Promoting Responsible Consumer Lending

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Submission to

Consumer Credit Unit
Retail Investor Division
The Treasury

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Re the Regulations To Support Provisions In The
Consumer Credit Legislation Amendment (Enhancements) Bill 2012
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The National Financial Services Federation welcomes the opportunity to make comment on the draft regulations to support provisions in the Consumer Credit Legislation Amendment (Enhancements) Bill 2012. The Federation seeks to make comments in relation to the various proposed regulations or amended regulations. In this document, the numbering is taken from the draft regulation.

28XXA Small amount credit contracts - requirements for warning on licensee's premises.

As has previously been advised, the Federation has no objection to this notice, provided the specific purpose of the objective of having such a notice is to provide information to consumers prior to entering into an agreement. The requirement to label shopfronts with a warning that the business provides "unnecessary and expensive loans", which "may not solve money problems" and details of a website which purports to show "how short-term loans really work" is, in the opinion of the Federation, aimed not at providing information to the consumer but at damaging the licensee's business.

This information would be equally as valuable if it was provided to consumers after they entered the premises as is proposed by regulation 28XXA (d)(ii). It is noted that for many years the provision of a comparison rate schedule was to be made available to consumers inside the premises and there has never been a suggestion that this was not adequate. This is the preferred position of the Federation.

In addition, the notice does not acknowledge that, in the vast majority of occasions, the consumer has exhausted the options proposed in the notice or they have already made a choice as to who their credit provider will be and the product they choose to utilise and is therefore patronising to all but a few consumers.

The Federation believes that a far more effective way of ensuring that consumers are aware of the content of the proposed warning would be to require such a warning to be provided to the consumer immediately before entering into the contract as part of disclosure requirements.

There are a number of other significant issues which the Federation feels should also be addressed.

1. "Premises". Whilst there would normally be little argument as to what would be regarded as "premises", the fact that there is a requirement under the proposed regulation that the warning must be displayed "on the front door or window of the premises as near to the entry point as possible" indicates that it is envisaged that "premises" refers to a shop with a single or multiple entry points, home office, office complex or building. If the licensee operates from a booth in a shopping centre, for example, there would be no front door or window. Likewise, if the business is operated simply from a computer terminal / kiosk (similar to an ATM), there are no doors or windows.

   Given the number of business models and structures in the market place the Federation recommends that the proposed regulation 28XXA(d)(i) be removed, leaving the proposed 28XXA(d)(ii) so that the obligation is to have the warning visible immediately on entering the premises. This, then, would cover all situations even where there are no walls.

2. The regulation does not contemplate shopfronts with multiple entry points. Is it a requirement to have a warning on every entry? It is unclear. This difficulty could be overcome by adopting the suggestion in the previous paragraph.

3. Regulation 28XXA(c)(ii) requires the warning to be in "poster form", while 28XXA(c)(iii) requires the warning to be A4 in size. The Federation does not know what "poster form" means. The Oxford Dictionary defines "poster" as "a large printed picture, notice or advertisement displayed in a public place". The Federation can only guess what is intended by the requirement that the warning be in "poster form". If what is intended is for the warning to be of a particular orientation, portrait or landscape, it should say so. Otherwise the requirement is of no value whatsoever.

4. Regulation 28XXA(c)(v) requires that the typeface be 18 point unless "otherwise illustrated in Schedule 7". The Federation is having some difficulty in determining how Schedule 7 indicates a different typeface as none are stated in Schedule 7. The Federation suggests that the regulation be amended to require 18 point size except where set out in the regulation without reference to Schedule 7.

5. The Federation is of the opinion that the content of the notice should be amended so that the options offered are simply possibilities to be followed rather than actual alternatives. The way the notice reads is that if you talk to your electricity supplier, they ***will*** work out a payment plan. Likewise, if you are on government benefits, Centrelink ***will*** provide you with an advance payment. The fact of the matter is that in a number of occasions the reason the application is being made to the licensee is because these alternatives are not available. The Federation therefore suggests that the notice be amended to read:
    - Talk to your electricity, gas, phone or water provider who may be able to work out a payment plan
    - If you are on government benefits, you may be able to obtain an advance payment from Centrelink: 13 17 94

6. The Federation also has a concern that the content of the notice may lead consumers to believe that if they need to borrow money for, say, veterinary expenses, then, as an alternative, the consumer can talk to their electricity, gas, phone or water supplier to delay their obligations to the supplier so that the consumer can then fund the veterinary expenses. The consumer's temporary cash shortfall is not always about being behind in bills for essential services and the notice should reflect that.

7. The Federation <u>strongly</u> suggests that the paragraph "Short-term loans are expensive and may not solve your money problems" be amended to read "Short-term loans may not provide a long-term solution to your money problems."

8. The Federation further suggests that the fact this is a "government requirement" should be made more obvious. Therefore, the Federation suggests that the final paragraph should be in the same font size as the balance of the notice. If the majority of the notice is in 18 point and the final paragraph is in 8 point, there is every chance that the final paragraph will not be read. The inevitable result is that consumers will see the warning as being one made by the licensee who will inevitably face the wrath of consumers if the payment plan cannot be entered into or Centrelink declines to give an advance payment. The Federation also notes that the size differential between the body of the notice and the last paragraph in the proposed webpage warning is nowhere near the difference between that

proposed in the "poster" warning and, in the opinion of the Federation, is more appropriate. The government should take ownership of the warning.

28XXB Small amount credit contracts - requirements for warning on licensee's website.

The Federation again is of the opinion, as is set out in the comments relating to the proposed regulation 28XXA above, that there are better ways of providing this information to consumers.

The Federation is also concerned that this proposal has been put into the regulations without taking any significant advice to the practicalities.

In relation to the specifics, the Federation is concerned about the general nature of some of the descriptions in the proposed regulation 28XXB. In particular the use of "reasonably visible" and "significant proportion" in regulation 28XXB(a) are terms that are subjective. This will, it is suggested, lead to many lenders including the "boxed icon" (whatever that is) on every page which will, in the Federation's estimation, lead to a situation where the mere fact of its repetition will lead to a loss of impact.

The Federation is concerned that the method of delivery of the notice can be achieved only with considerable expense to the licensee by way of the necessity for redesign and reprogramming the code supporting the webpage. The Federation has been advised that it will require a significant amount of reprogramming to every website. The Federation suggests that consideration be given, particularly in view of some of the issues raised later, to requiring a link to a PDF providing the warning instead of the regime proposed.

The Federation has the following concerns in relation to the current proposal in respect to websites:-

1. The prescription of the minimum size of fonts in a Web application by the use of "points" is of concern to the Federation. There are effectively four options for sizing of fonts on the Web. They are point, pixel, em and percent. Of these four, on the advice available to the Federation, point is the least useful and therefore the least used on the Web. For a useful discussion of the issues see http://kyleschaeffer.com/best-practices/css-font-size-em-vs-px-vs-pt-vs/.

The following items need to be considered:-

a. Points are "print" units, not "display" units.

b. Due to the use of different browsers, monitors, user settings and other variables, it is not possible to prescribe how a document will look when displayed through a Web application.

c. Font sizes limited by points may not be resizable, i.e., they may not be able to be made larger or smaller when viewed. This will limit those with accessibility problems (such as those with poor eyesight) with an inability to read the warning.
(see http://www.yourhtmlsource.com/stylesheets/csstext.html#points)

d. A significant number of consumers will be accessing websites via smartphones which, by definition, have a very small screen. The inability to resize will cause significant difficulty.

e. The Federation is also concerned, as a result of the above that prescribing the size of the font by points in documents on a Web application may breach the Web Content Accessibility Guidelines. The Australian Human Rights Commission has issued some advisory notes pursuant to the Disability Discrimination Act as to the content and accessibility to the World Wide Web. Inability to resize may breach this advisory.
(See http://www.hreoc.gov.au/disability_rights/standards/www_3/www_3.html)

f. If the intention is simply to have the warning in a format which is able to be read, perhaps that is what should be said. If it is intended to have the warning no less prominent than the surrounding text, then that should be what is said. The Federation believes that consideration should be given to not defining text size by points, but by what the Federation believes is the norm in website programming, i.e., pixels, ems or percentage.

2. The regulation requires a "hyperlink" to "open a warning". The Federation has a concern that the way the regulation reads, although obviously not intended, is that the hyperlink must open the warning in every case not only when the hyperlink is clicked on by the consumer. The Federation believes that it should

be made clear that the warning which is referred to in 28XXB(a) and (b) needs only be displayed where there is a request via clicking on the "boxed icon".

3. The regulation proposes that on two occasions a warning in the prescribed form be required to "open". The first is when a consumer takes, one assumes, action foreshadowed in 28XXB(a); the second is when the consumer accesses the application page. In both occasions the most usual way for such a warning to be displayed would be by way of a "pop-up". Many web browsers have pop-ups disabled either by a default setting at the time of installation; by preference; or use of antivirus software programs.

4. The only other way it can be achieved is by directing a consumer to an entirely new page. The advice that the Federation has obtained is that it is not possible to ensure that a Web page containing an application is available only after a warning page has been closed as it will require reliance on JavaScript. If the viewing computer has JavaScript disabled, the requirement will not be able to be met. It is not possible, according to the Federation's advice, to have a foolproof system of ensuring that closing a fresh webpage will return the user to the application form.

5. The requirement that the application form not be available until the "identical warning" is closed is impossible to comply with. If the warning is provided by way of a pop-up, a browser may disable pop-ups and therefore it would never be visible. If it is by way of a separate webpage, opened in a new browser tab, the warning may never be visible to the user. If it is in some way superimposed over the application form, it will not be displayed unless JavaScript is enabled. All of these are beyond the ability of the licensee to control.

6. The Federation is of the view that requiring the warning to be made available from numerous parts of the website together with a compulsory display prior to accessing an application form is not only impossible to achieve 100% achievability but is also considered to be simply overkill.

7. The Federation repeats the concerns it has in relation to the content of the notice that are expressed in the discussion concerning regulation 28XXA above.

28XXC Authorisation for deduction.

The Federation is concerned as to what is the intention of regulation 28XXC. It was intended, the Federation believed, to have a form which was required to be given to an employer by a credit provider where a deduction was to be made from salary. However, regulation 28XXC(1) seems to say that it is only required to be given to the employer where the first deduction is to be made within 30 days of the date of signing the document. If the first deduction is to be made after 30 days, then it appears the intent is defeated.

The Federation understood, and this appears to be supported by the content of section 160E(3) of the Credit Act, that the form was intended to be given in cases where there had been a default. It is noted that, notwithstanding the fact that there is a requirement under section 160E(3) to give the debtor 7 days notice in a form prescribed, no form is prescribed.

Further, the form in Schedule 9 appears to be a form delivered by the licensee to the employer using the licensee's particular format. That being the case, the Federation has concerns that the notice provides information meant for the consumer about the consumer's rights but is directed to the employer.

The Federation is of the belief that such information should be provided, if it is to be provided at all, in a document other than one which is effectively a notice from a credit provider to an employer.

The other concern the Federation has is that whilst the notice is said to be from the credit provider, it refers to the debtor in the first person. The syntax, therefore, needs reviewing.

It should be noted that payroll deductions are rarely used by members of the Federation in any event. This is not, in the Federation's estimation, a significant issue. The Federation's members believe that the documents used by them are far more detailed and useful than that proposed by the regulation.

28S Licensee must not enter into small amount credit contract if repayments do not make prescribed requirements.

Treasury will be aware that the principal expressed in the proposed regulation 28S was first espoused by the Federation. However, the Federation had in mind a far simpler method of determination than that which appears in the draft regulations.

AS OUTLINED BELOW, THE DRAFT REGULATIONS PROPOSE A METHOD THAT APPEARS TO HAVE NO EXPLAINED RELEVANCE TO THE LOAN ASSESSMENT AND APPROVAL PROCESS UNDER THE NCCP ACT. ASSESSMENT ON CAPACITY TO REPAY IS BASED ON A CONSUMER'S FUTURE CAPACITY TO REPAY, AND NOT THEIR "AVERAGED" HISTORICAL CAPACITY, WHICH THE DRAFT REGULATIONS INCORRECTLY FOCUS ON.

The Federation has the following concerns:-

1. Under the proposed regulation 28S, the trigger as to whether a person is entitled to rely on the protected earnings amount is whether they are "qualified for a pensioner concession card in accordance with section 1061ZA of the *Social Security Act 1991"* and for whom more than 50% of their income is derived from payments under that Act. It is, in the opinion of the Federation, unreasonable to expect a licensee to be able to determine whether or not a consumer is "qualified for a pensioner concession card". A person may have a card but not be qualified to hold it (as is explained later), or a person may be qualified but does not have the card. For this determination to be made it would be a requirement for the licensee not only to be conversant with the *Social Security Act 1991* (about 2600 pages), the *Social Security (Administration) Act 1999* (about 560 pages) and the regulations made under both but also with the Centrelink policies and procedures to make such a determination.

   It is far easier and, in the Federation's opinion, far more sensible simply to have to determine whether or not a consumer held a pensioner concession card. Failure to do so also would require the licensee to make a determination about whether or not the holder of a card is entitled to that card.

   For example, the holder of a card advises that they are in receipt of income that they have not disclosed to Centrelink, then it would be necessary for the licensee to make a determination as to whether or not such a disclosure to Centrelink would revoke the card. The situation is simply untenable.

2. It was the intention of the Federation to provide the protected earnings amount concession to long-term Centrelink recipients. The Federation therefore believes that there should be some time limit on the time a consumer holds such a card before the regulation applies. It should also be recognised that the protected earnings amount was proposed in lieu of an interest-rate cap rather than, as it has turned out, in addition to.

3. THE FEDERATION HAS MAJOR CONCERNS ABOUT THE METHOD OF CALCULATION AS PROPOSED IN REGULATION 28S(3) AND BELIEVES NOT ONLY IS THIS SECTION PRACTICALLY UNWORKABLE, BUT THEORETICALLY FAULTY AND SHOWS NO RELATIONSHIP TO, OR UNDERSTANDING OF, THE PRACTICALITIES AND REALITY OF THE LOAN ASSESSMENT REQUIREMENTS UNDER THE NCCP ACT.

In order for the licensee to be able to comply with the prescribed unworkable calculation, the licensee must be provided with, or be able to obtain, the following information:-

a. The income received by the consumer in the 12 months before the calculation day. Unless the consumer had all their income, both from government and non-government sources paid into a bank account and has access to 12 months bank statements, or the consumer retained every Centrelink Income statement and/or payslip, this calculation cannot be made. There is the additional problem in relation to the definition of "income" as is referred to later in this paragraph.

   This is simply unworkable.

b. The unpaid balance of each small amount credit contract. In the majority of occasions this will only be available by obtaining that detail from the credit provider who provided the small amount credit contract. Pursuant to section 36(2) of the National Credit Code, this statement can take up to 14 days to be provided. Applications for small amount credit contracts are invariably time critical. As a result, it is more than likely that the unpaid balance cannot be accurately determined within the required time. There is a further significant

issue in that, if the consumer has more than one small amount credit contract in respect to which payments have not yet been made, the licensee is unable to determine what these credit contracts are if the consumer does not tell the licensee. The consumer will, in circumstances such as this, not tell licensees because they know that they will not be advanced a loan in such circumstances.

This is simply unworkable.

c. Situations would also occur where the consumer has made a payment but that payment has not yet been applied to the loan balance, thus causing further distortion of this information. It can take several days from a direct debit from a consumer bank account to the time it is applied to their loan account.

This is simply unworkable and would be a constant area of conflict between consumer and lenders.

d. The number of days remaining in the contract. Similarly to the balance in the previous paragraph, this information may take 14 days to obtain.

This is simply unworkable.

The Federation has major concerns in relation to the calculation, even if that information is available. Firstly, the period over which the calculation is to be made is effectively 12 months. That could very easily provide a skewed response. If a consumer was employed full-time for 9 months and then was in receipt of a Centrelink benefit for 3 months because the average would be higher than that which should apply. Likewise a period of employment during the middle 6 months of the previous 12 months would alter the calculation. The Federation is of the view that, if there is to be an averaging (which we don't support), it should be over a much shorter time period before the calculation day to accurately represent the current circumstances and not those which existed over the previous 12 months and which now may not be relevant.

Secondly, the Federation notes that the balance standing against a customer's account may not end up being the amount payable. As a result using the "unpaid balance" as a method of determining the liability may provide an inaccurate result. This occurs where there is, for example, an inducement by a credit provider to a borrower to make payments on time by reducing the amount to be paid if the payments are successfully made.

Put simply, the balance of any outstanding loan has no fixed bearing on the repayment amount for that loan, and hence a consumer's capacity to repay another credit facility.

4. The Federation is concerned that the term "average daily income" is used without definition. Does this include income from all sources such as government grants (such as the recent compensation package for the carbon tax), tax refunds, superannuation payments, windfalls from lottery or gambling, sale of capital items such as furniture or motor vehicles, and other sources of income particularly child or spousal support. Further, is the paid income to be included at the pre-tax or post-tax rate?

5. The Federation must reiterate that it is NOT the consumer's past financial circumstances which are important when assessing a consumer's ability to repay the loan. Assessments are made on the income expected during the course of the loan (not the last 365 days). As a result, in the opinion of the Federation, it is not more appropriate, but simply practical to look at the current and expected income to determine whether or not the consumer should be entitled to the benefit of the protected earnings amount.

6. Overall, the cost of ascertaining whether the consumer is of the class of consumer specified by this provision is simply disproportionate to the expected return on such a small amount short term loan, having regard to the restrictive "20+4" cap on costs, and that most of the 20% establishment fee will be absorbed by the time and costs of satisfying this inquiry.

7. **A CONCEPT WHICH WAS SIMPLE, HAS BEEN COMPLICATED BEYOND REASON. THIS SECTION REQUIRES FURTHER CONSULTATION WITH INDUSTRY AND A TOTAL REWRITE.**

28XXD Unsuitable credit contracts - prescribed circumstances.

In principle the Federation has no objection to the prevention of "loan splitting". It should be noted however that under the 20%/4% formula it would not matter how many times the loan was "split" as the return to the lender and the cost to the borrower would be identical.

However, the Federation believes that it should be a rebuttable presumption that a contract is unsuitable under regulation 28XXD. There are circumstances where, given that an SACC could run for up to 12 months, a consumer may have a need to borrow two lots of money over that period. Rather than take out the full amount of the loan at the beginning, it may be to the consumer's benefit to borrow half the money first and the other half later in the year. The Federation suggests that the words "except in circumstances where it is to the debtor's benefit" be added to 28XXD(2).

79AB Credit provider prescribed person must not require or accept payment of a fee or charge in relation to small amount credit contract etc

The effect of this regulation is to include all costs associated with the provision of credit to be deemed as an irrecoverable cost of the licensee on the basis these amounts are to be paid to person/s introduced to a debtor by the credit provider. Whilst we understand it is an attempt to overcome some of the models used by lenders to circumvent interest-rate cap legislation in the past the effect of this regulation makes legitimate expenses to legitimate third parties irrecoverable.

There are several types of fees which in the opinion of the Federation should be excluded from regulation 79AB. These are fees payable for credit reports, those payable for electronic identification and fees payable to direct debit companies.

ASIC has issued guidance which says that it expects (subject to scalability) a credit report to be obtained in each case where an assessment is made. Credit reports cost the licensee up to $14 per report. If the loan is for a period of one month and in the sum of $100, with a payment at the end of that to collect the whole amount through a third-party provided DDR arrangement with a fee of $2, then about 66% of the gross profit on the loan would be lost through the cost of a credit report and

DDR. Instead of the apparent intended amount of $24 to the lender, the amount available would be only $8.

Leaving the draft regulation as it, acts as a direct disincentive for credit providers to undertake a credit report and with Comprehensive Credit Reporting about to be introduced, it is essential that there be as much encouragement as possible to ensure that all credit providers participate in the reporting system.

Likewise, in order to comply with AUSTRAC identification procedures, electronic identification is allowed. This again is a cost which makes the loan application process less cumbersome for the borrower but as the current regulation stands, a cost which must be borne by the lender.

The use of DDR facilities is by far the most convenient for borrowers. It is also the cheapest. Payments by cheque are cumbersome and expensive to the borrower and expensive for the lender. Payments by periodic debit (PDC) are very expensive with costs sometimes up to $7 per payment (payable by the payer) and are inconvenient as they are almost impossible to stop at the conclusion of the loan payment period unless the debtor makes the request.

Payment by way of DDR means that the debtor does not have to worry about a payment being made on time or in the correct amount. However, for reasons unknown to the Federation, direct debit facilities are rarely made available to lenders operating in the small amount credit contract area. The only way the facility can be offered to borrowers is through the use of third-party providers which comes at a cost.

79C Default in payment by direct debit under small amount credit contract.

The Federation has concerns that it is unclear from the regulation when a direct debit may resume. Regulation 79C(1) provides that a credit provider may not seek a repayment if it has twice sought to obtain a repayment using a DDR and the credit provider has not told the debtor that the direct debit requests have been unsuccessful or has not made reasonable attempts to contact the debtor. It seems that the intention is that the DDR must be suspended where it has twice been unsuccessful until the debtor has been told that it has been unsuccessful or a reasonable attempt has been made to do so.

It seems, then, that once the debtor has been told or contacted, the DDR may resume.

However, regulation 79C(2) says that the credit provider may resume the DDR once the payment has been made in another manner. If that is the intention of the regulation, why include regulation 79(1)(b)?

Section 79 of regulations was another researched Federation suggestion, which has subsequently been modified by Treasury. As has been previously put to Treasury, the Federation believes that the passage of time for two failures is insufficient time to allow the DDR system to properly bed down. In cases where payments are taken weekly, experience shows that in the majority of cases 3 weeks is required to overcome a problem which is not caused by lack of funds but the inability of the debtor to provide correct information to the credit provider.

THE FEDERATION STRONGLY RECOMMENDS TREASURY FOLLOW OUR RESEARCHED PROPOSAL, CHANGING THE TRIGGER FOR THIS SECTION TO THREE FAILURES OR IN THE ALTERNATIVE, REMOVE THIS SECTION UNLESS TREASURY UNDERTAKES AND PUBLISHES ITS OWN ASSESSMENT AND IMPACT OF THE TRIGGER AT TWO FAILURES.