FINANCIAL SYSTEM INQUIRY

GENERAL SUBMISSION OF
CONSUMER CREDIT LEGAL CENTRE (NSW) INC

9 SEPTEMBER 1996

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Consumer Credit Legal Centre (NSW) Inc

The Consumer Credit Legal Centre (NSW) Inc, (CCLC) is an independent community legal centre specialising in the financial services area.

The Centre was established in April 1986 with the brief of promoting a fair and equitable financial services market.

To this end the Centre:

- provides free legal advice and assistance to consumers and advisers, with priority of intake to low income and disadvantaged consumers;
- provides community legal education via books, pamphlets, a newsletter and regular seminars for advisers;
- conducts test case and other innovative litigation and
- advocates for change to benefit or protect consumers in appropriate fora in the financial services area.

The Centre receives ongoing funding from the NSW Department of Fair Trading and from the Federal Department of Legal and Family Services.

CCLC has recently represented consumers in the following landmark cases:

Carnie v Esanda Finance (1995)ASC 56-296;
State Bank of NSW v Various Respondents (1995)ASC 56-307;
The AGC national mediation and;
Aikins v National Australia Bank unreported, NSW Sup. Ct CA, No. CA40613192

and has membership of or involvement in the following bodies:

Australian Consumers Council (advisory council to Federal Minister)(ACC)
Australian Payments System Council (APSC)
Law Society Consumer Law Committee
Insurance and Superannuation Commission, Consumer Consultation Group.
The Australian Banking Industry Ombudsman
Aust Pacific Smart Card Forum - Code Working Group
Banking Code Taskforce
Financial Planning Association Complaints Resolution Scheme

Consumers Federation of Australian (CFA)
Australian Financial Counselling & Credit Reform Association (AFFCRA)
Financial Counselling Association of NSW (FCAN)
NCOSS, FONGA
Coalition for Class Actions
Homefund Action Coalition
National Association of Community Legal Centres

CCLC recently made submissions to:
the NSW Motor Trade Review
the EFT Code Review
the PSA Inquiry into Bank Fees and
the NSW Department of Agriculture’s Review of the Farm Debt Mediation Act.

Summary of Recommendations

2.1 That the Inquiry give specific consideration to the issue of the costs and benefits of deregulation for low income Australians.

3.1 That practical measures to ensure universal access to banking services be adopted.

4.1 That, whatever the ultimate structure of a consumer protection regulatory body, that body must:

- be a government regulator with a dedicated consumer protection function;
- have broadly-framed powers;
- be properly resourced to enable it to perform its functions effectively; and
- be required to adopt broad consultative processes including consultation with consumers and their representatives.

5.1 That the ACCC retain its consumer protection as well as its competition policy responsibilities as they are currently defined and that it receive adequate resources, commensurate with it functions, to carry out its responsibilities.

5.2 That the ACCC's ability to provide consumer protection in relation to finance sector industries not be diminished.

5.3 That all finance sector industries be subject to the full operation of the *Trade Practices Act 1974*, including Parts IVA and V thereof.

5.4 That the general protective measures provided for by the *Trade Practices Act 1974* not be reduced in any way.

6.1 That there be universal coverage of all credit providers in the financial services sector (including finance companies) through ADR schemes.

6.2 That all ADR schemes meet a minimum standard for such schemes (such as the industry-based customer dispute resolution schemes benchmarks currently being devised by a joint working party representing government, industry and consumers).

6.3 That consumer access to ADR schemes be enhanced by simplifying entry into the appropriate scheme. This could be achieved by:

(a) streamlining the multiplicity of existing and imminent schemes into a jointly funded mega-scheme with divisions, according to the nature of the product in dispute; or, at least in the interim,

(b) establishing a central point of entry with adequate skilled and trained staff to assess complaints and make appropriate referrals to individual schemes.

6.4 That there be regular contact between the ADR schemes and the appropriate government regulators in order to allow for speedy identification of problems.

7.1 That the Uniform Credit Code be retained without dilution of its consumer protection provisions.

7.2 That specialist Credit Tribunals be established in each State.

1. Introduction

The Consumer Credit Legal Centre (NSW) Inc. ("CCLC") has produced two Submissions to the Financial System Inquiry ("the Inquiry") announced by the Federal Treasurer on 30 May 1996. In addition to the present General Submission, which considers a range of consumer protection and access issues from a consumer perspective, we have also developed a submission entitled Smart Cards: Consumer Issues and Regulatory Options which provides an initial overview of regulatory issues associated with the introduction of stored value cards to Australia.

CCLC welcomes the opportunity to put its views to the Inquiry Committee. Both the broad Terms of Reference for the Inquiry and comments made by the Treasurer at the time it was announced indicate that the Federal Government recognises that the financial system which takes Australia into the next century must be one which maximises consumer benefits and well-being. Implicit in our Submissions is the view that these are goals which can only be achieved in a regulatory environment which gives due weight to consumer protection and access issues.

The following General Submission does not attempt to deal with all matters raised by the Terms of Reference. Rather, we have focussed on those issues most directly related to the needs of (in particular) low income and otherwise disadvantaged consumers and to our collective experience as direct service providers and credit advocates in a variety of fora [see under "Consumer Credit Legal Centre (NSW) Inc."].

2. The Results of Deregulation

The Inquiry is charged to report on the results arising from financial deregulation including the consequences for the choice, quality and cost of financial services available to consumers and other users [see Terms of Reference, Specifics, 1(a)]. We submit that, in discharging this obligation, the Inquiry should recognise that the impact of deregulation has not been consistent across the spectrum of consumers and that its costs and benefits for low to middle income consumers, in particular, requires specific consideration.

The Campbell Committee Report of 1981 expressed the hope [at p731] that low income earners would benefit from deregulation because, in a deregulated environment, they would have greater access to the banking system for credit and would therefore become less dependent on high cost loans from non-bank financial intermediaries. The Inquiry ought to consider whether the Campbell Committee's hope that deregulation would bring cheaper finance to the less well-off has in fact been realised. Our preliminary view is that, while deregulation may have been a factor in increasing the range of products and services available to many (but not all) consumers in recent years, there has been little evidence of price competition producing downward pressure on interest rates on consumer loans. The one notable exception here has been the home loan market in the relatively recent past. It needs to be noted, however, that while price competition among home loan providers has been beneficial for some lower income people, it has made little difference to the position, vis-a-vis the cost of finance, of the many in this group who cannot aspire to home ownership.

Apart from interest rates, another factor which needs to be taken into account in assessing the results of deregulation for low to middle income earners, is the effect of the proliferation of fees and charges which are now imposed on borrowers and deposit account holders. In this context, there should be consideration of the extent to which benefits to consumers in the form of lower interest rates (where such benefits exist) are offset by increases in fees, eg account keeping fees, associated with the provision of finance. Equally important is the position of the large group of low income Australians, including welfare and benefit recipients, who have not enjoyed a reduction in the cost of consumer finance but who are finding it progressively more expensive to participate in mainstream banking because of the introduction of a so-called 'user pays' approach to the operation of bank accounts. In what ways, if any, has this group benefited from deregulation of the financial system?

Recommendation:

2.1 That the Inquiry give specific consideration to the issue of costs and benefits of deregulation for low income Australians.

3. Access to Banking Services for all Australians

The Inquiry's Terms of Reference require that, in looking to the future, it make recommendations about how best to promote "the most efficent and cost effective service for users" consistent with, among other values, "fairness": see Terms of Reference, Specifics, 3(a). CCLC submits that the requirement that regard be had to "fairness" in developing proposals for the future of financial services regulation means, among other things, that serious consideration should be given to the issue of continuing access for all Australians to banking and related services.

Access to financial services has a number of dimensions. It involves at least:

- the maintenance of services which low income consumers can afford to access;

- geographical access, including the maintenance of services to rural and remote areas as well as to low income suburban locations; and

- access to services delivered in a way which does not exclude or seriously inconvenience consumers with special needs including many elderly and disabled people.

As the Inquiry Committee will be aware, a number of developments in the financial services market in recent years - including the introduction of fees and charges for basic banking and related services, the eroding of bank branch structures as a result of takeovers and internal rationalisation and the increasing shift to electronic banking as the dominant form of service delivery - are impacting in a negative way on the ability of some groups in the community to obtain ready access to basic services.

The situation in relation to rural and remote communities appears to be especially acute. For instance, a recent News Release from the Premier of New South Wales ["Bank Closures: Premier Announces Help for Country Towns", dated July 2, 1996] indicated that there are now 150 towns in New South Wales which, after the closure of more than 400 bank branches in the past five years, no longer have a bank. This situation can be assumed to be duplicated in the rest of rural and remote Australia.

The problem of access is not confined to the bush, however. The erosion of the bank branch network in suburban areas has had serious ramifications especially for less mobile users of services, including the elderly and people with disabilities, as well as for local businesses concerned about the loss of trade consequent on the removal of banking facilities for customers. To take one case only, in the area of South Sydney, with which CCLC is familar, concern about the loss of services - in particular, the closure of the two bank branches in the Waterloo area in 1995 - led to the formation of a Coalition Against the Removal of Bank Services by local residents, business people and community workers. The group attempted to negotiate with the banks in question and held a number of protest meetings; they were, however, ultimately unsuccessful in preventing the closures. Not surprisingly, perhaps, the Waterloo area is predominately inhabited by low income earners including a large portion of aged pensioners and Dept. of Housing tenants.

The reduction in face to face banking has been accompanied by a dramatic increase in electronic banking. Banks have relied upon the new electronic services as evidence of the increasing convenience of banking services. However, electronic banking does not facilitate access for all individuals within the community. In particular, the elderly and the disabled often face major difficulties when using these services. These difficulties may be physical such as eyesight problems or immobility or psychological difficulties such as fear of being robbed, inexperience with and mistrust of the security of electronic transactions and privacy concerns: see, for example, You Can't Always Bank On It!: The Report of a Study into the Banking Experiences of Older People by Australian Pensioners' and Superannuants' Federation (October 1993). In short, it must be remembered that for many consumers electronic banking does not, and often cannot, replace branch banking.

While CCLC recognises that in some areas the rationalisation of bank branch structure does not create access problems (sufficent services remain), and while we also recognise that electronic banking is increasingly providing new options for many consumers and, indeed, increasing their access to services, we are concerned that a significant segment of the population is now being marginalised and may be so increasingly in the future.

In our view, as already stated, this is an issue which the Inquiry should consider and in relation to which it should make workable recommendations. In the recent past the consumer movement has canvassed options for dealing with the question of access including the introduction of a compulsory basic banking product and the imposition of community service obligations as a condition of access to the payments system: see, for example, Australian Federation of Consumer Organisations Submission to Prices Surveillance Authority Inquiry into Fees and Charges Imposed on Retail Transaction Accounts by Banks and other Financial Institutions (April 1995). We recommend these approaches to the Inquiry.

Recommendation:

3.1 That practical measures to ensure universal access to banking services be adopted

4. A dedicated consumer protection regulator for the finance sector?

Since the deregulation of the finance system, the role of consumer protection mechanisms has become essential in dealing with the more complicated decisions consumers face and the financial risks they encounter. There is an inherent risk in the nature of a deregulated economy that unless consumer protection mechanisms are operating effectively, the underlying imbalance of power between individual consumers and financial institutions will be reflected in unfair market practices.

Currently, consumer protection functions in the financial services area are divided among a number of bodies including the ASC, the ISC, the AFIC, and the ACCC largely on an industry by industry basis. No doubt the Inquiry will look at this situation: indeed, its Terms clearly require it to. Further, it is quite possible that the Committee will recommend a consolidation and rationalisation of consumer protection functions in a single 'peak' body or possibly as a division of a single super-regulator which also has responsibility for prudential supervision. Presumably, in whatever form it emerges, such a unified regulatory structure would be responsible for a range of consumer protection measures including licencing, inspection and surveillance, the vetting of Codes of Conduct, oversighting ADR schemes, consumer liason, education and information etc.

At this stage in the Inquiry process, CCLC does not seek to advance a view regarding the optimal framework for consumer protection regulation into the future. While we see benefits in consolidation and the elimination of wasteful and confusing overlapping of functions among multiple regulators, we are also concerned that any new regulator have the power, resources and corporate will to perform its consumer protection functions effectively. An assessment of whether that is likely to happen will depend in large measure on the *detail* of any scheme as it emerges both during the Inquiry and beyond.

While, as just stated, we do not wish to put specific proposals about the future structure of the consumer protection regulator(s), we do believe that certain general principles need to be adhered to when arrangements are being developed in this area. These are set out in the Recommendation which follows.

Recommendation:

4.1 That, whatever the ultimate structure of a consumer protection regulatory body, that body must:

- be a government regulator with a dedicated consumer protection function;
- have broadly-framed powers;
- be properly resourced to enable it to perform its functions effectively; and
- be required to adopt broad consultative processes including consultation with consumers and their representatives.

5. The Role of the Australian Competition and Consumer Commission ("ACCC")

The ACCC was established on 6 November 1995 following the merger of the Trade Practices Commission and the Prices Surveillance Authority. It is the only national body able to deal with the enforcement of competition policy and, in this connection, it has responsibility for Part IV of the *Trade Practices Act 1974 ("TPA")* which aims to ensure that the market place is operating effectively and competitively and that consumers as a class are not disadvantaged by restrictive practices or other collusive conduct. In addition to its competition policy charter, the ACCC also has a related national consumer protection charter by virtue of its responsibility for Parts IVA and V of the *TPA*. These Parts of the Act seek to redress the underlying imbalance in bargaining power between individuals and traders by providing mechanisms to protect individuals from misleading, unfair and unconscionable conduct. In respect of both its competition policy role and its consumer protection role, the ACCC operates across virtually all industries, including the finance sector.

In our view, the role of the ACCC thus described should not change. More specifically, we submit that any proposals by industry groups that the Committee should recommend either that the ACCC have its consumer protection role taken from it or that finance sector industries, or some of them, should be exempt from the operation of the *TPA* (and thus intervention by ACCC) ought to be resisted. A number of considerations support this view.

First, it is strongly arguable that, in relation to consumer protection, the ACCC (and before it the TPC) has developed a regulatory style, founded on strategic intervention to correct marketplace irregularity, which, while highly effective, would not be easily replicated by another kind of regulator - for instance a finance sector specific consumer protection body charged with a range of detailed, on-going regulatory obligations: the kind of body discussed in the previous section.

Secondly, the exemption of one or more finance sector industries from the operation of the *TPA*, would inevitably create the potential for costly disputation over jurisdictional issues: did the exemption apply to the particular case?

Thirdly, the benefits of a conceptionally consistent approach to competition and fair trading issues which the existence of (virtually) universally-applicable regulation like the *TPA*, administered by a single body, encourages, would be lost if exemptions were permitted.

Fourthly, the firm relationship between competition policy and consumer well-being which the current regulatory regime secures at an institutional level (by making the ACCC responsible for both competition policy and consumer protection) may be diluted if the ACCC were forced to give up its consumer protection role.

Finally, and most basically, if the changes under consideration came about, consumers would lose the obvious benefit of a uniquely robust and determined consumer protection agency. This point is probably best illustrated by way of some examples of the strategic interventions of the ACCC (and the TPC before it) in recent years:

> *The TPC commenced proceedings against three life insurance companies, CML, Norwich and MML and investigations into the selling practices of three other insurance companies, AMP, NML, and Zurich as a result of alleged misleading and unconscionable conduct in the sale of life insurance products to Aboriginal people in remote communities. The TPC settled the proceedings and reached an informal settlement in relation to the investigations as a result of which premiums were refunded, internal compliance programs were established and funding was given to the education of Aboriginal people. As a result of the TPC's strategic intervention, the industry recognised the need for reform and internal review.*
>
> *The ACCC intervened in the 'Homefund' litigation commenced by private litigants who are seeking damages from a number of parties involved in the Homefund matter. The Respondents in the matter sought to extend the 'Bradken principle' that the TPA should not apply to the Crown to also protect the corporations which dealt with the Crown. The ACCC argued against such an extension. The Respondents were successful before the Federal Court but the Applicants are seeking leave to appeal to the High Court.*
>
> *The ACCC considered the proposed acquisition of Household Financial Services of Australia Limited by AVCO Financial Services to ensure that such acquisition did not have the effect of reducing market competition or consumer choice. The ACCC concluded that the proposal was not against the TPA and accordingly, was not opposed.*
>
> *The ACCC released a brief report on competition policy and banking as a result of the proposed acquisition of Challenge Bank in Western Australia by Westpac. Extensive market inquiries were made as a result of which the proposed acquisition was not opposed. The ACCC recognised however, the advantages of smaller regional banks to a retail finance market which is dominated by a few large trading banks and concluded that all further proposals to acquire a smaller regional bank would be carefully scrutinised.*

Recommendations:

5.1 That the ACCC retain its consumer protection as well as its competition policy responsibilities as they are currently defined and that it receive adequate resources, commensurate with its functions, to carry out its responsibilities.

5.2 That the ACCC's ability to provide consumer protection in relation to finance sector industries not be diminished.

5.3 That all finance sector industries be subject to the full operation of the *Trade Practices Act 1974* , including Parts IVA and V thereof.

5.4 That the general protective measures provided for by the *Trade Practices Act 1974* not be reduced in any way.

6. Consumer Redress

The need for effective ADR schemes has been recognised by many sectors of the financial services market, with such schemes having proliferated in the 1990's. However, one segment of the market - finance companies - has resisted this trend. The fact that consumers of finance company products do not have access to any ADR scheme at present should send a clear message that it is not appropriate to further deregulate at least this section of the market.

The failure of finance companies to develop an ADR scheme remains despite the fact that the advantages to both consumers and industry in having effective, independent and free alternative dispute resolution schemes have been widely acknowledged elsewhere within the financial services sector. This is demonstrated by the plethora of industry-based and initiated schemes and by numerous commentaries and reports: see, for example, the Sackville Committee's Access to Justice Report (1994) and the ASC's "Good Advice" report (November 1995).

Advantages of Alternative Dispute Resolution Schemes

In the absence of any real ability to enforce their rights and obtain adequate redress and compensation, consumer protection laws become nugatory and consumers lose confidence in the ability of the regulatory system and the financial services market to take account of and protect their interests. To the extent that access to free, independent ADR encourages consumers' confidence in the market and assists in institutions maintaining a fair level of dealing with consumers throughout the course of their relationship, this has commercial benefits for industry and for the Australian financial system generally.

From the point of view of industry, ADR schemes also deliver clear benefits in that they reduce the costs and delays of litigation, preserve customer relationships, and help to identify systemic problems. They are also an invaluable source of customer feedback. It is for these reasons, indeed, that industry-initiated ADR schemes have become more common.

From the point of view of consumers, access to ADR is vital. In the experience of CCLC, the vast majority of consumers experiencing difficulties with their financial service provider have no possibility of enforcing their rights, or seeking redress, through the court system. This can be for a range of reasons including: the prohibitively high cost of litigation; the lack of access to Legal Aid (which will be further diminished following cuts to Legal Aid funding announced in the 1996 budget); the risks of litigation; and the fact that the amount in dispute often does not make litigation viable. In other cases, the dispute does not necessarily give rise to a legal cause of action but involves an issue of fair dealing or good practice. In the last-mentioned context, the high level of complaints to ADR schemes where the basis of the complaint relates to the level of service provided is indicative.

ADR schemes can also assist government regulatory bodies by providng an "early warning" mechanism of potential problems. A series of complaints can help in the early identification of problems or changes in practices. For example, the selling practices of life insurance companies to regional Aboriginals in the late 1980's would not have been as extensive or ultimately as expensive for the companies concerned (in terms of refunds, litigation costs and reduced reputation) if these practices had been exposed earlier through complaints to an ADR scheme which had effective liaison with government.

Gaps in existing ADR schemes

The bulk of CCLC's work involves the consumer credit side of the financial services market. Of the major industry participants in the consumer credit market, namely, banks, credit unions, building societies, mortgage originators, retail store finance, and finance companies, only the banks provide an independent, free and external ADR scheme, the Australian Banking Industry Ombudsman scheme. However, we note that the Australian Association of Permanent Building Societies and the Credit Union Services Corporation (Australia) Limited are both preparing to establish ADR schemes, in compliance with their respective industry Codes of Practice (which are yet to be implemented).

While these advances are commended, there will continue to be a significant gap in the coverage of ADR schemes for consumers of credit products while finance companies do not have a scheme. In 1994/95 CCLC gave legal advice in 939 cases involving an institutional credit provider (bank, building society, credit union, finance company). Of those 939 cases, 348 (or 37%) involved a complaint about or problem with a finance company. In 1995/96 the figures were 384 cases involving a finance company out of a total of 1,043, or 37%, again. These figures are disproportionately high given the extent of the credit market held by finance companies.

Of the consumers who contacted us with problems with their finance company in 1994/95, 51% were low income earners. In 1995/96, 60% were persons on low incomes. These figures partly reflect the fact that finance companies dominate the lower socio-economic end of the consumer credit market. Consumers with less financial sophistication and fewer financial choices tend to resort to finance companies, rather than banks, for their credit. These are the same consumers for whom access to justice is most difficult and who therefore have an even greater need for access to a free, independent and fair alternate dispute resolution forum. At this time, they are missing out.

The types of problems, based on our cases, that consumers frequently experience and which are suited to ADR are:

1. Unfair practices at the point of sale, including:

    • misrepresentations as to the true cost of the credit. For example, misrepresentations as to: the amount of the repayment instalments; the amount of money actually being lent (often by financing expensive and inappropriate consumer credit insurance policies); or the interest rate charged; and

    • high pressure and other unfair selling tactics, especially by linked suppliers such as car dealers and door-to-door sellers. This results in consumers being pressured into signing expensive contracts for products they do not really need or are of poor quality, leading to financial overcommitment.

2. Unilateral increases in credit limits and unsolicited credit cards. These practices often lead to consumers financially overcommitting themselves.

3. Enforcement practices such as illegal repossessions and sales of mortgaged goods (especially motor cars) for undervalued prices.

4. Debt collection practices, including:

• harassment, including: frequent and/or abusive telephone calls; breaches of privacy by contacting and informing employers, relatives and neighbours; and threats of physical violence; and

• demanding payment for debts from individuals who were not parties to the credit contract (eg. the surviving spouse of a deceased borrower).

Case study

The following recent case illustrates a number of these issues in just one consumer's experience with a major national finance company:

> *A wife and husband went to a car dealer to buy a car. They had discussions with the car dealer about a car for $18,000, plus insurance for $3,000. While the couple were still thinking about this, the car dealer / finance company representative arranged finance with a major finance company. The wife told the dealer that she was concerned about the family being able to maintain the repayments in the short term, as the husband was a shearer and so had only seasonal work.*
>
> *The dealer responded to this by saying that he would arrange insurance to cover them if unemployed. Subsequently the husband was unemployed for 2 months, but when the couple attempted to claim on the insurance, they found that it was only disability/accident insurance.*
>
> *The finance company has refused all requests to vary the contract to accommodate the couple's financial position, despite the fact that the couple are now in a position to catch up the arrears.*
>
> *Instead the company attempted to repossess the vehicle. The repossession attempt involved the repossession agent driving the car away with the couple's two small children in the back seat* .

Recommendations:

6.1 That there be universal coverage of all credit providers in the financial services sector (including finance companies) through ADR schemes.

6.2 That all ADR schemes meet a minimum standard for such schemes (such as the industry-based customer dispute resolution schemes benchmarks currently being devised by a joint working party representing government, industry and consumers).

6.3 That consumer access to ADR schemes be enhanced by simplifying entry into the appropriate scheme. This could be achieved by:

(a) streamlining the multiplicity of existing and imminent schemes into a jointly funded mega-scheme with divisions, according to the nature of the product in dispute; or, at least in the interim,

(b) establishing a central point of entry with adequate skilled and trained staff to assess complaints and make appropriate referrals to individual schemes.

6.4 That there be regular contact between the ADR schemes and the appropriate government regulators in order to allow for speedy identification of problems.

7. Consumer Credit Legislation

After a very lengthy period of negotiation, the Consumer Credit Code ("the Code") is due to come into force on 1 November 1996. While acknowledging that the purpose of the Inquiry is to look at regulatory structures rather than individual pieces of legislation, CCLC considers it appropriate to comment on the Code in this submission. We take this view in the light of the history of attempts, most often successful, by the finance and banking industry to water-down and delay this important legislation; together with our expectation, following from this, that industry groups will seek to use the present Inquiry as another opportunity for attacking the Code. We submit that any such attempt should be critically examined by the Inquiry in the light of the following factors: the problems the legislation is designed to address; the history of its negotiation; and the present state of the credit market.

The Consumer Credit Code replaces the Credit Acts initially passed in 1984 (in some State jurisdictions). While the Acts contained detailed and prescriptive requirements they only covered a small percentage of the consumer credit market, predominantly loans up to $20,000. These loans were relatively high cost and were made to low to middle income consumers. The Credit Acts were a response to widespread problems associated, in particular, with the activities of finance companies which dominated the low value consumer credit market at the time. The problems in question included: overselling; inadequate and misleading disclosure of price information; poor training and monitoring of staff and agents; high levels of commission; overcharging and heavy handed debt collection practices.

Through the 1980's the banks increasingly entered the low value credit market. In doing so, they adopted many of the tactics and practices which had caused such problems with finance companies. In consequence, when the replacement of the 1984 legislation began to be discussed it was realised that consumer borrowers from banks needed many of the protections previously designed for finance company market consumers.

In the process of negotiation for new, uniform credit legislation (which began in the late 1980s) the banks argued very strongly that the legislation should cover the whole consumer credit market regardless of the type of institution or the size or purpose of the loan and should therefore encompass large loans to sophisticated consumers, as well as housing loans. As a concomitant of this, however, the banks also argued for a reduction in the degree of consumer protection in the legislation including the degree of specificity and prescription for which it provided. Consumer groups had initially sought more targeted and focussed legislation but eventually the industry position held sway: in essence, the banks got the Code they wanted. Notwithstanding this, however, banks now argue that the Credit Code is overly prescriptive. Such an argument is both facile, given the range of transactions the Code covers, and hypocritical given the banks' insistence on that wide coverage.

As already indicated, the Code is far less prescriptive than the 1984 Acts. While industry is incurring costs in seeking to prepare to comply with it, it is clear that the Code is the focus rather than the real cause of those costs. Being new to the regulated consumer credit market, the banks were effectively a generation behind in developing appropriate documents, training, computerisation and procedures for the credit market of the 1990's.

This is born out by a consideration of the section 86 civil penalty reinstatement cases faced by a number of the large banks in recent years. These cases arose under the 1984 Credit Acts in relation to the small percentage of bank loans that were regulated by that legislation. A reading of the cases reveals significant shortfalls in bank staff training, document design, computer management and internal review procedures: see for example *State Bank v Various Debtors Commercial Tribunal of NSW (1995) ASC 56-387.* The deficiencies revealed were not marginal failures to meet strict legislation although those existed. Rather, they involved a failure to meet any reasonable standard of competence and professionalism in key elements of proper lending. Nor were the errors simply technical: in many instances the cases show that credit providers were illegally overcharging individuals and passing on charges to them improperly.

For instance, in *State Bank v Various Debtors*, in which CCLC acted for the Respondent Debtors, it was calculated that, at the date of judgement, a total of $2,646,326.06 of overcharges made on consumers had not been refunded. These overcharges arose principally as a result of the Bank's use of an illegal formula to calculate accrued interest, and on systematic computer errors. With reference to the Bank's management of its computer systems, the Commercial Tribunal of NSW made the following observations:

> *The range of errors attributable to deficiencies in the Bank's computer systems in these proceedings attest to a most serious failure by the Bank to properly program the systems and/or adequately check their functions once programmed.[p354]*

More generally, the Tribunal stated as follows:

> *Throughout these reasons the Tribunal has recorded its concern with respect to the evidence of incompetence and inefficiency of Bank staff in particular circumstances ... The evidence ... does demonstrate that there was an unacceptable measure of indifference by the Bank to the significance of the Act, the need to comply with its requirements, and the need to embrace the concept of truth-in-lending which the Act embodies. In the view of the Tribunal the Bank's conduct falls short of what was required of it and the Bank's failure in that respect is viewed seriously, moreover, when debtors were so significantly overcharged without any appreciation that this was the case.[p355]*

In the light of comments like these, it is clearly simplistic to cite the credit legislation or government regulation as the *cause* of expenditure on improving practices, staff training, procedures and documentation. That much of this cost would have to have been incurred in any event in order for banks to provide a level of service commensurate with increased expectations of consumers is also apparent from an examination of banks' non-lending activities. Thus, the far less detailed Banking Code, drafted by the banks themselves, has also necessitated significant expenditure as banks seek to improve practices to a reasonable standard. Privately many in the industry acknowledge that these costs would have to have been incurred regardless of any code or legislation, just to bring practices up to proper standards for the competitive market of the 1990's. There have been similar expenses in the general and life insurance markets where codes are being introduced. High costs have been incurred in overcoming the complacency and bad practices which developed in the absence of regulation and straightforward access for consumers to dispute resolution bodies.

The position of the banks on many issues arising under the Code is purely and dogmatically ideological. For example, while the banks complain about the high cost of the prescribed disclosure, they fail to mention that, of the many pages in a home loan, the prescribed disclosure takes one page while their own arcane and unnecessary legalese takes up the balance. Further, provisions which are not designed to address practices of mainstream legitimate credit providers are attacked. For example, there is a power in the Credit Code allowing the Tribunals to review fees, charges and interest rates that are unconscionable. The purpose of this power is to protect consumers from rogue lenders who have charged borrowers interest rates as high as 142% p.a. in the past. Obviously, this power will not impact upon those charging competitive rates, such as banks.

Similarly, there is an attack on criminal penalties under the credit legislation. However, these have always existed and, despite literally hundreds of thousands of acknowledged breaches of provisions carrying a criminal penalty, there have been no prosecutions. It would be misleading to suggest there is any likelihood of a criminal sanction being imposed on a bank under the Code.

Civil penalties, the only effective enforcement that has existed previously and an important reason why some banks began to improve their procedures in the early nineties, are greatly narrowed and reduced in scale under the new Code. Nevertheless, the banks continue to attack them. In doing so they are unable to cite even one case from the past where a penalty was imposed which was not, or the size of which was not, justified. And this is despite some significant penalties being imposed. Every credit provider involved in the civil penalties cases had a right of appeal to a superior court under the legislation; and yet there have been no more than a couple of superior court applications to date. Presumably the great majority of penalised finance providers considered that they had little prospect on appeal because of the extent of their wrongdoing which had been exposed.

There is an extensive jurisprudence which has developed in relation to civil penalties and it gives the credit provider many grounds of defence. Many credit providers have walked away with no penalty being imposed, despite significant breaches of the disclosure requirements. The provisions of the Credit Code expand the grounds of defence available to credit providers.

The banks also advocate the restriction of applications to superior courts and speak disparagingly of Tribunals. In effect, this is an argument to place redress beyond the reach of consumers due to the cost and expense of litigation in those courts. The Tribunals which exist are highly competent and have specialised knowledge of the industry. They are subject to appeal. The absence of large numbers of appeals by banks is testimony to the quality of their decision-making.

The banks continue to argue that the market is delivering fair practices and clear disclosure to all consumers. What this argument fails to acknowledge, however, is that the detailed terms and conditions of contracts, including what happens on default, are simply not subject to competitive forces. Thus, there has never been a single advertisement or marketing strategy based on them. Competition, if it exists, will be on the question of price - and that will only occur if there is competitive disclosure of price on a comparative basis. The latter requires prescriptive legislation as the instances of financiers seeking to hide part of the cost of a product or understate it are legion. It is disappointing therefore that the Credit Code has made it more difficult to compare the cost of products.

The current national uniform approach to credit regulation is a clear improvement on the previous piecemeal approach to regulation, with variations between States. There are structures in place designed to co-ordinate regulatory supervision from State to State and these should be given a chance to work. What is still lacking, and is sorely needed, is an appropriate specialist tribunal in each jurisdiction which is accessible and competent to deal with disputes. This results in inequities between consumers from different States. The Inquiry should recommend that all States create such a Tribunal.

From time to time it is suggested that the Federal Government should take over the field and enact Commonwealth legislation to ensure uniformity. As noted above, we believe that the existing system should be given a chance to work before any such move is contemplated. In addition, the Commonwealth should not seek to interfere unless it is willing to expend the very significant amount of money required properly to monitor the legislation and provide recourse and advice and assistance to consumers.

Recommendations:

7.1 That the Uniform Credit Code be retained without dilution of its consumer protection provisions.

7.2 That specialist Credit Tribunals be established in each State.