Chapter 3

Comments on the main National Consumer Credit Protection bills

The Australian Credit Licence (ACL)

3.1 A key component of the NCCP bills is the establishment of a national licensing regime for persons engaged in credit activities. According to the Explanatory Memorandum, the new regime:

- requires persons who engage in credit activities to, initially, be registered with ASIC, and to subsequently hold an ACL;
- imposes entry standards for registration and licensing, and enables ASIC to refuse an application where the person does not meet those standards;
- requires registered persons and licensees to meet ongoing standards of conduct while they engage in credit activities; and
- provides ASIC the power to suspend or cancel a licence or registration, or to ban an individual from engaging in credit activities.[1]

3.2 Registered persons and licensees will also be required to meet responsible lending obligations which include a requirement to make reasonable inquiries into a consumer's circumstances and verify information provided by the consumer. Strong penalties (including civil and criminal penalties) apply if these obligations are not met.

3.3 Among other things, the proposed licensing regime is designed to remove the need for lenders and brokers who operate in more than one state or territory to meet different requirements:

> Currently there is no consistency in the way in which the States and Territories regulate providers of credit and related services. Western Australia has a licensing system for both lenders and brokers. Victoria and the Australian Capital Territory have registration systems covering credit providers and brokers. The remaining States and Territories do not impose any entry requirements on credit providers.[2]

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1 National Consumer Credit Protection Bill 2009, *Explanatory Memorandum*, p. 4.

2 National Consumer Credit Protection Bill 2009, *Explanatory Memorandum*, p. 28.

3.4 The Australian Securities and Investments Commission (ASIC) will administer the new licensing regime. In order to assess whether an applicant for an Australian Credit Licence (ACL) is eligible:

> ASIC must assess whether the applicant has adequate organisational capacity, systems and competence to be able to comply with their obligations under the Credit Bill when engaging in credit activities. For example, ASIC will need to consider whether the applicant has systems in place both to meet responsible lending obligations, and to deal with conflicts of interest so that their clients are not disadvantaged where any such conflict exists.
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> Secondly, ASIC must assess whether there is any reason to doubt the applicant is a fit and proper person to be involved in the provision of credit services. In considering this question ASIC is able to take into account a broad range of relevant matters, such as their past conduct and compliance with credit laws of States and Territories (including prior to the enactment of the Credit Bill).[3]

Streamlining ACL requirements

3.5 A number of submitters raised their concerns about how ASIC will manage the transition to this national licensing regime. According to the Explanatory Memorandum:

> A special process (called streamlining) has been designed for authorised deposit-taking institutions (ADIs). It is considered that ADIs are subject to levels of government supervision that are sufficiently rigorous so that they do not need to demonstrate, in order to obtain a licence, their competencies and qualifications. Once licensed, they will be subject to the same obligations as all other holders of an ACL.
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> The regulations may describe other categories of participants who may also be streamlined to an ACL.
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> These will be the only categories of person who will be streamlined, given the lack of uniformity in relation to registration and licensing of other credit providers and brokers or intermediaries at a State and Territory level.[4]

3.6 CPA Australia point out that the requirements for Australian Financial Services Licence (AFSL) holders are just as strict and so:

> Holders of an ASFL should… also be provided with a streamlined procedure to apply for an Australian Credit Licence. This argument is further supported by the fact that ASIC will be the responsible body for granting and monitoring ACLs, who are the same regulatory body responsible for issuing and monitoring AFSLs.[5]

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3 National Consumer Credit Protection Bill 2009, *Explanatory Memorandum*, p. 32.

4 National Consumer Credit Protection Bill 2009, *Explanatory Memorandum*, p. 32.

5 CPA Australia, S*ubmission 17*, p. 2.

3.7 Mr Gerard Fitzpatrick, from the Financial Planning Association of Australia summed up the concerns:

> ASIC has issued a series of consultation papers with response times of approximately three to four weeks. In terms of some of the licensing aspects, they were issued in July—so about three to four weeks after the bill was brought to the parliament. There is a whole series of issues that ASIC is working on currently in terms of providing guidance to licensees about what they need to do to fulfil their obligations to be registered before they are licensed under the credit regime and then subsequently to be licensed. We also await from ASIC more details on the responsible lending obligations under the bill. We are right in the middle of a whole series of consultations from ASIC. Given that the licensing regime starts from 1 January, obviously the time frame is quite tight.[6]

'Scalability'

3.8 The Committee also heard evidence concerning how the licensing requirements will affect different sized operations.

3.9 The lenders which are members of the National Financial Services Federation are not supervised by the Australian Prudential Regulation Authority and are not licensed to any degree in most states. The Federation commented:

> …the people that are lending in our area are going from effectively a non-licensed system to a highly licensed and highly regulated system. We have no objection to that as a principle, but the way it is being done is what concerns us. We are concerned about the position being taken by particularly ASIC that one size fits all. They are applying the same rules and regulations that a National Australia Bank would have to a one- or two-person corner shop…[7]

3.10 Treasury explained how the licensing regime would differentiate between large and small institutions, saying:

> Briefly, in relation to these concerns there was a specific provision included in the bill in subsection 47(2) that essentially says that the licensing obligations have to be scaled according to the size and complexity of the business. If, for example, you are a small lender only providing one or two very basic products, then the level of obligations, while expressed in the same language, and the steps you need to take to meet them, will be significantly less.[8]

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6 Mr Gerard Fitzpatrick, Financial Planning Association of Australia, *Proof Committee Hansard*, 24 August 2009 p. 59.

7 Mr John Brady, National Financial Services Federation, *Proof Committee Hansard*, 24 August 2009 p. 20.

8 Mr Christian Mikula, Treasury, *Proof Committee Hansard*, 21 August 2009 p. 9.

3.11 Abacus discussed the impact on their members of the schedule of fees attached to the new licensing regime:

> These fees range from $450 for an individual to $21,000 for institutions with more than 100 employees. These fees must be paid to apply for a licence and then again on an annual basis as we lodge our annual compliance certificates. As you can imagine, many Abacus members will now be required to pay $21,000 per year to engage in their usual credit related business. A mid-sized credit union will, under the draft regulations, be required to pay exactly the same per year as the largest banks in Australia. There is no equity in the application of these fees and, to us, there is little sense in using the number of employees as the benchmark. This is a costly and ineffective approach and we will be urging the government and Treasury to reconsider this regulation.[9]

Committee view

3.12 The Committee acknowledges the concern that stakeholders have expressed with how the new ACL regime will be implemented. The Committee also notes the broad support for a nationalised licensing scheme.

Recommendation 4

The Committee recommends that ASIC consider a form of streamlined process for holders of an Australian Financial Services Licence when they apply for an Australian Credit Licence.

Responsible lending provisions

3.13 The bill requires a lender to assess the suitability of a credit product for a consumer before extending the credit. In the case of a credit card or overdraft, the suitability of the maximum limit must be considered, and it must be reconsidered if the limit is increased. To be precise, the requirement is that the loan is 'not unsuitable'.[10]

3.14 Abacus stated that their members are already committed to responsible lending through a new mutual code of conduct.[11]

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9 Mr Mark Degotardi, Abacus-Australian Mutuals, *Proof Committee Hansard*, 24 August 2009, pp. 15-16.

10 The Australian Bankers' Association saw this as much better than a requirement that the loan be 'suitable'; Mr Gilbert, ABA, *Proof Committee Hansard*, 24 August 2009, p 13.

11 Mr Mark Degotardi, Abacus, *Proof Committee Hansard*, 24 August 2009, p 15.

Supportive measures

3.15 While not directly related to the bills, during the course of the inquiry the Committee heard some views about other measures that would encourage responsible lending and borrowing.

3.16 Banks currently have access to 'negative credit reporting', whereby they can receive information about defaults. 'Positive credit reporting', where a central credit reporting agency gathers and maintains information about the credit facilities which each consumer has and can be accessed by credit providers, was mentioned by the Australian Bankers' Association as enabling lenders to assess more accurately whether a borrower was becoming overcommitted, and hence whether a new loan was 'suitable':

> The current credit reporting system provides very little information. It is considered negative information. If there is a default and a credit provider chooses to record that default, you will find out about it, but otherwise you will not. You will not know whether a customer actually has a credit facility. The credit reporting system simply records the inquiry by the customer about a credit facility. You do not know what the current limit of that credit facility is. You do not know what date it was opened and when it was closed. This is information which is a little more than is currently available but certainly not as wide in scope as certain positive credit reporting regimes overseas are, which do raise some privacy issues. We think that this is manageable within a sensible privacy framework.[12]
>
> I think Australia and New Zealand are the only two countries in the OECD that do not have a system of positive credit reporting. [13]

3.17 Improved education on financial literacy in schools would contribute to a reduction in over-borrowing and consequent hardship by helping consumers recognise the risks associated with taking on debt.

3.18 The Committee was grateful for the discussions it had with stakeholders about these and other important issues but has limited this report to dealing with specific provisions in the bills.

3.19 The Committee also notes that the Government has announced its intention to respond to the Australian Law Reform Commission's report *For Your Information: Australian Privacy Law and Practice*, which contains 46 recommendations relating to

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12 Mr Gilbert, Australian Bankers' Association, *Proof Committee Hansard*, 24 August 2009, p 9.

13 Mr David Bell, Chief Executive Officer, Australian Bankers' Association, *Proof Committee Hansard*, 24 August 2009, p 9.

credit reporting (including positive credit reporting), within 18 months of its 30 May 2008 release.[14]

Period within which a credit provider must re-assess suitability

3.20 Section 128 of the NCCP bill prohibits a credit provider from entering into a credit contract with a consumer (or increase a credit limit) unless the licensee has, within 90 days (or another period prescribed in the regulations), made an assessment of the suitability of the credit contract (and undertaken all the verification and inquires required elsewhere in the bill). A civil penalty of 2,000 penalty units (currently $220,000) applies if this provision is contravened.

3.21 The Australian Bankers' Association commented on how this requirement will operate in the context of a long settlement on a property loan (for example). They say:

> Further, it is unclear how the 90 days prospective assessment period will affect a customer who has agreed to purchase a residence on 120 day settlement terms and who approached their bank for an early loan approval which could take only 14 days to approve. It should not be necessary for the bank and not cause the customer the inconvenience of having to repeat the process 90 days later in this sort of situation. There is scope for the regulations to stipulate a longer period to accommodate these situations.[15]

Committee view

3.22 The Committee acknowledges that a period of 90 days is generally an appropriate period after which a new assessment of whether the credit contract is suitable for the consumer should be undertaken. The Committee also supports the inclusion of a regulation-making power to alter this period if appropriate. However, the Committee feels that the legislation should reflect appropriate flexibility in the context of credit contracts which relate to mortgaged residential properties.

Recommendation 5

The Committee recommends that section 128 of the National Consumer Credit Protection Bill 2009 be amended so that, where the credit contract involves a mortgage over a residential property, the credit provider should only be required to re-assess the suitability of the credit contract if:

- **an assessment has not taken place within 90 days of the contract being written; and**
- **the credit provider has reason to believe that the situation of the consumer has changed such that the credit contract may no longer be suitable.**

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14 Joint Media Release, Senator The Hon John Faulkner, then Special Minister of State, and The Hon Robert McClelland MP, Attorney-General 11 August 2008. Available at: http://www.smos.gov.au/media/2008/mr_262008_joint.html (accessed 31 August 2009)

15 Australian Bankers' Association, S*ubmission 48*, p 9.

Responsibilities on retailers and lenders

3.23 A common form of consumer credit is initiated by customers in a retail outlet around the time of purchase. For example, a customer sees a sofa or plasma TV that they wish to buy but does not have enough funds in their bank account or a sufficient unused limit on their credit card to pay for it in this way. The sales assistant in the store then mentions the possibility of buying the goods on credit. It may be that the customer was attracted to the particular retailer by advertising that the goods could be purchased there under terms offering no interest or no repayments for a specified period.

3.24 An area of both controversy and uncertainty during the hearings was under what circumstances would the retailer and the sales assistant be covered by the NCCP bills. At one extreme, if the sales assistant merely says that there are banks and financiers that may lend the customer money but without mentioning any specific lender, then the sales assistant and retailer would not be covered. At the other extreme, if the sales assistant signs up the customer for credit provided by the retailer itself (a practice becoming less common), then the retailer would clearly be covered.

3.25 Between these polar cases, there was less certainty about how active a sales assistant had to be in marketing or providing credit before they might have been regarded as having provided 'credit assistance' with the associated responsibilities under the bills.

3.26 The draft version of the bill was interpreted as covering sales assistants with only a tangential involvement in the decision to provide credit. The Australian National Retailers' Association gave their perspective:

> The bill proposed to regulate not just credit providers but also their agents. A new concept, credit assistance, was created to require financial advisers to only recommend products not unsuitable for their clients. However, this concept of credit assistance was so broadly defined that it has captured much more mundane activities. For example, if a retail sales assistant suggested to a customer that they apply for a credit card or an interest-free loan, that sales assistant would be deemed to be offering credit assistance. This would trigger the same compliance requirements as would apply to a mortgage broker or a financial planner. In such cases, the draft bill would require a sales assistant to be an appointed representative of the credit provider, satisfying any training or other conditions set by the Australian Securities and Investments Commission. The sales assistant would have to assess whether the credit contract is suitable for the consumer. This assessment would need to be recorded and available on request.[16]

3.27 The current position is that under regulation 22 retailers are explicitly exempted where they are not providing credit or making the decision to provide credit,

16 Mrs Margy Osmond, Chief Executive Officer, Australian National Retailers' Association, *Proof Committee Hansard*, 24 August 2009, pp 41-2.

(It is not clear whether in the absence of this specific exemption, a retail sales assistant helping a customer apply for credit would have been required to be trained and the retailer licensed.[17]) The responsibility lies with the bank or finance company that provides the credit. For example, David Jones' 'store card' is provided by American Express and GE Finance provides credit to Harvey Norman customers. David Jones explained the division of responsibilities:

> The credit provider in the case of David Jones is American Express, and American Express own the receivables and the loan to that customer. They are also responsible for the credit policy and for the risk of the portfolio. Therefore, it is their decision to determine whether or not the customer has the ability to repay… what we say to customers is: 'If you would like to consider a David Jones store card or David Jones American Express card, we can help you to complete your application form for that. Your application form will then be properly and thoroughly assessed by American Express, which is the credit provider, and they will make a judgement as to whether or not that product is suitable for you.'[18]

3.28 This 'point of sale' exemption for retailers has been criticised as too broad:

> The point-of-sale people do linked credit…These people are just a species of broker. They arrange credit and even charge for credit…To put them out is inequitable and ridiculous, but it also seriously affects consumers because they are hampered in their ability to access justice.[19]
>
> …the current exemption in the regulations is too broad and is going to need to be fixed up in some way…[20]

3.29 One suggestion is that a sales assistant who becomes involved in the provision of credit should be treated as an agent of the lender:

> Whether you end up requiring point-of-sale retailers to be licensed or whether you deem that their conduct is essentially attributed to the lender, those are your two different solutions.[21]
>
> In this context, the credit provider providing their forms, they are obviously receiving a service from the shop assistant in relation to having their particular completed form submitted to them so that they get that business

17 See the discussion in *Proof Committee Hansard*, 21 August 2009, pp 9-10; 24 August 2009, pp 43-7; and 26 August 2009, pp 5-7.

18 Mr Eales, David Jones, *Proof Committee Hansard*, 24 August 2009, p 43.

19 Ms Katherine Lane, Consumer Credit Legal Centre NSW, *Proof Committee Hansard*, 26 August 2009, p 4.

20 Ms Nicole Rich, Consumer Action Law Centre, *Proof Committee Hansard*, 26 August 2009, p 4.

21 Ms Nicole Rich, Consumer Action Law Centre, *Proof Committee Hansard*, 26 August 2009, p 4.

> as opposed to another credit provider. There is a fundamental policy issue here, and the question arises: why shouldn't they be treated as agents?[22]

3.30 It is acknowledged that these provisions will need to be revisited once the bills are in operation to ensure they are operating as intended.

> …the minister announced, when he introduced the legislation, that we would not cover retail point of sale for this phase and we would do it in the next phase. He has allowed an additional 12 months so that we can work out how to make it work properly…[23]
>
> …there is a major issue in this whole area about the boundary between selling and advice. With respect to store credit, this is something that should be looked at very carefully. It may be something that is for phase 2.[24]

Committee view

3.31 The Committee acknowledges that the government will undertake further consultation before making decisions about contentious issues addressed by these reforms, particularly how the new regulations deal with point-of-sale operations.

Responsibilities on lenders and brokers

The 'reliance' provisions - who verifies?

3.32 Section 130 of the NCCP bill relates to what inquiries and verification must be undertaken by a credit provider before entering credit contracts or increasing credit limits. Subsection 130(3) states that if a preliminary assessment has been made by a credit assistant (such as a mortgage broker) in the preceding 90 days and the credit contract is found to be not unsuitable, the credit provider is not required to verify the consumer's financial situation.

3.33 For example, suppose a mortgage broker makes a preliminary assessment of a consumer's financial situation and suggests the consumer apply for a particular (suitable) credit contract. During the process of making this assessment, the broker has made reasonable requests for information and verified that information. The broker then passes that (verified) information to the credit provider (for example, a bank) within 90 days. Under subsection 130(3), that bank is not required to re-verify that information provided by the broker.

3.34 The provision helps credit providers avoid unnecessary processing duplication in circumstances where appropriate verification of the information has already taken place at the preliminary assistance stage.

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22 Mr John Moratelli, National Legal Aid, *Proof Committee Hansard*, 26 August 2009, p 7.

23 Mr Geoff Miller, Treasury, *Proof Committee Hansard*, 21 August 2009, p 9.

24 Professor Gail Pearson, *Proof Committee Hansard*, 24 August 2009, p 75.

3.35 However, some witnesses and submitters raised concerns that subsection 130(3) would undermine the intent and effectiveness of the responsible lending provisions.

3.36 The Credit Ombudsman Service Ltd (COSL) indicated their concern that this subsection is inconsistent with the bill's Explanatory Memorandum, saying:

> This [subsection] shifts the responsible lending obligations from the lender to the broker, and it is inconsistent with the explanatory memorandum's stated policy objective of having different levels of credit assessment for lenders and for intermediaries.
>
> …there is a real likelihood that the section will be used by predatory lenders—and we have seen this happen—as a defence for not verifying the borrower's financial position. They will say that they were not on notice that the loan application was, for example, fraudulently completed by the broker or that the salary slip was false, yet in these circumstances the most basic of inquiries by a lender would have uncovered these deficiencies. If the offending section is retained the responsible lending provisions of the bill will add little, if anything, to the existing law on injustice, which is quite inadequate.[25]

3.37 The MFAA, who represent mortgage and finance brokers, also voiced concerns about subsection 130(3).

> …despite a broker's best endeavours to verify information accessible to the broker, it can only ever be a preliminary assessment, but a credit provider can rely on that information. That seems to make a nonsense of the distinction between a preliminary assessment and an assessment...
>
> Lenders should be responsible for lending, servicing, and collections. Brokers should be responsible for broking. No doubt prudent lenders will have their own practices to ensure all information is appropriately verified, but it leaves the door open to poor practices under which predatory lending and broking, which this Bill is clearly focussed on protecting consumers from, can thrive.[26]

3.38 The Consumer Action Law Centre (CALC) indicated that they, and other stakeholders, have repeatedly raised their concerns about subsection 130(3).

> The requirement for credit providers (and others such as brokers) to make an assessment of whether a loan should responsibly be extended to a consumer is at the heart of the new laws… However, section 130(3)… excuses credit providers from the crucial obligation…
>
> Consumer Action believes that this section will encourage more, not less, irresponsible lending practices than the current consumer credit laws.

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25 Mr Raj Venga, Credit Ombudsman Service Ltd, *Proof Committee Hansard*, 24 August 2009, p. 33.

26 Mortgage and Finance Association of Australia, S*ubmission 6*, p. 3.

> This section is highly likely to become one of the major avenues for avoidance of the legislation, with many lenders insisting that loan applications be made through brokers and deliberately ensuring that their processes rely on broker information and assessments.
>
> Consumer Action's experience is that some of the most serious consumer problems relating to lending have resulted from lenders accepting information provided by a broker without any verification.[27]

3.39 Both the COSL and CALC contend that, if the subsection is deleted in its entirety, credit providers could still rely on the verification of the information received from the credit assistant or undertake further verification (they have to be certain that the information is correct) but that predatory lenders would not be able to use the provision as a defence.

Committee view

3.40 The Committee recognises that subsection 130(3), as it stands, may allow some credit providers to contend that they relied on the broker's verification and therefore are not liable if the application was fraudulently completed by the broker (or where the broker failed to identify instances where the consumer falsely declared their capacity to repay).

3.41 The Committee also acknowledges, however, that requiring the credit provider to again verify the information may place additional burden on the consumer.

3.42 The Committee believes that the provision, as it stands, may undermine the responsible lending obligations and be exploited by predatory lenders as a defence for not undertaking verification. As such, the Committee considers that any increased burden placed on credit providers by having to undertake additional verification of consumers' details is counterbalanced by the importance of introducing strong responsible lending obligations.

Recommendation 6

The Committee recommends that subsection 130(3) be omitted.

Linked Credit Providers

3.43 Another matter raised by the CALC related to avoidance behaviour where lending practices are developed to avoid some or all consumer credit regulations. The CALC provided the Committee with a number of examples of avoidance behaviour, one of which related to the ability of a consumer to challenge an unjust contract or establish a relationship between a credit provider and the broker who conducted the transaction.

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27 Consumer Action Law Centre, S*ubmission 47*, p. 9.

> A loan or the conduct leading up to the making of a loan may be in breach of the Code, but the lender may claim no knowledge or responsibility for this conduct because a broker was involved in arranging the credit.
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> A broker may knowingly obtain a "false" [business purpose] declaration from the consumer to pass onto the lender, which does not make further inquiries and can later argue that it was unaware of the purposes of the loan. As other examples, a consumer may be unable to challenge an unjust contract or establish a linked credit provider relationship if a broker conducted the transaction and stands between the consumer and lender.[28]

3.44 The CALC recommend that section 6, 7 or 8 of the NCCP bill be amended to provide that a person that provides general credit advice but is 'linked' or 'tied' to a person who engages in a credit activity, or derives a benefit from an arrangement whereby they refer consumers to a person who engages in a credit activity, is also engaging in a credit activity.[29] They raise their concern that, although a broker is covered by the bill as someone who provides credit assistance, the definition of 'credit assistance' (contained in section 8 of the NCCP bill) is limited to persons who provide various forms of assistance or suggestions in relation to a particular credit provider or lessor. The go on to explain that:

> This means that persons providing *general* advice about credit or a type of credit product, but not a particular product or products with a particular lender, will not have to be licensed nor be subject to the responsible lending provisions, such as the requirement not to recommend unsuitable products…
>
> …some years ago the Consumer Credit Legal Service (Vic) (now Consumer Action) encountered a business that charged $3,000 for misleading "mortgage reduction" plans which involved completing loan application documents. The Legal Service identified some breaches of the Victorian finance broker legislation in the way the fee was disclosed, however, the business structure was quickly changed to create two entities. One business provided the "mortgage reduction" plans for a fee, and then referred the consumer to a broker business to arrange the loan.
>
> It appears that similar structures could be established to defeat the intention of the new laws in relation to credit advice and assistance due to the narrow drafting of section 8.[30]

Recommendation 7

The Committee recommends that the Government undertake further consultation to determine whether the section 8 definition of 'credit assistance' is sufficient to prevent persons benefiting from referring a consumer to a person

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28 Consumer Action Law Centre, *Submission 47*, p. 5.

29 Consumer Action Law Centre, *Submission 47*, p. 11.

30 Consumer Action Law Centre, *Submission 47*, p. 11.

who engages in credit activity avoiding responsibility under the responsible lending obligations.

Disclosure

3.45 Section 114 of the NCCP bill requires a credit provider or credit assistant to provide a consumer with a written quote which:

- gives information about the credit assistance (and other services that the quote covers); and
- specifies the maximum amount that will be payable to the licensee in relation to the assistance and other services; and
- gives information about what that amount relates to (including the maximum amount of the licensee's fee, the maximum amount of charges that will be incurred by the licensee for matters associated with providing the assistance and the maximum amount of fees or charges that will be payable by the licensee to another person on the consumer's behalf); and
- states whether the maximum amount (or any other amount) will be payable by the consumer to the licensee if a credit contract is not entered or a credit limit is not increased; and
- complies with any other requirements prescribed by the regulations.

3.46 The CCLC have submitted that the obligation should expressly require the quote to include:

- the amount of credit sought by the consumer or (if the amount is not known) the maximum amount of credit, or the credit limit, sought by the consumer;
- if the credit is to be for a fixed term, the term of the credit sought by the consumer;
- the maximum interest rate that (at current interest rates) the consumer would be prepared to accept in respect of the credit;
- the date by which the credit is to have been secured for the consumer; and
- a description of any special loan features (such as redraw facilities) that are required by the consumer.[31]

3.47 The Credit Ombudsman Service Ltd has also recommended the quote include this information and has pointed out that:

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31 Consumer Credit Legal Centre (NSW), S*ubmission 41*, pp. 11-12.

> Such an amendment to the Bill would be immensely useful to EDR schemes when determining if the product recommended by the licensee matched the consumer's requirements. Without this amendment, there is unlikely to be any documentary evidence of the consumer's requirements, leaving EDR schemes to ascertain, on balance, the veracity of each party's version of events. This is not an ideal outcome.[32]

Committee View

3.48 The Committee notes the recommendations of the COSL and the CCLC to require more extensive information in the quote. The Committee feels that the regulation-making power in paragraph 114(2)(f) provides sufficient flexibility to require the inclusion of such information in the quote.

Penalties, sanctions and remedies

3.49 According to the Explanatory Memorandum accompanying the NCCP bill:

> The Credit Bill establishes a civil penalty and consumer remedy framework that promotes strong consumer protections, including a civil enforcement regime and broad civil remedies. The key provisions:
>
> - enable ASIC to seek a court declaration of contravention for a civil penalty and to seek a pecuniary penalty;
> - set out the administrative provisions in relation to a civil penalty;
> - enable the court to grant remedies to consumers for loss or damage suffered as a result of a contravention of the Credit Bill, including through varying the contract as well as monetary redress;
> - enable the court to grant relief to consumers for unlicensed conduct; and
> - permit infringement notices to be issued by ASIC for strict liability offences and civil penalties as provided by regulations.[33]

Seeking Remedies

3.50 There are two aspects to the discussion of penalties and remedies within the bills. The first aspect relates to whether consumers can seek compensation or other remedies in circumstances where no declaration of a contravention of a civil penalty provision has been made. The Consumer Action Law Centre (CALC) addresses this issue, saying:

> …a close reading reveals that the provisions in the NCCP Bill are, in fact, drafted more narrowly than the comparable provisions that currently operate under the TPA and ASIC Act. In all three regimes, injunctions will be available on the application of any party, including the regulator, in

32 Credit Ombudsman Service Ltd, *Submission 12*, p. 5.

33 National Consumer Credit Protection Bill 2009, *Explanatory Memorandum*, p. 5.

> relation to conduct that constitutes or would constitute a contravention. However, unlike under the TPA and ASIC Act, the NCCP Bill proposes that compensation orders (section 178) and other orders to compensate, prevent or reduce loss or damage (section 179) will only be available for contraventions of a civil penalty provision or an offence, not for contraventions generally.[34]

3.51 The CALC argue that the provisions in Part 4-2 should be redrafted to reflect 'best practice regulation in this area', allowing consumers to be awarded remedies (or compensation) by the courts (and indeed by ombudsmen or External Dispute Resolution (EDR) scheme operators).

3.52 The CALC also make the point that:

> …the NCCP Bill provides that ASIC can apply for compensation orders on behalf of an affected person… but only if the affected person has given consent in writing before the application is made. The NCCP Bill therefore replicates the current provisions of the ASIC Act and the TPA in this regard, which have… been recognised as deficient.
>
> It seems incongruous that the Government would have recognised the current deficiencies in the TPA and the ASIC Act with regard to seeking redress for consumers and other parties affected by contraventions of consumer protection laws, and is moving to fix them, while at exactly the same time it is re-enacting them in its new consumer credit laws.[35]

3.53 The Credit Ombudsman Service Ltd (COSL) is also concerned about the inconsistent approach for consumers who wish to seek remedies under the NCCP bill and the ASIC and TPA Acts. They say:

> The Bill is significantly deficient in that it severely limits the ability of a consumer to seek compensation for loss suffered as a result of a contravention of a responsible lending provision by a licensee or credit assistant.[36]

3.54 Currently, the COSL is able to award compensation of up to $250,000 for loss. It is also able to make orders compelling a member to do or refrain from doing specified acts. In their submission, they highlight that, as EDR scheme operators are not able to declare that a civil penalty breach has occurred:

> …sections 178 and 179 of the Bill will not permit an EDR scheme [such as the COSL] to award compensation to a consumer for a contravention of a responsible lending provision.[37]

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34 Consumer Action Law Centre, *Submission 47*, p. 13.

35 Consumer Action Law Centre, *Submission 47*, p. 14.

36 Credit Ombudsman Service Ltd, S*ubmission 12*, p. 2.

37 Credit Ombudsman Service Ltd, *Submission 12*, p. 2.

3.55 The other major ombudsman service which has an interest in the NCCP scheme, the Financial Ombudsman Service (FOS), say:

> …it would be preferable to remove any doubt that a consumer can claim compensation for a breach of the responsible lending provisions without the need for a determination of a civil penalty provision.[38]

Recommendation 8

The Committee recommends that Part 4-2 be amended to allow consumers to seek remedies and compensation for loss suffered as a result of a contravention of any responsible lending provision, regardless of whether a civil penalty is declared or a breach of a civil penalty is found to have occurred.

Inclusion of criminal penalties

3.56 The second aspect of the discussion about penalties relates to whether or not the harshness of the penalties, particularly the inclusion of criminal penalties, is proportionate.

3.57 The Australian Bankers' Association (ABA) has pointed out that:

> The responsible lending regime places the whole of the legal responsibility for the lending decision on the credit provider. A credit provider's officers or employees are liable to a jail term of up to 2 years and a fine of up to $10,000 if the credit contract is entered into with the customer and subsequently the contract is found to be unsuitable (as defined) for the customer.[39]

3.58 The ABA has highlighted their concern that such an approach does not help to clarify which information a bank must verify and which it may accept as fact in making an assessment about suitability. Furthermore, they argue that past practice has proven that banks have been effective in balancing a consumer's objectives and requirements in seeking credit with the bank's desire to provide credit responsibly and in accordance with the law. They say:

> …the imposition of criminal penalties, particularly imprisonment of employees, for certain breaches of the NCCP is disproportionate to the event. Penalties of this nature will cultivate a culture of over-caution and conservatism when banks are making their decisions about whether to approve a credit facility and the amount of credit that may be made available… a compliance culture should not be replaced with a fear of non-compliance.
>
> The ABA submits that ASIC should publish guidance on its approach and priorities to enforcement, including its view on when it would consider a

38 Financial Ombudsman Service Ltd, S*ubmission 30*, p. 5.

39 Australian Bankers' Association, S*ubmission 48*, p. 8.

> criminal prosecution for non-compliance should result in imprisonment of the offender.[40]

Committee View

3.59 The Committee considers the criminal penalties regime contained in the bill will create an appropriate incentive for credit providers to undertake due diligence when assessing whether a credit contract is not unsuitable for the consumer, without overreaching in instances where a civil or criminal breach has occurred.

Small Claims proceedings

3.60 Another issue relating to claims of hardship by consumers related to the availability of small claims or low/no cost proceedings for consumers where other proceedings have already commenced in a different court.

3.61 The Explanatory Memorandum accompanying the NCCP bill says that under the new law:

> Streamlined court proceedings can be adopted for credit disputes for claims under $40,000 or for hardship to ensure that consumers have access to simpler forms of dispute resolution.[41]

3.62 The Consumer Action Law Centre's submission explains their concern with the lodgement of a counter-claim:

> …in practice, many consumer credit disputes find their way to the court system through the lender, not the consumer, first commencing legal action, and lenders commence legal actions in a state court. Further, in home loan matters, this will be the Supreme Court of a state, not merely the Magistrates' or Local Court. A consumer with a related or counter claim, such as for a hardship variation or to reopen an unjust contract, needs to have a realistic (in other words, affordable and accessible) avenue to be able to make this claim, which is through the low/no cost jurisdiction.
>
> Currently, this is what occurs in NSW and Victoria where consumers can apply to the tribunal with their related or counter claim, without first having to apply to the Court for a stay or transfer of the issued proceedings.[42]

3.63 The Consumer Credit Legal Centre has also raised concerns about how available small claims proceedings will be in cases where an enforcement application has been lodged by a credit provider in another jurisdiction.

> Consumers should have access to the small claims procedure in appropriate cases, even those involving home loans that will be commenced in the State Supreme Courts… hardship applications, and stay of enforcement

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40 Australian Bankers' Association, *Submission 48*, p. 13.

41 National Consumer Credit Protection Bill 2009, *Explanatory Memorandum*, p. 127.

42 Consumer Action Law Centre, *Submission 47*, p. 17

> applications, on home loans that are brought after the commencement of the proceedings may need to be pleaded as a cross-claim in the Superior Court. This is in contrast to the current situation in NSW, where consumers can make an application in the Consumer Tenancy & Trader Tribunal for either a stay of enforcement, or a hardship variation, even after enforcement proceedings have been commenced in the Supreme Court.[43]

Committee view

3.64 The Committee also acknowledges the importance of providing consumers with access to low/no cost proceedings. The Committee believes that consumers should be able to commence proceedings in a low/no cost forum even when related proceedings have been lodged in another court. The Committee also feels that the lower court should be able to issue a stay on the related proceedings in that other court.

Recommendation 9

3.65 **The Committee recommends that the Government investigate means to ensure that the national legislation does not inadvertently reduce the current access of any consumers to low cost tribunals.**

Hardship provisions

3.66 The new National Credit Code (NCC) raises the hardship threshold from the current $125,000 to $500,000 (or a higher amount prescribed in the regulations). Additionally, the NCC requires a credit provider to notify the debtor that an application for a variation of terms on the grounds of hardship has been received within 21 days. This notification must state whether or not the credit provider agrees to the change and, if the credit provider does not agree to the change, the name of the EDR scheme of which the credit provider is a member and the debtor's rights under that scheme.

3.67 The Australian Bankers' Association pointed out that the banks' own codes of conduct have provisions along these lines.[44] Abacus has a code of practice for mutual lenders, which were lauded by a consumer representative:

> The mutual codes of practice for credit unions and building societies have better hardship provisions in them than are in legislation.[45]

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43 Consumer Credit Legal Centre (NSW), S*ubmission 41*, p. 18.

44 Mr David Bell, Chief Executive Officer, Australian Bankers' Association, *Proof Committee Hansard*, 24 August 2009, pp 8-9.

45 Ms Katherine Lane, Consumer Credit Legal Centre NSW, *Proof Committee Hansard*, 26 August 2009, p 11.

Hardship threshold

3.68 While the Credit Ombudsman welcomed the increase in the hardship threshold and the introduction of a 21 day notification period, he expressed disappointment that the increased hardship threshold would only apply to new credit contracts made after the code commences on 1 January 2010:

> This means that borrowers with existing credit contracts will not have the benefit of the new threshold unless they refinance their loans after that date. This is inconsistent with many of the announcements made by the government.[46]

3.69 The Consumer Action Law Centre (NSW) raised concerns about how the new threshold will apply to credit contracts that run for a number of years (25-30 for the standard home loan). CALC agree that it would not be reasonable to apply the new threshold to applications made before the scheme commences but maintain that:

> …the provisions remain inadequate to ensure credit providers deal appropriately with consumers in hardship… we do not see why the new provisions should not apply to hardship variation applications made after the new laws are enacted.[47]

3.70 National Legal Aid said:

> The only contracts to which the increased cap will apply are those written after the commencement of the Bill… for those contracts written before commencement, the hardship cap will continue to be determined by the floating system currently administered by the States and Territories under the UCCC… the operation of a two-tiered cap will be at best confusing for borrowers.[48]

3.71 The CCLC also submitted that the maintenance of both thresholds as applied to loans based on when the contract was written will be difficult to administer:

> In contrast to the Government's assurances that the new system would be easier to understand and apply, the transitional arrangements will create a complex dual system that will be difficult understand, apply and advise upon. The Commonwealth Government will no doubt also have to take over the regular publishing of the applicable hardship threshold from the States to ensure that it continues to be available for anything up to 25-30 years after the legislation commences (the term of many home loans).[49]

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46 Mr Raj Venga, Credit Ombudsman Service Ltd, *Proof Committee Hansard*, 24 August 2009, p. 32.

47 Consumer Action Law Centre, S*ubmission 47*, p. 24.

48 National Legal Aid, S*ubmission 20*, p. 5.

49 Consumer Credit Legal Centre (NSW), S*ubmission 41*, p. 17.

Committee View

3.72 The Committee agrees that it would be inappropriate to apply the new threshold to hardship applications made before the new regime commences. However the Committee does believe the increased threshold should apply to all applications made after the new National Credit Code is in place (regardless of when the credit contract commenced).

Recommendation 10

The Committee recommends that the increased hardship threshold ($500,000) should apply to all applications for a variation of the terms of a credit contract on the grounds of hardship (made under section 72 of the National Credit Code) regardless of when the credit contract commenced.

Consideration of hardship applications

3.73 When a consumer applies to a credit provider to vary the terms of a credit contract on the grounds of hardship, the credit provider must notify the consumer of the outcome of that application within 21 days.

3.74 The COSL has raised concern that:

> …the National Credit Code merely entitles a debtor to apply for a hardship variation or a stay of enforcement proceedings. Surprisingly, there is no obligation on the part of the lender to do more than receive the application for a hardship variation.[50]

3.75 The Consumer Action Law Centre echo the CCLC NSW's calls for a requirement that :

> …the lender not only respond to hardship variation applications within a certain time frame, but actually give reasons for any rejection of an application, and provid[ed] for a more flexible range of options for varying the repayment arrangements than the three narrow options currently listed.[51]

3.76 The COSL, the CALC and the CCLC have all raised concerns that, in the event that a consumer applied for a hardship variation and the variation is not agreed to, the courts will be limited to ordering one of the three options for hardship (extending the contract term, postposing payments for a period or both). They feel this may lack sufficient flexibility in appropriately addressing the needs of some consumers in this situation.

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50 Credit Ombudsman Service Ltd, S*ubmission 12*, p. 5.

51 Consumer Credit Legal Centre (NSW), *Submission 41*, p. 24.

3.77 The Australian Bankers' Association Code of Banking Practice, which 19 of Australia's largest banks have signed up to makes the commitment that:

> With your agreement, we will try to help you overcome your financial difficulties with any credit facility you have with us. We could, for example, work with you to develop a repayment plan. If, at the time, the hardship variation provisions of the Uniform Consumer Credit Code could apply to your circumstances, we will inform you about them.[52]

Committee view

3.78 The Committee believes the options available to a court under subsection 72(2) are sufficient to support a consumer who is experiencing hardship. The Committee also acknowledges the views put forward by the COSL, the CALC and the CCLC (NSW) regarding the requirement that lenders consider an application for a hardship variation. The Committee agree that where a hardship variation is not agreed to, the lender should provide a reason for rejection of the application.

Recommendation 11

The Committee recommends that, in the event that a hardship application is rejected by a credit provider, the lender be required to provide, in writing, the reason(s) for the rejection.

52 Australian Bankers' Association, Code of Banking Practice, p. 12.