Min-it Software

Submission –

National Consumer Credit Protection Amendment Regulations 20121: Enhancements

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Background Information

This submission is made by Min-it Software in consultation with a number of clients. We welcome this additional opportunity to contribute to Treasury's consultation on an amending regulation pursuant to the National Consumer Credit Protection Act 2009.

Aside from the software produced in-house, specifically by or for franchised organisations, Min-it Software is the industry leader in the Australian market for micro-lenders. It has current clients in Queensland, New South Wales, Victoria, South Australia and Western Australia. Min-it Software promotes compliance with the Uniform Consumer Credit Code and other legislation.

Neither the author nor his business partner has any financial interest in any lender.

Foreword

These draft regulations continue the apparently never-ceasing complication of legislative compliance requirements for non-ADI lenders.

Although we have many clients that already will not lend to Centrelink beneficiaries, the provisions of Regulation 28S provide a Clayton's prohibition in regard to small amount credit contracts. It is a prohibition without being one in name. The provisions are so complex to administer and costly to adhere to as intended that it will effectively provide a prohibition on borrowing by the vast majority of Social Security beneficiaries.

This single provision alone is in complete contradiction of Senator Cormann's understanding, as recorded in Hansard for 20 August 2012, that

"the vast majority of short-term lenders will remain commercially viable, that small family owned and operated businesses will not be adversely impacted, and that people who rely on these types of

loans, which are not provided by banks, will continue to be able to access the finance they rely on to meet unexpected expenses."

Senator Thistlethwaite also stated
"*there are a number of elements in this legislation which deal not only with protecting the most vulnerable but also with ensuring that those who operate in this space can operate a profitable business*."

Lenders cannot be expected to undertake additional and far more substantial enquiries, over and above responsible lending and loan suitability requirements simply to satisfy the demanding computations of draft Regulation 28S(3) when their gross income has been capped and, as has been acknowledged by Treasury, does not take into account any lender's current costs. The 20% establishment fee and 4% per month model is based on the original proposal of 10% and 2%, neither of which has any overseas counterpart and nor has any proven viability.

Furthermore, the *Caught $hort* final report released 13 August 2012 by Marcus Banks, Greg Marston, Howard Karger and Roslyn Russell states on page ix of the Executive Summary that
"This report helps to clarify that the reasons people engage in payday lending – and the growth of the industry – is connected to structural changes in the economy and society. Specifically, labour market changes that have decreased secure work in the manufacturing sector and increased the numbers of people engaged in precarious and casual employment, underemployment and long-term unemployment."

We note these authors do not actually support banning payday lending and that some charitable organisations actually see the benefits to consumers that the industry can provide. We have yet to see the structural changes that the Government intends to apply to assist those that will be excluded.

Finally, we would remind Government that the Green Party's proposed amendments to the Enhancements Bill were all thrown out in the Senate debate by a massive majority. On this basis, one would argue that Parliament did not intend for such draconian requirements as contained in these regulations to be implemented.

We will not respond to the questions asked but make the following general comments on some of the more contentious regulations.

Regulation 28XXA

The requirement for the warning as proposed in bricks and mortar premises is draconian. The rate is only expensive when compared to long-term mortgage loans but, as the Government has approved the model, that should be the end of the matter.

For those consumers that approach a lender that provides both small amount and medium term loans, the signage will be confusing; the warning is intended to only apply to small amount credit contracts and nothing else. The proposed regulation does not take this into account and if a credit provider suffers loss of business as a result, it will directly go against the intentions of those in the Senate who were able to see the full Enhancements Bill legislation before passing it.

In addition, if the National Financial Helpline and MoneySmart website is simply there to provide free referral to NILS and LILS lenders when we already know that these loans are not available for many purposes currently met by clients such as ours, the matter of misleading and deceptive conduct arises. Despite the fact the warning notice may be required by Regulation, s.76A of the Competition and Consumer Act 2010 Act (Cth) does not provide any defence relating to a contravention of s.95AZN through providing false or misleading information as a result of compliance to other legislation. We have sought legal advice on this matter and are currently awaiting an opinion.

If the warning requirement is to stay, our clients have indicated they look forward to the Government passing similar “nanny state” requirements for **every other Australian business.** For example, shoppers in supermarkets need to be similarly warned about fatty foods, those that contain high salt and sugar levels, and that the price to be paid may not be the cheapest and they should look elsewhere. Fast food outlets should have similar warnings – ‘Do you need that Burger and Fries today?’ Given the Government’s commitment to plain packaging for cigarettes, when are companies that sell cigarettes and tobacco products going to have a similar warning – ‘Do you need that Smoke today?’ The list is endless. If the answer is there will be no such similar requirement, then this regulation must be expunged.

Regulation 28XXB

For the web-based signage, the requirement to demand the warning be in a specific typeface and sizes is ludicrous. Many websites costs thousands of dollars and take into account many factors. The requirement for a particular font and font sizes does not take into account how the font will look on the page and whilst we acknowledge Arial is a 'default' typeface, many sites do not use it, preferring other fonts such as Verdana which are more easily read. In our opinion, any warning message should be in no less a font size as other text surrounding it.

Our comments pertaining to the need for similar warnings for every other business equally apply here but as one client said, given the high fat content of pizzas, given many take orders over the web and via SMS, we look forward to similar warning messages being required. Again, if the answer is this will not occur, then this regulation must be expunged as well.

Regulation 28XXA

In the Treasury Industry Group meetings, the consumer groups indicated they had an issue with the use of employer payroll authorities where they were used as a debt collection tool after other collection methods had failed. Some saw it as a semi-legitimate form of garnishee. The draft regulation does not cover this distinction but instead, it applies to all employer payroll deductions.

We have no issue with the wording of the prescribed form under Schedule 8 as our own form already goes much further than this, in that it makes it clear the employer is under no liability whatsoever under the arrangement.

Regulation 28S

Of all the draft regulations, the requirement of regulation 28S (3) provide the most concern. As the application will apply to all holders of Pension Concession Card holders with 51% of income derived from benefits and not just Newstart beneficiaries (who are the most problematic of all beneficiaries due to the fact that they really don't have sufficient to live on), the effects of this will be far more reaching than the industry originally believed.

We firmly believe the requirement to calculate the consumer's average daily income for the 12 months immediately before the calculation day to ensure that it's no more than 20% of the consumer's total income and then perform the requirements of 28(3) (b) to (d) will stop all loans from proceeding. This is incredibly complex and the ability to make a simple mathematical mistake can easily occur. Consequently, the amount of time this alone will take will exceed any potential income the lender can earn from the 20%/ 4% model.

What is even more worrying, though, is that the regulation

1. uses gross income rather than assessing disposable income to calculate the 20%. If the client doesn't have the disposable income to service the loan, they won't get one and no formula is going to help; and
2. appears to envisage the beneficiary has been a social welfare beneficiary for the preceding 12 months. Where they haven't, the consumer's average daily income may well exceed their current average daily income when calculated on what the beneficiary gets now from the Government. As one client stated, this is ridiculous. Lenders are concerned about what income the borrower has now and will have in the future, not what's been and gone.

We trust the Government will make the funds available to Centrelink and the not-for-profit sector funders to take up the demand these borrowers will require when our clients cease lending to them.

Regulation 79AB

The formula would appear to exclude third party fees such as bank fees, direct debit fees, credit reference or identity verification fees from being passed on to the consumer. Whether or not this is intentional or an oversight we do not know, but we would hope it is the latter.

With the requirement to obtain bank statements for the preceding 90 days and the additional provisions of Regulation 28S (3) should it remain, then consumers may well incur costs for copies of bank statements in order to secure a small amount credit contract. These costs should not be deducted and reduce the lender's income simply because the consumer has either lost or misplaced them and thereby incurs a cost to replace them. These are people whose lives are generally not efficiently organised. In addition, we would point out that Veda, one amongst many other third party service providers, increased its fees as of 01 July. The company is not providing any additional services or reporting to justify this increase, merely that it "can increase them because that's what we do every year". Over the past two years, more than one client has advised us that the fees paid to Veda have increased by just over 40%. The fee-based formula takes no account of this and the lender has absolutely no control over them. We would urge Government to allow such fees to be recoverable on an actual and reasonable basis.

Regulation 79C

We are concerned at the wording of subsection (2) as it appears to imply that a credit provider should not direct debit the consumer to recover <u>further</u> repayments due if a <u>single</u> repayment due (as per subsection (1)) under a small amount credit contract dishonours and:

(a) the credit provider has tried an additional time to recover the repayment by direct debit .and

(b) that the credit provider has not been told of the payment failures or made reasonable attempts to contact the debtor.

The wording of section 1 is unequivocal in that it refers to "<u>a</u> repayment", not <u>any further</u> repayment(s) due. As a system developer, each repayment on our system (and that of many others), regardless of how it is made, has a unique identifier. On that basis, if the repayment that's defaulted dishonours again, then no further debiting of that particular repayment number can occur but we would argue that it is perfectly acceptable to continue any direct debiting of repayments due after the one that's defaulted because the wording in subsection (1) does not specify any further repayment due.

We have reviewed the Commentary and Draft Questions and there is already considerable confusion and differing legal opinions over this provision. Some argue that "a repayment" means any repayment due whilst, as I have stated above, we would argue that as each repayment is unique, it must refer only to that one payment. We believe the intention needs clarification.

As was discussed in a Treasury Industry Group meeting earlier this year, we believe the requirement to cease debiting should be for <u>consecutive</u> dishonours, not merely a number of individual dishonours during the term of the loan. The Min-it Lending System already stops clients from continuing to debit consumers when there are three consecutive dishonours. Our belief is the number of dishonours should be increased from two to three as the way this regulation is written, it takes no account of the term of the contract. There is considerable difference between a small amount, short term loan of 4 weeks and having two dishonours and one lasting 12 months and having two dishonours. If the number is to remain at two, we would argue this should apply purely to very short term loans of less than 12 weeks.

The regulation also doesn't take into account any errors caused by either client or lender confusion in setting the, usually first, repayment date(s) as the client may well dishonour it. As a result, the lender may simply reschedule the remaining repayments.

Depending on how this regulation is read and interpreted, the wording of subsection (2) makes it plain that the dishonoured amount must be repaid before reinstating any direct debiting. There appears to be no provision that permits the lender to reschedule or make an arrangement to extend the loan term so that the borrower doesn't have to make up the dishonoured payment. This would not appear to be in the consumer's interest, particularly if they are unable to do so, and could be a source of considerable financial detriment and personal inconvenience. Our experience is it is far better to incorporate the repayment into the remaining ones and extend the term than demand the payment of money the consumer simply does not have.

We believe this needs considerable rework to make it clear exactly what can and can't be done and what is intended. In its current form, it creates further confusion.

Regulation 105C

Two clients have expressed concern with subsection (d), namely "the amounts the lessee is liable to pay if the goods are not returned, expressed as an amount for each month that the goods are not returned". If the goods are not returned, then their argument is any residual value the goods have is due and payable immediately. This is not some sum apportioned monthly but the entire balance. Expressing a monthly figure implies it is acceptable for the lessee to retain possession of the goods after the contract termination date. This may not always be the case and we believe this subsection needs rewording to take account of this.

Regulation 105F

As we raised the issue of hardship in the Treasury Industry Group meeting, we are concerned with any proposal that extends hardship to consumer leases for any undefined length of time. Given that the consumer can return the goods at any time and terminate the lease and put an end to any indebtedness, we believe rather than doing so, consumer advocates and financial counsellors may encourage lessees to claim hardship and retain the goods rather than return them. Unfortunately, this will lead to an accumulation of debt over the period of time hardship continues and when the lease matures and the goods have to be returned, the lessee may well be still liable for a considerable debt to pay off yet not have the use of the goods. Our belief is no consumer will do so and will simply try walk away from their responsibilities. This will lead lenders to pursue Court action to recover the debt.

We suggest that the regulations should encompass the lessee being able to return the goods at any stage and terminate their indebtedness up to that point in time. If they do continue to hold possession of the goods, then they may be liable for a debt that must be repaid even when they no longer have them.