

January 23, 2008

Mr Richard Fitzgerald
Commissioner of Enquiry
Productivity Commission
GPO Box 1428
Canberra City, ACT 2601

Submission to the Review of Australia's Consumer Policy Framework, by the "Reach Out for Kids" Foundation, 8-10 Silver Grove, Nunawading, Victoria 3131

This submission is of necessity brief, given the timelines set out (submissions must be received by the 6th February) and the pressure of demand for the financial counselling service based at the above agency and other reporting deadlines which fall within the month of January, 2008.

The submission seeks to address Key considerations 1,2,4.5 (Key Considerations, Draft Report. Canberra, 2007, v-vi)

In conducting the inquiry and making recommendations, the Commission is to have particular regard to:

1. the need to ensure that consumers and businesses, including small businesses, are not burdened by unnecessary regulation or complexity, while recognising the benefits, including the contribution to consumer wellbeing, market efficiency and productivity, of well-targeted consumer policy;
2. the need for consumer policy to be based on evidence from the operation of consumer product markets, including the behaviour of market participants;
4. the shared responsibility of the Australian Government and the State and Territory governments for consumer policy; and
5. the importance of promoting certainty and consistency for businesses and consumers in the operation of Australian's consumer protection laws.

With these considerations in mind, the Commission is required to report on:

1. ways to improve the consumer policy framework so as to assist and empower consumers, including disadvantaged and vulnerable consumers, to meet current and future challenges, including the information and other challenges posed by an increasing variety of more complex product offerings and methods of transacting;

2. any barriers to, and ways to improve, the harmonisation and co-ordination of consumer policy and its development and administration across jurisdictions in Australia, including ways to improve institutional arrangements and to avoid duplication of effort;

The Submitting Agency:

The “Reach Out for Kids” Foundation is funded by Consumer Affairs Victoria to provide a financial counselling service to the City of Whitehorse in Melbourne’s Outer East. The City of Whitehorse has a catchment population in excess of 150,000, and contains approximately 18.5% of the Outer Eastern metropolitan region’s population. The agency is situated at 8-10 Silver Grove, Nunawading, and one full-time financial counselling position is maintained there. Other services delivered by the agency include youth and family services. The agency is thus able to deliver a suite of services to presenting families/households. Approximately 71% of presenting households rely largely on Centrelink/FAO incomes, with the greatest frequency of incomes lying within the \$10,400 to \$15,600 bracket (nett, per annum) (ROK Annual Report, 2006-2007).

ISSUES ADDRESSED BY THIS SUBMISSION:

This submission seeks to address issues of concern relating to the operation of the Uniform Consumer Credit Code, and the lack of a uniform approach to Debt Recovery. These issues are closely related.

There is a precedent for an approach that seeks to unite the two areas. The US “Fair Debt Collection Practices Act” was enacted in 1977, and incorporated by way of amendment into that country’s Credit Code.

Find below a section of the preamble to the US “Fair Debt Collection Practices Act”. 1977.

15 USC 1692

S. 802. Congressional findings and declaration of purpose

- a) There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.
- b) Existing laws and procedures for redressing these injuries are inadequate to protect consumers.
- c) Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

- d) Abusive debt collection practices are carried on to substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.
- e) It is the purpose of this title to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

This Act also provides a structure to an industry, setting limits to communication, defining harassment, and establishing a structure for the validation of debts (something absent in Australia). Financial Counsellors have no right, in Australia, to receive any details of cost incurred when a debt is pursued by a debt collector, or the basis for its existence. Non compliance with existing legislative constraints can not even be detected, let alone enforced. By way of example, S.38, Private Agents Act (Vic) 1966 states that a Commercial agent must not charge a debtor for expenses of debt collection:

38. Commercial agents not to charge debtors for expenses of debt collecting etc.

- 1) No person who –
 - (a) exercises or carries on any of the functions of a commercial agent (whether or not he is required to hold a licence under this Act); or
 - (b) acts for or in collusion with a person mentioned in paragraph (a) -

shall be entitled to charge recover or receive from any debtor of a creditor any sum of money or valuable consideration for or on account of any costs charges or expenses (other than stamp duties and any legal costs fixed by or payable in accordance with the scale of costs under the rules of any court) or any remuneration or payment whatsoever for or in connexion with the collection of a debt.

- 2) The provisions of sub-section (1) -
 - (a) shall not be construed as affecting or removing any right existing from time to time of an owner or grantee to recover any costs charges or expenses in respect of the repossession of goods which are the subject of a hire purchase agreement or a bill of sale; and
 - (b) shall not extend to any sum charged recovered or received for or on account of the reasonable costs incurred by such owner or grantee where the owner or grantee forbears at the request of the hirer or the person

whose goods are comprised in the bill of sale (whichever is applicable) to take possession of such goods.

This section has never been enforced, understandably, given the lack of any right to establish non-compliance. S.809 (Validation of debts) of the US Fair Debt Collection Act, sets out the criteria for establishing validity of a debt, in that country. The right to seek validation of a debt could be substantially enhanced, in Australia, by the legislative endorsement of the right to seek details of costs from debt collectors.

15 USC 1692g

S. 809. Validation of debts

(a) Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing –

- (1) the amount of the debt;
- (2) the name of the creditor to whom the debt is owed;
- (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
- (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
- (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

(b) If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or any copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector. Collection activities and communications that do not otherwise violate this title may continue during the 30-day period referred to in subsection (a) unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name

and address of the original creditor. Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor.

(c) The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.

(d) A communication in the form of a formal pleading in a civil action shall not be treated as an initial communication for purposes of subsection (a).

RIGHT OF A DEBTOR TO DISPUTE CLAIMS AT A LOCAL VENUE:

The use of other jurisdictions (interstate courts) often denies a debtor the chance to put up a defence to a debt recovery action. A debt may be pursued in a jurisdiction where less protection is available to a debtor (e.g. NSW, where the protected income figure is set currently at \$294.16 per week nett, rather than 80% of nett income, as in other states), and where distance prevents defence (few debtors are aware of any right to seek a change of venue).

S.811, US Fair Debt Collection Act provides for an action to be commenced where the opportunity for defence is available to the debtor:

15 USC1692i

S. 811. Legal actions by debt collectors

(a) Any debt collector who brings any legal action on a debt against any consumer shall –

- (1) in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located; or
- (2) in the case of an action not described in paragraph (1), bring such action only in the judicial district or similar legal entity –
 - (A) in which such consumer signed the contract sued upon; or
 - (B) in which such consumer resides at the commencement of the action.

(b) Nothing in this title shall be construed to authorize the bringing of legal action by debt collectors.

CREDIT: CONSISTENCY WITH INTERNATIONALLY ACCEPTED NORMS OF ANNUAL PERCENTAGE RATE DISCLOSURE

Currently, neither the Uniform Consumer Credit Code or most State Jurisdictions (outside of NSW) require establishment costs and nominal interest rates to be disclosed under a single figure. This effectively makes comparison shopping for credit impossible for most consumers. Victoria sets a cap on “Annual Percentage Rates” (Sections, 39, 40, Consumer Credit (Victoria) Act 1995

39. Contract unenforceable if rate exceeds 48 per cent

- (1) A credit contract (and any mortgage given to a credit provider in relation to that contract) is unenforceable where the annual percentage rate in respect of the contract exceeds 48%.
- (2) Nothing in this section affects or limits the powers of the Court under section 70 of the Consumer Credit (Victoria) Code if the Court is satisfied that the annual percentage rate in respect of a credit contract although not exceeding, in the case of a credit contract in relation to which there is a mortgage, 30, and in the case of any other contract, 48, is excessive or that the transaction is unjust within the meaning of that section or is such that a court of equity would give relief.
- (3) A credit provider must not enter into a credit contract where the annual percentage rate in respect of the contract exceeds 48. Penalty applying to this sub-section: 10 penalty units.

40. Mortgage void if rate under credit contract exceeds 30 per cent

A mortgage relating to a credit contract in respect of which the annual percentage rate exceeds 30 is void in so far as it relates to that contract.

However, the confusion between Annual Percentage Rate and Nominal Interest Rate has allowed many predatory lenders to charge rates substantially higher than the “cap” set out in this Act. New South Wales has enacted the “Consumer Credit (New South Wales) Amendment (Maximum Annual Percentage Rate) Bill, 2005” in order to curb excesses suffered by other states. However, it is the contention of this submission that the rules need to be consistent for all, and that the Uniform Consumer Credit Code be amended to ensure consistency with other jurisdictions by adapting the definition of “Annual Percentage Rate” set out in the US Truth in Lending Act of 1968.

A brief summary of this definition follows:
(<http://www.answers.com/annual+percentage+rate>):

ANNUAL PERCENTAGE RATE

Investment

Annual Percentage Rate – APR

The annual rate that is charged for borrowing (or made by investing), expressed as a single percentage number that represents the actual yearly cost of funds over the term of a loan. This includes any fees or additional costs associated with the transaction.

Loans or credit agreements can vary in terms of interest rate structure, transaction fees, late penalties and other factors. A standardized computation such as the APR provides borrowers with a bottom-line number they can easily compare to rates charged by other potential lenders.

By law, credit card companies and loan issuers must show customers the APR to facilitate a clear understanding of the actual rates applicable to their agreements. Credit card companies are allowed to advertise interest rates on a monthly basis (e.g. 2% per month), but are also required to clearly state the APR to customers before any agreement is signed. For example, a credit card company might charge 1% a month, but the APR is $1\% \times 12 \text{ months} = 12\%$. This differs from annual percentage yield, which also takes compound interest into account.

Banking terms:

Annual Percentage Rate (APR)

Effective cost of credit in consumer loans and real estate loans expressed as a percentage rate. The annual percentage rate is the finance charge the borrower actually pays, including loan interest points, and origination fees.

The Federal Truth in Lending Act of 1968 requires lenders to calculate the cost of credit as an annual percentage and disclose the APR in large bold type in loan application documents. APR rates and the dollar amount (principal and interest) for various fixed-rate amortizing loans can be found in APR tables available from the Federal Reserve Board.

It should be noted that “excessive” comparison shopping for credit is reported on credit records and can lead to potential credit providers rejecting subsequent claims for credit or applying a risk weighted premium to borrowings.

The points above are raised because of their importance: This submission is not comprehensive. It is hoped that more comprehensive enquiries be initiated by the Productivity Commission at a later date in response to submissions such as this one.

Summary of Recommendations:

(a) That a unified regime or code governing debt recovery be adopted nationally, consonant with the uniform code governing credit. The example of the US Fair Debt Collection Practices Act has been cited. This would incorporate provisions governing cost recovery, debt and cost validation, jurisdictions for defence, harassment and coercion, etc;

(b) That the Uniform Consumer Credit Code be amended to ensure consistency of the definition of Annual Percentage Rate in Australia with that based on the Us Truth in Lending Act, 1968, and adopted internationally. This would require the combination of establishment fees and other ascertainable costs of credit with nominal percentage rates to establish the actual cost of credit. This is necessary if consumer choice in relation to credit is to be considered a desirable objective.

Yours sincerely,

BARRY DUGGAN
Financial Counsellor

Citations:

1. US Fair Debt Collection Practices Act (FDCPA), IS USC Enacted 1977.
2. Private Agents Act 1966 (Vic)
Act no 7494/1966
As awarded 13 January 2000
3. Reach Our For Kids Foundation
Annual Report, 2006 – 07.

Attachments

1. Fair Debt Collection Practices Act, US
2. Annual Percentage Rate Definition