



THIRTY-SEVENTH PARLIAMENT

REPORT 10

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

**CONSUMER CREDIT AND TRADE MEASUREMENT
AMENDMENT BILL 2006 (QLD)**

Presented by Hon Simon O'Brien MLC (Chairman)

May 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.”

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ISBN 1 9208 8676 1

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

IN RELATION TO THE

CONSUMER CREDIT AND TRADE MEASUREMENT AMENDMENT BILL 2006 (QLD)

1 INTRODUCTION

- 1.1 The Consumer Credit and Trade Measurement Amendment Bill 2006 (Qld) (**Queensland Amendment Bill**) was referred to the Uniform Legislation and Statutes Review Committee (**Committee**) on 4 April 2006 by way of a statutory referral under s 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 Bill, 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 legislation which adopt that main piece of legislation 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 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 most 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;⁴ and
- both Houses of the Western Australian Parliament must approve a draft order and then the Western Australian Governor may amend the consumer credit laws⁵ by an order published in the *Government Gazette*.⁶

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.⁷

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, Report 24, *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, Report 1, *Consumer Credit (Firefighter's Benefit Fund) Amendment Regulation (No. 1) (Qld)*, September 2005, pp1-3.

⁴ Section 6B(1), *Consumer Credit (Western Australia) Act 1996*.

⁵ The *Consumer Credit (Western Australia) Code* and the *Consumer Credit (Western Australia) Code Regulations*.

⁶ Sections 5(2)-(3) and 6(2)-(3), *Consumer Credit (Western Australia) Act 1996*.

⁷ Sections 6(B)(1) and (3).

3.2 Pursuant to this requirement, in letters dated 4 April 2006, Hon Michelle Roberts MLA, Minister for Consumer Protection (**Minister**), provided a copy of the Queensland Amendment Bill to the Clerks of the Legislative Council and Legislative Assembly.⁸

3.3 Section 6B(3) of the *Consumer Credit (Western Australia) Act 1996*, requires the Clerks to then give the copy of the Bill to the:

“[C]ommittee or committees of the Parliament whose terms of reference cover uniform legislation ...”.

3.4 In this manner, the Queensland Amendment Bill was referred to the Committee.

3.5 The second requirement with respect to amendments to the template legislative scheme is contained in ss 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.⁹

3.6 Although it is the Queensland Amendment Bill and not any subsequent Western Australian draft order which is referred to the Committee for inquiry, in order to assist the Legislative Council, the Committee has adopted the practice of reporting its scrutiny of the Queensland Amendment Bill in relation to the terms of any draft order.

3.7 Similarly, although there is no requirement for the Committee to report back to the Parliament on the Queensland Amendment Bill prior to the Parliament approving any relevant Western Australian draft order, the Committee’s usual practice is to endeavour to present its report on such template Queensland legislation prior to the Parliament’s consideration of any corresponding draft order.

4 INQUIRY PROCEDURE

4.1 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 BILL

5.1 The Explanatory Notes for the Queensland Amendment Bill state that the Bill’s objectives in relation to credit matters are to:

⁸ Copy of letter from Hon Michelle Roberts MLA, Minister for Consumer Protection, 4 April 2006 to the Clerks of the Legislative Assembly and the Legislative Council.

⁹ Section 5(2)-(3), *Consumer Credit (Western Australia) Act 1996*.

- “- facilitate the application of the electronic transactions legislation in each State and Territory to the [Consumer Credit] Code;
- ensure that consumer protection is not diminished as a result of a debtor transacting in an electronic environment; and
- extend the sunset clause in relation to the mandatory comparison rate regime in the [Consumer Credit] Code by 1 year to enable a review of that regime to be completed.”¹⁰

Consultation Associated with the Queensland Amendment Bill

- 5.2 The Committee notes that community consultation was undertaken by the Uniform Consumer Credit Code (UCCC) Management Committee with respect to the electronic transactions aspect of the Queensland Amendment Bill:

*“The [e-commerce] Consultation Package was released on 23 July 2004 and submissions closed on 3 September 2004. Submissions were received from industry representatives, consumer advocates, legal academics, law societies, legal firms and financial counsellors.”*¹¹

- 5.3 As to consultation regarding the extension of the sunset clause in relation to the mandatory comparison rate scheme, the Explanatory Notes for the Queensland Amendment Bill state:

“The proposed extension of the regime was specifically raised with stakeholders at the recent 15th Annual Credit Law Conference in 2005 where it appeared to be accepted as the most viable solution. Stakeholders are aware of the [mandatory comparison rate] review and should understand that it is necessary to allow time for consultation as well as consideration of the review.

*To ensure that stakeholders, particularly credit providers were advised of the amendment in the Bill extending the sunset clause, the UCCC Management Committee posted information on the national Code website and advised stakeholders (by email with a link to the website).”*¹²

¹⁰ Consumer Credit and Trade Measurement Amendment Bill 2006: Explanatory Notes, State of Queensland, 2006, pp1-2.

¹¹ Ibid, p7.

¹² Ibid, p7.

6 URGENT DRAFT ORDERS PROVIDED TO THE COMMITTEE

6.1 On 28 April 2006 the Minister provided the Committee with the following draft orders:

- Consumer Credit (Western Australia) Code Amendment Order 2006; and
- Consumer Credit (Western Australia) Code Regulations Amendment Order (No. 2) 2006.

6.2 On 23 May 2006 an amended version of the Consumer Credit (Western Australia) Code Regulations Amendment Order (No. 2) 2006 was provided to the Committee (with proposed cl 9, inserting a proposed new s 40AA into the *Consumer Credit (Western Australia) Code Regulations*, having been deleted).

6.3 As at the date of this report neither of these draft orders have been tabled in the Legislative Council.

6.4 The Consumer Credit (Western Australia) Code Amendment Order 2006 adopts in Western Australia only those amendments contained in the Queensland Amendment Bill that propose to amend the *Consumer Credit Code* (that is, Part 2 of the Queensland Amendment Bill).¹³

6.5 Interestingly, the second draft order provided to the Committee - the Consumer Credit (Western Australia) Code Regulations Amendment Order (No. 2) 2006 - does not adopt any aspects of the Queensland Amendment Bill. This draft order is instead consistent with **proposed** Queensland amendment regulations (not yet gazetted) that will complement the electronic transaction elements of the Queensland Amendment Bill. It is unusual for the Committee to receive a draft order prior to the relevant Queensland legislation being made. The Minister advised that the ‘advance’ copy of the Consumer Credit (Western Australia) Code Regulations Amendment Order (No. 2) 2006 was provided simply to assist the Committee in its consideration of the Queensland Amendment Bill.¹⁴

6.6 In the accompanying cover letter for these two draft orders, the Minister indicated that a high degree of urgency surrounds the gazettal of the draft orders. The Minister advised the Committee that:

*“... this matter is viewed as **extremely urgent**. The State Solicitors Office has advised that if WA’s adoption processes in relation to the extension of the sunset date are not completed (i.e. gazetted) prior to 9 July 2006, Part 9A of the Code will cease in WA. This will result in*

¹³ Letter from Hon Michelle Roberts MLA, Minister for Consumer Protection, 28 April 2006, p1.

¹⁴ Ibid, p1.

disuniformity of credit laws and implications for both WA consumers and industry. In addition, it is understood that if required, 'resurrecting' Part 9A of the Code and the associated regulations in WA will be particularly difficult and complex."¹⁵

7 SCRUTINY OF THE DRAFT CONSUMER CREDIT (WESTERN AUSTRALIA) CODE AMENDMENT ORDER 2006

7.1 The draft Consumer Credit (Western Australia) Code Amendment Order 2006 follows the wording of Part 2 of the Queensland Amendment Bill.

7.2 The Committee has identified issues concerning the following clauses of the draft Consumer Credit (Western Australia) Code Amendment Order 2006.

Clause 4 - Extension of the Expiry Date in relation to the Mandatory Comparison Rate

7.3 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.¹⁶

7.4 Part 9A of the *Consumer Credit Code* sets out the mandatory comparison rate scheme and has the object of assisting consumers to identify the true cost of credit offered by credit providers. The objects provisions of Part 9A relevantly states that Part 9A:

"(a) makes it mandatory for credit providers to include the comparison rate in advertisements for consumer credit (other than under continuing credit contracts) if an interest rate is advertised; and

(b) requires credit providers, linked suppliers and finance brokers to supply consumers with schedules of comparison rates for any such consumer credit.

The comparison rate will reflect the total cost of credit arising from interest charges and other prescribed credit fees and charges."¹⁷

7.5 Currently the mandatory comparison rate scheme is subject to an expiry date (or sunset clause) of 30 June 2006.¹⁸

¹⁵ Ibid, p2.

¹⁶ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 9, *Consumer Credit (Western Australia) Amendment Bill 2002*, 6 May 2003, p13.

¹⁷ Section 146A(2), *Consumer Credit (Western Australia) Code*.

¹⁸ In Western Australia the relevant sunset clause is s 146D of the *Consumer Credit (Western Australia) Code*.

- 7.6 The Ministerial Council on Consumer Affairs committed to review the mandatory comparison rate scheme prior to 30 June 2006.¹⁹
- 7.7 A review was commenced in October 2004 and was scheduled to report in January 2006. Delays in the consultation phase now mean that there is insufficient time to consider the final report prior to 30 June 2006.²⁰

Infringement of Fundamental Legislative Principles - Henry VIII Clause

- 7.8 Clause 4 of the draft Consumer Credit (Western Australia) Code Amendment Order 2006 proposes the extension of the expiry date for Part 9A of the *Consumer Credit Code* to either 30 June 2007 or to an earlier date fixed by a regulation so as to allow consideration of the outcome of the review of the mandatory comparison rate scheme.²¹
- 7.9 The proposed authorisation of the use of regulations to determine the expiry date of various provisions of the *Consumer Credit Code* makes this a “Henry VIII” clause. *Henry VIII* clauses are regarded as contrary to fundamental legislative principles as they give insufficient regard to the institution of Parliament as the supreme Legislature by eroding the sovereign function of Parliament to legislate.²²
- 7.10 The Committee brings this *Henry VIII* clause to the attention of the Legislative Council.

Clauses 5 to 12 - Electronic Transactions

- 7.11 Electronic transaction legislation has been enacted in all Australian jurisdictions as part of a uniform legislative scheme to facilitate the use of electronic transactions.²³
- 7.12 There is uncertainty about the application of electronic transactions legislation to the *Consumer Credit Code* in a number of Australian jurisdictions.²⁴ As a result of this uncertainty a number of jurisdictions, including Western Australia, have expressly

¹⁹ *Consumer Credit and Trade Measurement Amendment Bill 2006: Explanatory Notes*, the State of Queensland, 2006, p3.

²⁰ *Ibid*, p4.

²¹ *Ibid*, p4.

²² The former Uniform Legislation and General Purposes Committee previously considered “Henry VIII” clauses in its following reports: Report 1: *Offshore Minerals Bill 2001*, *Offshore Minerals (Registration Fees) Bill 2001* and *Offshore Minerals (Consequential Amendments) Bill 2001*, June 2002, pp52-66, Report No 17: *Architects Bill 2003*, June 2004.

²³ Western Australia, Legislative Council, Standing Committee on Constitutional Affairs, Report 58, *Electronic Transactions Bill 2000*, 6 November 2000, p4.

²⁴ *Consumer Credit and Trade Measurement Amendment Bill 2006: Explanatory Notes*, State of Queensland, 2006, p4.

exempted the *Consumer Credit Code* from the application of uniform electronic transaction legislation.

7.13 In Western Australia s 7 (1) of the *Electronic Transactions Act 2003* provides that for the purposes of a law of Western Australia a transaction will not automatically be invalid because it took place wholly or partly by electronic communication.²⁵ However, by operation of reg 4 of the *Electronic Transactions Regulations 2003*, s 7(1) does not apply to the *Consumer Credit Code*.

7.14 The Queensland Amendment Bill aims to

“... ensure that the wording of the Code permits electronic credit transactions, such as issuing contracts and providing notifications.”²⁶

7.15 The Queensland Amendment Bill will facilitate the application of electronic transactions legislation to the *Consumer Credit Code* by:

- “- confirming the application of each jurisdiction’s electronic transactions legislation to the Code;
- standardising current provisions that make incomplete and inconsistent reference to electronic communications in the Code; and
- removing provisions that would not permit electronic communications.”²⁷

7.16 The Queensland Amendment Bill also seeks, according to the Explanatory Notes, to provide protection for consumers of credit by:²⁸

- preventing the rules that govern the receipt and attribution of electronic communications under general electronic transactions legislation to be altered by agreement; and
- allowing some transactions, documents or information to be excluded from being electronically communicated in the interests of consumers.

7.17 Whilst noting the draft Consumer Credit (Western Australia) Code Amendment Order 2006 (which essentially follows the wording of the Queensland Amendment Bill), the Committee presumes that additionally, for the sake of clarity, reg 4 of the *Electronic*

²⁵ Section 7(1), *Electronic Transactions Act 2003*.

²⁶ *Consumer Credit and Trade Measurement Amendment Bill 2006: Explanatory Notes*, the State of Queensland, 2006, p4.

²⁷ Ibid, p4.

²⁸ Ibid, p5.

Transactions Regulations 2003 will be deleted or amended to facilitate the proposed amendments to the *Consumer Credit (Western Australia) Code*.

Infringement of Fundamental Legislative Principles - Henry VIII Clause

- 7.18 Clause 7 of the draft Consumer Credit (Western Australia) Code Amendment Order 2006 introduces new credit consumer protection measures in relation to electronic transactions that includes the insertion into the *Consumer Credit Code* of another *Henry VIII* mechanism (new s 164A(3)), which states:

“The regulations may provide that —

(a) a specified transaction, or a specified class of transactions; or

(b) a specified document, or a specified class of documents; or

(c) specified information, or a specified class of information;

referred to by or under this Code must not be made, given or provided by electronic communication.”

- 7.19 The draft Consumer Credit (Western Australia) Code Regulations Amendment Order (No. 2) 2006, which was provided to the Committee on 28 April 2006 (in advance of the corresponding Queensland amendment regulations being introduced) by the Minister to assist the Committee with its inquiry, sets out the proposed amendments to the *Consumer Credit (Western Australia) Code Regulations* pursuant to the proposed new s 164A(3) *Henry VIII* mechanism. Proposed new reg 39A states:

“39A. Exemptions in relation to electronic communications

For the purposes of section 164A(3) of the Code, the following transactions, documents or information, or classes of transactions, documents or information, must not be made, given or provided by electronic communication -

(a) a guarantee to which the Code applies under section 9 of the Code;

(b) a copy of a guarantee given under section 52(1)(a) of the Code;

(c) a copy of a credit contract given under section 52(1)(b) of the Code;

(d) a copy of a contract document given under section 54(2)(a) of the Code;

- (e) *a notice setting out particulars of the change in the terms of the credit contract under section 56(1)(a) of the Code;*
- (f) *a default notice under section 80(1) of the Code;*
- (g) *a default notice under section 80(2) of the Code;*
- (h) *information concerning the provisions of section 91 of the Code provided to the occupier of premises under section 91(1)(b) of the Code;*
- (i) *a request for entry to premises under section 24(a) of these regulations;*
- (j) *a consent to enter premises under section 24(c) of these regulations;*
- (k) *a notice under section 94(1) of the Code;*
- (l) *a demand made on the supplier under section 120(5)(a) of the Code;*
- (m) *a demand made on the supplier under section 120(6)(a) of the Code;*
- (n) *a notice of intention to repossess under section 156(1) of the Code;*
- (o) *a transaction on which duty is only charged under the laws of this jurisdiction if the transaction is effected or evidenced by an instrument or document in hard copy form;*
- (p) *an instrument on which duty is only charged under the laws of this jurisdiction if the instrument is in hard copy form.”*

7.20 In explaining the rationale for the use of a *Henry VIII* clause, the Explanatory Notes advise:

“The exemption is placed in the regulation as a safety net provision offering additional consumer protection. Electronic communication and transacting is still developing. At this point in time, the proposed regulation would exempt such material as a notice setting out particulars of the change in the terms of the credit contract under

section 56(1)(a) of the Code; a default notice under sections 80(1) and (2) of the Code; a notice of intention to repossess under section 156(1) of the Code; and instruments on which duty is only charged if they are in hard copy.

As consumers become more sophisticated in the use of electronic communication and transacting, it is anticipated that the provisions could be removed. The provisions relating to duty are likely to be subject to change in the future. Therefore, the exemption is somewhat in the nature of a transitional provision. It is difficult to predict the time when the provisions may not be necessary and therefore to provide for “sunsetting” of the regulation making ability. It will, of course, be subject to the usual 10 year sunset rule for all regulations.

In addition, the Code is part of a nationally uniform scheme. It can take a significant period of time to gain formal agreement of all jurisdictions due to State/Territory and national procedural requirements. It may be necessary to extend the list described above where consumer detriment is identified and to minimize the detriment, amendment of the regulation, rather than the Code itself, would be the quicker option in the national context.

It should be noted that there was public consultation on the draft Bill and the draft Regulation. The only comment in relation to this issue was regarding guarantees, as a result of which the provision was made more specific.”

- 7.21 The Committee brings this *Henry VIII* clause to the attention of the Legislative Council.

8 CONCLUSION

- 8.1 The Committee notes that the purpose of Part 2 of the Queensland Amendment Bill is to:
- a) extend the expiry date in relation to the mandatory comparison rate scheme in the *Consumer Credit Code* by up to one year to enable a review of that scheme to be completed; and
 - b) facilitate the application of electronic transactions legislation to the *Consumer Credit Code*.
- 8.2 Although the Queensland Amendment Bill contains two *Henry VIII* clauses (one in relation to determining the date of expiry of the mandatory comparison rate scheme and the other in relation to a power to exclude various credit transactions from

electronic transaction legislation), the Committee acknowledges that such clauses may be appropriate in the circumstances to allow an appropriate degree of flexibility and to rapidly address identified concerns in the area of consumer protection.

Recommendation

Recommendation 1: The Committee recommends that if the Legislative Council is asked to approve a draft order which adopts Part 2 of the Consumer Credit and Trade Measurement Amendment Bill 2006 (Qld), then it be approved.



Hon Simon O'Brien MLC
Chairman

May 25 2006