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Thursday, 17 November 2005

By email: adjudication@accc.gov.au

The General Manager
Adjudication Branch
Australian Competition and Consumer Commission
PO Box 1199
DICKSON ACT 2602

Re: Third line forcing notifications N70435 lodged by Cash Converters Pty Ltd ("CCPL")

I write on behalf of the Consumer Law Centre of Victoria ("**CLCV**") and the Consumers' Federation of Australia ("**CFA**") in response to the CCPL notification lodged with the Australian Competition and Consumer Commission ("the **ACCC**") on 6 October 2005.

About CFA
CFA is the national peak body for consumer organisations in Australia. Its 99 members include legal centres, health rights bodies, local consumer organisations and public interest bodies. CFA aims to put the views and interest of its member organisations to government and industry and to advocate on behalf of Australian consumers. Its focus is primarily on advancing the interests of disadvantaged and vulnerable consumers.

About CLCV
Based in Victoria, the CLCV undertakes research, policy development, advocacy and education. The CLCV also operates a large consumer legal practice assisting over one thousand low-income consumers each year with free legal advice and representation. The CLCV's work is focussed on advancing the interests of low-income and vulnerable consumers. The CLCV is currently working on a range of issues that affect the consumer interest, including utilities, competition and consumer protection policies, financial services, telecommunications, exploitative credit and access to justice.

Both CLCV and CFA consider that the proposed conduct is likely to generate considerable public detriment and therefore recommend the ACCC refuse authorisation. In our view, payday lending generates great detriment, in the form of overcommitment resulting from exhorbitant lending charges and is contrary to the general social aims of access to safe products and improved choice for consumers.

On available product information, we also view the proposed exclusive dealing with Safrock Finance Corporation ("**SFC**") as restricting the finance options available through arguably the largest and most high-profile short-term finance provider in the country. Even a cursory overview of the market for short-term finance reveals cheaper alternatives, less likely to create the financial strain posed by SFC products.

1. Summary

It is our experience that payday lending, by its very nature, incorporates exploitative lending practices which frequently cause or exacerbate financial hardship among vulnerable consumers. Far from generating a public benefit, it is our strongly held view that an authorisation of this conduct would compound the substantial detriment to low-income and disadvantaged consumers caused by the inherently unsafe practice of payday lending.

In making this submission, we are particularly concerned at those elements of CCPL's proposed conduct which would require CCPL franchisees to offer cash advances and SFC personal loans.

Moreover, we believe that granting authorisation in this instance would further compound the lack of competition in the sub-prime credit market.

2. Public benefit test

As you are aware, in order to obtain authorisation for its third line forcing conduct, CCPL must demonstrate that requiring its new and existing franchisees to offer payday lending and SFC personal loans will produce a net public benefit.

In defining what might constitute a public benefit, the ACCC has not limited itself to economic considerations. This view was expressed by the Trade Practices Tribunal ("**the Tribunal**") in the *QCMA and Defiance Holdings* decision, where a public benefit was defined as: "Anything of value to the community generally, any contribution to the aims pursued by the society".

The ACCC has further elaborated on this definition to include the following:

- Improvement in the quality and safety of goods and services and expansion of consumer choice;
- Promotion of equitable dealings in the market[1]

In defining public benefit, it will also apply the general objectives of its administration of the Act:

- To prevent anti-competitive conduct, with the aim of promoting economic efficiency and enhanced social welfare, including an improved choice for consumers in price, quality and service; and
- To provide appropriate safeguards for consumers in their dealings with producers and sellers in fostering adherence to fair trading practices in well informed markets.

In addition to giving a wide definition to the concept of public benefit, the Tribunal has given similarly wide definition to the concept of detriment. In the *Victorian Newsagency* (1994) ATPR 41-357 decision the Tribunal said at 42,683:

> "As with the assessment of benefit we give the characterisation of the 'detriment to the public' a wide ambit, namely, any harm or damage to the aims pursued by the society..."

In demonstrating its conduct will generate a net public benefit, CCPL must:

- Show a nexus between the claimed public benefits and the restrictions for which authorisation is sought;
- Provide sufficient evidence of public benefit;
- Show how the conduct contributes to community objectives;
- Demonstrate that the benefit will be to the public or a large cross-section of the community;
- Identify any adverse effects and who they will affect;
- Detail any effects on competition; and
- Show how detrimental effects will be minimised[2].

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[1] Prof. Allan Fels, "The Public Benefit Test in the Trade Practices Act 1974", Speech to National Competition Policy Workshop, Melbourne, 12/7/2001 at 6-7.

Some cases where non-economic public benefit has been considered include where fostering fitness and recreation were found to produce a net public benefit[3], or where self-regulation of tyre retreading quality standards was deemed to produce a net public benefit by improving public safety.[4]

3. CCPL Submission

CCPL has sought to discharge this onus with several assertions:

Uniformity: That authorisation will enable CCPL to maintain consistent standards across its franchisees, provide consistent product and service to consumers regardless of location and thereby generate consumer confidence in the brand.

Quality control: That authorisation will improve compliance systems, militating against inappropriate lending practices and will "ensure standards, check that franchisees do the right thing, prevent abuse, ensure a common product range and service standard and generally encourage customers to be ongoing, happy customers".

Viable fees: Even though CCPL acknowledges cheaper offerings may be available, argues the use of franchise network-wide systems is ultimately cheaper.

Cost/Benefit: That innovations may be more quickly assessed and rolled out across the network.

Advertising: Marketing of products and services will be more effective if consumers can be confident of accessing them at any outlet, rather than through participating outlets.

It ultimately contends that the authorisation is necessary to promote what it terms 'micro-lending' (a conflation with the no-interest and low-interest products offered by the not-for-profit and community sectors to low-income and disadvantaged clients) to "the consumers whose needs we seek to service".

4. CLCV/CFA view

In our view, the arguments presented by CCPL do not demonstrate a net public benefit as a result of authorisation and accordingly, the ACCC should withhold authorisation.

We note that in support of its application, CCPL has asserted it offers an "ethical product". We see little evidence in the design and marketing of CCPL credit products or from our casework to support this contention and little to suggest it offers products which meet any of the public benefit test elements detailed above.

CCPL argues it is an ethical alternative to "fringe lenders and loan sharks whose practices leave much to be desired". It claims its loan products are "designed to avoid consumers getting into a debt spiral".

Unfortunately, the 'safeguards' it cites do little to prevent the financial hardship we and other caseworkers all too regularly observe:

- No more than 15% of a customer's net income will be advanced;
- No security is taken from the customer;
- No further loan is made until the existing loan is repaid.

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[2] Sitesh Bhojani, 'Public Benefits under the Trade Practices Act', Address to Joint Conference – Competition Law and the Professions, 11/4/1997. http://www.accc.gov.au/content/index.phtml/itemId/95976

[3] *Speedo Knitting Mills* (1981) ATPR (Com) 50-106.

[4] *Australian Tyre Dealers' and Retreaders' Association (formerly Australian Tyre Dealers' Association, Independent Retreaders' Division)* (1994) ATPR (Com) 50-162.

A quick consideration of a common payday lending experience demonstrates these 'safeguards' are of scant comfort or protection to low-income borrowers:

A consumer on an annual income of $20,000 who borrows $300 from CCPL for a 14 day period will pay $105 in fees. A common practice for financially-stressed borrowers is to 'roll-over' the debt at the end of that 14 day period, paying out the original loan, but then immediately borrowing on similar terms again. They may have technically 'repaid' their existing loan, but they have not reduced their debt, and face another set of fees. The small amount of the loan compared to their annual income and the fact the loan is unsecured will not save them from the fact that if this situation continues they face fortnightly fees of $105 and will not pay down the principal.

4.1 Payday lending

There has been extensive documentation and analysis of the problems generated by payday lending.[5] Typically, such loans are for small amounts that are repaid by the borrower's next payday. Rather than charge interest, the lender will generally charge a 'fee' for providing the service.

The criticisms of payday lending may be summarised as follows:

- Payday lenders charge unconscionably high rates with effective rates of up to 1300% per annum;
- Payday lenders target vulnerable consumers;
- Payday loans lead vulnerable consumers into debt spirals through 'roll-over' and 'back-to-back' loans; and
- Payday lenders use direct debit as a form of payment guarantee, taking funds directly from income as it is received and exposing borrowers to high bank penalty fees.

In Victoria, the *Consumer Credit Act* provides for a 48% interest rate cap. However, the Uniform Consumer Credit Code separates out interest from fees and charges.[6] As a consequence, fees and charges imposed by lenders are no longer covered by this cap.

Payday lenders have taken advantage of this change by designing products to maximise revenue from fees and charges to evade the effect of the interest rate cap. In this way, CCPL charges $35 for every $100 borrowed through its 'Cash Advance' product. If the loan is to be repaid within 14 days, a fee of $35 per $100 borrowed has an effective interest rate of approximately 910% per annum. Other reported rates have been as high as 1300%.[7]

Some lenders have sought to counter this criticism on the grounds it is inappropriate to refer to an annual interest rate when the terms of these loans state they should be repaid within a 14 day or similarly short period. However, it is unfortunately common for consumers to 'rollover' the loan, or fall into the trap of repeat borrowing. This can very quickly lead the consumer into a downward debt spiral, whereby they fall deeper into debt, paying ever increasing amounts to the lender without ever repaying the principal.

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[5] See for example, Dean Wilson, *Payday Lending in Victoria – A Research Report*, Consumer Law Centre Victoria (2002); Chris Field, 'Payday Lending – an exploitative market practice' (2002) 27(1) *Alternative Law* Journal 36; Therese Wilson, 'The inadequacy of the current regulatory response to payday lending' (2004) 32 *Australian Business Law Review* 159; Justin Malbon, 'Predatory Lending' (2005) 33 *Australian Business Law Review* 224.

[6] Elizabeth Lanyon, *Changing direction? A perspective on Australian consumer credit regulation*, Keynote Address at Australian Credit at the Crossroads Conference held at Melbourne (8-9 November 2004) at 4.

[7] Chris Field, above, n 4; Dean Wilson, above, n 4. Among the survey participants in the latter study, there was an average of 6 advances in 12 months.

4.2 SFC personal loans

According to its website, www.safrock.com.au, the personal loans offered by SFC appear to impose extremely high effective annual rates of interest. Following the link to its online calculator brings up this screen (with values entered as shown):

LOAN CALCULATOR	
Loan Required $:	$2500
Term (Months): 12	
Frequency:	Weekly
Repayment:	$79.96

This would result in a repayment total of $4157.92, with an annual interest rate of 166%.

If this is typical of the offerings of SFC, it matches similar products generally targeted at low-income, non-mainstream borrowers, and would appear likely to generate many of the difficulties observed by financial counsellors and case workers, namely that such loans are likely to generate long-term indebtedness and financial strain for many borrowers who access them.

But on the basis of information provided through the online calculator, SFC's loan costs are high when set against some of their competitors. Without endorsing the high rates charged by other sub-prime lenders (those targeting low-income or 'low-documentation' borrowers, or those with constrained credit records), the following examples demonstrate that SFC is more expensive, and therefore more likely to generate financial hardship than currently available alternatives:

Mainstream lenders
Among mainstream lenders, the following are available:

For an unsecured personal loan of $2500 repayable over 12 months in Victoria (as at 16/11/2005):

Lender	Variable rates		Loan Amount		Fees	
	Min	Max	Min	Max	Entry	Exit
Credit Union Australia	12.95	-	-	$100,000	-	-
IMB	11.20	-	$2000	$20,000	-	-
MECU	12.75	-	$1000	-	-	-
RegionalOne Credit Union	9.99	15.75	$2000	$15,000	$100	-
South West Credit Union	15.00	17.25	$1000	$20,000	$60	-
Transcomm Credit Union	13.70	-	$1000	$5000	-	-
Victoria Teachers Credit Union	10.95	-	-	-	-	-

Source: www.infochoice.com.au

These rates are considerably lower than those apparently offered by SFC, and are also offered by lenders who take a responsible and ethical approach to loan approvals, screening out would-be borrowers with constrained credit histories.

Non-conforming lenders
Even among other sub-prime or 'non-conforming' lenders, SFC's charges appear inordinately high. For example, GE Money offers loans on similar terms with a Comparison Rate of 39.71%.

Neither CLCV nor CFA endorse interest rates of 39.71%, nor do we suggest these are appropriate alternatives for consumers seeking short-term finance. However, the stark difference in rates demonstrates that while both products are likely to generate financial stress among borrowers, the SFC product appears very much more dangerous.

Breach of 48% cap
Moreover, the SFC rate as it appears on that company's website appears to be in breach of recent NSW legislative changes which incorporate fees and charges as well as the nominated interest rate into its 48% interest rate cap. It may also be in breach of the Victorian cap, depending on the proportion of charges comprised by the interest rate (which is not clear from the information on the SFC website).

Apart from the consideration of public benefit, we would advise careful consideration of whether the applicants are likely to be in breach of current law in at least two states before any authorisation is granted. If SFC is found to be in breach of the NSW 48% cap (interest + fees and charges) or the Victorian cap (interest rate), we would urge appropriate enforcement action by the relevant state regulators.

4.2 Consumers of payday lending

Dean Wilson's research found that payday borrowers tend to be low-income consumers who use it to pay for everyday expenses such as utility bills, car repairs and rent, to cushion the unexpected shocks of large bills or emergency expenses and the high cost of caring for dependants.

The location of payday lending outlets tends to be in lower socio-economic areas, and advertising tends to emphasise the capacity of payday loans to 'alleviate' short-term financial stress, rather than to fund consumption, in contrast to mainstream credit marketing.

From www.cashconverters.com.au:

> **WE LOAN** - You may have a phone or utility bill or some other reason for needing short term cash without hassle or delay. Whatever your reason our stores can provide you with an on the spot instant cash loan. To take advantage of this convenient service, bring any good or value into our stores and discuss the amount you can borrow. Suitable identification is required.
>
> **CASH ADVANCE** - This is a great way to get a short term loan, secured against your next pay cheque, for any emergency or short term need where you require the cash in a hurry.

As such, it is not surprising that according to the Wilson research, the majority of payday borrowers he surveyed were low-income earners:

- The average payday loan consumer is equally likely to be a male or female in their late twenties or early thirties, Australian-born and from an English speaking background;
- They will earn about $24 000 a year and will borrow $250 for between 2 and 4 weeks;
- If they are male their income will be from a full-time job; if they are female their income will be from a Centrelink allowance, probably a sole parenting payment;
- The loan will be to cover bills or for day-to-day living expenses;
- They will most likely get more than 1 loan and, if they do, they will probably get 6 payday loans over the next 12 months.

It is clear payday lending is attractive largely because it is available and few alternatives exist for consumers with constrained credit histories or insufficient proof of income to qualify for mainstream credit offerings.

Many payday borrowers are aware they obtaining a suboptimal loan at a far higher cost that would be charged by a mainstream lender. They feel forced to resort to payday lenders because of a lack of affordable or accessible alternatives.[8]

4.3 Alternatives to payday lending

Unfortunately, at times when cash loans are sought by consumers with constrained credit histories or who are on very low incomes, the current system provides few alternatives to the type of high-cost credit offered by CCPL. But alternatives do exist, and rather than take a defeatist attitude, we advocate expansion of those alternatives in place of entrenching the predatory practice of payday lending.

Bank loans and credit cards
A recent report by Beverly Kliger for Good Shepherd found that low-limit credit cards are a preferred form of credit amongst some low-income people. However, credit cards currently on the market usually charge higher fees and interest rates to consumers than personal loans.[9]

Moreover, those cards with the best interest rates are usually not accessible to consumers who are on a low-income or have a poor credit rating and many credit
cards have a minimum credit limit that is inappropriate for low-income consumers.

Until recently, there has not been a product that combines some of the advantages of a personal loan with the flexibility of a credit card. However, the National Australia Bank recently released a hybrid product whereby a credit card is used over a limited period of time after which no further credit can be used, and the debt is then paid off in monthly instalments. The structure of the "National Personal Project Loan" is one that could possibly suit low income consumers, although consideration would have to be given to allowing lower credit limits.

Centrelink Advance
Centrelink does provide some loans to Centrelink benefit recipients though an advance on Centrelink payments (Centrelink Advance). Although this appears to be a useful alternative to payday lending for some borrowers, it is limited in that it cannot be accessed by low-income consumers who are not receiving benefits and is also limited to one loan of up to $500 per year. 20% of consumers surveyed by Dean Wilson for CLCV had used the Centrelink Advance loan. Wilson states in his report that consumers tend to use the Centrelink Advance first and then use payday loans until they become eligible for a further advance and recommends that more frequently available, smaller Centrelink loans would be more appropriate.[10]

Social loan products
We have also advocated for reform of mainstream products, to ensure the availability of safe, fair and appropriate products and services available to low-income consumers.[11]

The failure of mainstream lending institutions to provide affordable financial services is arguably linked to the growth in fringe lending because of a lack of competition in the market. In our view, this lack of competition has led to an unfair outcome as those on the lowest incomes are forced to pay more for credit than those who are more affluent.

Appropriate hardship policies
Finally, while we strongly support the expansion of affordable credit alternatives for low-income and disadvantaged consumers, we do not believe that alternative credit products are the entire solution to the problems surrounding pay-day lending. Many consumers who use payday lenders use the credit to make up for a shortfall in income to pay bills and living expenses.

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[8] Dean Wilson, above, n 4 at 81
[9] Beverley Kliger, *The Road to Debt: Consumer Choice in the 21st Century* (2004), at 42.
[10] Dean Wilson, above, at 85.
[11] Anna Stewart (ed.) *Do the Poor Pay More?* CLCV, 2005.

It is difficult to see how incurring a debt will improve the circumstances of most of these borrowers, other than in the very short term. In fact, research shows that in most cases it does not. The level of repeated borrowing, including roll-over and "back to back" loans, suggest that for many consumers such loans can lead to a cycle of increasing debts.

The problem for many of these borrowers is low income or financial difficulties brought about by external factors such as a death in the family or sudden unemployment. As such, both the Government and the community as a whole must continue to consider other ways of addressing these problems.

For example, it is vital that the Government takes measures to ensure that appropriate support and assistance by way of concessions and other measures to address financial hardship are made available to low-income consumers of essential services such as energy, water and telecommunications services.

Providers of these essential services must also develop suitable hardship policies, to provide assistance to those customers in financial difficulty and unable to meet short-term unexpected or large expenses. Rather than see those customers resort to payday lenders, alternative strategies must be put in place to restructure payment arrangements, provide access to financial counselling or alter service provision to reduce future costs.

5. Conclusion and Recommendations

Recommendation 1
Given the widespread evidence of the dangers posed to vulnerable consumers by payday lending and high-cost short-term finance, we recommend that the notification lodged by CCPL be rejected on the grounds the proposed conduct will generate considerable detriment rather than produce any net public benefit.

Recommendation 2
That the ACCC refer the possible breaches by SFC of the 48% interest rate cap to the relevant State Fair Trading and Consumer Affairs authorities for further investigation and possible enforcement action.

Recommendation 3
That as part of its Campaign to protect disadvantaged and vulnerable consumers, the ACCC work with utilities, telecommunications and financial services providers to develop appropriate sector-specific hardship policies to assist consumers in financial stress.

Recommendation 4
That the ACCC follow the lead of the United Kingdom Office of Fair Trading/Consumer Commission (currently examining the home credit market) and work with State Fair Trading and Consumer Affairs authorities to investigate whether the payday lending market is competitive for consumers on low incomes, and the extent to which the features of that market are significantly harming the interests of consumers. In particular, we recommend that the ACCC consider:

- **The barriers to consumers switching between different lenders;**
- **The alternative forms of credit available to low-income consumers;**
- **How the market for payday lending is shared between participants;**
- **Barriers to entry for alternative lenders; and**
- **Whether charges are maintained at an artificially high level.**

I would be happy to provide further information as required, and am available to discuss any aspect of this submission. I can best be contacted at Catherine@clcv.net.au or on (03) 9629 6901.

Yours sincerely

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