THE OPERATION OF THE UNIFORM CONSUMER CREDIT CODE

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1. INTRODUCTION

The Uniform Consumer Credit Code (UCCC) commenced operation on 1 November 1996. Operating as a uniform national legislative scheme, it was enacted as template legislation in Queensland and adopted in the other States and Territories. (Until recently, Western Australia chose instead to enact its own substantially similar legislation, rather than participate fully in the uniform scheme.)

The nature of this scheme means that amendment can be a difficult and cumbersome process. Since its implementation there have been two rounds of review – a Post Implementation Review (PIR) in 1998, followed by a National Competition Policy Review (NCPR) in 2000. Many of the Recommendations of the PIR have yet to be adopted (other than a number of largely technical amendments), despite most being supported in the NCPR.

The most significant substantive amendments since 1996 have been the closure of the short term lending loop-hole in December 2001, (which had allowed the proliferation of pay day lenders), and the introduction of the mandatory comparison rate regime in July 2003.

Although the UCCC was preceded in a number of jurisdictions by Credit Acts, the nature of the regulation imposed by the UCCC was in many respects new and untried. That being the case, it is perhaps surprising that there has not been greater attention paid to identifying areas in which the legislation has failed to properly protect consumers, or to provide a legislative response where such failures have been identified.

It is our view that the effect of the UCCC is best reflected in the experiences of consumers who enter into consumer credit transactions. Consumer Credit Legal Service is the primary provider of free legal services to such consumers in Victoria - particularly disadvantaged and vulnerable consumers. Drawing on the experiences of those clients, and also of consumers who have sought assistance from Credit Helpline Inc, it is possible to make a grounded assessment of where the UCCC is effective and where it fails. The authors have also sought input from agencies in other jurisdictions, including the Consumer Credit Legal Centre (NSW) and the Consumer Law Centre of the Act.

Unfortunately, the list of the failures of the UCCC is not insubstantial. While it is beyond the scope of this project to identify each and every problem, we have sought to highlight a broad range of matters which exemplify the difficulties faced by consumers despite – or in same cases, because of – the UCCC.

This paper also examines two specific issues in particular detail – avoidance of the UCCC using the Business Purpose Declaration, and the issues of fees and charges. Again, it is beyond the scope of this project to examine each of the other issues in such detail, however the authors recommend that such examination be undertaken, in order that necessary reforms can be pursued.

2. EVASION OF THE CONSUMER CREDIT CODE

While regulation of consumer credit transactions appears a straightforward one, even the very basic concepts of "consumer" and "credit" are sufficiently unclear as to allow for manipulation. Each of the tests that must necessarily be applied to any given transaction in order to determine whether or not that transaction falls within the ambit of the UCCC allows for at least one, if not multiple, opportunities for avoidance.

For that reason, one of the defining features of the regulation of consumer credit in Australia is the extent to which the UCCC is avoided by credit providers. It is clear from the anecdotal evidence provided by credit lawyers and financial counsellors that many consumers who obtain credit are denied the protection of the UCCC. Common examples include credit contracts taken out in car yards and with fringe credit providers, which are often documented in a manner designed to avoid regulation by the UCCC. Transactions which fall outside the ambit of the UCCC can be disadvantageous for consumers for a number of reasons, including:

- Consumers are provided with less meaningful disclosure than would be the case under the UCCC – eg. the failure to disclose an interest rate;
- Consumers lose important rights and remedies are considerably less;
- Fees and charges associated with the transaction are often significantly higher; and
- Higher commissions may be paid in relation to the transaction.

2.1 The Business Purpose Declaration

There are a number of mechanisms utilised by lenders seeking to avoid the UCCC. Perhaps the most prevalent is misuse of the Business Purpose Declaration.

The UCCC applies to a credit contract entered into by a consumer where the credit is provided wholly or predominantly for personal, domestic or household purposes. As such, credit for business purposes is exempt from the Code. The Code then further provides that credit is presumed conclusively to be *not* provided wholly or predominantly for personal, domestic or household purposes where the consumer signs a declaration before entering into the credit contract stating that the credit is obtained wholly or predominantly for business or investment purposes – section 11.

That declaration will be binding upon the consumer (whether it is true or not) unless the consumer can establish that the credit provider (or any other relevant person who obtained the declaration from the consumer) knew, or had reason to believe, at the time that the declaration was made that it was false.

It is noteworthy that the provision has been limited by amendment so that a consumer can only challenge the Business Purpose Declaration where the person taking the declaration knew it to be false *and* that person was the credit provider, a finance broker or had an association with a credit provider or a finance broker through a regular

referring of consumers for credit or holding the credit provider's contract forms at its premises.

Accordingly, where a Business Purpose Declaration is signed by a consumer the UCCC will not apply, irrespective of the true purpose of the loan, unless the consumer can prove that:

- the loan was for a personal purpose, *and*
- the person taking the declaration was the credit provider, finance broker or an associated person, *and*
- that person knew, or had reason to believe, that the declaration was false.

Unless all three points are proved the credit contract will not be covered by the UCCC even though it was for a personal purpose. The burden of proof rests with the consumer.

The operation of the Business Purpose Declaration was considered in the case of *Neuendorf v Rengay Nominees P/L & Anor*. The case represents not only an interesting examination in legal principles but a good case study of the use of Business Purpose Declarations by some credit providers.

Case Study No.1

Mrs Neuendorf, an elderly retired woman, contacted Fishley Financial Services Pty Ltd with a view to refinancing a loan she had written with Bailey O'Neil Pty Ltd, which had in turn been taken out to pay various personal debts.

Fishley Financial Services Pty Ltd were finance intermediaries and mortgage consultants. Mrs Neuendorf met with Mr Fishley of that firm three or four times over a period of a month. In the course of the transaction Fishley wrote to Rennick & Gaynor, Solicitors (of which Rengay was a subsidiary) requesting "residential finance". That letter stated that the current mortgage was with Bailey O'Neil and that Mrs Neuendorf wished to refinance the current loan to effect repairs to her home and to cover costs. Mr Rush of Rengay stated that he drew no conclusion about the purpose of the loan from this letter as he understood that Bailey O'Neil only made loans not subject to the Code, that is, not for personal, domestic or household purposes.

In any event Rengay approved the loan application and forwarded the loan offer through a company called McDuff Thompson, an associated company of Fishley Financial Services, which then arranged for the offer to be completed by Mrs Neuendorf.

> The loan offer contained a condition that the loan would be for predominantly business purposes and required a Business Purpose Declaration to be signed. Mrs Neuendorf completed the loan application and as part of this process was taken by Mr Fishley to the offices of C A Italia & Associates, Solicitors, where she signed the Business Purpose Declaration which had been forwarded to that firm by Rengay. The Tribunal found that in the course of the interview with Mr Italia Mrs Neuendorf told Mr Italia that the purpose of the loan was to refinance the Bailey O'Neil loan. There was no evidence that Mr Italia was told anything more about the purpose of the Rengay loan.
>
> The Tribunal found that the purpose of the loan was personal, however the Declaration was effective to exclude the operation of the Code. The reasoning of the Tribunal appears to be that it accepted the evidence that Rengay did not realise the loan was for a personal purpose due to its erroneous assumption that all loans made by Bailey O'Neil were for business purposes. It further held that Mr Italia was not explicitly told that the loan was for a business purpose and had no reason to believe otherwise. Finally it held that Mr Fishley's knowledge of the true nature of the transaction was irrelevant as he was not the person taking the declaration.

The case confirms the view that where a credit provider uses an intermediary for the purpose of obtaining a business purpose declaration then it can rely upon a Business Purpose Declaration by simply ensuring that the intermediary makes no inquiries as to the purpose of the loan. Indeed, in the course of the evidence, Rengay made it plain that their reasons for insisting upon Business Purpose Declarations in every transaction they entered into was to ensure that those transactions were not regulated by the UCCC. This approach, when coupled with ensuring that the person taking the Declaration is not associated with the credit provider or a finance broker, will ensure that the conclusive presumption of business purpose can never be displaced.

The effect of this is that by this relatively simple loan application structure the UCCC essentially becomes voluntary in its application to consumer credit contracts.

It is remarkable to consider the outcome of the Neuendorf case when one considers that:

- the consumer was an elderly retired woman,
- the letter sent by the finance intermediaries to Rengay requesting finance stated that it sought "residential finance", and further went on to state that Mrs Neuendorf wished to refinance the current loan to effect repairs to her home and to cover costs, and
- it appears that Fishley Financial Services (the finance intermediaries) were aware that the loan was for a personal purpose.

It is contended that if the Business Purpose Declaration is to be held effective in these circumstances then it is difficult to consider circumstances where the Declaration would be ineffective. These facts support the contention that the credit provider is under no obligation to make any reasonable enquiries as to the true purpose of a loan once a Declaration is signed. It can, and as a matter of self-interest should, sit on its hands and ensure that it makes no enquiries where such a "suspicious" transaction comes across its desk. The issue of third party intermediaries is discussed further below at 5.8.

However the use of the Business Purpose Declaration is not restricted to circumstances relating to finance brokers as set out above. There is material to suggest that lawyers acting for credit providers advise clients that they should utilise Business Purpose Declarations as a mechanism for avoiding regulation by the Code.

Case Study No.2

In the *State of Queensland v Ward & Anor* (2002) ASC ¶155-055 the Queensland Supreme Court dealt with an application concerning a large number of loans made by Shark Financial Services. The credit provider lent money at rates of interest between 150% and 360% per annum. Many of the consumers who borrowed from Shark Financial Services were in difficult financial situations and some at least were borrowing money to keep themselves supplied with unlawful drugs. It was Shark Financial Service's practice to require any borrower to sign a Business Purpose Declaration irrespective of the true purpose of the loan. Ambrose J commented that:

It is clear that Shark in the present case received legal advice as to the effect of the constraint under section 6(1)(b) of the Code after which he/it regarded it as providing a 'loop hole' for loan shark activities to the extent that it could be pretended that they involved monies advanced to borrowers for 'business or investment' purposes.

In this case Ambrose J held that the credit provider in fact knew that the loans were not for business purposes. In this regard he had the advantage of a number of police phone taps with respect to the credit provider's activities. His Honour stated that:

It is perfectly clear from the content of the many tape recorded conversations (during July, August and September 1998) and from an examination of the nature of the occupations, income sources, etc of many of the borrowers that Shark - upon legal advice - seized upon s 11 as providing him/it with a loop hole to avoid whatever constraints under the Act and Code might be imposed upon him/it should borrowers be lent money for personal, domestic or household purposes.

The case illustrates the extent to which some credit providers will utilise the Business Purpose Declaration as a loophole. However it is also important to note had it not been for the extreme circumstances of the case where the credit provider's conversations were recorded by the Queensland Police it might have proved very difficult for borrowers to prove that the credit provider was aware of the true purpose of the loan. Such evidence would have been dependent upon borrowers' oral testimony to contradict the Business Purpose Declaration signed by them.

This makes challenging the Business Purpose Declaration in the Courts an uncertain process.

As stated earlier, it is quite common to see Business Purpose Declarations obtained by motorcar traders in relation to the financing of the purchase of a motor vehicle. When challenged, the credit provider will inevitably state that it did not know the true purpose of the loan contract and relied upon the signed Declaration. The motorcar trader will usually support the Declaration and state that it had no reason to believe that it was not true. Many consumers complain that they were unaware that they were signing a Business Purpose Declaration when signing the various documents relating to both the purchase and the financing of the motor vehicle. Further, and in many circumstances, consumers have stated that they had made known the true purpose of the loan to the trader.

When presented with two alternative views as the circumstances of the case it is often useful to consider the issues of the parties' self-interest in the transaction. In many of the cases that have come before credit lawyers and financial counsellors it is plain that the purpose of the loan was for personal use. Further, as many of these borrowers appear to be quite credit worthy there would appear to be no reason for the borrower to misrepresent the purpose of the loan.

Those borrowers appear to be obtaining no advantage in the credit transaction and subsequent to entering into the loan contract have not sought to obtain any tax benefit from the transaction: for example seeking tax deductions in relation to a leased motor vehicle. In contrast, there appear to be numerous incentives to both the lender and the intermediary to document the transaction so as to bring it outside the ambit of the UCCC.

A recent case study illustrates the above circumstances.

Case Study No.3

Ms N approached a car yard to purchase a Porsche motor vehicle. Upon deciding to purchase the car she was asked whether finance would be required to assist the purchase. She agreed she needed finance and the car dealer said that he could arrange finance through a related company. The dealer then asked if she wished to lease the vehicle for tax deductibility reasons.

> Ms N replied that she was an employee of a company and did not use her car in her work and so could not obtain a tax deduction on the car as it was only used for personal use. Ms N then signed the finance documents.
>
> She subsequently decided to pay out the loan and refinance when she calculated that the interest rate on the loan was 10% - higher than she had understood would be the case. On obtaining a pay out figure it became apparent that she was required to pay a $5,000.00 early termination fee. She queried this and was told it was because the loan was a "business loan", and those loans had a higher termination fee. In fact she discovered that the loan was a finance lease. Upon complaining that she had been wrongly signed up to business finance she was told that nothing could be done as a commission had been paid to the car dealer, and this was higher than for loans documented as consumer credit.
>
> Ms N sought legal representation and after legal proceedings were issued, the termination fee was dropped.

Three points arise from the case study. First, there is absolutely no advantage to the borrower in misrepresenting that the transaction was for business purposes. Accordingly it would be reasonable to presume that the borrower's allegations that she made known that the vehicle would be used for business purposes and explicitly stated that it would not be associated with a business, were true.

Second, the terms of the contract entered into by the borrower were significantly detrimental compared with the terms that she would have obtained had the credit contract been documented as a loan contract under the UCCC. In particular:

- The borrower would have obtained disclosure of the interest rate in relation to the contract. Relevantly, that interest rate was approximately 10% - comparatively high.

- The borrower would have had a right to pay out the loan contract with a minimal termination fee, and accordingly would have saved $5,000 in penalties and payouts.

- It would appear from the comments made by the finance company to the borrower that the motorcar trader received a significantly higher commission in relation to the transaction than would have been the case if the loan had been documented under the UCCC.

It is noteworthy in the above case study that the borrower had considerable trouble in resolving her complaint. Upon making her complaint to the financier her lawyers were advised that a Business Declaration had been signed and that they relied upon this as conclusive proof for the purpose of the loan and accordingly that it was not regulated

by the UCCC. Although the borrower could easily prove that the loan had not been used for a business purpose her only evidence would be her own testimony that the person taking the Declaration was aware that the loan was for a personal purpose. Put bluntly, it would be her word against that of the dealer, and this meant that she ran considerable risks in issuing proceedings to resolve her complaint given the relatively modest amount in dispute.

From the above it is apparent that the operation of the Business Purpose Declaration has had the effect that compliance with the UCCC is essentially voluntary. Credit providers and their agents are able to put application process structures in place to ensure that a Business Purpose Declaration, unwittingly signed by a borrower, will always be conclusive proof irrespective of the true purpose of the loan.

There is also material that suggests that there are significant financial incentives to the originators of credit contracts such as motorcar traders, to promote credit contracts that are not regulated by the UCCC. Those contracts are often materially disadvantageous to consumers.

It is strongly recommended that the Business Purpose Declaration procedure contained in section 11 of the UCCC be repealed. In this context, further consideration needs to be given to the ambit of the UCCC, particularly having regard to the fact that the Federal financial services legislation applies to investment. Given the apparent ease with which consumers can be denied protection perhaps the more appropriate exclusion would be credit provided to incorporated entities.

This would not merely remove the ability of credit providers to so easily avoid regulation, but would reflect the changing nature of the market. Australian consumers have in recent years moved increasingly into the investment market in the normal course of managing their domestic finances. The need to provide consumer protection to small business and domestic investors is now recognised in many ways, including financial services legislation, co-regulatory mechanisms such as industry based codes of conduct, and in the Terms of Reference of relevant External Dispute Resolution schemes such as the Banking and Financial Services Ombudsman.

In this context it is clear that the UCCC is now far too limited in its application. The fact that this limitation also facilitates one of the avoidance mechanisms makes the argument for its removal particularly compelling.

2.2 Terms Contracts

A number of credit providers are currently providing credit by way of selling goods (or land) by instalment. Under these arrangements the consumer purchases items from either the credit provider or a supplier, and the finance for the purchase is provided by the consumer entering into a contract of sale with the credit provider whereby the consumer will pay the "purchase price" of the goods by instalments with ownership in the goods passing to the consumer on payment of the last instalment.

The issue as to whether such transactions involve the provision of credit as defined in the Consumer Credit Code has produced considerable controversy and been the subject of decisions such as *Rafiqui v Wacal Investments Pty Ltd* (1998) ASC ¶155-024 and *McKenzie v Smith; Lenehan v Smith* (1998) ASC ¶155-025. The argument advanced by credit providers to say such transactions are not regulated, is that credit can only occur where a debt is formed and then deferred. In these transactions, it is argued that the time for payment of the debt is at the end of the transaction or when each instalment becomes due, and therefore no deferment of debt ever occurs. Such credit providers point to High Court authority for such a proposition in the case of *McDonald v Dennys Lascelles* (1933) 48 CLR 457.

The uncertainty created by these decisions means that these consumers can't assert their rights, and are unable to access important protections. While resolution of these matters might ultimately be obtained through the courts, the intent of the UCCC is sufficiently clear as to suggest that the appropriate response should be legislative, and that the UCCC should be amended without further delay.

2.3 Interest Free Credit

A number of fringe financiers add another layer to the "sale by instalments" tactic, insisting that to the extent that the transaction can be characterised as credit, no charge is made for that credit.

The UCCC only applies to consumer credit transactions where a charge is or may be made. Some lenders exploit this requirement by incorporating the charge (or the cost of the credit) into the cost of the goods to be financed, and arguing accordingly that the credit is being provided at no cost. This is particularly prevalent in the used car market, where the true cost of the goods being offered for sale is difficult if not possible to ascertain, and where egregious mark-ups are often par for the course.

2.4 Negotiable Instruments

In Victoria, prior to the introduction of the *Credit Act* in 1984 many fringe financiers endeavoured to avoid the money-lending legislation by lending to consumers by way of Negotiable Instrument.

The way in which this transaction occurred is that the consumer approached the lender for a loan, usually for a relatively small amount, eg. $1,000.00. That loan was then advanced to the consumer and was secured by way of the consumer signing a promissory note or other negotiable instrument for, say, $2,000.00.

The basis of the arrangement is that at the end of a particular period of time, the promissory note will be payable and the lender effectively receives $2,000.00 in repayment for its advance of $1,000.00. Such an arrangement is expressly excluded from the operation of the UCCC by s.7(5). Anecdotal evidence from consumer groups indicates that such lending is again on the rise so as to take advantage of the exemption from regulation by the UCCC.

2.5 Consumer Leases

Since the introduction of the UCCC, consumer workers have complained about a significant rise in the use of leases for standard consumer purchase transactions.

Under the UCCC, leases are separately regulated and a much more limited disclosure regime applies. In addition, the remedies available to consumers entering into consumer leases are significantly less than the remedies available to consumers entering into loan contracts.

> **Case Study No.4**
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> Mr M went to a car yard to purchase a second hand car. He made it clear to the dealer that he would need to purchase the vehicle on finance, and that he could only afford repayments in the vicinity of $350/month. The dealer showed Mr M what vehicles were available and after a test drive Mr M agreed to purchase a small sedan. He signed all documentation at the dealership.
>
> Mr M subsequently lost his job and approached a financial counsellor. The financial counsellor realised that Mr M had in fact signed a consumer lease. Further, although monthly payments were slightly less than Mr M's $350 limit a substantial proportion of the true cost of the vehicle had been accounted for as a "residual". The agreement explicitly gave Mr M no right or option to purchase the vehicle. In contrast to his position under a loan contract Mr M was liable for stamp duty on each payment, and after 1 July 2000 also became liable for GST.

Similar issues arise in relation to consumer leases as arise in relation to business purpose declarations, particularly in the context of the involvement of third party intermediaries. It is common for such intermediaries – motor vehicle traders, store salespeople etc – to arrange finance by way of lease rather than a loan without explaining to the consumer the difference, without any regard to the needs of the consumer, and in some cases without the consumer realising. The fact that the only party apparently receiving a benefit from the transaction being constructed in this way is the financier, suggests that there must be some unseen incentive provided to the intermediary.

3. OTHER EXAMPLES OF NON-COMPLIANCE

While the issues raised in the preceding section involve avoidance – or in the case of consumer leases substantial avoidance – of the UCCC there are numerous examples of credit providers simply making little if any attempt to comply with the obligations imposed by the legislation even when all parties agree that the transaction is a regulated one.

Non-compliance can include systemic failure to disclose relevant matters or to properly calculate relevant amounts, or ignoring restrictions operating in respect of enforcement. This section seeks to identify some of the key systemic issues, such as incorrect interest rate disclosure. Additional examples of non-compliance such as illegal repossessions are discussed in more detail in section 5. Ineffective Consumer Protections.

3.1 Interest Rate Disclosure

A cornerstone of the UCCC was to ensure that credit providers prominently and accurately disclose the interest rate applicable to the credit contract. In recent times, consumer groups have become aware of a number of instances where the interest rate disclosed on the loan contract is inaccurate.

In one recent case, a major lender was disclosing an interest rate of 9.96% when in fact the interest rate (based on the calculation of the amount lent versus the repayments to be made) represented 15.19%. The UCCC requires disclosure of the annual percentage rate –s.15(C). On its face, a failure to provide accurate disclosure of the interest rate pursuant to s.15(C) represents a breach of s.100 of the legislation, and a civil penalty of an amount up to the loss of interest charges under the contract applies. However, credit providers argue that in circumstances such as those described that there is no breach of the interest rate provisions, as the UCCC defines "annual percentage rate" as the rate specified in the contract as the annual percentage rate. As such, the interest rate disclosed in the contract will always, automatically, be correct.

The consumer might argue that if the interest rate is correct, then either the amount or the term of the repayments must necessarily be incorrect. However, such argument is of little value to the consumer as such an incorrect disclosure is not subject to any civil penalty under the UCCC and it is unclear whether any compensation is payable. As such, incentives for credit providers to accurately disclose interest rates is significantly lower to that which was originally intended.

3.2 Pre-emptive enforcement

An increasing number of credit card providers are moving to pre-emptively enforce in the event of default, ignoring the 30 day "grace" period prescribed by section 80 of the UCCC.

> **Case Study No.5**
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> Ms X. had a credit card with a major financier. She unwittingly defaulted, but had no idea that she had done so. A day before receiving the section 80 default notice allowing her the opportunity to remedy the default she received a call from a debt collection agency demanding immediate payment of the entire balance. When she received the default notice the next day she contacted the financier, but was told that the account was cancelled and accordingly it was no longer possible for her to remedy the default.

Some finance companies assert the right to accelerate a contract without allowing the debtor to remedy a default within the 30 day period prescribed in section 80. The operation of the relevant sections appears to allow for some inconsistency. This needs to be clarified, with the debtor clearly retaining a right to remedy the default.

4. FEES AND CHARGES

Under the Credit Acts there was strict regulation of the types of fees that could be charged separately from interest. As a general rule internal fees and charges, and establishment fees and procuration fees were prohibited. The UCCC represents a radical departure from this policy. The policy behind the UCCC was to permit credit providers to impose fees and charges on borrowers so as to allow the credit provider to "cost recover". The policy of the UCCC is that fees and charges are the means by which the credit provider recoups the cost of establishing and administering a loan while the return for providing the loan, or "profit" earned by the credit provider, is to be viewed as recouped through interest. This distinction is important both under the UCCC and as a matter of credit law policy, as the comparative nature of interest rates will be lost if credit providers can shift "profitability" on a loan from the interest rate to fees and charges by inflating the fees and charges on the loan.

For example a consumer wishes to borrower $4,000 and compares two loans:

Loan 1	
Amount lent	$4,000
Establishment fee	$100
Interest rate	12%pa
Amount payable	24 monthly payments of $193.
Loan 2	
Amount lent	$4,000
Establishment fee	$300
Interest rate	7.25%pa
Amount payable	24 monthly payments of $193.

As can be seen from the above example, lender No.2 can lower the interest rate by almost 5%pa by shifting profitability from the interest rate into an inflated establishment fee. Lender 2 also earns more on the loan than Lender 1 if the loan is repaid early.

Accordingly the object of the UCCC was to require disclosure and charging of the true costs of establishing, terminating and maintaining credit contracts. Consumer groups complained that providing freedom of fees and charges would result in abuse by unscrupulous lenders and sought limits to be placed upon fees and charges. The policy approach by government was to avoid placing direct limits or caps upon fees and charges, but to allow consumers an ability to challenge excess fees and charges. Following the introduction of the UCCC, and particularly in recent years, there appears to have been a significant increase in the type and amount of fees charged in relation to credit contracts. In this context it is noteworthy that between 1997 and

2002 the average increase in fees relating to bank loans was 19% per annum. In 2002 there was an increase in bank lending fees of 26% and, as will be seen below, other non-bank lenders are charging very considerable fees.

In looking at this emerging issue in more detail, it is worthwhile giving separate consideration to establishment fees, termination fees and the ongoing fees charged by some lenders.

4.1 Establishment fees

The UCCC allows credit providers to recover the upfront costs of providing a loan by way of an establishment fee, subject to two limitations. First, if there is an establishment fee then it must be disclosed – section 15(G). Second, a consumer can challenge the fee as unconscionable if the fee exceeds the credit provider's reasonable costs of determining an application for credit and the initial administrative cost of providing the credit or exceeds the credit provider's average reasonable cost of these items – section 72(3).

In recent times there appears to have been an increase in the level of establishment fees being charged by lenders. That increase appears to be greater than the amount that would be expected to relate to increased costs in establishing loan contracts. In other cases the amount of the establishment fee being charged is so excessive as to plainly exceed the usual cost of establishing loans of that type. In still other cases the amount charged is so disproportionately excessive as to defy justification, even if it can be shown that it does genuinely reflect costs incurred in establishing the contract.

The recent increase in the size of establishment fees for personal loans is illustrated by the table below, which shows the establishment fee used by a selected number of major financial institutions over the past five years.

Institution	October 1998	April 2000	September 2003
Adelaide Bank	$125.00	$135.00	$135.00
ANZ Bank	$100.00	$125.00	$125.00
Australian Central Credit Union	$80.00	$110.00	$149.00
Bank of Melbourne / Westpac	$100.00	$150.00	$175.00
BankWest	$0.00	$95.00	$125.00
Bendigo Bank	$100.00	$120.00	U/A
Challenge Bank	$0.00	$150.00	$175.00
Commonwealth Bank	$0.00	$99.00	$120.00
Community First Credit Union	$40.00	$100.00	$100.00
CPS Credit Union	$50.00	$65.00	$100.00
Illawara Credit Union	$30.00	$100.00	$125.00
Illawara Mutual Building Society	$75.00	$100.00	U/A
Average	**$58.00**	**$112.00**	**$133.00**

Even if the above increases in fees are accepted, it is notable that a number of lenders, especially fringe credit providers, have in recent times charged establishment fees far in excess of the average fee shown above for secured personal loans.

For example, Annexure A is a City Finance loan contract entered into in May 2002. The terms of the contract are worth setting out:

Amount of credit provided:	$800
Establishment fee:	$350
Interest rate:	30% per annum
Security taken:	a substantial number of household goods, *and* a motor vehicle

Prior to this, in November 2000 the same credit provider was charging a $350 establishment fee in relation to an $800 loan with an interest rate of 43%pa.

It is noteworthy if we consider the above two loans and recalculate them on the basis of an establishment fee of $135. The interest rates are 70%pa and 85%pa respectively.

The issue of establishment fees has become more acute in the housing sector. In that area the divergence between the level of establishment fees offered by credit providers is considerable. Examination of the current establishment fees charged by the four major banks shows that a standard home loan establishment fee by those banks is $600. A survey of some 200 home loans recorded by Cannex Financial Services Research Group confirms that the average home loan establishment fee is approximately this amount.

A number of lenders in the marketplace have, however, introduced significantly higher establishment fees than those offered by the majority of major lenders.

Notably a number of mortgage originators have significantly higher establishment fees:

Home Loans Limited - Smart Saver Home Loan -	$799
RAMS Mortgage Corporation - Basic Home Loan -	$820
Home Loans Plus - Variable Loan -	$1,125
Mortgage House of Australia - Basic Home Loan -	$1,395

Case Study No.6

Annexure B contains two sample loan contracts entered into by Liberty with different consumers in March and June 2001.

Three important points arise from consideration of those loan contracts:

- The establishment fees are substantial but differ significantly.

- The establishment fee for the June 2001 loan is precisely 1% of the loan amount.

- The establishment fee for the June 2001 loan is identical to the amount paid by way of commission to the broker/introducer of the loan.

Case Study No.7

A further example of high establishment fees is the St.George Bank Variable Rate Loan Contract contained in Annexure C. The loan is for $88,000 and provides for an establishment fee of $800. The loan contract was entered into in June 2001. It is notable that despite the loan being entered into 16 months ago the establishment fee charged is almost $150 higher than the current advertised establishment fee by St.George as listed by Cannex Financial Services. This loan appears to have originated via a broker/introducer as a commission is disclosed as payable to "Finance Selection Services for the introduction of credit business". The amount of that commission is not disclosed.

On the basis of the above examples it would appear that there are strong reasons to suspect that a number of credit providers are charging establishment fees that are considerably in excess of the average usual costs of establishing personal loans and home mortgage loans. Yet it is notable that, although a number of credit lawyers have challenged the amount of those fees, few cases have been brought on behalf of consumers claiming unconscionable establishment fees under section 72(3) of the Code. From discussion with those credit lawyers there would appear to be three fundamental reasons for this:

- Often the excessive amount of the establishment fee is not sufficiently great to justify the considerable expense of bringing such a claim. For example to challenge a fringe lender's establishment fee might result in a refund of $200. However given the significance of the issue to that credit provider's loan portfolio it is likely that the credit provider will settle individual cases where legal action is issued (therefore having no impact on other borrowers paying the same fee). If the credit provider chose to proceed, the litigation would be complex and protracted and cost far in excess of the amount claimed. The fact that a claim under section 72(3) can only be brought in the Credit List of the Victorian Civil and Administrative Tribunal (VCAT) means that no class action or group proceeding procedure is available. The lack of such procedure, or some effective civil penalty procedure, renders any litigation in this area cost ineffective and so very unlikely.

  It is worth noting that in those jurisdictions that have some form of licensing regime, objectionable practices by credit providers may allow regulators some recourse pursuant to relevant licensing provisions. This is, however, a difficult and convoluted process that does not engage directly or effectively with specific

matters, and which is likely to involve a far greater burden on the resources of that regulator than targeted action pursuant to a more directed and relevant power.

- To challenge an establishment fee as unconscionable the consumer must show more than the fact that the establishment fee charged by that credit provider is excessive when compared to the average costs of establishing that type of loan facility. If this were the test, and that would be difficult enough, then at least the consumer could show by reference to the general cost of other establishment fees charged by similar lenders that the fee was excessive. However, the consumer must show that the fee is more than *that particular credit provider's* reasonable costs for establishing the facility and those costs are unlikely to be known to the consumer. This imposes considerable problems of proof for the consumer and so significantly increases the risk of any such litigation.

- Related to the above point, the credit provider will not be found to have charged an unconscionable establishment fee if the fee represents that credit provider's cost of processing the application for credit. There is a reasonable argument that any amount paid by a credit provider to a third party, no matter how excessive, will be viewed as an actual cost incurred in establishing the loan and so reasonable. There is no provision in the Code which limits the amount of a procuration fee payable to third party or requires such fees to be reasonable. As such it is quite arguable that the effect of section 72(3) of the Code is able to be circumvented through payment of excessive commissions and other fees to third parties. This issue has been the principal one in preventing litigation of unconscionable establishment fees charged by at leat one major non-bank lender.

4.2 Early termination fees

The basic government policy on termination fees was that such fees should be allowed to be charged where there was a loss to a credit provider due to an early termination of a credit contract. This involved an assumption that such fees were really only legitimate where there was a fixed rate contract and the debtor had terminated the contract at a time when interest rates were lower than at the time of contract entry. Indeed, in discussions regarding this issue, government pointed to the fact that some credit providers were discussing implementing termination clauses whereby the debtor would be paid a benefit if, at the point of termination, interest rates had increased. Sadly the market has not been quite as sensitive as this.

First, the vast majority of contracts do not provide for a termination fee which pays a benefit in the event of the termination occurring at a time when interest rates have increased.

Second, some financiers provide for a termination/loan repayment administration fee which is payable on a variable rate loan contract.

Third, and most significantly, many finance companies introduced a termination fee based on the old Rule 78 rebate method whereby the termination fee was payable in all cases irrespective of rate movement. The practices therefore undid any benefit

consumers were intended to gain by the abolition of the Rule of 78. In recent times it is notable that those finance companies have in general abandoned this form of termination fee, and introduced a revised version of that fee which results in an even higher termination fee where the contract is paid out early.

Again it is worth considering the recent form of contracts used by some credit providers with respect to the practices referred to above.

Case Study No.8

Annexure B contains a Liberty Funding Pty Ltd Variable Rate Consumer Loan dated March 2001. As was noted earlier this contract contains the sizeable initial establishment fee of $1,987.50. The contract further provides that a deferred establishment fee will be payable if the loan is repaid within 10 years. The amount of that fee is $1,975. Similarly the Liberty Funding contract dated June 2001 contains an initial establishment fee, which on this occasion is $1,250, and again the same $1,975 deferred establishment fee.

This "deferred establishment fee" is clearly a form of early termination fee.

On the basis of these two contracts it appears that:

- The fee is a flat fee which does not directly relate to the size of the loan or the interest rate charged.
- The fee is payable irrespective of interest rate movements.
- The fee is not calculable by reference to any apparent loss by the credit provider relating to early termination of either contract.
- Each contract is a variable rate contract and so no break cost would be applicable.

Case Study No.10

Annexure D contains examples of personal loan contracts entered into by General Motors Acceptance Corporation, Toyota Finance and GE Automotive Financial Services. Each of those contracts is a fixed rate contract and each provides for an early termination fee. The GE contract's termination clause is typical:

"An early termination fee will be payable if you pay out this contract in full before the expiration of the term of the loan. The amount of the fee in respect of the early termination is $600 at the disclosure date and thereafter is that amount multiplied by the number of un-expired whole months in the term at the time of early termination divided by the number of whole months in the term. An account closing fee of up to $5 (to be determined by GE in its absolute discretion at the time of closing the account) may be payable when you pay out the loan."

Again it is notable that the fee does not relate to the credit provider's loss from early termination of the credit contract. It may be that interest rates increase during the term of the loan contract and accordingly the credit provider will obtain a benefit from re-lending the loan funds at a higher rate.

The table below shows the effect of the termination fee when compared to the actuarial payout and the Rule 78 payout. The table is based upon the payout of a loan contract of $20,000 repayable by 72 monthly installments of $422.90. The estimated credit charge is $10,448.80 and the interest rate is 15%.

Payout at	Actuarial	Rule 78	With GE termination fee
12 months	$17,776.44	$18,098.01	$18,276.44
24 months	$15,195.43	$15,623.48	$15,595.43
48 months	$8,721.99	$8,956.82	$8,921.99

It would appear that there has not been any case run on the basis of an unconscionable early termination fee. The difficulties faced by a borrower in bringing an unconscionable establishment fee application – discussed above – are shared in relation to termination fees.

4.3 Late/default fees

An emerging trend in the market appears to be a further increase in relation to late and default fees. Notably, some credit providers have now introduced a flat fee "for each day a payment (or a part-payment) remains overdue". An amount may be then debited to the borrower's account and incur further interest. This fee is being charged even though any late payment fee will of course increase the amount of interest payable on the contract whilst the credit provider is able to charge the default rate of interest on the amount in default.

Case Study No. 11

The contract contained in Annexure E provides that "a late payment fee of $1.00 is payable for each day a payment (or a part payment) remains overdue". It is noted that the annual percentage rate is 29.95%.

A similar approach taken by a fringe credit provider known as Cash Advance. A copy of their formal loan contract is contained at Annexure F and provides that a default fee of $8 is payable "for every $100 for every day that the loan is not paid back by the time shown in Item 8(d)."

Again it is noteworthy that the interest rate is a sizeable 47%pa – one percentage point below the maximum permitted by the law in Victoria.

There are two points that can be made in relation to these case studies:

- First is the general increase in fees and charges by credit providers. It may be that the introduction of the comparison rate will have some impact in creating greater transparency with respect to this price dispersion of the cost of credit, although this is arguably unlikely. Of course in relation to late/default fees this will definitely not prove to be the case as such fees are not automatically payable with respect to a credit contract, and so cannot be included in a comparison rate.

- Second, it may be the case that credit providers are attempting to boost profit through the imposition of default/late fees that exceed the cost of default. It can be argued that where a debtor pays late they already incur an appropriate penalty through the increase in the interest rate that automatically arises from use of a higher default rate.

5. INEFFECTIVE CONSUMER PROTECTION

Even where a transaction is clearly regulated by the UCCC, and the credit provider complies with its obligations pursuant to the legislation, there are numerous circumstances in which a consumer is denied even very basic protections, such as might reasonably be expected to have been provided. For many, the "protection" afforded by the UCCC is at best illusory, and at worst serves to mask unfair and unsafe practices.

5.1 No Remedy for Breach

Although the UCCC prescribes certain positive and negative conduct obligations for credit providers, failure to comply with those obligations rarely gives rise to any useful or relevant remedies for consumers. Section 114 provides a general right to compensation, however in practice this is demonstrably ineffective either as a mechanism to remedy a breach or as a disincentive to credit providers to ensure compliance.

This issue is highlighted in the context of repossession of mortgaged goods. The UCCC and the Regulations are very specific about when a credit provider may legitimately seek to take possession of mortgaged goods. However, where goods are repossessed in contravention of those restrictions the affected consumer has no clear grounds on which to demand or even seek their return.

Some of the issues confronting debtors following non-compliant repossession are highlighted in *Graham v Aluma Lite Pty Ltd* (1996) ASC ¶56-345. It is difficult to justify a situation in which a debtor whose goods are repossessed in contravention of Code requirements - which are explicitly designed not only to protect debtors from unreasonable conduct but also to allow debtors to remedy a default or take other appropriate action - does not have an avenue to ensure return of those goods.

It is also noted in this context that an illegal repossession may well take place following expiration of the 30 day default notice period, meaning that the debtor cannot even seek postponement of sale of the secured goods due to the unduly limited operation of ss.86-88 – see further discussion on these provisions below: 5.7.

Similar issues arise in the context of a request for documentation. While the UCCC obliges a credit provider to provide a consumer with relevant documentation within prescribed periods, failure to do so merely constitutes an offence – there is no provision for the consumer to seek to enforce the obligation, or to obtain any other remedy for the failure to comply.

These problems are exacerbated by the particularly poor record of regulators in enforcing UCCC obligations, which has sent a message to credit providers that compliance is not a matter of relevant concern. Consumer protection legislation can not and will not deliver benefits to consumers in and of itself, and in the absence of visible and targeted enforcement is arguably counter productive. Regulators must take

a more pro-active approach to their roles in ensuring that credit providers comply with the obligations imposed by the UCCC.

In recognising the limitations on available resources, it is also important to recognise that providing consumers with access to remedies in the event of breach would in effect amount to a self enforcing mechanism, likely to result in greater efforts by credit providers to ensure compliance.

5.2 Illusory Protection Against Financial Overcommitment

One of the most important reforms effected by the UCCC was to place on credit providers some responsibility for protecting consumers against financial overcommitment. While this obligation was not framed in positive terms – in contrast to the more recent s.28A of the *Fair Trading Act* 1992 (ACT), which came into effect in November 2002 – it is included as a matter to which the Court may have regard when deciding whether to re-open a transaction on the basis that it is unjust.

Unfortunately, while s.71 is very broad in its description of the powers available to the Court in the event that a transaction is reopened as unjust, it provides little practical guidance as to how those powers will or should be exercised. The courts have consistently suggested that even where a transaction is impugned on the grounds that it is unjust, the debtor must "bring to account the benefit received" – see for example *Elkofairi v Permanent Trustee Co Ltd* [2002] NSWCA 413, and *Esanda Finance Corporation Ltd v Murphy* (1989) ¶ASC 55-703, in which it was suggested that "it is difficult to imagine the circumstances in which the debtor should not be required to repay at least the principal sum... lent": per Hunt J. If such principles are applied in the context of a transaction found to be unjust because the debtor was financially overcommitted, that debtor will not obtain any real or practical relief. What is required in such a case is reduction of or release from liability. Any outcome other than this will merely compound the unfairness to the debtor, and will in turn create a situation in which credit providers have little if any disincentive to overcommitment, on the basis that the only potential detriment will be loss or even merely reduction of profit.

One artificial mechanism often utilised by lenders offering car loans in an effort to make the credit appear affordable is to include a balloon payment. This means that instead of dividing the amount to be repaid into 60 equal monthly instalments, a significant portion of that amount is effectively quarantined as the final payment, with the remainder being paid by the preceding 59 instalments. A debtor who would struggle to afford monthly repayments of, say, $400, may far more easily afford repayments of only $280. That debtor will not, however, have the slightest chance of being able to afford the final lump sum payment, and will be forced to either refinance that amount or sell the vehicle.

The fact that products of this type are fairly standard in the market is a useful illustration of the failings of section 70, and the UCCC more generally as a means of ensuring consumer safety.

5.3 Limited Commitment to Fairness

Two other significant limitations to s.70 undermine the intent of this provision.

Firstly, while it seeks to protect consumers from unjust transactions it is concerned almost exclusively with procedural unfairness, and with the exception of certain limited issues regarding cost (which protections are to some extent augmented by s.72) makes no attempt to protect against substantive unfairness – eg. unfair contract terms.

Secondly, the provision operates entirely in respect of individual transactions. To the extent that it is possible to demonstrate systemic unjust practices or products, s.70 is incapable of responding, leaving each and every consumer affected by those practices to take individual action in search of an appropriate remedy.

This issue is starkly illustrated by the example of excessive or blackmail securities. Those credit providers that obtain such securities do so wherever possible and to as great an extent as possible. Each and every one of those transactions is arguably unjust, yet any attempt to curtail such practices is easily circumvented by the practical limitations imposed by s.70 – only so many consumers are likely to seek assistance or take action on their own account, and in most cases it will be economically beneficial to the credit provider to resolve each dispute as it arises, rather than to alter those practices.

These issues may be resolved as a result of the recent developments through SCOCA, which issued a Discussion Paper earlier this year suggesting a need to regulate unfair contract terms. This need has already been recognised in Victoria, which in 2003 amended its *Fair Trading Act* 1999 by inserting a new Part 2B. Unfortunately, and possibly due to its concern to retain the uniformity of the UCCC, regulated consumer credit contracts are explicitly excluded from the ambit of this new regulation.

5.4 High Cost of Credit

Although some jurisdictions set a cap on the interest that can be charged, these caps have no uniform operation and are not incorporated into the UCCC. Instead, the UCCC provides protection only through its unjust provisions, the limitations of which are canvassed above.

To prevent exploitation of vulnerable and disadvantaged consumers, the UCCC should set a cap on the interest able to be charged by credit providers.

To be effective, however, such a cap – and indeed the caps that already exist in some jurisdictions – must acknowledge the dual pricing mechanisms allowed by the UCCC, and so apply not simply to interest but to the true cost of credit. This true cost could be expressed as an "effective APR", being a rate that incorporates interest, fees and charges.

5.5 Cohesive Consumer Response to Breach

Where systemic breaches are identified, the UCCC does not allow consumers to join together in seeking appropriate remedies. Limited ability to respond to systemic breaches is conferred on the relevant Government Consumer Agencies, but this will depend on the priorities and resources available, and will rarely provide appropriate outcomes for affected consumers.

The only genuine mechanism for a systemic response to non-compliance with the UCCC is the civil penalty regime that operates in respect of relevant disclosure requirements. The effectiveness or otherwise of that regime is discussed briefly below, however one of the primary limitations of that mechanism is that it relates solely to disclosure. A civil penalty regime can provide incentives for industry compliance that are difficult to establish by other means, and which more effectively target the nature of the failures identified. There is no compelling reason for this mechanism to be limited to disclosure, ignoring other often more relevant obligations imposed by the UCCC.

5.6 Civil Penalties

Both the UCCC and the Credit Acts made use of a civil penalty regime to enforce disclosure requirements. The UCCC regime, however, materially altered the manner in which a penalty could be sought and imposed.

There has been a dramatic decrease in the number of civil penalty cases under the UCCC compared with the Credit Acts. It is plain that the civil penalty regime under the Credit Acts had significant impact upon credit providers, creating a commercial imperative to devote sufficient resources to ensure compliance. Anecdotal evidence indicates that widespread non-disclosure or mis-disclosure is now occurring, yet very few civil penalty cases have been brought by either consumers or credit providers. Not least among the causes of this situation is the lack of incentive for consumers to play a part in civil penalty applications. Where the application is brought by a Government Consumer Agency, then any penalty will be paid into a statutory fund. Where the application is brought by the consumer the costs of doing so will almost inevitably outweigh the benefit.

5.7 Hardship Variations and Postponements

One of the more practical consumer protections available under the UCCC is the ability to seek a variation on the grounds of financial hardship, and to pursue such variation through the Court if the request is refused by the credit provider – ss.66-68. Similar protection is available to consumers seeking postponement of enforcement proceedings – ss.86-88.

These provisions are however limited in their application and effect, and as a result many consumers for whom a variation or postponement would provide practical relief are denied assistance.

5.7.1 $125,000 limitation

The provisions are limited in their effect to contracts for amounts of $125,000 or less. This arbitrary limit is demonstrably too low in the context of regulated home loans, with no reason for borrowers to be denied the protections otherwise afforded by these provisions.

This problem was identified as early as 1999 during the Post Implementation Review of the UCCC. One of the recommendations to come out of that review was to "Revise the monetary limit of $125,000 on the application of sections 67-69 imposed by section 66(3) of the Code to a level sufficient to cover most Australian home mortgages." It was further proposed in the Final Report "that a new limit should be established which sets the threshold at a level at least above the average level for home mortgages in these major cities [Sydney and Melbourne]. It would also appear that this change can be achieved by amendment to the Regulations."

Despite the early recognition of this problem, and despite the fact that since 1999 Australian has experienced a boom in the price of housing, the $125,000 limit remains in place.

The authors understand SCOCA is currently considering increasing this threshold to a more realistic level, and ensuring that it is indexed in line with market fluctuations. While this would be a positive development, it is a concern that it has taken so long for any action to have been taken in respect of such an evident problem.

Further, there is reason to suggest that reference to a monetary limitation on application of these provisions should be removed altogether, as the operational mechanisms already provide reasonable limitations sufficient to guard against exploitation or abuse.

If a limit is retained, it should more usefully apply to current balance and not the amount borrowed.

5.7.2 Variations on continuing credit not a practical option

The three variation options contained within s.66 are virtually inoperable in the context of continuing credit, and even where they may be applied rarely provide any real or practical benefit to a debtor experiencing financial hardship.

5.7.3 Nature of variations unnecessarily limited

The fact that these provisions allow for only three, very limited variation options (leaving aside the potentially wider powers conferred on the court by s.68(2)) means that many debtors experiencing temporary financial hardship are not afforded relevant protection by the UCCC, as the options available to them are of no assistance given their particular circumstances.

5.7.4 Effect of an Application for variation

A consumer seeking a variation on the grounds of financial hardship is often either in default or heading inevitably towards default. The fact that applications under s.66-68 do not lead automatically to postponement of enforcement action allows credit providers to exercise unreasonable pressure, and potentially undermine the process.

5.7.5 Limited window of opportunity for postponement

As demonstrated in the matter of *Anseline v General Motors Acceptance Corporation* (1998) ASC ¶155-020, the right to seek postponement of enforcement action is extremely limited, being available only with the 30 day period of a section 80 default notice. There are many reasons why debtors should have a right to seek postponement of enforcement action prior to receiving a section 80 notice or subsequent to expiration of such a notice.

5.8 Third Parties and Linked Credit Provisions

This is a particularly difficult area, with the involvement of third parties in a consumer credit transaction potentially giving rise to a broad range of problems. As noted in Section 2, some credit providers take advantage of one or more third parties in an effort to avoid the application of the UCCC. Where avoidance of the legislation is not an issue, third parties can still break the nexus between the consumer and the credit provider such as to deny consumers remedies to which they would otherwise be entitled.

These problems include:

- Although the UCCC makes a lender liable for representations made about a tied credit contract by a supplier, these protections are limited to positive misrepresentations. Conduct of the supplier such as encouraging the borrower to sign a business purpose declaration, or arranging an unsuitable credit product (for example a lease where the consumer may prefer a loan) is not covered.

  Problems in this regard often arise in the context of store credit (particularly "interest-free" finance) – where salespeople are commission driven and do not properly understand the products they are selling – and car loans obtained at the dealership.

- The linked credit protections do not cover finance or mortgage brokers (except possibly to a limited extent in the rare case where a fee is paid by the consumer to the broker, and that fee is financed under the loan contract obtained) which given the mainstream role now played by brokers in the consumer credit market is a significant problem.

- The involvement of an intermediary reduces consumers' rights and remedies under the UCCC – particularly in relation to linked credit and unjust transactions. For example, the conduct, and knowledge of, a credit provider is more difficult to prove if the borrower is not dealing directly with the credit provider. In relation to linked credit, if a car dealer refers the consumer to a finance broker to arrange the credit, the consumer may lose a range of rights that would have otherwise existed against the credit provider.

  Issues relating to the conduct of brokers have been examined on a number of occasions in recent years, but the need for changes to the UCCC to accommodate the changing nature of the market is rarely the focus of those examinations.

  For a summary of concerns about finance brokers see:
  http://www.consumersfederation.com/documents/BrokerIssuesSummaryv2_001.pdf

5.9 Insurance

The UCCC includes some regulation of credit related insurance. The need for such regulation arose out of the circumstances in which insurance had historically been sold to consumers entering primarily into a credit contract, and the excessive commissions that had become a feature of Consumer Credit Insurance (CCI).

Nevertheless, credit related insurance explicitly excludes extended warranties, a product which for all practical purposes performs the same function as a contract of insurance, and in respect of which consumers need at least the same level of protection, if not in some cases more.

It is unclear to what extent the UCCC regulates gap insurance, a product the benefit of which is at best illusory, and which may in fact be so worthless as to make its sale entirely unconscionable.

In response to the problem of excessive commissions the UCCC limits the commission that can be paid by an insurer in connection with CCI to 20% of the premium. By limiting this restriction to CCI, the UCCC has allowed continued exploitation of consumers who purchase other insurances, including gap insurance. In fact, anecdotal evidence suggests that gap insurance was specifically developed to enable the sale of an insurance product that could avoid the UCCC 20% commission cap. We believe that commissions for gap insurance can reach 50% (the level of commission on some CCI products prior to introduction of the UCCC). The higher commission for this product actively encourages sale of such insurance products even where the consumer has no need of that product, does not want that product, or in some cases has not even realised that they have agreed to purchase that product.

5.10 Jurisdictional Limitations

As noted in the Introduction, national uniformity of consumer credit regulation is achieved by way of a template scheme, with all States and Territories adopting the template legislation enacted in Queensland as its own Consumer Credit Code.

The legislation that applies to any given transaction is the Code of the State or Territory in which the debtor resides at the time the contract was entered into (assuming all other criteria are met). So, for example, if a consumer living in Victoria obtains a personal loan that loan will be regulated by Victoria's Consumer Credit Code, and will always be regulated by that legislation for so long as the contract remains a relevant instrument.

Each State and Territory then assigns jurisdiction for matters arising under its Code to appropriate courts and tribunals. In Victoria jurisdiction for most matters has been conferred on the Credit List of the Victorian Civil and Administrative Tribunal.

This scheme does not allow for cross-vesting of jurisdiction. Accordingly, if the consumer whose contract is regulated by the Victorian Code moves interstate, that consumer is unable to pursue rights or remedies in any more local jurisdiction, but is forced instead to pursue such matters in VCAT. In almost every case this will be prohibitive. Where the consumer seeks to avail him or herself of protections such as a s.68 hardship variation, or to have the transaction reopened as unjust, then the consequences of the effective denial of those protections can be particularly harsh.

6. CONCLUSION

Regulation of consumer credit is an important consumer protection, given the nature of consumer credit transactions and the impact that such transactions can have on consumers if they are not fairly and properly managed. The objects of the Uniform Consumer Credit Code remain relevant, but unfortunately they are increasingly unmet.

This report seeks to identify many of the failings of the UCCC, both in its content and the extent to which lenders can avoid its application. In some cases the steps required to remedy those failings are clear, and it is recommended that those steps be taken as a matter of urgency. Given the extent of these failings, however, we would also recommend that a more comprehensive review of consumer protection in the context of credit and credit related transactions be undertaken, with a view to implementing a regime that better reflects the realities of the market.

One of the most troubling aspects of avoidance of the UCCC is that those transactions that are artificially removed from the scope of the legislation are those in respect of which consumers most need access to the protections and remedies otherwise made available to them. Particular consideration must be given to the needs of vulnerable and disadvantaged consumers.

Where the UCCC does apply, non-compliance materially undermines its efficacy as a mechanism for consumer protection. The ability of consumer protection legislation to properly protect consumers rests not only in the legislation itself but in the extent to which it is enforced. The record of enforcement of the UCCC is particularly poor, sending lenders entirely the wrong message regarding the need to comply.

Finally, whatever issues are identified it continues to be the case that the nature of the uniform scheme means that amendment can be a difficult and cumbersome process. As a result the legislation is far less responsive that it needs to be, allowing consumers to be exposed to dangerous practices that have long been identified, and from which they might justifiably expect protection.