



THIRTY-SEVENTH PARLIAMENT

REPORT 9

**STANDING COMMITTEE ON UNIFORM
LEGISLATION AND STATUTES REVIEW**

***CONSUMER CREDIT (WESTERN AUSTRALIA) ACT
1996: CONSUMER CREDIT (CHARGE CARD)
AMENDMENT REGULATION (No. 1) 2005 (QLD)***

Presented by Hon Simon O'Brien MLC (Chairman)

April 2006

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“8. Uniform Legislation and Statutes Review Committee

8.1 A *Uniform Legislation and Statutes Review Committee* is established.

8.2 The Committee consists of 4 members.

8.3 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 review the form and content of the statute book;
- (e) to inquire into and report on any proposal to reform existing law that may be referred by the House or a Minister; and
- (f) to consider and report on any matter referred by the House or under SO 125A.

8.4 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 Simon O’Brien MLC (Chairman)

Hon Sheila Mills MLC

Hon Matt Benson-Lidholm MLC

Hon Donna Faragher MLC

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**REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES
REVIEW**

IN RELATION TO THE

***CONSUMER CREDIT (WESTERN AUSTRALIA) ACT 1996: CONSUMER CREDIT (CHARGE CARD)
AMENDMENT REGULATION (NO. 1) 2005 (QLD)***

1 INTRODUCTION

- 1.1 The *Consumer Credit (Charge Card) Amendment Regulation (No. 1) 2005 (Qld) (Queensland Amendment Regulation)* was referred to the Uniform Legislation and Statutes Review Committee (**Committee**) on 28 October 2005, by way of a statutory referral under section 6B of the *Consumer Credit (Western Australia) Act 1996*, for inquiry and report to the Legislative Council.
- 1.2 The *Consumer Credit (Western Australia) Act 1996* is the Western Australian component of a template legislative scheme underpinning the national *Consumer Credit Code* which commenced on 1 November 1996.
- 1.3 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. The main 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.¹
- 1.4 Before scrutinising the Queensland Amendment Regulation, it is appropriate to briefly outline the nature of the template legislative scheme underpinning the *Consumer Credit Code*.

2 CONSUMER CREDIT CODE - TEMPLATE LEGISLATIVE SCHEME

- 2.1 The *Consumer Credit Code* is a template legislative scheme which means that one jurisdiction passes the main piece of legislation and other jurisdictions pass Acts which adopt that Act and any subsequent amendments. For the purposes of the *Consumer Credit Code*, Queensland is the template jurisdiction. The Queensland template legislation consists of the:
- *Consumer Credit Code* (Qld) which is an appendix to the *Consumer Credit (Queensland) Act 1994* (Qld); and

¹ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report No 9, *Consumer Credit (Western Australia) Amendment Bill 2002*, May 2003, p8.

- *Consumer Credit Regulation 1995* (Qld).

2.2 Thus the *Consumer Credit (Western Australia) Act 1996* provides that the:

- *Consumer Credit Code* (Qld); and
- *Consumer Credit Regulation 1995* (Qld)

apply as laws of Western Australia and are to be referred to as the:

- *Consumer Credit (Western Australia) Code*; and
- *Consumer Credit (Western Australia) Code Regulations*.

2.3 Unlike in other jurisdictions,² amendments to the Queensland template legislation do not automatically apply in Western Australia.³ The *Consumer Credit (Western Australia) Act 1996* imposes two requirements before such amendments can operate, namely:

- a copy of amendments to the Queensland template legislation are to be provided to the Clerk of each House of the Western Australian Parliament and then to the Committee; and
- both Houses of the Western Australian Parliament must approve a draft order and then the Western Australian Governor may amend the consumer credit laws⁴ by an order published in the *Government Gazette*.

3 REFERENCE

3.1 Section 6B of the *Consumer Credit (Western Australia) Act 1996* contains the first requirement in relation to amendments to the template legislative scheme.

3.2 Section 6B(1)(b) provides that within seven days of the Minister becoming aware of a notification in the Queensland *Government Gazette* of regulations to amend the *Consumer Credit Regulation 1995* (Qld), the Minister must give the gazetted

² Like Western Australia, Tasmania does not automatically apply amendments to the Queensland template legislation.

³ Previous reports of this Committee and the former Uniform Legislation and General Purposes Committee with respect to similar amendment regulations set out a detailed history relating to the *Consumer Credit Code* and its application in Western Australia. See for example, Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Consumer Credit Amendment Regulation (No. 2) 2004* (Qld), May 2005, pp1-3 and Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, *Consumer Credit (Firefighter's Benefit Fund) Amendment Regulation (No. 1)* (Qld), September 2005, pp1-3.

⁴ The *Consumer Credit (Western Australia) Code* and the *Consumer Credit (Western Australia) Code Regulations*.

Queensland regulations to the Clerk of each House of the Western Australian Parliament.

3.3 Pursuant to this requirement, in letters dated 28 October 2005, Hon John Kobelke MLA, Minister for Consumer and Employment Protection (**Minister**), provided a copy of the gazetted Queensland Amendment Regulation to the Clerks of the Legislative Council and Legislative Assembly.⁵

3.4 Section 6B(3) of the *Consumer Credit (Western Australia) Act 1996*, requires the Clerks to then give the copy of any amendments to the regulations to the:

...committee or committees of the Parliament whose terms of reference cover uniform legislation...

3.5 In this manner, the Queensland Amendment Regulation was referred to the Committee.

3.6 The second requirement with respect to amendments to the template legislative scheme is contained in sections 5 and 6 of the *Consumer Credit (Western Australia) Act 1996*. These sections provide that when the *Consumer Credit Code (Qld)* or the *Consumer Credit Regulation 1995 (Qld)* are amended, the Western Australian Governor may similarly amend the *Consumer Credit (Western Australia) Code* or *Consumer Credit (Western Australia) Code Regulations* by an order published in the *Government Gazette*. However, such an order cannot be made unless both Houses of Parliament have first approved a draft order.

3.7 A copy of the *Consumer Credit (Western Australia) Code Regulations Amendment Order 2006 (Draft Order)* was tabled in the Legislative Council on 22 March 2006.⁶ Although it is the Queensland Amendment Regulation and not the Draft Order which is referred to the Committee for inquiry, in order to assist the Legislative Council, the Committee has reported its scrutiny of the Queensland Amendment Regulation in relation to the terms of the Draft Order.

4 INQUIRY PROCEDURE

4.1 The Minister provided the Clerks of the Legislative Council and the Legislative Assembly with an explanatory memorandum in relation to the Queensland Amendment Regulation (**Explanatory Memorandum**).⁷ The provision of an

⁵ Copy of letter from Hon John Kobelke MLA, Minister for Consumer and Employment Protection, 28 October 2005 to the Clerks of the Legislative Assembly and the Legislative Council.

⁶ Tabled Paper 1346.

⁷ Letter from Mr John Mandy, Acting Clerk of the Legislative Assembly, to the Committee enclosing a copy of a letter from Hon John Kobelke MLA, Minister for Consumer and Employment Protection, 28 October 2005; and letter from Mr Malcolm Peacock, Acting Clerk of the Legislative Council, to the Committee enclosing a copy of a letter from Hon John Kobelke MLA, Minister for Consumer and Employment Protection, 28 October 2005.

explanatory memorandum was part of the Committee's recommendations in its report on the *Consumer Credit (Firefighter's Benefit Fund) Amendment Regulation (No. 1) 2005* (Qld).⁸ The Explanatory Memorandum assisted the Committee to promptly deal with the Queensland Amendment Regulation.

4.2 The Committee did not advertise for or invite submissions. However, details of the inquiry were placed on the parliamentary website at: www.parliament.wa.gov.au.

5 PURPOSE OF THE AMENDMENT

5.1 The Minister indicated that the purpose of the Queensland Amendment Regulation (as contained in the Draft Order) is to exempt from the operation of the *Consumer Credit Code* 'charge card' contracts offered by:⁹

- American Express Australia Limited;
- American Express International Inc;
- Diners Club Pty Limited; and
- Motorcharge Limited.

5.2 'Charge cards' are defined by the Reserve Bank of Australia as:¹⁰

a card whose holder has been granted a non-revolving credit line enabling the holder to make purchases and possibly make cash advances. A charge card does not offer extended credit; the full amount of any debt incurred must be settled at the end of a specified period.

5.3 With respect to the specific charge cards dealt with in the Queensland Amendment Regulation, the Explanatory Memorandum states:¹¹

Charge cards offered by AMEX, Diners Club and Motorcharge provide credit from the time a transaction takes place to the time the card holder receives a statement of account for using the card (i.e. the demand for payment for the provision of that credit). The usual terms and conditions of charge cards require the full balance of an account

⁸ Western Australia, Legislative Council, Uniform Legislation and Statutes Review Committee, Report 1, *Consumer Credit (Firefighter's Benefit Fund) Amendment Regulation (No.1)* (Qld), September 2005, p10.

⁹ Copy of letter from Hon John Kobelke MLA, Minister for Consumer and Employment Protection, to the Clerk to the Legislative Council, 28 October 2005.

¹⁰ See the glossary on the Reserve Bank of Australia's website, <http://www.rba.gov.au>, (viewed on 3 November 2005).

¹¹ Explanatory Memorandum, p1.

to be paid immediately upon receipt of the statement. Failure to do so may result in liquidated damages¹² being charged to an account and then recovered after non-payment. This entitlement usually arises after 3 to 4 weeks of non-payment.

- 5.4 The Explanatory Memorandum indicates that the amendment is intended to overcome the effect of amendments to the *Consumer Credit Code* in 2001. Prior to 2001, short term credit of less than 62 days was exempted from the *Consumer Credit Code*.¹³ In 2001, amendments were made to the *Consumer Credit Code* to capture the ‘payday lending’ industry which involves short term loans of relatively small amounts which are to be repaid by the consumer’s next pay day.¹⁴ The concern with ‘payday lending’ has been the often high interest rates charged for outstanding amounts.¹⁵ The 2001 amendments provided that the *Consumer Credit Code* would not apply to credit of less than 62 days provided the fees and charges do not exceed 5% of the amount of the loan and the interest rate does not exceed 24%.¹⁶
- 5.5 American Express Australia Limited, American Express International Inc, Diners Club Pty Limited and Motorcharge Limited received legal advice indicating that the 2001 amendments had resulted in their charge cards, which were previously exempt, being subject to the *Consumer Credit Code*. Consequently, these credit providers submitted to the Ministerial Council on Consumer Affairs (**Ministerial Council**) that their provision of credit is not part of the ‘payday lending’ industry and should be exempt.¹⁷
- 5.6 Section 7 of the *Consumer Credit (Western Australia) Code* sets out the circumstances where the *Consumer Credit Code* does not apply. Section 7(10) enables regulations to be made that exclude the provision of credit of a specified class from the application of all or any provisions of the *Consumer Credit (Western Australia) Code*.
- 5.7 However, any amendments to the *Consumer Credit Code*, including the regulations, must be approved by two thirds of the Ministerial Council.¹⁸ The Ministerial Council

¹² ‘Liquidated damages’ are damages sought or awarded to a plaintiff, the amount being a sum fixed by the parties to a contract as a genuine pre-estimate of the plaintiff’s loss in the event of the defendant’s breach or ascertainable by a simple calculation or fixed by any scale of charges or other positive data: Dr P. Nygh and P. Butt, *Butterworths Australian Legal Dictionary*, Butterworths, Australia, 1997, p697.

¹³ Consumer Credit (Queensland) Amendment Bill 2001, Explanatory Memorandum, p1.

¹⁴ *Ibid.*

¹⁵ At website: <http://www.fairtrading.qld.gov.au>, (viewed on 4 November 2005).

¹⁶ Consumer Credit (Queensland) Amendment Bill 2001, Explanatory Memorandum, p1.

¹⁷ Explanatory Memorandum, p1.

¹⁸ Clause 10, *Australian Uniform Credit Laws Agreement 1993*.

consists of all Commonwealth, State, Territory and New Zealand Ministers responsible for fair trading, consumer protection laws and credit laws.¹⁹

5.8 The Explanatory Memorandum indicates that the Ministerial Council has approved the amendments contained in the Queensland Amendment Regulation.²⁰

6 SCRUTINY OF THE DRAFT ORDER

6.1 The Draft Order proposes to insert a new section in Part 2 of the *Consumer Credit (Western Australia) Code Regulations*. Part 2 contains regulations relating to exemptions from the *Consumer Credit Code*.

6.2 Clause 3 proposes to insert a new section 6J which provides:

(1) *The Code does not apply to the provision of credit under a charge card contract made available by one of the following credit providers -*

(a) *American Express Australia Limited ACN 108 952 085;*

(b) *American Express International Inc. ARBN 000 618 208;*

(c) *Diners Club Pty Limited ACN 004 343 051;*

(d) *Motorcharge Ltd ACN 008 962 132.*

Examples-

• *american express platinum card*

• *diners club personal card*

• *motorcharge card*

(2) *In subsection (1) -*

charge card contract *means a credit contract under which -*

(a) *credit is ordinarily obtained by the use of a card; and*

(b) *multiple advances of credit are contemplated; and*

¹⁹ The role of Ministerial Council is to consider consumer affairs and fair trading matters of national significance and, where possible, develop a consistent approach to those issues: <http://www.consumer.gov.au/html/protection.htm>, (viewed on 4 November 2005).

²⁰ Explanatory Memorandum, p1.

(c) the provision of an advance of credit is limited to a total period of not more than 62 days; and

(d) monthly or other periodic statements of account are provided to the debtor; and

(e) liquidated damages or charges for late payment are payable by the debtor if the debtor does not repay an advance of credit mentioned in a monthly or other periodic statement of account within a stated period.

6.3 The Committee is of the view that proposed section 6J in clause 3 of the Draft Order clearly achieves the purpose set out in the Explanatory Memorandum.

6.4 The Committee notes that proposed section 6J relates to *specific* credit providers as listed and not other credit providers currently offering charge cards (or who may offer charge cards in the future). The exemption process (which is detailed on the *Consumer Credit Code* website: <http://www.creditcode.gov.au>) contemplates specific credit providers making an application, with each application being examined on its merits.

7 CONCLUSION

7.1 The Committee notes that the exemption of charge card contracts offered by American Express Australia Limited, American Express International Inc., Diners Club Pty Limited and Motorcharge Ltd from the operation of the *Consumer Credit Code* required the approval of two thirds of the Ministerial Council. Whilst the Committee does not have the benefit of the details of the applications for exemption, it is clear from the Explanatory Memorandum that the specific credit providers were, in the view of their legal advisers, exempt from the *Consumer Credit Code* prior to 2001. It appears to the Committee that the 2001 amendments may have unintentionally captured the charge card contracts offered by these credit providers.

7.2 The *Consumer Credit Code* website states that:²¹

certain exemptions were written into the Code and it was not anticipated that additional exemptions would be granted (as has been the case with the previous legislation) unless it was discovered that products were unintentionally caught by the Code's provisions.

7.3 The Committee is of the view that the Queensland Amendment Regulation is appropriate as, based on the Explanatory Memorandum, it appears that the 2001

²¹ http://www.creditcode.gov.au/display.asp?file=/content/exempt_applications.htm, (viewed on 8 November 2005).

amendments were not intended to apply to the specified credit providers. Therefore, the Committee makes recommendation 1:

Recommendation

Recommendation 1: The Committee recommends that if the Legislative Council is asked to approve a draft order which adopts the *Consumer Credit (Charge Card) Amendment Regulation (No. 1) 2005 (Qld)*, then it be approved.



Hon Simon O'Brien MLC
Chairman

4 April 2006