variation of its own<sup>15</sup>) and Territories followed the template legislation model and adopted the Qld Act as a law of their State or Territory under application of laws legislation. As a result, the Qld Code, as amended from time to time, automatically applies as a law of each State or Territory but is referred to as the Code of the particular State or Territory.

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<sup>15</sup> The Consumer Credit (Tasmania) Bill 1996 was adopted with amended application of laws provisions. This means that the Consumer Credit Code, as in force from time to time in Queensland, applies as a law of Tasmania once the Governor - by Proclamation - declares that the Code in Tasmania is also amended. A Proclamation can not be made until both Houses of the Tasmanian Parliament have approved a draft of the Proclamation.

- 7.6 This national legislative scheme of consumer credit laws commenced on November 1 1996 and is generally referred to as the Consumer Credit Code.

### **The Consumer Credit Code**

- 7.7 The Consumer Credit Code regulates all consumer credit lending for personal, domestic or household purposes in Australia such as home loans, personal loans, credit cards and in-store finance. Fundamental to the policy objectives of the Consumer Credit Code is the protection of all users of consumer credit.
- 7.8 A principal objective of the Consumer Credit Code is to ensure that borrowers and guarantors are provided with adequate information at all stages of consumer credit transactions to enable them to make informed choices and decisions. The Consumer Credit Code also provides significant redress mechanisms for borrowers and guarantors in the event that credit providers fail to comply with their requirements.

### **Some areas of non-uniformity**

- 7.9 In his second reading speech the Minister for Racing and Gaming representing the Minister for Consumer and Employment Protection stated that “...*the States and Territories have agreed to some areas of non-uniformity. These essentially relate to administrative matters, such as whether a court or tribunal hears a dispute and where no further regulatory burdens are imposed on credit providers.*”<sup>16</sup>
- 7.10 The Minister noted that there are some differences between the current WA Code and the Qld Code that do not affect Western Australia’s ability to meet its obligations and commitments under the 1993 Agreement. The Minister stated that “*Therefore, the Bill has been drafted to retain these differences, while still adopting the template legislation model.*”<sup>17</sup>
- 7.11 As an example, the Minister stated that “...*one of the differences between the existing Western Australian code and the Queensland code that will be retained is a provision that enables consumers experiencing genuine short-term hardship due to illness or unemployment to apply to the Department of Consumer and Employment Protection for assistance in negotiating a change in the terms of a credit contract.*”<sup>18</sup>

### **Amendments to the Consumer Credit (Queensland) Act 1994**

- 7.12 Clause 10(2) of the 1993 Agreement provides that legislation to amend the Consumer Credit Code in those states and territories that have applied the Qld Act must not be

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<sup>16</sup> Second Reading Speech, Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, Thirty-Sixth Parliament Second Session, April 3 2003, p6053.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

introduced unless there has been a resolution of the Ministerial Council for Uniform Credit Laws (operating under the auspices of the Ministerial Council on Consumer Affairs), passed by a majority comprising at least two thirds of the members who are present and who vote to approve the amendment.

- 7.13 Regulations made under the Qld Act and amendments to regulations are also considered by the Ministerial Council on Consumer Affairs. Under the 1993 Agreement, Queensland is required to submit proposed regulations and proposed amendments to regulations to the Queensland Executive for making after there has been a resolution of the Ministerial Council, passed by a majority comprising at least two thirds of the members who are present and who vote to approve the regulation or the amendment to the regulation.
- 7.14 Under Part 6 of Queensland's *Statutory Instruments Act 1992*, following the making of subordinate legislation, it must be published in the Gazette and then tabled in the Queensland Legislative Assembly within 14 days of being published. If it is not tabled, the subordinate legislation ceases to have effect. The Queensland Legislative Assembly is able to pass a resolution disallowing subordinate legislation if a notice of a disallowance is given by a member within 14 sitting days after the legislation is tabled. There is no requirement for the regulations to be tabled in each State or Territory Parliament.

#### **Amendments to the *Consumer Credit (Western Australia) Act 1996***

- 7.15 The Committee notes clause 11 of the 1993 Agreement which provides that a state or territory which has passed alternative consistent legislation (in this case, Western Australia) is not required to obtain Ministerial Council approval for amendments to its legislation. However such amendments must be consistent with the uniform scheme.
- 7.16 Pursuant to the requirement in the 1993 Agreement that all jurisdictions maintain uniformity with respect to the uniform credit laws, the Western Australian Parliament has had to pass separate, but consistent, amendments each time the Qld Code has been amended.

#### **Ministerial Council on Consumer Affairs**

- 7.17 At its meeting in Adelaide on August 2 2002 the Ministerial Council on Consumer Affairs determined, among other things, that “...*new mandatory requirements for comparison rates in relation to fixed term credit commence on a national basis on 1 July 2003. This will enable consumers to access a schedule of comparison rates to help them shop around for a loan.*”<sup>19</sup>

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<sup>19</sup> Joint Communique, Ministerial Council on Consumer Affairs, Adelaide, August 2 2002.

***Consumer Credit (Queensland) Amendment Act 2002***

- 7.18 As a result of the Ministerial Council agreement referred to above, the Consumer Credit (Queensland) Amendment Bill 2002 was introduced into the Queensland Parliament on March 6 2002, passed on April 18 2002 and assented to on April 24 2002.
- 7.19 The objective of the *Consumer Credit (Queensland) Amendment Act 2002* (Qld Amendment Act 2002) was to amend the Qld Code to require the publishing of mandatory comparison rates for fixed term consumer credit products and extend the time limitation period for civil penalty applications currently available under the Qld Code.

**8 CONSUMER CREDIT (WESTERN AUSTRALIA) AMENDMENT BILL 2002**

**Template legislation**

- 8.1 As noted earlier, the Bill is template legislation.
- 8.2 In his letter to the Committee the Minister for Consumer and Employment Protection advised that “*The Government has agreed to adopt the use of template legislation where it is appropriate as it allows for a national standard to be put in place across the country and for improvements made in one jurisdiction to be reflected in all others, without having to put separate amending legislation through every State Parliament.*”<sup>20</sup>
- 8.3 The Committee notes that in a statement on the use of template legislation made in the Legislative Assembly on June 27 2001, the Minister for Consumer and Employment Protection stated that “*...making use of template legislation will benefit Western Australians with the possibility of faster introduction of business, law and order and lifestyle improvements. Consumers can be protected quickly and unscrupulous operations can be put out of business.*”<sup>21</sup>
- 8.4 However the Minister for Consumer and Employment Protection also stated that “*...each State needs the ability to move to protect the particular interests of its people outside the broader national agenda.*”<sup>22</sup>
- 8.5 In relation to the Bill currently before the Committee, the Minister for Consumer and Employment Protection advised in his letter that “*...the finance market is a national market largely regulated by the Commonwealth. Although the Consumer Credit Code*

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<sup>20</sup> Letter from the Minister for Consumer and Employment Protection to the Committee dated April 1 2003.

<sup>21</sup> Western Australian *Parliamentary Debates (Hansard)*, Legislative Assembly, Thirty-Sixth Parliament First Session, June 27 2001, p1457.

<sup>22</sup> Ibid.



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*credit legislation is administered by the states, it is not practical for Western Australia to have separate arrangements from the rest of Australia.*”<sup>23</sup>

- 8.6 The Minister for Consumer and Employment Protection noted that *“In relation to the national Consumer Credit Code, the Government has acknowledged that improvements to the Code in Western Australia, have in some instances, been delayed for up to two years.”*<sup>24</sup>
- 8.7 He also noted that *“The use of template legislation will ensure that the significant delays experienced in the past in introducing amendments to the Code in Western Australia are avoided, and that nationally consistent consumer protection legislation in relation to consumer credit is delivered in a timely manner in Western Australia.”*<sup>25</sup>
- 8.8 In his second reading speech the Minister for Racing and Gaming noted that *“Some members of Parliament may be concerned with the concept of template legislation and fear that it diminishes the role of Parliament in law-making for this State.”*<sup>26</sup>
- 8.9 However he also stated that *“...when dealing with national issues such as consumer credit there needs to be a balance between the traditional role of a State Parliament and the need for timely and realistic law-making.”*<sup>27</sup>
- 8.10 The Minister for Racing and Gaming noted that the responsibility for the regulation and administration of the provision of consumer credit in Australia ultimately rests with the Ministerial Council on Consumer Affairs. He stated that *“...before any changes can be made, an extensive development and consultation process will be followed by the Standing Committee of Officials of Consumer Affairs and the Uniform Consumer Credit Code Management Committee.”*<sup>28</sup>
- 8.11 He also stated that *“These processes ensure that any changes to the code can be made only after extensive consultation and with the involvement and strong support of ministers from all States and Territories.”*<sup>29</sup>

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<sup>23</sup> Letter from the Minister for Consumer and Employment Protection to the Committee dated April 1 2003.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Second Reading Speech, Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, Thirty-Sixth Parliament Second Session, April 3 2003, p6053.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

*Committee comment*

- 8.12 The Committee draws to the Council's attention the fact that by adopting the template model of uniform legislation, future amendments to the WA Code will not come before the Western Australian Parliament for consideration.
- 8.13 Under the alternative consistent model of uniform legislation, amendments to the WA Code did come before the Western Australian Parliament. However the ability of the State Parliament to amend that legislation was strictly limited to inconsequential amendments in order to avoid the State being in breach of the 1993 Agreement.

**Purpose of the Consumer Credit (Western Australia) Amendment Bill 2002**

- 8.14 The principle purpose of the Bill is to amend the WA Act to adopt the Consumer Credit Code, as set out from time to time in the Qld Code, as a law of Western Australia, instead of having to enact consistent legislation each time the Consumer Credit Code is amended.
- 8.15 As noted above, the Qld Amendment Act 2002 amended the Qld Code to require the publishing of mandatory comparison rates for fixed term consumer credit products and extend the time limitation period for civil penalty applications currently available under the Qld Code.
- 8.16 The passing and commencement of the Bill will mean that those amendments will automatically apply in Western Australia.

**9 COMMENT ON COMPARISON RATE ADVERTISING AND EXTENSION OF TIME LIMITATION PERIOD**

**Comparison rate advertising**

- 9.1 The total cost of fees and charges payable on a loan can have a significant impact on the overall cost of the credit and is an important matter consumers must consider when making decisions to borrow money. Comparing interest rates alone is only part of the true cost of a loan.
- 9.2 In his second reading speech the Minister for Racing and Gaming noted that since the introduction of the Consumer Credit Code in 1996, lenders have introduced a range of different fees and charges on consumer loan products.<sup>30</sup>
- 9.3 He stated that "*Consumers face difficulties when they try to compare the cost of credit between different lenders and different products. The combination of fees and*

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<sup>30</sup> Ibid, p6052.

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*charges and interest rates makes it difficult for consumers to make an informed judgement in this regard.*"<sup>31</sup>

- 9.4 The mandatory comparison rate is a method of reducing the total cost of a loan, including interest and all fees and charges, to a single percentage rate. This allows for easier comparison of the overall cost of loan products by consumers.
- 9.5 The effect of the adoption of the Qld Code in Western Australia in relation to the mandatory comparison rate will be to require credit providers to make available to consumers the comparison rates applicable to their products in advertising, in brochures and on the Internet. The aim of this amendment is to assist consumers in comparing the total cost of different credit products and the total cost of products offered by different credit providers.
- 9.6 The proposed amendments in relation to comparison rates will require:
- a) a credit provider to include a comparison rate in any advertisement for a fixed term credit product that contains an annual percentage rate; and
  - b) a credit provider, finance broker and linked supplier, to display and have available for collection by members of the public, copies of a comparison rate schedule.
- 9.7 It will only be mandatory for credit providers to disclose the comparison rate for fixed term credit products (such as home loans and personal loans that must be paid out within a fixed term.) The regime will not apply to continuing credit products such as credit cards.
- 9.8 At its hearing on the Bill the Committee queried the likelihood of the comparison rate confusing or misleading consumers.
- 9.9 The Committee was subsequently advised by way of letter from the Office of the Minister for Consumer and Employment Protection dated April 15 2003 that *"The introduction of the mandatory comparison rates will help consumers in making decisions about their financial futures by providing them with more information about the products they are considering."*<sup>32</sup>
- 9.10 The Committee notes that comparison rates do not include extras such as a mortgage offset facility, flexible repayments, free cheque account or other features offered by a credit provider that cannot be reduced to a monetary amount. The Committee was

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<sup>31</sup> Ibid.

<sup>32</sup> Letter from the Office of the Minister for Consumer and Employment Protection to the Committee dated April 15 2003.

advised that this is because fees that may apply to the use of such a facility apply when the option is used by a consumer.<sup>33</sup>

- 9.11 As a result, credit providers will be required to include a prescribed warning in their advertisements alerting consumers that other factors, which are not included in the comparison rate, such as redraw fees or fees for early repayment, may influence the final cost of the loan.<sup>34</sup>
- 9.12 The Committee notes the advice from the Office of the Minister for Consumer and Employment Protection that *“Consequently, it is believed that comparison rates will assist consumers in dealing with the existing array of confusing options and not confuse or mislead consumers.”*<sup>35</sup>
- 9.13 The proposed date for the comparison rate advertising amendments to commence across Australia is July 1 2003.
- 9.14 The amendments to the WA Code include a sunset clause providing that the mandatory comparison rate regime will expire after three years. The Committee notes that in her second reading speech on the Consumer Credit (Queensland) Amendment Bill 2002 Hon Merri Rose MLA stated that *“During that time, government, industry and consumers will be able to monitor its effectiveness. Prior to the expiration of the sunset period it is intended to review the effectiveness of the regime, including whether it should be extended to cover credit cards.”*<sup>36</sup>
- 9.15 At its hearing on the Bill the Committee queried whether the three year sunset period provides enough time for the effectiveness of the amendments to be properly monitored.
- 9.16 The Committee was subsequently advised by way of letter from the Office of the Minister for Consumer and Employment Protection dated April 15 2003 that *“It is considered that prior to the expiration of the sunset period sufficient time will have elapsed to enable Government, industry and consumers to have monitored the effect of comparison rates and to review their effectiveness in the marketplace.”*<sup>37</sup>

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33 Ibid.

34 Ibid.

35 Ibid.

36 Second Reading Speech, Queensland, *Parliamentary Debates (Hansard)*, Legislative Assembly, Fiftieth Parliament, March 6 2002, p368.

37 Letter from the Office of the Minister for Consumer and Employment Protection to the Committee dated April 15 2003.

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**Extension of time limitation period**

- 9.17 Part 6 of the Consumer Credit Code provides that in the event of a credit provider breaching a “key requirement” of the Consumer Credit Code (such as failing to disclose details of fees and charges which are payable under the loan), either the debtor, the credit provider or the Department of Consumer and Employment Protection, as the regulator, may commence an application to the Court seeking the imposition of a civil penalty on the credit provider.
- 9.18 The civil penalty can be a fine of up to \$500 000 which is paid to the Department of Consumer and Employment Protection or the loss of all interest under the affected loan.
- 9.19 Currently, legislation limits taking such action to a period within two years from the date on which the cause of action arose.<sup>38</sup>
- 9.20 Therefore the Department of Consumer and Employment Protection has two years from the date of the breach in which to commence an application under Part 6 of the WA Code.
- 9.21 In his second reading speech the Minister for Racing and Gaming stated that “*As most of the key requirements are in relation to disclosures that occur at the time of the contract, the Department of Consumer and Employment Protection effectively only has two years from the date the contract was entered into to commence a civil penalty application.*”<sup>39</sup>
- 9.22 He also stated that “*This is very limiting considering home loans are written for up to 30 years. Usually, complaints in relation to consumer credit contracts do not occur until some point well after the contract has been entered into.*”<sup>40</sup> He stated that the two year time limitation is a “*...major restriction on the ability of the Department of Consumer and Employment Protection in policing the actions of credit providers and their compliance with the code. It also significantly undermines the deterrent value of the civil penalty regime.*”<sup>41</sup>
- 9.23 The effect of the adoption of the Qld Code in Western Australia in relation to the time limitation period will be to extend the period for commencing civil penalty applications against credit providers who breach any key requirement imposed by the

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<sup>38</sup> Section 37 of the *Limitation Act 1935* (WA).

<sup>39</sup> Second Reading Speech, Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, Thirty-Sixth Parliament Second Session, April 3 2003, p6052.

<sup>40</sup> Ibid, p6053.

<sup>41</sup> Ibid.

Consumer Credit Code from two years to six years. This is the time limitation period applicable to most other civil actions.

9.24 At its hearing on the Bill the Committee queried how many applications the Department of Consumer and Employment Protection had commenced in the last financial year.

9.25 The Committee was subsequently advised by way of letter from the Office of the Minister for Consumer and Employment Protection dated April 15 2003 that the Department had bought no applications in the last financial year. The Committee was advised that “...the regulatory framework of the Code encourages such applications to be brought instead by the credit provider. The encouragement is in the form of a cap on the amount of penalty which could be awarded against the credit provider as opposed to an application brought by either the GCA (Government Consumer Agency) or a debtor.”<sup>42</sup>

9.26 The Committee was advised that “The purpose behind this is to enforce the mechanism of self-regulation by the credit provider while also ameliorating the costs of the individual debtor and the GCA.”<sup>43</sup>

9.27 The Committee was advised that in the last financial year there had been one application brought by a credit provider in Western Australia which has resulted in the awarding of a civil penalty to GCA.<sup>44</sup>

## **10 OTHER COMMENTS**

### **Regulations**

10.1 Section 6 of the Qld Amendment Act 2002 inserted a new Part 9A into the Qld Code, which contains the provisions in relation to comparison rates.

10.2 Section 146T of Part 9A of the Qld Code provides, in part, that:

*A regulation may make provision about the following -*

*(a) exempting any class of persons or matters from the operation of any provision of this Part;*

10.3 At its hearing on the Bill the Committee queried the extent and nature of the exemptions.

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<sup>42</sup> Letter from the Office of the Minister for Consumer and Employment Protection to the Committee dated April 15 2003.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

- 10.4 The Committee was subsequently advised by way of letter from the Office of the Minister for Consumer and Employment Protection dated April 15 2003 that in 1996 the Standing Committee of Officials of Consumer Affairs established the Uniform Consumer Credit Code Management Committee (UCCCMC), on which all jurisdictions are represented, to help coordinate activities in relation to the Consumer Credit Code to ensure consistency across jurisdictions. UCCCMC's role includes responsibility for consideration and assessment of any applications for exemption before making appropriate recommendations to the Ministerial Council on Consumer Affairs.
- 10.5 The Committee was advised that the fundamental aim of UCCCMC in making recommendations for exemption is to maintain, as far as possible, the primary functions of the Consumer Credit Code.<sup>45</sup>
- 10.6 The Committee was advised that the application for exemption process is particularly stringent. Generally, an exemption will only be recommended where the exemption is not considered to adversely affect the overall policy basis for the Consumer Credit Code and where the particular circumstances relating to the credit provider are such that it may, in all the circumstances, be unwarranted or unjust for the credit provider to be regulated (or fully regulated) when balanced against the prospect of any possible disadvantage of consumers being deprived of the protections of the Consumer Credit Code.<sup>46</sup>
- 10.7 The Committee was advised that very few exemptions have been granted since the commencement of the Consumer Credit Code, and that a number of the exemptions granted have been partial exemptions.<sup>47</sup> A copy of regulations made to date under the WA Code which refer to exemptions is attached as Appendix 2 to this report.

### **Advantages and disadvantages of the scheme**

- 10.8 In his letter to the Committee, the Minister for Consumer and Employment Protection commented on the advantages and disadvantages to the State of Western Australia as a participant in the scheme.
- 10.9 The Minister advised that "*Western Australian consumers will be advantaged by having new improved protections in place at an earlier date. Business will be advantaged by the guarantee of uniformity across states.*"<sup>48</sup>

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<sup>45</sup> Letter from the Office of the Minister for Consumer and Employment Protection to the Committee dated April 15 2003.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> Letter from the Minister for Consumer and Employment Protection to the Committee dated April 1 2003.

10.10 Specifically, the Minister listed the advantages to the State as follows:

- *“Cost effective - reduces costs and duplication of effort.*
- *Efficiency - avoids delays in having to introduce separate, but consistent amendments in Western Australia each time the template Code is amended in Queensland. Enables Western Australia to keep pace with future initiatives. Improves capacity to respond quickly and uniformly to issues that arise in the marketplace.*
- *Compliance - reduces compliance costs for business (same laws apply across Australia) resulting in greater certainty and competition in the marketplace.*
- *Education - makes it easier to inform and educate consumers and industry.*
- *Maintains Uniformity - ensures that Western Australia does not risk breaching the AUCLA [1993 Agreement] by not maintaining uniformity with the rest of the country.”<sup>49</sup>*

10.11 The Minister advised that, with respect to disadvantages to the State, *“The most common concern with template legislation is that it impacts the sovereignty of participating jurisdictions and a perceived reduction in Parliament’s role as the ultimate law-maker.”<sup>50</sup>*

### **Past delays**

10.12 The Committee notes the comments made by the Minister for Racing and Gaming in his second reading speech that as a result of Western Australia not adopting the template Qld Code in 1996 and instead having to pass consistent but separate amendments each time the Qld Code has been amended, there has been *“...a lack of certainty in the marketplace, unnecessary duplication of effort and significant delays in implementing changes.”<sup>51</sup>*

10.13 The Minister stated that *“In the past other States and Territories have delayed the commencement of amendments to the code until the amendments have been passed in Western Australia. Understandably, delays of up to two years in some instances have been viewed as untenable and have attracted criticism from consumer groups, industry stakeholders and other States and Territories.”<sup>52</sup>*

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<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Second Reading Speech, Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, Thirty-Sixth Parliament Second Session, April 3 2003, p6054.

<sup>52</sup> Ibid.



- 10.14 The Committee raised this issue at the hearing on the Bill and queried whether these delays had, in fact, disadvantaged consumers, credit providers or the Department of Consumer and Employment Protection.
- 10.15 The Committee was advised that the recent development of ‘payday lenders’ across Australia had required action to be taken quickly to amend the Consumer Credit Code and that there had been delay at the national level as a result of Western Australia not having template legislation in place. The Committee notes that the Legislative Council Standing Committee on Legislation discussed ‘payday lending’ in its Report Number 5 on the Consumer Credit (Western Australia) Amendment Bill 2001, tabled in the Council on October 23 2001.
- 10.16 The Committee was also advised that delays occurred in relation to ‘housekeeping matters’ soon after the Consumer Credit Code commenced.

### **Opt out mechanism**

- 10.17 The Minister for Consumer and Employment Protection also provided an explanation as to whether, and by what mechanism, the State can opt out of the scheme.
- 10.18 Under Part X of the 1993 Agreement, a party may voluntarily withdraw at any time from the 1993 Agreement by giving not less than one year’s written notice.
- 10.19 Western Australia may also cease to be a party to the 1993 Agreement if it breaches it by introducing amending legislation that is not pursuant to a resolution of the Ministerial Council on Consumer Affairs or if it introduces legislation that conflicts with, negates or is not consistent with the operation of the Consumer Credit Code.

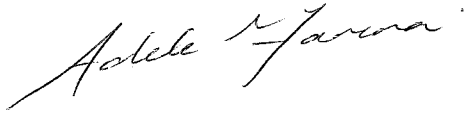
### **Minister to keep Parliament informed**

- 10.20 The Committee notes that in his second reading speech the Minister for Racing and Gaming stated that *“To further ensure that this Parliament remains fully informed about prospective changes to the code, the Minister for Consumer and Employment Protection intends as a matter of policy to advise of any amendments prior to their introduction into the Queensland Parliament.”*<sup>53</sup>

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<sup>53</sup> Second Reading Speech, Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, Thirty-Sixth Parliament Second Session, April 3 2003, pp6053-6054.

**Recommendation 1: The Committee recommends that the Consumer Credit (Western Australia) Amendment Bill 2002 be passed without amendment.**



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**Hon Adele Farina MLC**  
**Chairman**

Date: May 6 2003

# APPENDIX 1

## IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

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The former Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements identified and classified nine legislative structures relevant to the issue of uniformity in legislation which were endorsed by the 1996 Position Paper. A brief description of each is provided below.

- Structure 1:** *Complementary Commonwealth-State or Co-operative Legislation.* The Commonwealth passes legislation, and each State or Territory passes legislation which interlocks with it and which is restricted in its operation to matters not falling within the Commonwealth's constitutional powers.
- Structure 2:** *Complementary or Mirror Legislation.* For matters which involve dual, overlapping, or uncertain division of constitutional powers, essentially identical legislation is passed in each jurisdiction.
- Structure 3:** *Template, Co-operative, Applied or Adopted Complementary Legislation.* Here a jurisdiction enacts the main piece of legislation, with the other jurisdictions passing Acts which do not replicate, but merely adopt that Act and subsequent amendments as their own.
- Structure 4:** *Referral of Power.* The Commonwealth enacts national legislation following a referral of relevant State power to it under section 51 (xxxvii) of the Australian Constitution.
- Structure 5:** *Alternative Consistent Legislation.* Host legislation in one jurisdiction is utilised by other jurisdictions which pass legislation stating that certain matters will be lawful in their own jurisdictions if they would be lawful in the host jurisdiction. The non-host jurisdictions cleanse their own statute books of provisions inconsistent with the pertinent host legislation.
- Structure 6:** *Mutual Recognition.* Recognises the rules and regulation of other jurisdictions. Mutual recognition of regulations enables goods or services to be traded across jurisdictions. For example, if goods or services to be traded comply with the legislation in their jurisdiction of origin they need not comply with inconsistent requirements otherwise operable in a second jurisdiction, into which they are imported or sold.

**Structure 7:** *Unilateralism.* Each jurisdiction goes its own way. In effect, this is the antithesis of uniformity.

**Structure 8:** *Non-Binding National Standards Model.* Each jurisdiction passes its own legislation but a national authority is appointed to make decisions under that legislation. Such decisions are, however, variable by the respective State or Territory Ministers.

**Structure 9:** *Adoptive Recognition.* A jurisdiction may choose to recognise the decision making process of another jurisdiction as meeting the requirements of its own legislation regardless of whether this recognition is mutual.

## APPENDIX 2

### REGULATIONS MADE TO DATE UNDER THE CONSUMER CREDIT REGULATIONS WHICH REFER TO EXEMPTIONS

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#### **6A. GIO Finance Limited's No Interest Loan Scheme —exemption from Code**

- (1) This section applies to the scheme (the “**No Interest Loan Scheme**”) that is operated by GIO Finance Limited ACN 002 812 704 in accordance with the deed of agreement executed on 26 June 1992 by the New South Wales Minister for Further Education, Training and Employment and GIO Finance Limited.
- (2) The Code does not apply to the provision of credit under the No Interest Loan Scheme.

Note — This exclusion is made under section 7(10) of the Code.

*[Section 6A inserted in Gazette 14 May 1999 p. 1925.]*

#### **6B. Rental Purchase Plan — exemption from certain provisions of Code**

The Code, other than sections 70 to 74, does not apply to the provision of credit under the Queensland Government scheme known as the Rental Purchase Plan Scheme, and formerly known as the H.O.M.E. Shared Scheme.

Note — This exclusion is made under section 7(10) of the Code.

**[Section 6B inserted in Gazette 14 May 1999 p. 1926.]**

#### **6C. Partnership loans — exemption from certain provisions of Code**

- (1) The Code, other than Part 1, Division 3 of Part 4, Divisions 4 and 5 of Part 5, Part 7, Part 11 and Schedules 1 and 2, does not apply to the provision of credit by a firm, or by a related body corporate of the firm, to a partner of the firm, whether or not it is provided to the partner with another person.
- (2) However, for a credit provider who provides credit in the course of a business of providing credit to which the Code applies to partners of a firm and to others, this section applies only to the provision of credit on terms that are more favourable to the debtor than the terms on which the credit provider provides credit to which the Code applies to persons who are not partners of the firm.
- (3) For the purposes of this section —
  - (a) a partner of a firm includes a former partner of a firm and an employee or former employee of the firm; and

- (b) a related body corporate of a firm is a body corporate that is ultimately wholly owned by all or some of the partners of the firm or by other persons on their behalf.

Note — This exclusion is made under section 7(10) of the Code.

*[Section 6C inserted in Gazette 14 May 1999 p. 1926.]*

**6D. Student loans — exemption from certain provisions of Code**

- (1) The Code, other than sections 56(1) and 70 to 74, does not apply to the provision of credit by a higher educational institution, or by an association of students of the institution, to a student of the institution on the grounds of hardship or of an emergency.
- (2) However, subsection (1) only applies if the institution or association gives the debtor and any guarantor the following things before the contract for the provision of credit is entered into by the debtor or the guarantee is signed by the guarantor —
  - (a) a statement of the costs of the provision of credit, which must include any fees or charges payable and the interest rate applicable and may include other information; and
  - (b) a copy of the terms and conditions of the contract for the provision of credit.

- (3) In this section —

**“association of students”**, of a higher educational institution, means a union, guild or other association of students —

- (a) of the institution; or
- (b) of the institution and of other higher educational institutions;

**“higher educational institution”** means an institution within the meaning of the *Higher Education Funding Act 1988* (Cwlth), section 4.

Note — This exclusion is made under section 7(10) of the Code.

*[Section 6D inserted in Gazette 1 Oct 1999 p. 4725-6.]*

**6E. Loans for conservation of heritage items - exemption from Code**

The Code does not apply to the provision of credit under any of the following provisions -

- (a) the *Heritage Act 1977* (NSW), section 106;
- (b) the *Heritage Act 1993* (SA), section 12, but only in respect of loans made from the State Heritage Fund to owners of land constituting places entered in the State Heritage Register established under that Act;
- (c) the *Heritage Act 1995* (Vic), section 140.

**6F. Authorised deposit-taking institutions – exemption from Code**

- (1) The Code does not apply to the provision of credit by an authorised deposit-taking institution limited by the contract to a total period not exceeding 62 days.
- (2) In this section —  
**“authorised deposit-taking institution”** has the meaning given under the *Banking Act 1959* (Cwlth), section 5(1).  
*[Section 6E inserted in Gazette 21 May 2002 p. 2590.]*

**7. Mortgages — exemptions from Code**

- (1) The Code does not apply to the following mortgages —
  - (a) any mortgage relating to perishable goods, livestock, primary produce or food stuffs;
  - (b) a banker’s right to combine accounts;
  - (c) a lien or charge arising by operation of any Act or law or by custom.

However, sections 14 and 15 of the Code (relating to disclosures) apply in respect of a mortgage referred to in paragraph (a).

- (2) Section 83 of the Code does not apply to any mortgage relating to goods that are lawfully in the possession of the credit provider.

Note — This exclusion is made under section 8(3) of the Code.

**8. Guarantees — exemption from Code**

The Code does not apply to any guarantee by the supplier under a tied loan contract or tied continuing credit contract.

Note — This exclusion is made under section 9(3) of the Code.