



FIRST SESSION OF THE THIRTY-SIXTH PARLIAMENT

**REPORT OF THE
STANDING COMMITTEE ON LEGISLATION
IN RELATION TO THE
CONSUMER CREDIT (WESTERN AUSTRALIA)
AMENDMENT BILL 2001**

Presented by Hon Jon Ford MLC (Chairman)

Report 5
October 2001

STANDING COMMITTEE ON LEGISLATION

Date first appointed:

May 24 2001

Terms of Reference:

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

“1. Legislation Committee

- 1.1 *A Legislation Committee* is established.
- 1.2 The Committee consists of 7 members.
- 1.3 The functions of the Committee are -
 - (a) to consider and report on any bill referred by the House;
 - (b) to review the form and content of the statute book;
 - (c) to inquire into and report on any proposal to reform an existing law;
 - (d) to consider and report on a bill referred under SO 230 (c).
- 1.4 Unless otherwise ordered, the policy of a bill referred under subclause 1.3(a) at the second reading or any subsequent stage is excluded from the Committee’s consideration.
- 1.5 The Committee of its own motion, or on a reference from a Minister, may inquire into and report to the House on any or all aspects, including policy, of a proposal for an agreement or arrangement that, to have effect, would necessitate the enactment of legislation of a type described in SO 230 (c).”

Members as at the time of this inquiry:

Hon Jon Ford MLC (Chairman)

Hon Adele Farina MLC

Hon Giz Watson MLC (Deputy Chair)

Hon Peter Foss MLC

Hon Kate Doust MLC

Hon Bill Stretch MLC

Hon Paddy Embry MLC

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REPORT OF THE STANDING COMMITTEE ON LEGISLATION

IN RELATION TO THE

CONSUMER CREDIT (WESTERN AUSTRALIA) AMENDMENT BILL 2001

1 REFERENCE

- 1.1 The Consumer Credit (Western Australia) Amendment Bill 2001 (the Bill) was referred to the Standing Committee on Legislation (the Committee) by the Legislative Council on September 20 2001 under Standing Order 230(d).
- 1.2 Standing Order 230(d) requires that the Committee report to the Legislative Council within 30 days.

2 INQUIRY PROCEDURE

- 2.1 The Committee resolved to form a subcommittee to assist in the inquiry. The subcommittee comprised Hon Giz Watson MLC (Convenor) and Hon Kate Doust MLC.
- 2.2 As part of the review an advertisement was placed in *The West Australian* newspaper inviting submissions on the Bill. Three written submissions were received as a result of the advertisement.
- 2.3 As a further part of the review comment was invited from a number of stakeholders. Those organisations were:
 - Sussex Street Community Law Service Inc;
 - Gosnells Community Legal Centre;
 - the Law Society of WA (Inc);
 - Australian Finance Conference Ltd; and
 - the Trades and Labor Council of WA, Welfare Rights and Advocacy Department.

3 BACKGROUND TO THE BILL

- 3.1 The Consumer Credit (Western Australia) Amendment Bill 2001 amends the *Consumer Credit (Western Australia) Act 1996* (the Act) and the *Consumer Credit (Western Australia) Code* (the Code) which forms an Appendix to the Act.

- 3.2 The Act forms part of a national legislative scheme of consumer credit laws which commenced on November 1 1996 pursuant to the *Australian Uniform Credit Laws Agreement 1993* (the Agreement) to which Western Australia is a signatory. The scheme is generally referred to as the Consumer Credit Code.
- 3.3 The principal objective of the Act and 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 Act and Code also provide significant redress mechanisms for borrowers and guarantors in the event that credit providers fail to comply with their requirements.
- 3.4 In his second reading speech the Minister for Racing and Gaming representing the Minister for Consumer and Employment Protection (the Minister) stated that “The Consumer Credit Code is a national scheme of uniform consumer credit laws which aim to advance consumer protection and at the same time ensure that product diversity and competition is optimised.”¹ The Consumer Credit Code regulates all consumer credit lending for personal, domestic or household purposes 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.

4 WHAT IS PAYDAY LENDING?

- 4.1 Payday loans are short-term loans of relatively small amounts of money offered by some financiers to consumers to be repaid on the consumer’s next payday, in exchange for a fee.
- 4.2 Payday lenders are high-cost, low-value lenders. They charge a fee rather than interest.

5 PURPOSE OF THE BILL

- 5.1 The second reading speech refers to two objectives of the Bill. The principal objective is to close a loophole in the Code that allows payday lenders to avoid regulation under the Code. The amendments in the Bill will extend coverage of the Code to payday lending and set a maximum total cost of credit for loans of less than 62 days.
- 5.2 The second objective is to ensure that the same consumer credit laws continue to apply in Western Australia as apply in all other Australian states and territories.
- 5.3 The Code is intended to apply the same sets of rules universally to all forms of consumer credit; that is, credit for personal, domestic or household purposes including home loans, personal loans, credit cards and in-store finance. When the Code was

¹ Second Reading Speech, Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, Thirty-Sixth Parliament First Session, September 20 2001, p. 4056.

introduced in 1996, payday lending did not exist in Australia. In his second reading speech the Minister stated that “There has been a rapid growth in payday lending in the past two years. This rapid growth is causing considerable community concern due to the apparent lack of protection provided to consumers.”²

- 5.4 The parameters of the Code therefore need to be amended to ensure that it remains universally applicable to all consumer credit lenders, including payday lenders. At present, section 7(1) of the Code does not apply to loans of less than 62 days. As payday loans are typically for less than 62 days, they are not regulated.
- 5.5 The original purpose of setting a 62-day period within the Consumer Credit Code was to exempt short-term finance provided by mainstream credit providers, such as bridging finance and trade credit. There was no intention to exempt payday loans.
- 5.6 As payday loans are not regulated by the Code, none of the consumer protections within the Code currently apply to consumers obtaining payday loans. For example, payday lenders are not legally required to fully and frankly disclose the terms of the loan, nor are they required to provide a written loan contract. In addition, consumers accessing payday loans are not able to challenge a loan contract that is unfair or oppressive.
- 5.7 This non-regulation of payday lenders is contrary to the key consumer protection principles underpinning the Code. In particular, the people obtaining payday loans are often some of the most vulnerable consumers in society. In his second reading speech the Minister gave as an example the findings of a working party established last year by the Queensland Department of Tourism, Racing and Fair Trading that found circumstances where interest rates charged by payday lenders ranged between approximately 235 per cent and 1 300 per cent per annum.³
- 5.8 The Bill closes the loophole which allows payday lenders to avoid regulation by providing that if a loan is for less than 62 days and the interest rate exceeds 24 per cent then the Code applies to that transaction. Similarly, if the fees and charges payable on a loan exceed five per cent of the amount of the loan and the loan is for less than 62 days, then the Code will apply.
- 5.9 As payday lenders charge well in excess of 24 per cent in interest and five per cent in fees and charges, the Code will apply to payday loans. The amendment will provide consumers accessing payday loans with the same level of consumer protection enjoyed by other consumers of credit. The Code’s protections include pre-contractual disclosure of all costs and terms and conditions of the loan, a requirement that a written copy of the contract be provided, and restrictions on repossession and

² Ibid, p. 4057.

³ Ibid, p. 4057.

enforcement. However, it will not capture some products offered by mainstream credit providers, such as bridging finance, that were never intended to be caught by the Code.

- 5.10 The Bill also addresses the issue of prescribing a maximum interest rate. Provisions already exist under section 12 of the Act to prescribe, by regulation, a maximum annual percentage rate for a credit contract or class of credit contract. The Committee notes that Western Australia has not, to date, utilised this provision. However, the Committee also notes that in his second reading speech the Minister stated that “The Government is currently considering setting a ‘total cost of credit’ maximum of 48 per cent for short-term credit.”⁴
- 5.11 The amendments in the Bill will strengthen this maximum interest rate provision by setting a ‘total cost of credit’ maximum for short-term credit.
- 5.12 This will mean that short-term credit providers will be required to incorporate the fees and charges for providing credit into their interest rate calculations to produce a ‘total cost of credit’ figure. The total cost of credit will not be allowed to exceed a specified maximum interest rate per annum.

6 UNIFORM LEGISLATION

- 6.1 The *Australian Uniform Credit Laws Agreement 1993* 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.
- 6.2 The Agreement extends to the enactment of amendments to the Code, and requires the approval of the Ministerial Council on Consumer Affairs (the Ministerial Council) before any amendments can be made to the Queensland Code by the Queensland Parliament.
- 6.3 The Ministerial Council formally approved the payday lending amendments to the Queensland Code following a period of consultation with key stakeholders.
- 6.4 As a result, a Consumer Credit (Queensland) Amendment Bill 2001 was drafted and subsequently enacted by the Queensland Parliament in August 2001. The Western Australian Bill has been drafted to be consistent with the Queensland amendments.

⁴ Ibid, p. 4057.

7 CONTENTS OF THE BILL

Clauses 1 to 3

- 7.1 Clauses 1 to 3 are purely formal. Clause 1 sets out the short title, clause 2 deals with commencement of the provisions of the Act and clause 3 states that the Act amends the *Consumer Credit (Western Australia) Act 1996*.

Clause 4

- 7.2 Clause 4 amends section 12 of the Act.
- 7.3 Clause 4(1) inserts a new subsection 12(1a) into the Act. This new subsection will allow regulations to be made to require all interest charges and all other fees and charges relating to the provision of short-term credit to be included for the purpose of calculating the maximum annual percentage rate which may be fixed by regulations made under section 12(1) of the Act.
- 7.4 This will mean that short-term credit providers will be required to incorporate the fees and charges for providing credit into their interest rate calculations to produce a 'total cost of credit' figure.
- 7.5 Clause 4(2) inserts a new section 12(4) into the Act which defines a short term credit contract as a credit contract where the total period does not exceed 62 days and which is not exempted from the Code under section 7(1) or which is a contract of a kind prescribed by the regulations.
- 7.6 The Committee notes that there is a drafting error in the Clause Notes to clause 4(2) of the Bill. The Clause Notes state that clause 4(2):

...inserts a new section 12(4) into the Act which defines a short-term credit contract as a credit contract where the total period does not exceed 62 days and which is not exempted from the Code under section 7(1) or which is not a contract prescribed by the regulations.⁵
(Committee emphasis)

- 7.7 This evidences an intention to define a short-term credit contract as a credit contract which is not a contract prescribed by the regulations.
- 7.8 Clause 12(4)(b) defines a short-term credit contract as a credit contract which is a contract of a kind prescribed by the regulations. The Committee observes that, to conform with the intention of the Bill, the Clause Notes to clause 4(2) should read:

⁵ Clause Notes, p. 3.

...inserts a new section 12(4) into the Act which defines a short-term credit contract as a credit contract where the total period does not exceed 62 days and which is not exempted from the Code under section 7(1); or a contract of a kind prescribed by the regulations.

Clause 5

- 7.9 This clause amends section 7 of the Code.
- 7.10 Clause 5(2) repeals the existing section 7(1) and replaces it with a new section 7(1) that adds two additional conditions to the 62-day threshold. The 62-day exemption remains, however if the fees and charges for the loan exceed five per cent of the amount of the loan or the interest rate exceeds 24 per cent per annum, then the Code will apply.
- 7.11 This means that the Code applies unless three conditions are satisfied:
- the loan is for less than 62 days;
 - the fees and charges do not exceed five per cent of the amount of the loan; and
 - the interest rate does not exceed 24 per cent per annum.
- 7.12 These three conditions are cumulative; that is, all three must be satisfied to take advantage of the exemption in section 7(1).
- 7.13 For the purposes of determining the 24 per cent per annum interest rate threshold, paragraph (c) permits the use of the provisions of the Code itself to determine whether a particular transaction exceeds the interest rate threshold. In particular section 26 of the Code, which provides the manner in which interest charges are to be calculated, can be used for this purpose.
- 7.14 Clauses 5(3) and 5(4) amend section 7(2) of the Code. This is to overcome an unintended consequence of the amendment to section 7(1).
- 7.15 If a customer of a bank or authorised deposit taking institution overdraws a cheque or savings account where there is implied agreement or agreement by conduct to permit the overdraw, the Code will apply to this situation if the fee imposed exceeds five per cent of the amount overdrawn. The credit provider in this situation will not have the benefit of the exemption in section 7(2) or section 7(1) and the Code will apply.
- 7.16 It is not the intention of the amendment to apply the Code to this situation. Consequently, the amendment makes it clear that the Code will only apply to this situation if there has been express agreement between the parties to provide credit.

Clause 6

- 7.17 Clause 6 inserts a new Part 12 to the Code that provides a transitional period for the amendment to section 7(1). It provides that the amendments only apply to contracts entered into after the commencement of the amendment to section 7(1).

8 SUBMISSIONS**Sussex Street Community Law Service Inc**

- 8.1 The Committee received a written submission on the Bill from the Sussex Street Community Law Service Inc (the SSCLS) by facsimile dated September 28 2001.

- 8.2 The SSCLS submitted that the Bill has addressed the major issues of the consumer movement in relation to payday lenders by bringing them within the ambit of the Act and the Code. The SSCLS in particular noted the provisions of disclosure of fees and charges, disclosure of contractual obligations, assessment of ability to pay, and re-opening of cases of financial hardship.

- 8.3 The SSCLS strongly urged the adoption of the Bill as soon as possible.

- 8.4 The SSCLS also commented on clause 4 of the Bill which amends section 12 of the Act to prescribe, by regulation, a maximum annual percentage rate for a credit contract or class of credit contract. The SSCLS informed the Committee that it noted the comment in the Explanatory Memoranda to the Bill that it is intended that Western Australia will move to set a maximum annual percentage rate. The SSCLS stated that “We would strongly urge that this is expedited.”

- 8.5 The Committee was advised by the SSCLS that:

An immediate cap on the maximum annual percentage rate is necessary otherwise consumers will continue to suffer under excessive fees for aggressively promoted short term loans.

- 8.6 The SSCLS also stated that “We note that there is an increase in the financial services offered by payday lenders, therefore it is critically important that stringent controls are in place.”

- 8.7 The Committee notes that the SSCLS raised an issue that is separate to the Bill. The SSCLS submitted that:

Banks currently do not take more than 10% of any Centrelink payment, and some limit should be imposed on the power to withdraw from the accounts of low income earners.

- 8.8 The Committee resolved not to comment on this issue as it is outside the scope of the inquiry.

The Western Australian Council of Social Service Incorporated

- 8.9 The Committee received a written submission from the Western Australian Council of Social Service Incorporated (the WACOSS) by letter dated October 2 2001. The WACOSS advised the Committee that it is the peak body for community services in Western Australia.
- 8.10 The WACOSS informed the Committee that the WACOSS Emergency Relief Agencies Forum (comprising around 200 organisations), regional networks and individual members have reported concerns to WACOSS regarding the lack of regulation of payday lenders. The Committee was advised that each of these complaints concerns the negative impact of payday lenders' practices on those experiencing financial crisis, due to unforeseen circumstances, inadequate income or insufficient financial management skills.
- 8.11 The WACOSS submitted that payday lenders have exploited the exemption provided by section 7(1) of the Code. It submitted that:

The subsequent failure of these businesses to conduct themselves in an ethical manner has resulted in practices such as not providing the borrower with a copy of the contract and the provision of unreasonable terms in relation to fees and conditions.

- 8.12 The Committee was further advised that:

As a consequence, low-income people have been further disadvantaged, to the point where many families and individuals have had to access food, vouchers and financial assistance from already inadequately resourced welfare organisations.

- 8.13 The Committee was advised that the WACOSS strongly supports the Bill "...in it's [sic] endeavour to close the legislative gap that has allowed pay-day lenders to operate in a manner detrimental to many consumers."

- 8.14 The WACOSS submitted that:

Increased regulation through this legislation, coupled with educative strategies for consumers will go far in providing a socially responsible solution to the damaging effect that pay-day lenders have had on low-income people in WA.

Consumer Credit Legal Service (WA) Inc

- 8.15 The Committee also received a written submission from the Consumer Credit Legal Service (WA) Inc (the CCLS) by facsimile dated October 2 2001. The CCLS advised the Committee that it was making the submission as a member of the national consumer network lobbying government for the regulation of payday lenders.
- 8.16 The CCLS is a non-profit community legal service that provides legal advice, assistance and representation to Western Australian consumers in the areas of credit, banking and finance. The CCLS is also active in community legal education and policy and law reform.
- 8.17 The CCLS advised the Committee that it was making the submission as a result of its work with financial counsellors on this issue, and also as a result of their experience providing advice and representation to clients with payday loans.
- 8.18 The CCLS submitted that it "...strongly supports the government's decision to bring payday lenders within the regulatory framework." It stated that in general terms the CCLS supports the provisions of the Bill.
- 8.19 The CCLS also submitted that:

We note that the Explanatory Memorandum to the Amendment Bill indicates that the government intends to regulate to introduce a cap on interest rates.

We strongly support the urgent enactment of regulation/s to prevent pay day lenders charging unconscionably high interest rates (and fees).

- 8.20 The Committee notes that the CCLS raised two issues separate to the Bill. The CCLS:
- submitted that section 6 of the Consumer Credit Regulation 1996 be amended to incorporate the thresholds established in clause 5(2) of the Bill; and
 - are concerned that many payday debtors will be unable to exercise their rights under the Code without the assistance of an advocate. The CCLS stated their concern that in the absence of resources to assist payday debtors exercise their rights under the legislation, those rights may become illusory.
- 8.21 The Committee resolved not to comment on these issues as they are outside the scope of the inquiry.

9 CONCLUSIONS

- 9.1 The Committee supports the Bill.

- 9.2 In relation to a proposed cap on interest rates, the Committee notes the submissions received from the SSCLS (refer to paragraph 8.5) and the CCLS (refer to paragraph 8.19). The Committee also notes that in his second reading speech the Minister stated that:

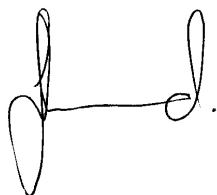
The Ministerial Council of Consumer Affairs, which includes all Australian consumer affairs Ministers, is currently considering further regulatory options and the Minister for Consumer and Employment Protection will continue to discuss these proposals with his fellow Ministers.

The Committee resolved not to comment on this issue as it is outside the scope of the inquiry.

- 9.3 The Committee notes that submissions raised additional matters that are separate to the Bill. Refer to paragraphs 8.7 and 8.20. The Committee has not commented on these matters as they are outside the scope of the inquiry.

10 RECOMMENDATION

Recommendation 1: The Committee recommends that the Consumer Credit (Western Australia) Amendment Bill 2001 be passed without amendment.



Hon Jon Ford MLC
Chairman

Date: October 17 2001