

THE Financier

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THE FINANCIERS ASSOCIATION OF AUSTRALIA LIMITED NEWSLETTER

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Welcome to the Spring 2007 edition of The Financiers Association of Australia Limited newsletter.

As usual we try to keep up with any legislative changes in the credit code as well as inserting any interesting general business pieces gleaned from various sources.

A welcome is also extended to new members at this time.

Credit privacy set to be tested

AN INQUIRY into Australia's credit-reporting code is under way amid concerns that the current system fails both borrowers and lenders.

As part of a broader review of the Privacy Act, the Australian Law Reform Commission is weighing the pros and cons of giving banks and other lenders greater access to customers' financial details.

It is expected to deliver draft findings within two months.

Under the existing "negative" credit-reporting system in Australia, lenders have limited access to the financial histories of potential borrowers.

They can check only the number of times applicants have applied for credit in the past five years, whether they have defaulted on payments in the past 60 days, and if they have faced any court judgments or bankruptcy orders.

The information listed on credit files thus "provides no great insight into the credit-worthiness of applicants," said Steve Brown, director of commercial and

consumer services with Dun and Bradstreet.

However, under the "positive" credit reporting system supported by many in the financial services industry, including D&B, lenders could also probe how many and what types of current credit accounts borrowers held, their credit limits, and how long their accounts had been open.

But consumer groups have rallied against the proposed reforms, citing privacy and fears of predatory marketing.

Mr Brown said more comprehensive information would allow lenders to make sounder decisions.

This would reduce the risk of credit over-extension and bad debts, while increasing access to mainstream credit for deserving borrowers.

The problem was particularly acute for young people who were not only responsible for a high proportion of loan defaults, but were often unaware a bad credit file could affect their chances of borrowing money later in life, said Queensland Fair Trading Minister Margaret Keech.

"Even if it is a small loan, the default will go on your record, and it may warn other lenders to steer clear of you," Mrs Keech said. "People with bad credit records have to wait five years before the default is removed from their file."

Article from: The Sunday Mail (Qld) July 29, 2007

Money lender prosecuted for collecting debts without a licence for franchisee

FAZIO -v- INTERIM ADVANCE CORPORATION PTY LTD & ANOR [2007] WASC 108 (11 May 2007)

Interim Advance Corporation Pty Ltd traded as Aussie Cash, a business that made cash advances of \$100 to \$1000.

Interim Advance also operated as a franchisor to a number of independent franchise Aussie Cash stores throughout Western Australia. Susan and Malcolm Macdonald traded in partnership as Aussie Cash Northam, one of these independent franchisees. Aussie Cash Northam made cash advances to their borrowers using

their own money, not that of Interim Advance.

Clients would make an application and, if successful, Aussie Cash Northam purchased a promissory note issued by the client. The promissory notes required the borrower repay the cash plus interest within three months. Twenty per cent of that interest was paid to Interim Advance as franchisor.

The main way of collecting repayments was by way of direct debit from the borrower's bank account. Interim Advance provided the direct debiting service to Aussie Cash Northam. Interim Advance would deduct its share first and pay the balance to Aussie Cash Northam. Aussie Cash Northam instructed Interim Advance to recover the debts from defaulters on Aussie Cash Northam's behalf in return for specified fees. Interim Advance looked to defaulting clients for the collections costs eventually, but Aussie Cash Northam was charged in the first instance, being reimbursed in due course in the event of recovery action proving successful. On or about 30 April 2004, Interim Advance prepared and signed six Local Court summonses. Interim Advance forwarded the summonses with a cheque for the filing fees to Aussie Cash Northam. It was Aussie Cash Northam's responsibility to process them through the Northam Local Court and serve them.

These six summonses were the basis of a prosecution against Interim Advance and its director, Oliver George Douglas, in the Magistrates Court at Perth, for collecting debts without a licence

under the WA Debt Collectors Licensing Act. The Act says in essence, that you can't collect debts for other businesses for a fee unless you have a licence under the Act. It says that: "debt collector" means a person who on behalf of any other person and for or in expectation of any gain, fee or reward whatever, by whomsoever paid or payable and either on his own account or in conjunction with another, carries on the business of collecting requesting or demanding payment of debts or who advertises or notifies that he carries on that business;" Interim Advance's "fee" for each summons was \$75 (and at some point in the arrangement, this changed to \$85). The Northam Local Court charged \$51 to issue each summons (in round figures), an effective "fee" of \$24 per summons less postage.

The Magistrate concluded that Interim Advance was not carrying out debt collection. "In my view the definition is not sufficiently wide to cover a situation such as existed between head office and its franchisees, that is, the provision of a service involving the preparation and possible service of a summons for little or no reward, perhaps at a loss, in circumstances where such a service could be regarded simply as a means by which head office seeks to ingratiate itself with its franchisees."

For the sake of completeness, I should say that if the prosecution could prove that [Interim Advance] charged its franchisees not only for court fees, service fees, staff time, stationery, telephone calls, use of motor vehicles and so on, and then, on top of that, levied a fee of \$75 or

\$85, the case would, of course, [bear] a different complexion.

I find on the evidence that IAC in preparing, signing and sending the summonses to McDonald was not exercising a function of debt collector. I accept it is, in a sense, a gratuitous service."

The police appealed. (Fazio, the appellant, was the policeman concerned.) In the WA Supreme Court, the judge found that "the learned Magistrate" was completely wrong. It wasn't relevant to consider the costs incurred by Interim Advance, or its profit margin. The \$75 or \$85 fee to Interim Advance was a fee or gain within the meaning of the definition of "debt collector." Interim Advance had acted in expectation of a gain. The appeal was allowed and the matter was sent back to the Magistrates Court for a further hearing.

Developments In Credit Regulation

The speakers at Thompson Australia's recent credit law conference provided a useful overview of current developments in credit regulation as summarised below.

1. Lenders to join EDR scheme

Victoria proposes to introduce legislation to Parliament by the end of 2007 to require all lenders of UCCC regulated credit to be members of an ASIC approved external dispute resolution scheme. This proposal is supported by industry associations and consumer bodies. Most

reputable lenders are already a member of such a scheme. The proposal is designed to give borrowers from fringe lenders access to a free dispute resolution scheme.

2. Reverse mortgage initiative

Victoria is considering requiring a plain English information statement to be provided to all reverse mortgage customers and providing statutory protection against negative equity. In this regard, it is relevant that the proposed national broker legislation will require brokers selling reverse mortgages to undertake special training.

3. Unfair terms in credit contracts

Victoria proposes to amend its *Fair Trading Act* so that the unfair contract provisions apply to credit contracts. Currently all states and territories have Fair Trading Acts which are substantially the same. The existing Victorian *Fair Trading Act* goes further than other Fair Trading Acts by providing in Part 2B that unfair contract terms are void. It is proposed to extend to the operation of that part to credit contracts.

4. Responsible lending

Victoria proposes to release a major consultation document on responsible lending. The initial focus will be on credit cards.

5. Mandatory comparison rate

The mandatory comparison rate ('MCR') legislation has currently been extended to 1 July 2009. The objective of the MCR is of course to help consumers identify the true cost of a fixed term loan. Possible options include:

- restrict MCR to credit advertisements and abandon comparison rate schedules
- restrict MCR to selected market segments or product types
- large scale consumer education (but this option takes a long time to take effect and so has little support)
- abandon MCR (there is significant support by regulators and consumer bodies to have some mechanism which assists consumers properly assess the cost of credit).

In this regard, the Commonwealth's component pricing proposals are relevant as they may also provide assistance to consumers to assess the true cost of credit.

6. AML-CTF laws

The Anti-Money Laundering and Counter-Terrorism Act requires all lenders to identify borrowers and maintain an active AML-CTF Compliance Program. Austrac is charged with administering this law.

Austrac is at some pains to point out that although there is a 15 month "shading in" period from the date of commencement, this should not be seen as an amnesty period but rather an "assisted compliance" period. Affected businesses will be required to be taking active steps to comply or risk prosecution.

Although it is up to each business to decide, Austrac expects that most lenders will continue to conduct identification procedures such as 100 points and that any further identification for high risk

products or high risk customers would occur as part of the credit approval process, rather than at broker level.

Stage 2 of the second tranche of reforms will cover real estate agents, dealers in precious metals, dealers in precious stones, and a range of non-financial transactions provided by accountants, lawyers, trust, and company service providers. The second tranche requires legislation to be passed and, given the impending federal election, no indication of a commencement date is available.

7. EFT Code of Conduct review

A review is currently being conducted by ASIC of the EFT Code of Conduct. Compliance with the code is voluntary. ASIC is hoping that more non-bank lenders and other providers of electronic payment methods will subscribe.

The key issues to be addressed in the review include:

- dealing with mistaken payments – a growing issue because of 'pay anyone' facilities
- whether the code should be extended to small businesses (currently it only applies to consumers).

Somewhat surprisingly, there is little impetus to change the allocation of liability for loss, possibly because banks continue to want to build confidence in online banking.

8. Personal property securities reform

This reform, promoted by the Commonwealth Attorney General, proposes a single registry for any security over any kind of property
