

Chapter 1

The Committee Inquiry

Introduction

1.1 On 25 June 2009 the Senate Selection of Bills Committee referred the bills that make up the 'Consumer Credit Protection Reform Package'¹ to the Senate Economics Legislation Committee for inquiry and report by 13 August 2009. The reporting date was later extended to 7 September 2009.

1.2 The package comprises the National Consumer Credit Protection Bill 2009, the National Consumer Credit Protection (Fees) Bill 2009, the National Consumer Credit Protection (Transitional and Consequential Provision) Bill 2009 and the Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009. The last bill is somewhat independent of the others and contains a number of new strategies for the regulation of margin lending, trustee corporations and promissory notes.

1.3 The bills give effect to the agreement by the Council of Australia Governments (COAG) to the Commonwealth assuming responsibility for regulation of all consumer credit.²

Conduct of the inquiry

1.4 The Committee advertised the inquiry in the national press and invited written submissions by 17 July 2009. Details of the inquiry were placed on the Committee's website and the Committee also wrote to a number of organisations and stakeholder groups inviting written submissions. The 58 submissions received by the Committee are listed in Appendix 1.

1.5 Three public hearings were held by the Committee, in Canberra on 21 August 2009 and in Sydney on 24 and 26 August 2009. A list of witnesses appearing before the Committee is provided at Appendix 2.

1.6 The Committee thanks the submitters and witnesses who participated in this inquiry.

1 National Consumer Credit Protection Bill 2009 *Explanatory memorandum*, p. 3.

2 Senator the Hon Nick Sherry, Minister for Superannuation and Corporate Law, *Press Release*, 3 July 2008.

Timing and passage

1.7 The Government has announced the following timeline for implementation of the National Consumer Credit Protection (NCCP) reform package:

- From 1 November 2009 credit providers and credit assistants will have to register for the new system (which Treasury expects to be a fairly 'light touch' process)³.
- Between 1 January 2010 and 30 June 2010, credit providers and credit assistants will have to be issued with an Australian Credit Licence (ACL).
- On 1 January 2010, the main suite of changes, including the increased hardship threshold, commences for credit providers and credit assistants other than banks and Australian finance companies.
- On 1 July 2010 some of the new responsible lending obligations and other improvements that form part of phase 1 commence.
- On 1 January 2011 the full range of responsible lending obligations commence for everyone (including banks and Australian finance companies).

1.8 Treasury explained some of the important issues relating to this timeline:

Part of the timing problem is the fact that this bill needs a referral from the states and territories for constitutional reasons. For them to actually do their referrals we have to give them a bill in its final form, or in as near to final form as possible, for them to pass their amending references. In our view the bill will be in its almost final form at the time it finishes with the Senate processes, whenever that might be. It will be at that point when we can hand a version of the bill to the states and territories and say, 'Go and do your referrals.'

The later that is, the less time the states and territories have to pass their referrals.⁴

1.9 There could be difficulties if the Parliament did not pass the bills before 1 November 2009:

...[the States] definitely need to have [the bills] through before 1 January, because that is when most of the measures commence. We expect that some of the states will have difficulties getting their referrals through by 1 November, but we have contingency plans for how the registration process can continue to run in the meantime. The critical date for referrals is 1 January 2010 because that is when effectively all the main provisions in the new national consumer code commence...

3 Mr Geoff Miller, Manager, Corporations and Financial Services Division, Treasury, *Proof Committee Hansard*, 21 August 2009 p. 2.

4 Mr Geoff Miller, Treasury, *Proof Committee Hansard*, 21 August 2009 p. 2.

If, because of the time it takes to get through the Senate, there are states that cannot get their references through by 1 January, it would probably mean a deferral of up to six months.⁵

Evidence given in relation to timing

1.10 A number of witnesses commented on the impact that the timing and implementation of the reforms will have on consumers, credit providers and organisations which provide credit assistance. There were essentially two broad concerns. Industry representatives were concerned that starting some aspects of the scheme in January 2010 gave insufficient time for preparation and training. Others expressed concern about the delay until 2011 of some of the responsible lending aspects of the bills.

The starting date

1.11 The Business Council of Australia highlighted the need for sufficient time for businesses to adapt to the costs associated with the new regulations. They said:

The BCA notes that the new regime imposes many additional requirements on businesses, including licences, insurance requirements and significant new disclosure requirements (amongst other things). As a consequence it will be necessary for businesses to devote significant new resources towards compliance, including changes to documentation and internal processes as well as training employees.⁶

1.12 The Australian Bankers' Association has also indicated the importance of allowing sufficient time for credit providers to prepare for the new regulations:

...the NCCP will impose a number of new obligations that banks need to understand, develop procedures and IT systems, new documentation and train their employees and credit agents to ensure they are fully compliant.

There are severe civil and criminal penalties for non-compliance with the responsible lending regime and certain other provisions of the NCCP. The final terms of the NCCP will not be known until October at the earliest. ASIC has yet to provide its regulatory guidance on responsible lending and the proposed regulations for the NCCP are not available.

Implementation of compliance procedures, practices, documentary and staff training requirements cannot really begin efficiently and effectively in an integrated way until all of these details are known and settled.⁷

1.13 GE Capital Finance, a leading non-bank provider of consumer finance also worried that the timetable was unrealistic:

5 Mr Geoff Miller, Treasury, *Proof Committee Hansard*, 21 August 2009 p. 2.

6 Business Council of Australia, *Submission 26*, p. 1.

7 Australian Bankers' Association, *Submission 48*, p. 11.

Credit providers are required to comply with the NCCC by 1st January 2010. The NCCC contains a number of changes from the UCCC requirements. The details of these changes are in some cases to be provided in Regulations that have not yet been published. Without the "full picture" of these changes it is impossible for credit providers to design and implement the necessary changes to IT systems and other business processes efficiently and effectively.⁸

1.14 The Securities and Derivatives Industry Association expressed their concerns:

With the possibility Bill and Regulations may be passed in the Spring sittings, with an implementation date of 1 November (or possibly later), our Members are very concerned about the severe logistical burdens for the whole industry – Lenders and Advisers – and their clients... Many of the new changes will necessitate systems, procedural and operational changes. Heading into the Christmas/New Year holiday season, many firms impose freezes on systems developments, making it a particularly difficult time in which to implement new systems.⁹

Commencement of responsible lending provisions

1.15 Some consumer advocate groups indicated their disappointment with the delayed commencement of the responsible lending obligations until 1 January 2011.

The delayed implementation of the Responsible Lending Conduct provisions of the Bill, which will not come into force until January 2011 is seriously disappointing. We are particularly concerned about the consequences of this delay in relation to brokers and fringe lenders.

Consumer groups have lobbied since prior to 2003 for comprehensive national broker legislation. We are very disappointed to have to wait another 18 months. Further, unless the States and Commonwealth agree on urgent action to address the situation, the law may instead go seriously backwards in four States, including the most populous states, for a period of twelve months.¹⁰

1.16 The Mortgage and Finance Association of Australia (MFAA) expressed a similar concern:

These provisions of the Bill are the heart and soul of the legislation, so a decision to delay their operation is tantamount to a decision to delay consumer credit protection for 12 months. But it is more than that because in those states and territories where there is already operative broker legislation, viz WA, NSW, Victoria and ACT, consumers will be in a worse position than they currently are, as it is proposed state jurisdictions will be 'turned off' on 31 October 2009.

8 GE Capital Finance, *Submission 35*, p 4.

9 Securities and Derivatives Industry Association, *Submission 23*, pp 1-2.

10 Consumer Credit Legal Centre (NSW), *Submission 41*, p. 7.

MFAA members are already operating in an association regulatory regime which is at least equivalent, and in some respects superior, to the proposed legislation. There is no desire on their part to delay the legislation.¹¹

1.17 Later, at the public hearing on 24 August 2009, their Chief Executive Officer said:

I now know that Minister Bowen has made a statement which changes that and which brings forward the regulation of brokers to 1 January 2010. I suppose that some of our members might say that that is unequal treatment, in that some credit providers are being given a year off and we have to start from year one, but we are quite comfortable with that. As we say in our submission, our membership requirements are at least equal to and in some cases better than what is in the legislation, so we do not have a concern about that.¹²

1.18 Abacus-Australian Mutuals supported the 'solid platform for the regulation of consumer credit' as laid down by the bills.¹³ However he commented that the effectiveness of the framework will be significantly reliant on how the regulator – the Australian Securities and Investments Commission (ASIC) – implements the new reforms.

If ASIC repeats mistakes experienced in the implementation of the FSR reforms through the formulation of highly prescriptive, ineffective and inflexible regulation then consumers and lenders will be poorly served...

ASIC is currently publishing a range of consultation papers that provide drafts of their proposed regulatory guides. These guides are important signposts to industry, and ASIC deserves some kudos for providing guides that, on their face, appear to avoid the mistakes of the past. However, the test may well be in the implementation once the regime commences. We are hopeful that the regulator will continue to apply its authority in efficient, flexible ways, allowing institutions like ourselves to adopt different approaches to issues like staff training rather than reverting to a one-size-fits-all approach. The importance of effective regulatory oversight should not be underestimated and we will of course continue to work with ASIC to achieve good outcomes in that respect.¹⁴

11 Mortgage and Finance Association of Australia, *Submission 6*, p. 2.

12 Mr Phil Naylor, Mortgage and Finance Association of Australia, *Proof Committee Hansard*, 24 August 2009, p. 50.

13 Mr Mark Degotardi, Abacus-Australian Mutuals, *Proof Committee Hansard*, 24 August 2009 p. 15.

14 Mr Mark Degotardi, Abacus-Australian Mutuals, *Proof Committee Hansard*, 24 August 2009, p. 15.

Committee view

1.19 The Committee understands why many groups are keen to have national legislation in place, to ensure consumers are appropriately protected, as soon as possible. However, for the legislation to be effective it is necessary to allow sufficient time for industry to prepare.

1.20 The Committee feels that the Government's two phased approach will allow sufficient time for the Government and ASIC to undertake further consultation on the more contentious reforms. However, the Committee is concerned that three to four months may not be sufficient time for the industry to prepare for the measures currently scheduled to commence in January 2010.

1.21 The Committee also recognises the importance of allowing sufficient time for state and territory governments to initiate their referral to the Commonwealth.

Recommendation 1

The Committee recommends that at least the first three bills be passed, subject to the Committee's recommendations, before 1 November 2009 to facilitate the necessary referrals by state parliaments.

Recommendation 2

The Committee recommends that implementation of the reforms due to begin on January 1 2010 be deferred to 1 July 2010 to allow sufficient time for industry to prepare and ensure state parliaments are able to facilitate the necessary referrals. However the responsible lending provisions due to start on 1 January 2011, should still operate from this date.

Recommendation 3

The Committee recommends that State Parliaments ensure their own 'turn off dates' are legislated for so that consumers are not left without protection before the national licensing scheme is in place.

Structure of the report

1.22 Chapter 2 provides a brief background to the regulation of consumer credit in Australia and contains an overview of the National Consumer Credit Protection Reform package. Chapter 3 of this interim report provides an in-depth analysis of the evidence the Committee received on the first three bills and its recommendations on them. Chapter 4 addresses the Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009.

1.23 To assist the Senate's consideration of the recommendations contained in this report, the Committee has prepared two suggested draft amendments which demonstrate how Recommendations 5 and 6 could potentially be implemented. The suggested amendments are attached at Appendix 3.