

8<sup>th</sup> July 2009

Committee Secretary  
Senate Standing Committee on Economics  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

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**SUBMISSION, RE: NATIONAL CONSUMER CREDIT PROTECTION BILL 2009  
CHAPTER 3 – RESPONSIBLE LENDING CONDUCT  
DIVISION 4 – PRELIMINARY ASSESSMENT OF UNSUITABILITY OF CREDIT CONTRACT**

We refer to the National Consumer Credit Protection Bill 2009 (“Consumer Credit Protection Bill”).

We specifically wish to address the issue of responsible lending conduct and the definition of unsuitable credit contracts as they relate largely to finance brokers, specifically covered in Chapter 3, Division 4, sections 115 to 119.

While the intent of the Consumer Credit Protection Bill is to be lauded, we are concerned that it will actually dissuade and prevent risk taking, especially amongst people who are financially sophisticated, which is fundamental to a free market economy.

Our specific concern relates to the ability of “sophisticated” borrowers to make decisions that effectively they will be unable to under the Consumer Credit Protection Bill.

For example, let's assume a person (referred to as the “sophisticated borrower”) has sold a business and has net proceeds of \$2.5 million dollars. The sophisticated borrower decides that they wish to invest in residential property as they see potential upside over the next 3 years. They do not intend to work or start another business in the near term.

They approach a Licensee to obtain \$1.5 million of borrowings to purchase a number of residential investment properties worth \$2 million (including transaction costs). They intend to put a deposit of \$500,000 into the transaction. The sophisticated borrower intends to keep the remaining \$2 million in a bank account to live on, potentially purchase a new house to live in, and to pay any additional interest and other expenses that the rent from the rental properties does not cover.

Under the proposed Consumer Credit Protection Bill, a Licensee would have no alternative but to make a preliminary assessment that a loan is unsuitable and hence could not submit a loan application for the sophisticated borrower.

Under Section 117 of the Consumer Credit Protection Bill, a Licensee must make reasonable enquiries about the consumers' requirements and financial situation before making a preliminary assessment. This would result in the Licensee discovering the sophisticated borrower does not have any other source of income and may have to fund some of the interest expenses on the loan from equity.

At 3.69 of the Explanatory Memorandum, it states, "The general position is that consumers should be able to meet the contract's obligations from income rather than equity in an asset. However it is noted that there may be circumstances where this may not be a reasonable position"

Clearly, with substantial penalties applicable to Licensees, it is unlikely a Licensee would ever be willing to assess that a credit contract in this situation is not unsuitable and hence the sophisticated borrower would not be able to obtain a loan. There are many circumstances where people who would ordinarily be able to make informed borrowing decisions will not be able to under the proposed laws.

Under Part 3-1, Division 4, subsection 117(2) of the Consumer Credit Protection Bill, it states that regulations can specify the steps that need to be taken or not taken in order to have made reasonable enquiries. As the regulations are not currently available, we do not know what those regulations may state.

It is our position that a "sophisticated borrower" provision should be inserted into the Consumer Credit Protection Bill that mirrors the provision provided for sophisticated investors under the Corporations Act 2001.

It is noted that in relation to an offer of a body's securities under the Corporations Act 2001 ("Corporations Act"), at section 708(8) no prescribed disclosure is required where an offer is made to "sophisticated investors".

Broadly under the Corporations Act, it is conceded that a person who is investing more than \$500,000 OR who is certified by a qualified accountant as having net assets of at least \$2.5 million OR who is certified by a qualified accountant as having a gross income of more than \$250,000 a year over the last 2 years, is sophisticated enough to make their own investment decisions and does not require prescribed disclosure.

The sophisticated borrower in the example above can, under the Corporations Act, invest their money in any way they choose without the requirement for any prescribed disclosure by the body offering securities. Yet under the Consumer Credit Protection Bill, as it currently stands, the same person could not take out a simple loan to purchase residential investment property.

We propose that a "sophisticated borrower" clause be inserted into the Consumer Protection Credit Bill. It should provide that where a person is deemed to be a "sophisticated borrower" that there is no requirement for the Licensee to make reasonable enquiries to determine whether the credit contract is unsuitable and a credit contract shall be deemed not unsuitable when offered to a sophisticated borrower.

We further believe that a "sophisticated borrower should be defined as follows:

- (i) Has existing borrowings of more than \$1 million
- (ii) Has Net Assets of greater than \$1 million as certified by a qualified accountant
- (iii) Has a gross income of more than \$150,000 a year over the last 2 years as certified by a qualified accountant.

We submit that the requirements to deem a borrower "sophisticated" under the Consumer Credit Protection Bill should be lower than those required under the Corporations Act to deem a person a sophisticated investor. We believe that even if a borrower is deemed sophisticated, the credit providers will still impose their own requirements, in order to ensure that the sophisticated borrower can successfully repay the loan. Where a sophisticated investor invests their money, the money is passed from the investor to the body issuing the securities, without any subsequent check by any third party who has an interest in protecting the sophisticated investors' funds.

### **Conclusion**

Protecting consumers in financial matters is an important role and responsibility of the Government. However, protection of more vulnerable consumers should not restrict risk taking by those who understand the risks are willing to take.

A "sophisticated borrower" clause in the Consumer Credit Protection Bill will allow sophisticated borrowers to make borrowing decisions that are suitable to their circumstances. I do not expect that this will lead to rampant risky lending, as importantly, the credit providers will still be a final check and will impose their own criteria in assessing whether or not to lend money, as ultimately they want the money to be paid back.

If you have any further questions in relation to our submission, please do not hesitate to contact me on 1-800-000-159 or [damianc@momentumwealth.com.au](mailto:damianc@momentumwealth.com.au)

Sincerely



Damian Collins  
Director

## **About Us**

Momentum Wealth is a full-service property investment consultancy group. Our core focus is building the long-term wealth of our clients by assisting them in the strategic selection, acquisition and management of their investment properties. Through understanding our clients' needs and applying our own highly-developed real estate investment strategies, we strive to deliver maximum property investment returns for our clients in the shortest time-frame possible.

We provide Mortgage Broking services across Australia and currently hold a Western Australian Finance Brokers Licence.

## **The Author**

Damian Collins, age 40, is the sole Director of Momentum Wealth. Damian is a highly successful property investor who has been investing in property for many years. Damian launched Momentum Wealth to assist investors in achieving their long-term property wealth goals.

Damian owns a multi-million dollar property portfolio and as the founder and Managing Director of Momentum Wealth he applies his many years of experience to help investors accelerate their wealth creation through property investment. His own carefully developed system for selecting the best performing property investments is used to find clients the finest investment properties.

To date, Damian has earned the following qualifications:

### **Academic Qualifications**

Bachelor of Business (Accounting) RMIT  
Completion of the Professional Year – Institute of Chartered Accountants  
Graduate Certificate in Financial Planning (FINSIA)  
Graduate Diploma in Applied Finance and Investment (FINSIA)  
Graduate Diploma in Property (Curtin)  
Certificate IV in Financial Services (Finance / Mortgage Broking)

### **Professional Memberships**

Member of the Institute of Chartered Accountants (CA)  
Fellow of the Financial Services Institute of Australia (FFin)  
Member of the Australian Institute of Management (AIMM)  
Accredited Mortgage Consultant with the Mortgage and Finance Association of Australia (MFAA)