

Chapter 6

Other matters

6.1 This chapter addresses other aspects of the Bill canvassed in evidence presented during the inquiry, namely:

- restrictions on certain representations and advertisements;
- restrictions on the use of certain terms including 'independent' and 'financial counsellor';
- remedies for unfair or dishonest conduct; and
- the proposed amendment to the Corporations Act.

Restrictions on certain representations and advertisements

6.2 Part 3, Schedule 1, items 12–18 of the Enhancements Bill would amend the responsible lending requirements in Chapter 3 of the NCCP Act to prohibit credit providers from making representations that a consumer is eligible to enter into a credit contract prior to assessing whether the proposed contract is 'unsuitable'. The amendments would commence on 1 July 2012.

6.3 The Explanatory Memorandum notes the intended effect of, and policy rational for, the amendments.

The effect of these amendments is to prohibit credit providers from making representations to consumers that they are eligible to enter into a contract, or have their credit limit increased irrespective of, for example, their personal circumstances or credit history. These types of representations can encourage a consumer to apply for credit because of the certainty their application will be accepted, but where the resulting terms on which the credit is provided may be more onerous than those offered by other credit providers.¹

6.4 As currently drafted, it appears that the amendments will apply across the broad range of credit providers and credit contracts. The Explanatory Memorandum does not provide an explanation for the broad application. However, it is clear that the amendments encompass credit advertising. As stated in the Explanatory Memorandum:

[t]hese provisions will also prevent credit providers or lessors from using advertisements which represent that a consumer is eligible to enter into a

1 Explanatory Memorandum, Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011, paragraph 2.58.

contract, even where they have poor credit. Advertisements of this type will need to be suitably qualified.²

6.5 It was also put to the committee that the amendments target credit card offers. While not referenced in the Explanatory Memorandum, the ABA informed the committee that the amendments are intended to address unsolicited representations about a consumer's eligibility to obtain credit under a credit card arrangement. Specifically the amendments target unsolicited credit offers that informed the customer that he or she is 'pre-approved'.³

6.6 The Consumer Action Law Centre and Redfern Legal Centre also submitted that the amendments are designed to regulate initial offers of credit cards. The Centre supported the restriction on credit card advertisements, noting the findings of its 2008 report *Congratulations, you're pre-approved* that the representation that a consumer is 'pre-approved' is used 'to encourage consumers to take on more credit impulsively'.⁴ Redfern Legal Centre also interpreted the provision as applying to initial credit card advertisements, providing the following example in support of the amendments.

Case study

Warren is a 45-year-old man from Redfern, with limited understanding of financial matters. He sought advice from Redfern Legal Centre in relation to his various credit card debts. Warren had 6 credit cards. When queried as to why he had so many credit cards, Warren said that whenever he got a letter in the mails stating that he had pre-approval for a card or was told by a salesperson that he was eligible for a credit facility, Warren assumed that that meant that he could afford the credit facility. He assumed that salesperson or the credit institution had made an assessment of his income. Warren was pleased to receive such offers of credit because he thought they meant that he had a good income and was a good credit risk from the perspective of the credit provider. He always accepted such offers.⁵

6.7 However, while the Consumer Action Law Centre and Redfern Legal Centre supported the application of the amendments to initial credit card offers, the ABA questioned whether unfair representations in relation to initial credit card offers are currently adequately restricted under the NCCP Act. It was noted that Division 4, Part 1, Schedule 1 of the *National Consumer Credit Protection Amendment (Home Loans and Credit Cards) Act 2011* will restrict certain unsolicited offers relating to credit cards. While the Act refers to offers from credit card providers to increase credit

2 Explanatory Memorandum, Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011, paragraph 2.63.

3 Mr Ian Gilbert, Policy Director, ABA, *Committee Hansard*, 24 October 2011, p. 14.

4 Consumer Action Law Centre, *Submission 20*, p. 17.

5 Redfern Legal Centre, *Submission 18*, p. 6.

limits, rather than to provide initial credit,⁶ the ABA submitted that the provisions are sufficient to prohibit this conduct.⁷

6.8 In addition to conflicting views regarding the actual and intended application of the amendments, the committee was informed of a significant concern with the effect that the proposed restriction might have on business and consumer confidence. The ABA submitted that the restriction will limit prudent business practice in relation to providing finance for property purchased at auction.⁸ The committee was informed that the breadth of the restriction will undermine consumer certainty by limiting a bank's capacity to inform the consumer of the amount available for purchases at auction.

It is part of current practice in terms of good customer relationships. Say a customer who is known to the bank wants to bid at an auction and asks the bank, 'Am I going to be okay to bid up to such and such a price?' The bank would run through some rudimentary points with the customer just to establish that nothing had changed since they last had dealings with them and say: 'You'll be fine. Go up to that amount. We're happy to entertain an application from you.' Of course, it depends [on] things like whether the property comes up to the value that it is expected to reach and so forth. The point is that the way this legislation is drafted, you really will not be able to say that. You might say: 'Go ahead and bid. But we are required to conduct a full assessment of your circumstances,' because that is what the responsible lending obligations in the law require. So for an addition to that law that says, 'We can't tell you that you're going to be eligible to apply or enter into a contract with us, but the indications are reasonably good,' there is a question of our legal compliance⁹

Committee view

6.9 The committee endorses the responsible lending requirements as contained in the NCCP Act. However, the committee notes the concerns with the seemingly broad application of the amendments restricting representations regarding a consumer's eligibility to enter into credit contracts.

6.10 In relation to the concern that the restriction is not necessary to ensure fair conduct in credit card advertising, the committee would be concerned were separate provisions in the NCCP Act and National Credit Code targeted towards the same conduct. Such legislation would duplicate the regulatory burden on business without measurable gains for consumer protection. The committee draws the concerns to the Government's attention for its consideration.

6 *National Consumer Credit Protection Amendment (Home Loans and Credit Cards) Act 2011*, s. 133BC.

7 Mr Gilbert, ABA, *Committee Hansard*, 24 October 2011, p. 14.

8 ABA, *Submission 43*, p. 13.

9 Mr Gilbert, ABA, *Committee Hansard*, 24 October 2011, pp 13–14.

6.11 The committee shares concerns that the amendment would restrict consumers from obtaining pre-approval for personal or business loans, particularly in circumstances where pre-approval was sought to purchase property at auction. This unintended consequence is at odds with the policy objective to strengthen consumer protection, and, in turn, strengthen market confidence. If left in its current form, the committee considers that the Bill would undermine certainty for consumers and the business sector, as it is not suited to current commercial arrangements particularly in the property market. Accordingly, the committee recommends that Part 3, Schedule 1 be amended to confirm that ADIs may provide pre-approval for personal and business credit contracts, particularly contracts relating to the purchase of property at auction.

Recommendation 13

6.12 The committee recommends that Part 3, Schedule 1 be amended to confirm that ADIs may provide pre-approval for personal and business contracts.

Restrictions on the use of certain terms including 'independent' and 'financial counsellor'

6.13 The Enhancements Bill proposes to limit the circumstances in which credit providers and intermediaries may use certain terms when explaining, or otherwise describing, their role in the credit process. Clause 160B, Schedule 1 would prohibit credit providers and intermediaries from using the words 'independent', 'unbiased', and 'impartial', or words with similar meaning, in representations about their role and services. The restriction would not apply if the credit provider or intermediary:

- does not receive any commissions apart from commissions that are rebated in full to the consumer ('commissions' does not include fees paid by the consumer for the service);
- does not receive other gifts or benefits from lenders or lessors that may reasonably be expected to influence the licensee;
- is not subject to any restraint on product offerings; and
- is not subject to any conflict of interests.

6.14 Under clause 160C, Schedule 1, the Enhancements Bill would also limit the circumstances in which licensees could use the terms 'financial counsellor', 'financial counselling' or words with a similar meaning. As outlined in the Explanatory Memorandum, the restriction would not apply to, and thereby not restrict the work of, Government funded and not-for-profit financial counsellors.¹⁰

10 Explanatory Memorandum, Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011, paragraph 2.79.

6.15 Submissions before the committee support the proposed restrictions. Abacus Australian Mutuals strongly supported measures to restrict the use of the terms 'independent', 'impartial' and 'unbiased', submitting that the restrictions will raise the standard of broker conduct:

In our view, commission based remuneration structures inevitably compromise the capacity of brokers to provide genuinely disinterested recommendations, and consumers should not be given an exaggerated impression of the benefits associated with the broker channel. Excessive claims about the value of brokers' services also have the potential to impact negatively on the competitive position of credit providers who do not make extensive use of broker networks to initiate business (including the majority of our members).¹¹

6.16 The proposal to regulate the use of the terms 'financial counsellor' and 'financial counselling' was also strongly supported. Anglicare Victoria argued that the current absence of restrictions on the use of the terms can mislead consumers as to the natures of available services. The organisation submitted that the restriction would prevent cases of 'unscrupulous individuals...preying on the disadvantaged and vulnerable in the community.'¹² The Consumer Action Law Centre also supported the proposed restriction. However, the Centre is concerned that the restriction will not address unlicensed credit providers from advertising as, or otherwise claiming to be, financial counsellors:

We believe it needs to be broadened again so that the prohibition will extend to anybody passing themselves off as a financial counsellor. We acknowledge that a person falsely claiming to be a financial counsellor could be subject to action under section 18 of the Australian Consumer Law for deceptive or misleading conduct. However, having created the prohibition at section 160C, we see no reason for limiting it only to credit licensees.¹³

Committee view

6.17 Misleading conduct in the credit sector threatens market integrity and consumer confidence. The committee has previously commented that it is essential that financial advisers provide proper disclosure regarding their independence from a recommended financial product.¹⁴ The committee considers that the proposed restrictions are in keeping with the principle of proper disclosure, and will require such disclosure by intermediaries and credit providers. Accordingly, the committee approves the proposed restrictions on the use of terms 'independent', 'unbiased', 'impartial' and related terms.

11 Abacus Australian Mutuals, *Submission 38*, p. 3.

12 Anglicare Victoria, *Submission 39*, p. 4.

13 Consumer Action Law Centre, *Submission 20*, p. 17.

14 Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into financial products and services in Australia*, November 2009.

6.18 Evidence before the committee has highlighted the valuable services provided by financial counsellors. Their work promotes financial literacy and, in turn, facilitates the development of a market in which consumers are fully informed. The committee notes views that clause 160C should be cast more broadly to ensure that all misrepresentations regarding a person's qualifications as a financial counsellor are prohibited. The committee draws these views to the Government's attention.

Remedies for unfair or dishonest conduct

6.19 At Part 2, Schedule 1, the Enhancements Bill introduces a new category of conduct for which consumers may seek civil remedies. Clause 180A would create a new class of conduct, namely, 'unfair or dishonest conduct by credit providers'. As outlined in the Explanatory Memorandum, civil remedies are available from the court, at the court's discretion, if the court is satisfied that:

- a person provided a credit service to a consumer and engaged in conduct that was connected with the provision of the service and that was unfair or dishonest; and
- the conduct had one or more of the following results:
 - the consumer entered into a credit contract, consumer lease, mortgage or guarantee that they would not have entered into had the conduct not occurred;
 - the consumer entered into a credit contract, consumer lease, mortgage or guarantee with different terms to one that they would have entered into apart from the conduct; or
 - the consumer became liable to pay fees or costs to the person or a third party.¹⁵

6.20 The proposed definition of 'unfair or dishonest conduct' is based on the circumstances of the consumer credit transaction. The court must consider it likely that the conduct was unfair or dishonest if one or more of the circumstances outlined in the Bill existed and affected the consumer's interests. The circumstances that focus on the consumer are:

- the consumer was at a special disadvantage;
- the consumer was a member of a class of persons whose members are more likely to be at a special disadvantage;
- a reasonable person would consider that the conduct was directed at the class of persons more likely to be at a special disadvantage and of which the consumer was a member;

15 Explanatory Memorandum, Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011, paragraph 2.29.

- the consumer was unable, or considered him or herself to be unable, to enter into a credit contract, mortgage or consumer lease; or
- the terms of the contract were less favourable than the consumer could have obtained from another provider.

6.21 The two circumstances relating to the credit provider's conduct are:

- whether the credit provider could determine or significantly influence the contract terms; and
- whether the credit provider's conduct involved a technique that should not in good conscience have been used or manipulated the consumer.

6.22 The Regulation Impact Statement that accompanied the Explanatory Memorandum explained that the new provisions are intended to be an extension of existing remedies that allow consumers to reopen credit contracts on the grounds the contracts are unjust:

The implementation of Phase One of the credit reforms has maintained in the Code the right for consumers to be able to have a credit contract, consumer lease, mortgage or guarantee reopened on the grounds that it is unjust. This provides a general remedy beyond those existing in other legislation. A remedy of this type in respect of credit contracts has been long-standing, and previously been included in money-lending legislation. The remedy has recognised the desirability of industry-specific protections that encourage higher standards of conduct by credit providers.

However, the Credit Act does not provide any equivalent general remedy in relation to providers of credit services. There are two classes of such persons, those who provide credit assistance by arranging or suggesting a particular or identified contract (and are therefore required to comply with the responsible lending requirements in Chapter 3 of the Credit Act), and other intermediaries who only play a lesser role in the provision of credit or leases.¹⁶

6.23 Evidence before the committee indicates that there is in-principle support for the new class of actionable conduct.¹⁷ However, there are concerns with the practicality of clause 180A.

6.24 The Consumer Action Law Centre supported the introduction of remedies for 'unfair and dishonest conduct', stating '[t]hese provisions may in our view extend greater protection to vulnerable or excluded customers who may find it difficult to

16 Regulation Impact Statement: Phase two of the national consumer credit reforms, Explanatory Memorandum, Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011, paragraphs 9.238–9.239.

17 Aussie, *Submission 10*, p. 3; Consumer Action Law Centre, *Submission 20*, p. 16; Consumer Credit Legal Centre (NSW) Inc, *Submission 47*, p. 12; Good Shepherd Youth and Family Services p. 4.

prove unconscionability as defined by the *Australian Securities and Investments Commission Act 2001*.¹⁸ Similarly, the Consumer Credit Legal Centre (NSW) Inc argued that the measures are necessary to address existing regulatory gaps:

Many of the cases dealt with by CCLC over the past 10 years have involved unfair and/or dishonest conduct by intermediaries such as finance/mortgage brokers. Without these amendments there is a risk that either consumers will be left without recourse, or that credit providers will bear the brunt of any remedy in circumstances where another party is at fault or partly at fault.¹⁹

6.25 While supporting the intention to provide redress for consumers affected by unfair or dishonest conduct, the Consumer Action Law Centre and Good Shepherd Youth and Family Services argued that the definition's focus on the consumer's 'special disadvantage' is too restrictive. The Consumer Action Law Centre recommended that 'special disadvantage' be replaced with the broader term 'disadvantage', arguing that this would avoid 'a more conservative interpretation than is required'. The Centre also argued that the circumstance 'the transaction was less favourable than the terms of a comparable transaction' be replaced with 'the transaction was unfavourable to the consumer'.²⁰

6.26 In submitting that the focus on the consumer's special disadvantage is too restrictive, Good Shepherd Youth and Family Services proposed that clause 180A be amended to 'not require "special disadvantage" to be established, only that the dishonest conduct led to the taking of the financial product'.²¹ The recommendation highlights the issue of whether clause 180A requires a nexus to be established between the credit provider's conduct and the harm suffered by the consumer.

6.27 The ANZ also commented on the issue of causation, arguing that the proposed definition of 'unfair or dishonest conduct' is inappropriate and should be recast to focus on the appropriateness of the credit provider's conduct:

The guiding circumstances in s. 180A(4) are heavily weighted towards the vulnerability of the consumer and the resulting credit contract. In ANZ's view, any finding of unfairness or dishonesty should be based on the nature of the actual conduct engaged in by the defendant, rather than on the consumer's particular circumstances.²²

18 Consumer Action Law Centre, *Submission 20*, p. 16.

19 Consumer Credit Legal Centre (NSW) Inc, *Submission 47*, p. 12.

20 Consumer Action Law Centre, *Submission 20*, pp 17–18.

21 Good Shepherd Youth and Family Services p. 5.

22 ANZ, *Submission 41*, p. 4.

Committee view

6.28 The committee is concerned that as presently drafted, clause 180A does not require a causal nexus between the credit provider's conduct and the harm suffered by the consumer. Defining 'unfair or dishonest conduct' primarily with reference to the borrower's circumstances and without reference to the credit provider's knowledge of those circumstances may create an incentive for credit providers to cease to lend to disadvantaged persons. Therefore, failure to provide this nexus may undermine consumer protection and access to finance for vulnerable consumers.

6.29 The committee is also concerned with the appropriateness of paragraph 180A(3)(f) and paragraph 180A(3)(g), which define 'unfair or dishonest conduct' by reference to whether the credit provider could significantly influence the terms of the credit contract or consumer lease and to whether the terms were less favourable to the consumer than terms of a comparable transaction. These provisions presuppose equal bargaining power between consumers and credit providers, and that variation in the terms of similar products is a sign of an unfair or inappropriate credit market. The Explanatory Memorandum has not provided sufficient explanation to justify equating either circumstance with injustice or dishonesty. A market may be operating fairly and prudently despite unequal bargaining power between parties to a consumer transaction. The committee also notes that product variation is one factor contributing to competition and market growth.

6.30 The committee recommends that the circumstances that may constitute 'unfair and dishonest conduct' in subclause 180A(4) be redrafted to include a nexus between the credit provider's behaviour and the harm suffered by the borrower. For example, the conduct covered by paragraph 180A(4) and 180A(4)(g) should only constitute unfair and dishonest conduct where the credit provider knew the borrower was at a special disadvantage and the conduct was undertaken in an attempt to exploit the special disadvantage.

Recommendation 14

6.31 The committee recommends that the circumstances that may constitute unfair or dishonest conduct at paragraph 180A(3)(f)–(g) be amended to only apply where the credit provider is aware of the borrower's special disadvantage and seeks to exploit this.

Amendment to section 250R of the *Corporations Act 2001*

6.32 Schedule 7 of the Enhancements Bill proposes an amendment to subsection 250R(5) of the Corporations Act. The schedule would commence the day after the Bill receives Royal Assent.²³

23 Item 2, Schedule 7, Consumer Credit and Corporations Legislation Amendment (Enhancements Bill) 2011.

6.33 The *Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Act 2011* (the Amendment Act) introduced an exception to the general restriction on key management personnel and closely related parties from participating in votes during annual general meetings regarding executive remuneration.²⁴ As stated in the Explanatory Memorandum, '[s]ome confusion has arisen as to whether this exception applies in respect of the non-binding vote required under section 250R.'²⁵

6.34 The proposed amendment would clarify that the exception does not prevent the chair of annual general meetings, who is also defined as key management personnel or a closely related party, from voting undirected proxies in the non-binding vote if the shareholder provides express authorisation for the chair to exercise the proxy.²⁶

6.35 Three submissions commented on the proposed technical amendment. The AFC supported the amendment, noting that the organisation 'understands that the amendment is one of clarification.'²⁷ Similarly, Chartered Secretaries Australia approved the amendment, noting that it would address an anomaly in the Amendment Act.²⁸ The Australian Institute of Company Directors did not support the amendment, however, this was on the basis of concerns with the Amendment Act.²⁹

Committee view

6.36 The committee supports the proposed amendment.

24 Item 12, Schedule 1, *Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Bill 2011*.

25 Explanatory Memorandum, *Consumer Credit and Corporations Legislation Amendment (Enhancements Bill) 2011*, paragraphs 8.1 – 8.2.

26 Explanatory Memorandum, *Consumer Credit and Corporations Legislation Amendment (Enhancements Bill) 2011*, paragraphs 8.3.

27 AFC, *Submission 29*, p. 2.

28 Chartered Secretaries Australia, *Submission 50*, pp 2–3.

29 Australian Institute of Company Directors, *Submission 9*, p. 1.