Queensland Law Society

Law Society House, 179 Ann Street, Brisbane Qld 4000, Australia
GPO Box 1785, Brisbane Qld 4001 | ABN 33 423 389 441

[redacted]

Office of the President

20 April 2018

Our ref: KB-C&C-BankFin

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

By email: economics.sen@aph.gov.au

Dear Committee Secretariat

National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Bill 2018 [Provisions]

Thank you for the opportunity to provide a response to the inquiry on the National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Bill 2018 [Provisions]. The Queensland Law Society (**QLS**) appreciates being consulted on this important piece of legislation.

QLS is the peak professional body for the State's legal practitioners. We represent and promote nearly 12,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

In advocating for good law, QLS is assisted by its policy committees and working groups who are comprised of members across a range of professional backgrounds and expertise. This furthers QLS's profile as an honest, independent broker delivering balanced, evidence-based comment on matters which impact not only our members, but also the broader Queensland community.

This submission has been compiled with the assistance of the QLS Competition and Consumer Law Committee and the Banking and Financial Services Law Committee, whose members have substantial expertise in this area.

Drafting

We are concerned with a definition proposed to be inserted into section 5(1) of *National Consumer Credit Protection Act 2009* (clause 3 of the Bill). Here, "evidential burden" is defined as, "in relation to a matter, … the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist."

We consider that this definition adopts a standard of proof contrary to that developed by the law over time. Where the evidential burden relates to a civil matter, the normal civil burden, on the balance of probabilities, should apply and, in the case of the evidential burden relating to a criminal matter, the standard should be beyond a reasonable doubt.

Courts, lawyers and even members of the public are very familiar with these standards and if different wording is used, it raises the suggestion that a different level of onus of proof exists than that traditionally applicable in criminal and civil cases.

This drafting will create confusion rather than clarification and that we recommend a more orthodox approach. We suggest that the definition should be changed to delete "a reasonable possibility" and insert "in the case of a civil proceeding, on the balance of probabilities and, in the case of criminal proceedings, beyond a reasonable doubt…"

Public policy concerns

The introduction of mandatory Comprehensive Credit Reporting (CCR) has been widely debated and considered. As outlined in the Explanatory Memorandum to the Bill, CCR has the potential to benefit consumers by way of better access to consumer credit. It will enhance the ability of consumer credit providers to lend responsibly as it will enable lenders to better assess risk due to the increase in available information.

On one view mandatory CCR will lead to greater differential pricing however there is an expectation that where the cost in credit is higher (or lower) for an individual, this increase (or reduction) in cost will reflect the increased (or lower) risk which is able to better assessed by the lender due to the increased information available.

A contrary view, however, is that mandatory CCR may result in lower income applicants being charged more for credit due to greater differential pricing based on more available information.

This is likely to push these applicants more towards higher cost lower-tiered lenders, like the providers of small amount and medium amount credit contracts. It may also mean that a consumer's credit score/risk score is going to increase and could have a negative affect when a person tries to purchase credit.

QLS believes that ensuring lower income applicants are not unduly disadvantaged by the comprehensive credit reporting regime is a consumer protection issue, and QLS encourages the Government to develop an appropriate policy response to achieve this.

As a consequence, the introduction of mandatory CCR may lead to more consumers using credit repair organisations, which in some cases, have not led to the best consumer outcomes.

In conjunction with the introduction of mandatory CCR, we recommend that consideration be given to a review of credit repair organisations to ensure better consumer outcomes from the use of these services.

The second issue we wish to raise from a policy perspective relates to those consumers who have applied for financial hardship under a loan under the *National Consumer Credit Protection Act* and *National Credit Code*. Currently, unless a credit default has already been

listed on a consumer's credit report, being in financial hardship does not affect your credit report because you have come to a mutually acceptable arrangement to pay your debt.

Under the CCR, it is our understanding that some credit providers incorrectly believe that even where a mutually acceptable financial hardship arrangement has been reached, they are still obliged by CCR to show that consumer as being one or more cycles behind in payments on their credit report.

We refer the Committee to guidelines published by the Office of the Australian Information Commissioner "*What does the term 'due and payable' mean in the definition of repayment history information?*"[1] and Financial Ombudsman Service, Determination 422745, 21 April 2016[2], both of which give guidance on the obligations in this regard, particularly in relation to a variation to the terms of a consumer credit contract. All relevant credit providers should be familiar with these publications.

In respect of the CCR framework, we recommend that it be made clear that mutually acceptable financial hardship arrangements do not require reporting.

As there are different points in time at which a person may make a hardship application, we recommend that when a hardship application is made, the credit provider must keep sufficiently detailed records of the application so as to correctly reflect the consumer's circumstances.

It is important that mandatory CCR does not reduce the flexibility of lenders' responses to circumstances including whether or not to report a default. There may be particularly sensitive circumstances giving rise to the default, such as financial abuse or domestic violence, and it is crucial that lenders be able to take appropriate steps, including making indulgences, to ensure that the consumer is not further disadvantaged.

We urge the Committee to recommend in its report that this policy be monitored closely and that a review of its impacts be undertaken.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Acting Advocacy Manager, Wendy Devine [redacted] or Senior Policy Solicitor, Kate Brodnik on [redacted]

Yours faithfully

[redacted]

Ken Taylor
President

[1] Available at: https://www.oaic.gov.au/agencies-and-organisations/faqs-for-agencies-orgs/businesses/what-does-the-term-due-and-payable-mean-in-the-definition-of-repayment-history-information - accessed 17 April 2018
[2] Available at: https://forms.fos.org.au/DapWeb/CaseFiles/FOSSIC/422745.pdf - accessed 18 April 2018